A COMPARISON OF THE SOUTH AFRICAN

AND

NAMIBIAN LABOUR DISPUTE RESOLUTION SYSTEM

by

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TABLE OF CONTENTS

FOREWORD

The dynamic social and economic conditions in Namibia warranted a periodic review of labour legislation. Given these needs, uhe then Ministry of Labour, undertook a project in 1998, to assess the effectiveness of the first post kndependence Labour Act, 1992 (Act No 6 of 1992) a trirartite task force was established which recommended the amendment of the 1992 Act. This led to the enactment of the Labour Act, 2004 which introduced a new system of dispute prevention and resolution. However, the 2004 Act could not be put into effect in its entirety, because of its technical flaws and the fact that the Namibian Employers Federation (NEF) took issue with some of the provisions of the Act, such as leave provisions.

In 2005, the Ministry of Labour and Social Welfare with its social partners undertook a complete technical review of the entire 2004 Act. As a result, In 2007, the new Labour Bill 2007 was tabled in Parliament, which eventually adopted it as the Labour Act, 2007 (Act No 11 of 2007) which became operational on the 1st November 2008.

The new Labour Act, 2007 (Act No 11 of 2007) brings in sweeping changes to the familiar terrain of labour law and industrial relations practice in Namibia. The new Act, has done aware with the District Labour Court system, in its place comes the Labour Commissioner. The rudimentary dispute- settlement mechanisms of the old (first) Labour Act, 1992 (Act No 6 of 1992) have made way for the more sophisticated, yet speedier and more economical system of alternative dispute resolution through arbitration and conciliation by the Labour Commissioner.

The Labour Act, 2007, requires parties to the labour dispute to seek conciliation before either taking industrial action or seeking adjudicative solutions to the dispute. Not only does the Labour Act, establish or makes provision for the appointment of the Labour Commissioner to provide for dispute resolution, it also permits parties to establish their own process for dispute resolution through a private arbitration route.

Faced with this daunting array of untested rules and institutions, I have approached the writing of this work with some trepidation. My aim is to provide a thoroughgoing commentary on the provisions relating to dispute resolution. In the absence of much

authoritative interpretation, I had to rely heavily on past practices and foreign South African precedents to identify the construction that judges and arbitrators are likely to arrive at.

The present treatise provides a, comprehensive and integrated commentary for all involvement in the resolution of labour disputes in Namibia; it further provides rules and procedures which govern statutory disputes resolution through the Labour Commissioner. I sincerely hope that this paper, will prove useful to all those involved in labour law and industrial relations practice, as well as to teachers and students of this subject.

CHAPTER 1
HISTORICAL BACKGROUND AND DEVELOPMENT OF THE NAMIBIAN LABOUR LAW REFORM (DISPUTE RESOLUTION MECHANISM)

1.1 INTRODUCTION

The Namibian Labour Act,[1] herein referred to as the "first Labour Act of 1992", marked a major change in the country's[2] statutory labour relations system. Following the transition to the political democracy, the Labour Act of 1992,[3] encapsulated the new government's[4] aim to reconstruct and democratise the nation as applied internationally in the labour relations arena.

The Labour Act, of 1992 introduced institutions aimed at giving employers and employees an opportunity to break with the intense adversarial that has characterised their employment relationship before independence, now with the new dispensation aimed at promoting more orderly collective bargaining and providing for dispute resolution system.

The first Labour Act, of 1992, was followed by two new statutes that furthered government's program of reform, in meeting with the economic demands of the country. These legislations went through a process of negotiations between registered organised labour, registered employer's organisation and government within the established statutory body called the Labour Advisory Council.[5] Despite, contentious nature of the debates by this body, the outcome passed through Parliament and in the end, the process contributed to gaining the commitment of the parties to the new labour relations dispensation. As put by the Namibian Employers Federation,[6] that the " new draft labour law set to replace the existing Labour Act, 1992, some time … is the product of intensive tripartite brainstorming".

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1 Labour Act, 1992 (Act No 6 of 1992).
2 Republic of Namibia.
3 Act No 6 of 1992.
4 Government of the Republic of Namibia.
5 LAC see s 7 of the Labour Act, 1992 (Act No 6 of 1992).
6 NEF see also Paper presented by Dr van Rooyen at the 11th Round table on labour relations – Dispute Resolution – Consultation and involvement of third parties.

Following these deliberations, a subsequent, Labour Act, 2004,[7] was passed by the National Assembly; however, it did not see life in its totality, as it was short-lived. Another new Labour Act, 2007,[8] was passed to replace both the first Act and the second Labour Act, 2004 that was not put into full operation. It is this statute that seeks to directly address the failures of the previous system while also building on its successes. The success, which will, according to the Permanent Secretary of Labour, essentially depends on the social partners, i.e. employees, employers and Government to take ownership of the principles and concepts contained therein.[9] Thus, stated that "the process of developing the new dispute resolution system was totally transparent and based on tripartite concept".

The new Labour Act,[10] thus aims at achieving primary goals as summarised below:

- to facilitate productive, individual and collective labour relations and therefore a productive economy;

- to achieve harmonious industrial labour relations based on the importance of democracy; and

- to guarantee fundamental principles and rights at work enshrined in both the Namibian Constitution[11] and in the International Labour Organisation (ILO) Declaration 1998.

This chapter therefore surveys the milieu from which the new Labour Act 2007 emerged. It briefly reviews the contents of previous statutes and identifies some trends in the key areas of the labour relations system within the new dispensation.

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7 Labour Act, 2004 (Act No 11 of 2007).
8 Labour Act, 2007 (Act No 11 of 2007).
9 Keynote address by the Permanent Secretary of the Ministry of Labour delivered at the 11th Round Table on Labour Relations – dispute resolution, see footnote 5 above.
10 Act No 11 of 2007.
11 Article 21 of the Namibian Constitution.

1.2 DISPUTE RESOLUTION IN TERMS OF THE LABOUR ACT, 1992, (Act No 6 of 1992)

Two years after Namibia attained her independence from the South African apartheid regime in 1990. The new Government passed the Labour legislation, the Labour Act, 1992,[12] and signed into law by the first President of the Republic of Namibia on the 26 March 1992, in terms of the Constitution.[13]

This Act,[14] provides in its introductory clause that the purpose thereof is "to make provision for the regulation of the conditions of employment of employees in Namibia … to provide for the settlement of disputes between employees or registered trade unions and employers or registered employers organisation amongst others".

Moreover, in the Preamble provisions, the Labour Act, 1992, further provides that the Republic of Namibia has adopted a labour policy aimed at enacting legislation that take due regard to the furtherance of labour relations conducive to economic growth, stability and productivity through the promotion of an orderly system of free collective bargaining, including the promotion of sound labour relations and fair employment practice.

1.2.1 DISPUTE RESOLUTION PATH

In terms of this first Act, of 1992, a party to a labour dispute would report such dispute by notice in writing to the Labour Commissioner[15] and thereby serving a copy of such notice to the other disputing party.[16] In such a notice, the reporting party should include full particulars such as the names, address, the subject matter of the dispute and the facts and circumstances, which gave rise to the dispute. If the dispute alleges the existence of a right, the grounds on which such allegation is premised should also be communicated. However, before the Labour Commissioner entertains the dispute, the referring party must show that the parties attempted to resolve the dispute by themselves and that they have failed to settle.[17]

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12 Act No 6 of 1992.
13 The Namibian Constitution Article 56.
14 See footnote 12 above.
15 Labour Commissioner appointed in terms of Section 3 of the Labour Act, 1992 (Act, No 6 of 1992).
16 S74(1) of the Labour Act, 1992(Act No 6 of 1992).
17 S 74(2) *supra*.

On receipt of the notice, the Labour Commissioner is obliged to establish a conciliation board, to be chaired by a person agreed upon by the parties themselves, or in the absence of such an agreement, by the Labour Commissioner himself or herself or any person so designated by the Labour Commissioner. The conciliation board would then be constituted with equal numbers of representatives from both sides.[18]

In an event of the dispute being resolved or settled by conciliation, the parties would prepare a memorandum of agreement in which the agreed terms and conditions are recorded and if the parties so desire file a copy of such an agreement with the Labour Commissioner.[19] This is optional for the parties to do so.

Where the dispute remains unresolved by conciliation, and where the dispute is a dispute of right, such dispute would be referred to the District Labour Court[20] for adjudication.[21] The Labour Commissioner could conciliate rights dispute only if there was failure to resolve the dispute would either party refer the dispute to the District Labour Court for adjudication. This approach seems to be retained by the new Labour Act, 2007.[22] On the other hand, in a dispute of interest where the deadlock persists, a party to such a dispute had the right to take industrial action in accordance with the provisions of [s 81][23] by way of strike if it is the employees or by lock-out if it is the employer. This process should meet with the procedural requirement as outlined in the Act.[24]

Besides the Labour Commissioner, the Labour Act, 1992 established the Labour Court [s15],[25] with exclusive jurisdiction to hear and determine … "any appeal from the District Labour Court" and on the other hand, the District Labour Court had jurisdiction to hear all complaints lodged with such Court by an employee against an employer or vice versa for any alleged contravention of or alleged failure to comply with any provision of the Labour Act or any terms and conditions of a contract of employment or a collective agreement.[26] This Act further required that, before the matter is heard in the District Labour Court, such a dispute be

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18 S 75 of the Labour Act, 1992 (Act No 6 of 1992).
19 S 78 of the Labour Act, 1992 (Act No 11 of 1992).
20 DLC.
21 S 78 of the Labour Act, 1992 (Act No 6 of 1992).
22 The Labour Act, 2007 (Act No 11 of 2007).
23 of the Labour Act, 1992 (Act No6 of 1992).
24 S 79(1)(c) *supra*.
25 See footnote 16 above.
26 S 19 of the Labour Act, 1992 (Act No 6 of 1992).

referred to a Labour Inspector,[27] to attempt to resolve the dispute by holding a pre- trail conference.[28]

The above labour relations system, few years after its operation, became the subject of debate by social partners. Government stated that initially, there was a need for amendments to be focused on improving the dispute resolution system, but later as the process unfolded, Government found that it was necessary that other aspects of the Labour Act, 1992 also needed improvement.[29] It was at the same forum, where government admitted unequivocally that the first Labour Act, 1992 was drafted in a legal language that made it very difficulty to understand for non-lawyers. Further that even lawyers themselves some times had difficulties in fully understanding some of the provisions. Thus an easy legislation was therefore necessary.

On the other hand, the Namibia Employers Federation also expressed concerns on the inefficiency of the first Labour Act, 1992, in that the Act has a stifling effect on the labour market, on Namibia's international competitiveness and the creation of employment. Therefore a new labour legislation that puts on high priority job creation, economic growth needed to be put in place.[30]

Similarly, organised labour, under the umbrella of the National Union of Namibian Workers,[31] criticised the dispute resolution system under the first Labour Act, 1992. In that it was not effective at all, in its current form and thus needed an urgent overhaul. Thus listing the following reasons for such a call:

- that the process is too lengthy to resolve disputes;
- the system is costly and is not accessible to those who do not have the resources to bring their complaints to the Labour Courts and that workers are not an exception to this;
- interdicts are being granted by our Courts without the other party being given an opportunity to be heard and state its case;

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27 An Inspector appointed in terms of section 3 of the Labour Act, 1992 (Act 6 of 1992).
28 Rule 6 of the District Labour Court Rules.
29 See footnote no 6 above, extract from Government speech. Pag 2.
30 See footnote 5 above, paper presented by NEF.
31 NUNW.

- the process is frustrating rather then promoting finality of the disputes;
- it is adversarial and it is not user friendly to the majority of the workers;
- the system is full of loopholes which are currently being misused by the parties to achieve their goals. etc.[32]

These were some of the reasons that gave rise to the complete overhaul of the first Labour Act, 1992 to the Labour Act, 2004.

1.3 THE MOVE TOWARDS THE LABOUR ACT, 2004 (Act No 15 of 2004)

The Labour Act, 2004[33] herein referred to as the "second Labour Act", represents the culmination of several years of intensive deliberations by social partners since 1997. Some months after a protected devastating strike at Ongopolo Mine, in Tsumeb, Northern Namibia. After the strike, both ordinary citizens and the social partners were in agreement that the first Labour Act, or the labour relations system needed a drastic overhaul. It was after the impact of that strike was felt, that the stakeholders recognised that socio-economic development in the country depends on an equitable, stable employment environment in which parties to the employment relationship could unfold their full productive potential, which seemed wanting with the existing labour legislation, of 1992.[34]

Government immediately reacted to all these calls and concerns, thereby approaching the International Labour Organization[35] for assistance. Funding was secured from the ILO Swiss Government. A task force was appointed comprising of social partners with strong inputs from outside, essentially from the South African based experts close to the Commission for Conciliation, Mediation and Arbitration.[36] The proposed system of dispute resolution was therefore a comparative based system with the CCMA.[37]

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32 Extract from an Input paper to the Round Table on Labour Relations- on Dispute Resolution, Consultation and Involvement of third Parties. Presented by Sackey Aipinge – Assistant General Secretary of Mine Workers Union on behalf of NUNW. Held on the 13th April 2000, Safari Hotel - Windhoek. Pag 2.

33 Act No 15 of 2004.

34 Dr JWF van Rooyen, (2004) *Namibian Labour Lexicon* Volume 2, the Namibian Labour Act, 2004 A-Z. Guide to the understanding and application of the new labour law. Namibia Institute of Democracy.

35 ILO.

36 CCMA, see also footnote 23 above.

37 See footnote 24 at p 6.

The task force was given the requirements that the proposed labour law must be efficient yet simple, be impartial, and have high quality outcomes, be user friendly, cost effective.[38] On the other hand the employers also agreed with the trade unions calls for a labour legislation system that is-

- easily accessible to an ordinary worker;
- simple and quick and which is user friendly;
- sufficiently flexible to deal with the different nature of disputes;
- the system that will be independent, legitimate and impartial;
- a system that is free from technical problems and that will promote representation by trade unions and employers representation a well as the involvement of social partners.[39]

Much of the proposals were then accepted by social partners and culminated into the Labour Act, 2004. It is this Labour Act, 2004, that laid the foundation for the new system of dispute resolution of conciliation and arbitration by the Labour Commissioner. However, this Act did not see full implementation as all stakeholders agreed and accepted that it was full of typographic flaws and could cause or lead to ambiguity in interpretation and application. Thus, all the social partners with experts from the ILO and Commission for Conciliation and Arbitration (CCMA) agreed to redraft the Act in a simplified version acceptable to all. The result is the new Labour Act, 2007 the focus of these treaties.

1.4 THE NEW LABOUR ACT, 2007 (Act No 11 of 2007)

The Labour Act, 2007[40] was passed by the National Assembly and signed into law by the President on the 31 December 2007. This new Act, establishes a system for dispute prevention and resolution (disputes involving employers and employee/ trade unions) including disputes about dismissal. The new Labour Act, 2007 provides for economic disputes or disputes of interest to be resolved through collective bargaining and if need be, by

38 See footnote 25.
39 See footnote 27 above.
40 Act No 11 of 2007.

industrial actions (strike and/or lock-out).[41] Disputes of right must be resolved through the procedure of conciliation and adjudication.[42]

The new Labour Act 2007 presupposes conciliation to be the first stage of the process of dispute resolution. Thereafter, the Act provides for adjudication essentially in one of the two ways- by either arbitration or by the Labour Court, this approach seemed to be similar to the CCMA system.[43] Arbitration hearings will resort under the Labour Commissioner only, unless it is private arbitration.[44] The situation is somewhat different from the CCMA, from which the new system is premised. In South Africa, there are Bargaining Councils and private agencies accredited by the CCMA to resolve disputes either by conciliation or arbitration.[45] This is not the case in Namibia. The Act does not make any provision for accreditation of any private agency, but however, provides for private arbitration.[46] This implies therefore that private agencies may be established for this purpose without necessarily being accredited by the Labour Commissioner and may function in terms of [s91] of the Act.

Moreover, whether the dispute will be dealt with by arbitration or by the Labour Court will depend on the nature of the dispute or in the case of dismissal dispute, the reason for the dismissal.[47]

The new Labour Act 2007 is the legislation that seeks to create institutions to resolve conflict in the workplace effectively through conciliation and if conciliation fails, through arbitration. The Act retains the continuation of the Labour Court to continue to produce authoritative precedents and to supervise the arbitration institutions.[48] These institutions for dispute prevention and resolution will be discussed in details in Chapter 3. These same institutions are also created in terms of the Labour Relations Act of South Africa,[49] which has a specialized Labour Court, the Labour Appeal being superior to institutions below.[50]

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41 S 74 of the Labour Act, 2007 (Act No.11 of 2007).
42 S 86(5) *supra*.
43 Jordaan & Steilzner *Labour Arbitration* (2002).
44 S 86 of the Labour Act, 2007 (Act No 11 of 2007).
45 S 127 of the Labour Relations Act, 66 of 1995.
46 S 91 of the Labour Act, 2007 (Act No 11 of 2007).
47 See footnote 15 above.
48 S 115 of the Labour Act, 2007 (Act No 11 of 2007).
49 Act 66 of 1995.
50 Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law: A Comprehensive Guide* 5th ed (2006). See also ss 151, 157 and 173 of the Labour Relations Act 66 of 1995.

The basic characteristics of the new disputes resolution system are similar in nature to that of the CCMA system in that:

- employers, trade unions and employees are encouraged to resolve their own disputes through collective bargaining;[51]
- strikes actions are impermissible in most rights disputes;[52]
- unions and non- unionised disputants have easy access to conciliation through relatively simple procedures;[53] and
- disputes are intended to be resolved quickly.[54]

Notwithstanding the above characteristics, the new system of dispute resolution established by the new Labour Act, 2007 has a totally different point of departure from the first Labour Act, of 1992. The new Labour Act, 2007, is structured upon the key concept of conciliation, arbitration and adjudication. The Act recognizes the importance of self-regulatory to be the primary mechanism for regulating collective disputes. In that registered trade unions and employers organization must ensure that all collective agreements contains procedures to resolve disputes about their interpretation, application and enforcement of such agreements. [55] The Labour Commissioner has only residual jurisdiction.[56]

The system therefore strongly encourages a pivotal consensus –seeking process of conciliation and only if this process fails may the parties resort to other processes.[57] Consensus seeking is therefore an integral part of the new dispute resolution process.

This new system of dispute resolution presupposes that most disputes rely as a first step, on conciliation [s82 (3)][58]. The Act provides that if the dispute is referred to the Labour Commissioner, the Commissioner must appoint a conciliator to attempt to resolve that dispute

51 S 70 of the Labour Act 11 of 2007.
52 S 75 of the Labour Act 11 of 2007.
53 S 82 of the Labour Act 11 of 2007.
54 S 82(10)(a) and s 86(18).
55 S 73 of the Labour Act, 2007 (Act no 11 of 2007).
56 S 73(2) *ibid*, see also a similar situation in relation to the CCMA Bosch *et al* (2006) p89.
57 S 86(5) of the Labour Act, 2007 (Act No 11 of 2007). These same sentiments were expressed by Brand at al (1997) Labour Dispute Resolution on the new Labour Relations Act 66 of 1995.
58 Labour Act, 2007 (Act No 11 of 2007).

through conciliation. It therefore follows that parties must not resort to industrial action without having gone through this process. [s74 (1) (a-d)].[59]

Brand *et al* (1997)[60] established that conciliation by its very nature is a consensus – seeking process in that, it is a procedural step common to all types of disputes and that it does not only apply to disputes of right but also to disputes of interest and not only individual disputes, but also collective disputes.

Brand at al (1997), further states that the process of conciliation is aimed at seeking to resolve the dispute through agreement by the parties themselves, thereby limiting damage to their long-term relationship. A relationship, which may emerge from a successful conciliation even stronger than before.

Similarly, conciliation process is seen as a process that serves to filter out disputes, in order to lessen the load of arbitration and formal labour court adjudications proceedings. Conciliation was therefore considered by the CCMA to be an effective filter, which should significantly reduce the number of disputes refereed to arbitration.[61]

At the time of writing this chapter, the Minister of Labour and Social Welfare, announced in the National Assembly on the 25 September 2008, that the new Labour Act, 2007 will be put into effect on the November 1, 2008. To this effect he stated as follows "the operationalisation of the Labour Act, 2007 signals the beginning of a new era in labour relations in Namibian. An era characterized by social dialogue on all key issues affecting the labour market, mutual respect between employers and employees and fairness at the workplace, effective communication and collective bargaining, improved productivity and early and peaceful resolution of labour disputes. This places a challenge before Government, employees, and employers to ensure that the Act fulfils it enormous promise".[62] He concluded by encouraging all stakeholders to become familiar with its provisions, utilize it effectively, and ensure strict adherence.

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59 *Supra*.

60 Brand, Lotter, Mischke, Stedman *Labour Dispute Resolution* (1997).

61 LRA 66 OF 1995, Explanatory Memorandum, the Conciliation of Dispute at p150.

62 Extract from the Statement by Hon. Immanuel Ngatjizeko, MP. Minister of Labour and Social Welfare, made in the National Assembly on the Labour Act 2007 (Act No 11 of 2007) pg 3.

1.5 CONCLUSION

It is evident from the discussion in this Chapter that the first Labour Act, 1992 had somehow failed to address the needs of ordinary workers in Namibia and further that it was probably not conducive for economic growth. Social partners all come to an agreement to completely overhaul the Act, on reasons relating to its legalistic style, and the fact that it was too adversarial and was not user friendly.

It is on this premise that social partners agreed to bring in place legislation with features that creates institutions that resolves labour disputes in a speedy and simpler manner and which is easily accessible by ordinary workers. Thus the result was the Labour Act, 2004. However this Act was short lived as it was not put into full operation because of its drafting ambiguity and technical flaws.

Subsequently, the Labour Act, 2007 (Act No 11 of 2007) was agreed upon and passed by the National Assembly to replace the first Labour Act and the second Labour Act of 2004. This new Labour Act, 2007, introduces a new point of departure in dispute resolution and prevention. The Act, broadly emphasise the concept of conciliations, arbitration and adjudication of labour disputes, with conciliation as the primary process in an attempt to resolve labour dispute and thereby encouraging self regulatory by means of collective agreement and collective bargaining by the parties themselves.

Comparative experience with the CCMA indicates that conciliation phase of dispute resolution should be seen by the users of the new dispute resolution system, as a process of dispute screening. And that should there be a large-scale failure of the conciliation phase of dispute resolution, the newly established statutory system of dispute resolution may find itself bogged down in an unmanageable load of arbitration and adjudications by the Labour Court. Should this state of affairs prevail, delays may once again manifest, as the Labour Commissioner may struggle to cope with an arbitration workload in relation to disputes that should have been or could have been resolved by means of the consensus –seeking process outlined in [s82] of the new Labour Act, 2007, hence may have similar criticism as the first Labour Act, of 1992.

CHAPTER 2
CONFLICT AND DISPUTES

2.1 INTRODUCTION

Anstey (1999)[63] defines conflicts as a struggle over values and claims to scare status, power and resources in which the aim of the opponents are to neutralize, injure or eliminate their rivals. However, (Nel, Swanepoel, Kistern, Erasmus and Tsabandi 2005)[64], defines conflict as a "process that begins when one party perceives that another party has negatively affected or is about to negatively affect something that the first party cares about. Accordingly, they argue that conflict may be potentially health and even beneficial. Nel *at al* (2005) is further of the view that conflict is often a catalyst for change, growth and development and without it, employment relationship system or society, as a whole may tend to stagnate. It is therefore, believed that conflict is the force underlying transformation. The challenge is therefore how to approach conflict, manage it and handle it appropriately.

On the other hand, [s1] of the Labour Act,[65] define dispute to "mean any disagreement between an employer or an employers' organization on one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter". In the context of the Labour Act, it appears clearly that the dispute therein refers to an existence of an employment relationship between those mentioned parties. However, the usage of employee does not ordinarily mean, one employee but could be a group of employees in dispute with their employer.

63 Anstey *Managing Change: Negotiating Conflict* (1999).
64 Nel, Swanepoel, Kirsten, Erasmus, Tsabandi *South African Employment Relations: Theory and Practice* 5th ed (2005).
65 Act No 11 of 2007.

This Chapter will therefore look at the nature of labour disputes and try to isolate conflict that may culminate into labour disputes. Further the Chapter will endeavour to distinguish between disputes of rights and interest disputes and will equally provide for the route to resolving these disputes when they do arise.

2.2 NATURE OF CONFLICT AND DISPUTES

Anstey (1999), states that conflict exist in a relationship when parties believe that their aspirations cannot be achieved simultaneously, or perceive a divergence in their values, needs or interest thus they may be referred to as latent conflicts. The parties purposefully employ their power in an effort to eliminate, defeat, neutralize or change each other to protect or further their interest in the interaction thus they become manifest conflict.

On the other hand, Nel *et al*, (2005) states that conflict in employment relations may be regarded as inherent part of the interaction between the parties. That such conflict is usually caused by such factors to include:

- different values or attitudes or perceptions;
- different objectives or methods of achieving objectives;
- differences in information or communication blockages;
- lack of resources;
- skew distribution of resources (structural imbalances); and
- personality differences

In the final analysis, *Nel et al* (2005) states that because conflict lies at the very root of employment relations, it is important for the parties thereto to have knowledge about it and how to manage it constructively through the process such as collective bargaining, negotiations and / or third-parties intervention.

However, Burton (1990)[66] states that in disputes situations, issues are open to negotiations and settlement through compromise and through the award of an arbitrator - tension can thus be contained or suppressed and managed. Whereas in conflict situations, it is perceived that tension cannot be dealt with in a way disputes are dealt with. The reason being that they

[66] Burton *Conflict: Resolution and Prevention* (1990).

centre on threats to fundamental human needs, they are not open to compromise and cannot be bargained away. Usually they are resolved through a major environmental and policy restructuring to facilitate transformation of relationship. Compromise is thus not viable in these situations.

On the other hand, (Bosh, Molahlehi and Everett 2004),[67] are of the view that conflict is a way of life in the industrial relations arena. Thus the labour legislation's objective should be to create an environment where conflict is managed in order to advance the interest of the parties and promote a positive relationship between them.

It is on this premise that the Labour Act,[68] was enacted to provide a framework within which employees, and /or union and employers can collectively bargain on terms and conditions of employment and other matters of mutual interest.[69] Moreover, the Labour Act regulate collective labour relations and provide for the systematic prevention and resolution of labour disputes.[70]

Given the foregoing arguments, it is therefore fair to suggest that a dispute occurs when an underlying conflict comes into the open. Thus once a dispute has arisen, it is incumbent upon the parties to consider resolving such disputes to avoid the dispute aggravating the conflict.

Both the Labour Act[71] and the Labour Relations Act,[72] requires that before a matter can be referred to an external dispute resolution body, a dispute must first exist in the workplace. Thus, *Bosch et al*[73] argue that for a dispute to exist, at the very least a demand should be made, be communicated to the other party and that party be given an opportunity to settle the matter. To this end, in the matter of *Durban City Council v Minister of Labour,*[74] the court held that a dispute must at a minimum, so to speak, postulate the notion of the expression by the parties opposing each other in controversy of conflicting views, claims and contention.

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67 Bosch, Molahlehi and Everett *Conciliation and Arbitration Handbook. A Comprehensive Guide to Labour Dispute Resolution Procedure* (2004).

68 Act No 11 of 2007 in the preamble and purpose statement.

69 Part D of the Labour Act 11 of 2007.

70 Part D Chapter 8 of the Labour Act 11 of 2007.

71 Act No 11 of 2007.

72 Act 66 of 1995.

73 See footnote 6 above.

74 1953 (3) SA 708 D cited with approval in *Edgar's Stores (Pty) Ltd v SACCAWU* (1998) 5 BLLR 447 LAC: (1998) 19 *ILJ* 771 LAC.

It is therefore not enough simply to make a demand and then immediately to refer the dispute to the appropriate forum. In fact [s82],[75] shifts the burden on the referring party to satisfy the Labour Commissioner that the parties have taken all reasonable steps to resolve or settle the dispute, before the Commissioner can entertain it.

2.3 DISPUTES OF RIGHTS AND DISPUTES OF INTERESTS

The Labour Act differentiates between two categories of disputes that may be referred to the Labour Commissioner. These are:

- Disputes of interests[76]- which are defined to mean any dispute concerning a proposal for new or changed conditions of employment but does not include a dispute that the "Act" or any other Act requires to be resolved by –

  a) adjudication in the Labour Court or other court of law; or
  b) arbitration.

- The other category of "disputes" are those disputes defined in Section 84 (2)[77] to mean:

  [s 84] for purpose of Part C of the Labour Act11 of 2007, " dispute means –

  a) a compliant relating to the breach of a contract of employment or a collective agreement;
  b) a dispute referred to the Labour Commissioner in terms of section 46[78];
  c) any dispute referred in terms of section 82 (16) [79]
  d) any dispute that is required to be referred to arbitration in terms of the "Act".

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75 Labour Act No 11 of 2007.
76 S 1 of the Labour Act, 2007 (Act No 11 of 2007).
77 Labour Act No 11 of 2007.
78 Affirmative Act, 1998 (Act No 29 of 1998).
79 Of the Labour Act, 2007 (Act No 11 of 2007).

The old Labour Act,[80] defined dispute of right to include any dispute relating to-

(aa) the application, or the interpretation, of any provision of the Act or of any terms and conditions of a contract of employment or a collective agreement, including the denial or infringement of any right conferred by or under any provision of the Act or any right conferred by any term and conditions of a contract of employment or a collective agreement, or the recognition of a registered trade union as an exclusive bargaining agent or the refusal to so recognize any such trade union;

(bb) the existence or non-existence of a contract of employment or a collective agreement.

The first Labour Act, 1992 definition seem to have been derived from the International Labour Organisation'[81]concept of differentiating features of disputes of rights and disputes of interest. In terms of the ILO, the concepts of disputes over rights are sometimes known as legal disputes, which usually involves individual workers or a group of workers who claim that they have not been treated in accordance with rules laid down in collective agreements, individual contracts of employment, in laws or regulations or elsewhere. A practical example would be where a worker may claim not to have been paid wages in accordance with the overtime provisions of the applicable collective agreement; or to have been dismissed in contravention of a legal or contractual requirement that dismissal shall not take place unless there is a valid reason for such action. Essentially, the important point is that the right disputes involves an alleged violation of an established right recognized by law.[82]

On the other hand, Gladstone (1984) elaborates further on the disputes of interest than what the definition provides for in the new Labour Act, 2007. In his view, interest disputes are sometimes known as economic or bargaining disputes where parties are faced with a conflict opposing the interest of a worker, usually expressed through their trade unions, and those of an employer or employers association.

Accordingly, in these types of disputes, there is no question of interpreting what are the rights of the parties by making reference to existing rules. The question in these disputes is rather

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80 Labour Act, 1992 (Act No 6 of 1992).
81 ILO.
82 Gladstone *Voluntary Arbitration of Interest Disputes: A Practical Guide* (1984).

what those rules should be. For example, in more concrete terms: an interest dispute involves the establishment of terms and conditions of employment or the rules regulating various aspects of the relationship between the trade union and the employers' or the employers association reach a deadlock in collective bargaining. I.e. when they cannot agree on all or some of the issues upon which they have been negotiating. These are therefore the same principles adopted in terms of the new Labour Act, 2007 system of dispute resolution.

Unlike the Namibian Labour Act,[83] the South African Labour Relations Act,[84] does not use the term dispute of right. It does generally use the term dispute about a matter of mutual interest to mean dispute of interest. This has a wide meaning and may include disputes regarding higher wages and changed conditions of employment. These disputes may be resolved through power by way of either lockout or strikes, which are protected only if the process prescribed by the LRA [s64] or the Labour Act [s74], including conciliation, have first been exhausted. On the other hand disputes of rights relate to those in which parties assert rights that they may have acquired through statutory law, common law or agreements. e.g. a dismissal where a party relies on rights, unfair labour practices and non-compliance with the terms of a contract. These disputes are generally resolved, if not settled through direct negotiations or during conciliation, through either arbitration or Labour Court adjudication.[85]

2.4 DISPUTE RESOLUTION PROCESS

Most disputes have to be conciliated before they can proceed to arbitration or adjudication.[86] At the end of the conciliation process an outcome certificate is issued, indicating whether or not the dispute has been resolved through conciliation.[87]

If a certificate of non-resolution has been issued at the end of the conciliation phase, the conciliator must, if the parties have agreed, refer the unresolved dispute for arbitration or adjudication,[88] depending of the nature of the dispute. Similarly, [s 86 (5) & (6)][89] requires

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83 Act No 11 of 2007.
84 Act No 66 of 1995.
85 Bosch *et al The Conciliation and Arbitration Handbook. A Comprehensive Guide to Labour Dispute Resolution Procedure* at 6.
86 S 85(5) of the Labour Act, 2007 (Act No 11 0f 2007).
87 S 82(15) and (16) of the Labour Act, 2007 (Act No 11 of 2007).
88 S 82(16) Labour Act, 2007 (Act No 11 of 2007).
89 Labour Act, 2007 (Act No 11 of 2007).

that unless the dispute had already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.

The Labour Act refers to various disputes that may arise under each chapter and provides the process to be used in resolving them. For example, at the end of each Chapter, up to Chapter 6, it specifies how dispute concerning interpretation or application of that Chapter must be resolved. Parties can also agree to have their disputes resolved through [private conciliation] and arbitration.[90]

Brand *et al* (1997) on the other hand, postulates that the systematic isolation of specific disputes under the LRA and equally the same under the new Labour Act, 2007, is important because disputes must be dealt with by specific process and specific disputes resolution bodies. The aim is to avoid shopping forum concept. It is therefore established from the already exiting system of the CCMA, that if the parties choose the wrong process or go to the wrong body they may find that their efforts to resolve the dispute are delayed and frustrated.

Further, parties may agree to use alternative process or other private institutions such as the bargaining councils in South Africa. Self-regulation is strongly encouraged by the new Labour Act in resolving disputes. [s73][91] for example specifically requires parties to a collective agreement to regulate how disputes in terms of those agreements are to be resolved. In the absence of such an agreement it is imperative that parties choose the right process and the right forum in terms of the Act. Therefore the following table will help the parties to do so.

[90] S 91 of the Labour Act, 2007 (Act No 11 of 2007).
[91] Of the Labour Act, 2007 (Act No 11 of 2007).

2.5 WHICH DISPUTES GOES WHERE IN TERMS OF THE LABOUR ACT, 2007 (Act No 11 of 2007)

Type of dispute	Conciliation by the Labour Commissioner	Arbitration by the Labour Commissioner	Labour Court (LC) adjudication	Protected strikes / lock out
2.5.1 Disputes about fundamental rights Chapter 2 of the Labour Act[92]				
(a) Unfair Discrimination	Conciliation[93] If conciliation fails,	Refer to arbitration [94]	The Party effected may approach the Labour Court directly [s7 (5)	-
(b) Sexual harassment s5[95]	-	Arbitration [s7]	May also be referred directly to Labour Court [s7 (5)]	-
(c) Constructive dismissal derived from sexual harassment s 5 (10)	-	Arbitration [s7]	May be referred to the Labour Court [s7]	-
(d) Freedom of association s6	Conciliation [s7(4) (a)] if fails refer to -	Arbitration [s7 (4) (a)	Labour Court	
All fundamental rights disputes			May be referred directly to the Labour Court[96]	
2.5.2 Unfair dismissals disputes				
(a) Dismissal for misconduct	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]	-	-
(b) Dismissal for incapacity	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]		
(c) Constructive dismissal	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]		
(d) Automatic unfair dismissal	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]		

92 Labour Act, 2007 (Act No 11 of 2007).
93 S 7 of the Labour Act, 2007 (Act No 11 of 2007).
94 S 7(4)(b) of the Labour Act, 2007 (Act No 11 of 2007).
95 Of the Labour Act, 2007 (Act No 11 of 2007).
96 S 7(5) the Labour Act 2007 (Act No11 of 2007).

(e) Dismissal for operational reasons	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]			
(f) Dismissal for participating in an unprotected strike	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]			
(g) Non- renewal or unfair renewal of fixed term contract	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]			
(h) Refusal to reinstate after maternity leave	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]			
(i) Selective non re-employment	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]			
(j) Transfer of employment contracts	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]			
(k) Dismissal because employee made protected disclosure (victimization)	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]			
(l) Dismissal relating to probation	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]			
(m) Other unfair dismissal	Con-Arb [s86 (5)] report within six (6) Months [s86 (2) (a)	If Conciliation fails, refer to arbitration [s86 (6)]			
2.5.3 Basic Conditions of employment disputes					
(a) Non-compliance with, contravention or interpretation of chapter 3, basic conditions of employment. I.e. calculation of remuneration and basic wage;[97] **Payment of remuneration,**[98]	Enforcement by the labour inspector, issue compliance order [s126 (1)	Refer to arbitration[105] within 12 months [s86 (2) (b)]	Does not go to the Labour Court	No strikes are permissible	

[97] S 10 of the Labour Act, 2007 (Act No 11 of 2007).
[98] S 11 of the Labour Act 2007 (Act No 11 of 2007).

unlawful deductions,[99] **ordinary hours of work,**[100] **overtime work, leave entitlement,**[101] **provision of accommodation,**[102] **payment of severance pay,**[103] **payment on termination**[104] **etc**				
2.5.4 Disputes relating to health, safety and welfare of employee Chapter 4 S 39- 42 of the Labour Act 2007 (Act No. 11 of 2007)				
(a) Disputes about health and safety issues, safety reps, and committee[106]	-	Refer to the Labour Commissioner for arbitration[107] within12 Months	-	-
2.5.5 Disputes relating to unfair labour practices				
Unfair labour practice relating to trade union organizations				
(a) Refusal to bargain collectively[108]	Conciliation if fails parties my choose arbitration or strike action	Arbitration [s51 (3)]	-	Employees may strike [s49 (3)]
(b) bargaining in bad faith[109]	Conciliation if fails parties my choose arbitration or strike action	Arbitration [s51 (3)]	-	Employees may strike [s49 (3)]-
(c) Unfair representation of an employee[110]	Conciliation if fails, parties my choose arbitration or strike action	Arbitration [s51 (3)]	-	Employees may strike [s49 (3)]

105 S 38 of the Labour Act 2007 (Act No 11 of 2007).
99 S 12 of the Labour Act 2007 (Act No 11 of 2007).
100 Part C of chapter 3 of the Labour Act 2007 (Act No 11 of 2007.
101 Part D *supra*.
102 Part E *supra*.
103 S 35 of the Labour Act 2007 (Act No 11 of 2007).
104 S 37 of the Labour Act 2007 (Act No 11 of 2007).
106 S 43-46 of the Labour Act 2007 (Act No 11 of 2007).
107 S 47 of the Labour Act 2007 (Act No 11 of 2007).
108 S 48(1)(a) of the Labour Act, 2007.
109 S 49(1)(b) of the Labour Act, 2007.
110 S 49(1)(d) of the Labour Act, 2007.

2.5.6 Unfair labour practice relating to employer's organizations				
(a) Refusal to bargain[111]	Conciliation if fails, parties my choose arbitration or strike action	Arbitration [s51 (3)]	-	Employees may strike [s49 (3)]
(b) Bargaining in bad faith[112]	Conciliation if fails, parties my choose arbitration or strike action	Arbitration [s51 (3)]	-	Employees may strike [s49 (3)]
(c) Failure to disclose relevant information to the trade union reasonably required, to perform the functions and to consult or bargain collectively[113]	Conciliation if fails, parties my choose arbitration or strike action	Arbitration [s51 (3)]		Employees may strike [s49 (3)]
(d) Unilateral alteration of terms and conditions of employment[114]	Conciliation if fails, parties my choose arbitration or strike action	Arbitration [s51 (3)]		Employees may strike [s49 (3)]
(e) Seeking to control any trade union or federation of trade unions[115]	Conciliation if fails, parties my choose arbitration or strike action	Arbitration [s51 (3)]		Employees may strike [s49 (3)]
(f) Conduct that subvert orderly collective bargaining or intimidate any person[116]	Conciliation if fails, parties my choose arbitration or strike action	Arbitration [s51 (3)]		Employees may strike [s49 (3)]

111 S 50(1)(a) of the Labour Act, 2007.
112 S 50(1)(b) of the Labour Act, 2007.
113 S 50(1)(c) (d) of the Labour Act, 2007.
114 S 50(1)(e) of the Labour Act, 2007.
115 S 50(1)(f) of the Labour Act, 2007.
116 S 50(1)(g) of the Labour Act, 2007.

2.5.7 Disputes relating to the establishment and winding up of Trade Unions and Employers Organizations Chapter 6				
(a) Refusal to establish an employer organization, trade Union and including order to cancel registration thereof and winding up[117]	-	-	Appeal to the Labour Court[118]	
2.5.8 Recognition and Organizational rights of Trade Unions				
(a) Refusal to recognize trade unions[119]	Conciliation [s69(3)] if fails refer to-	Arbitration [69(4)]		
(b) Withdrawal of recognition of trade union[120]	Conciliation [s69(3)] if fails refer to-	Arbitration [69(4)]		
(c) right of access to the premises of the employer[121]	Conciliation [s69(3)] if fails refer to-	Arbitration [69(4)]		
(d) right to deduction of trade union dues[122]	Conciliation [s69(3)] if fails refer to-	Arbitration [69(4)]		
(e) election of workplace union representative[123]	Conciliation [s69(3)] if fails refer to-	Arbitration [69(4)]		
2.5.9 Disputes about collective agreements				
(a) Interpretation, application or enforcement of a collective agreement, where internal procedure not	Internal procedure should prevail [s73 (1) if not operative or effective.	Refer to the Labour Commissioner for Arbitration[125] within 12.		

117 S 54 and 62 of the Labour Act, 2007.
118 S 56 and 63 of the Labour Act, 2007.
119 S 64(5)(b) of the Labour Act, 2007.
120 S 64(12) of the Labour Act, 2007.
121 S 65(1) (2) to exercise this right the Act requires that the Union claiming the right, must be recognized as an exclusive bargaining agent or that it must be a registered trade union.
122 S 66 same principles as above applies, to exercise this right.
123 S 67 of the Labour Act, 2007.

operative or existing[124]				
2.5.10 Dispute of interest, strikes and lock-out Chapter 7 of the Labour Act 2007 (Act No. 11 OF 2007)				
(a) Disputes of interest[126] **e.g. wages**	Refer the dispute Conciliation [s74 (1)(c) within 30 days			Strike/ lock-out may commerce after notice[127]
(b) Unprotected strikes[128]	No conciliation required		The employer may apply to the Labour Court interdict or employees could approach the Labour Court in case of unprotected lock-out [129]	
(c) Disputes about picketing[130]	Refer to the Labour Commissioner for Conciliation			Strike/ lock-out may commerce after notice
(d) Disputes whether a service is an essential service or whether an employee/er is engaged in essential services[131]	Refer to essential services committee for considerations and recommendations to the LAC within 14 days for considerations and forward recommendations to the Minister of Labour [132]	Arbitration [s78 (3)		No strike or lock-out may take place pending the minister's decision [133]
2.5.11 Disputes under the Affirmative Action (Employment) Act, 1998 (Act No29 of 1998)				
(a) Disputes in terms of Section 45 of the Affirmative Action Act, 1998	Refer to the Labour Commissioner for conciliation [s45][134]			

125 S 73(3) and (4) of the Labour Act, 2007.
124 S 73(1) and (2) of the Labour Act, 2007.
126 S 74 of the Labour Act, 2007.
127 S 74(1)(d) of the Labour Act, 2007.
128 S 79(1) of the Labour Act, 2007.
129 S 79(1)(a)-(c) of the Labour Act, 2007.
130 S 76(c) of the Labour Act, 2007.
131 S 78(1) of the Labour Act, 2007.
132 *Ibid*.
133 S 77(12) of the Labour Act, 2007.
134 Employment Equity Act, 1998 (Act No. 29 of 1998).

(Act No. 29 of 1998)				
2.5.12 Contracts entered into by the State for the provision of goods and services				
(a) Dispute whether an employer is complying with an undertaking given in terms of section 138 of the Act[135]			Any person, including the Minister,[136] may make application to the Labour Court to compel compliance and the Labour Court may make any appropriate order to secure compliance. [s138 (4)	

2.5.13 Conduct that may constitute an offence in terms of the Labour Act, 2007 (Act No. 11 OF 2007)[137]

Offence	Process	Penal action / sanction
(a) Child Labour[138]	Criminal process through the police and heard in criminal courts	A person convicted of this offence is liable to a fine not exceeding N$20,000 or to imprisonment not exceeding four years, or to both such fine and imprisonment[139]
(b) Failure to comply with Section 34[140]	Criminal process through the police and ultimately heard in criminal court	An employer who fails to comply with this section commits and offence and becomes liable to a fine not exceeding N$10,000 or to imprisonment for a period not exceeding two years or to both the fine and imprisonment[141]
(c) Failure to restore unilaterally altered terms and conditions of employment by the employer after the Labour Commissioners decision to restore such[142]	Criminal charges at the police and prosecuted in criminal court	An employer who contravenes or fails to comply with section 50 (4) commits an offence and on conviction is liable to a fine not exceeding N$10,000 or to imprisonment for period not exceeding two years or to both such fine and imprisonment[143]

135 S 138(2) and (3) of the Labour Act, 2007 (Act 11 of 2007) provides that the State must not issue a license to an employer, or enter into a contract with an employer for the provision of goods or services to the State unless that employer has given a written undertaking … to ensure that every individual directly or indirectly employed for the purpose of exercising rights under the license, or for the purpose of providing goods and services under the contract , is employed on terms and conditions not less favorable than those provided for in the collective agreement in that industry or those prevailing for similar work in the industry and the region in which the employees are employed.

136 Minister responsible for Labour s 1.

137 The Labour Act like its predecessor, criminalizes certain conduct that constitutes non-compliance.

138 S 3 of the Labour Act, 2007 (Act No 11 of 2007).

139 S 3 of the Labour Act, 2007 (Act No 11 of 2007) this section provides that it is an offence for any person to employ, or require or permit, a child to work in any circumstances prohibited under this section.

140 Procedural requirement for dismissal arising from collective termination or redundancy.

141 S 34(10) of the Labour Act, 2007.

142 S 50(4) of the Labour Act, 2007.

143 S 50(5) of the Labour Act, 2007.

(d) failure to, without lawful excuse to comply with a subpoena issued in terms of subsection 18(a)[144] or refuse to answer any question put to that person by a conciliator in terms of subsection (18)(c)[145]	The conciliator may lay criminal charges with police and the culprit may be prosecuted in the criminal court	On conviction of the alleged offence, the offender is liable to a fine not exceeding N$10,000, or to imprisonment for a period not exceeding two years or both the fine and imprisonment.[146]
(e) Failure to, without lawful excuse to comply with a subpoena issued by a an arbitrator in terms of section (8)(c)[147]	The arbitrator may lay criminal charges with police and the culprit may be prosecuted in the criminal court	On conviction of the alleged offence, the offender is liable to a fine not exceeding N$10,000, or to imprisonment for a period not exceeding two years or both the fine and imprisonment.[148]
(f) <u>Offences in relation to inspectors</u> section 127(1) provides that any person who does any of the following acts commits an offence: ▪ Hindering or obstructing a labour inspector in the performance of the inspectors functions or exercise of the powers; ▪ Refusing or failing to answer to the best of that individual's ability any question put by a labour inspector in terms of section 125 (2) (a) (vi) 125 (2) (b) ▪ Internationally furnishing false and misleading information to a labour inspector; ▪ Refusing or failing to comply with any compliance order issued in terms of section 126; or ▪ Falsely claiming to be a labour inspector	The labour inspector may lay criminal charges with police and the culprit may be prosecuted in the criminal court	On conviction of the alleged offence, the offender is liable to a fine not exceeding N$10,000, or to imprisonment for a period not exceeding two years or both the fine and imprisonment.[149]

144 In terms of the subsection, a conciliator may subpoena any person to attend a conciliation hearing if the conciliator considers that that person's attendance will assist in the resolution of the dispute.

145 In terms of this subsection, a conciliator may question any individual about any matters relevant to the dispute.

146 S 82(19) of the Labour Act, 2007.

147 In terms of the section, the an arbitrator may subpoena any person to attend an arbitration hearing if the arbitrator considers that the person's attendance will assist in the resolution of the dispute.

148 S 86(9) of the Labour Act, 2007.

149 S 127(2) of the Labour Act, 2007.

(g) <u>Prohibition of labour hire chapter 10 section 128</u> **No person may, for a reward, employ any person with a view to making that person available to a third party to perform work for the third party**[150]	It appears that criminal charges should be laid by ministry of Labour official, in the absence of explicitly provisions	On conviction of the alleged offence, the offender is liable to a fine not exceeding N$80,000, or to imprisonment for a period not exceeding five years or both the fine and imprisonment.[151]
(h) <u>Records and returns section 130)</u> **Every employer is obliged to keep records, current for the most recent five years in the prescribed manner at the workplace**[152]	The labour inspector may lay criminal charges with police and the culprit may be prosecuted in the criminal court	On conviction of the alleged offence, the offender is liable to a fine not exceeding N$10,000, or to imprisonment for a period not exceeding two years or both the fine and imprisonment. [153]
(i) Preservation of secrecy section 131 **This offence may be committed by any person performing a function in terms of the Act, he/ she must not disclose any confidential information acquired in the course of performing that function unless done in terms of section 131(1)(a) (b)**	It appears that criminal charges should be laid by ministry of Labour official, in the absence of explicitly provisions	On conviction of the alleged offence, the offender is liable to a fine not exceeding N$10,000, or to imprisonment for a period not exceeding two years or both the fine and imprisonment. [154]
Liability Clause section 132		
(a) Section 132(1) provides that the employer is liable for contravention conduct by his manager, agent or employee unless exonerated in terms of section 132(1)(a- c)[155]		
(b) Section 132(2) joins the manager, agent or employee in his person who contravenes the Act to be equally liable whether or not the employer is also held liable in terms of section 132(1) above.		

150 S 128(1) of the Labour Act, 2007.

151 S 128(3) of the Labour Act, 2007.

152 S 130(1) provides for the information that would constitute records and returns that employers are obliged to keep for five years.

153 S 130(5) of the Labour Act, 2007.

154 S 131(2) of the Labour Act, 2007.

155 The section provides that the employer is liable, unless it is established on the balance of probabilities that- (a) the commission of the contravention was not within the scope of the authority or in the cause of the employment of the manager, agent or employee, (b) the manager, agent or employee contravened the Act without the permission of the employer and (c) the employer took all reasonable steps to prevent the contravention.

2.6 CONCLUSION

Labour disputes and conflicts are inherent in all labour relations system. They tend to occur when the collective bargaining process reaches a breaking point and, if not resolved, often give rise to industrial actions, such as strikes and lock-outs. The establishment of a system for the prevention and settlement of labour disputes is therefore the cornerstone of sound labour relations policy and the effective resolution of labour dispute should be foreseen as closely linked to the promotion of the right to collective bargaining.

Similarly, it should be noted that conflict gives rise to disputes due to the divergent interests of the parties to the employment relationship. Conflict is therefore believed to be a catalyst for change in the employment relations' arena. Once the dispute arises, which is inherent in any employment relationship, it is incumbent on the parties to deal with the situation in a constructive manner to prevent damage to that relationship.

The Labour Act, 2007 (Act No 11 of 2007) differentiate between disputes of interests and disputes of rights and provides for mechanisms to resolve these disputes, which parties are at liberty to exhaust. Moreover, the Namibian Labour Act, 2007 criminalizes certain conduct by the employers and employees alike, in an event of failing to comply with its requirements.

CHAPTER 3

DISPUTE RESOLUTION INSTITUTIONS

3.1 INTRODUCTION

The Labour Act, 2007,[156] creates a number of institutions or bodies to manage and perform dispute resolution functions. These include, (not listed in hierarchical manner) Labour Inspectorate [s125 (2) (1)], the Labour Commissioner [s121], private arbitration [s91], and the Labour Court. However on this note, the statute establishes no specific private agencies, as is the case of bargaining councils in South Africa.[157] What is in place is more a sectoral or industrial bargaining bodies, for minimum wages and other conditions of employment and impliedly could include dispute resolution internally in terms of the collective agreements in place. I.e. Security Association of Namibia with Namibia Transport and Allied Workers Union[158] and Namibian Security Guard and Watchman Union,[159] in the security sector, the Construction Industry Federation of Namibia with Metal and Allied National Workers Union (MANWU) in the construction industry and The Agricultural Employers Association, the Namibian National Farmers Union and the Namibian Farm Workers Union. On another note, the new Act, establish or continues the existence of the Labour Court,[160] as it was pointed out already above.

Each of these institutions have their own specific jurisdiction and can only deal with disputes that falls within their jurisdiction up to a certain extent.[161] Notwithstanding these created

156 Act No 11 of 2007.
157 S 27 of the Labour Relations Act, 66 of 1995.
158 Herein as NATAU.
159 Herein NASGW.
160 S 115 and 117 of the Labour Act, No 11 of 2007.
161 Bosch *et al* (2004) P19.

institutions for dispute prevention and resolution, the Labour Act, 2007 gives the parties freedom to determine their own dispute resolution mechanisms through collective agreements.[162]

The parties to a dispute may undertake these routes only when they have exhausted the provisions of their collective agreement, thus, the internal procedure contained therein should take precedent. These procedures may only be departed therefrom in instances where there is no provision or if the provision is not operative[163] for what ever reason. In this respect, the court held that dispute resolution procedure set by collective agreement enjoys precedence over the provisions of the LRA,[164] which is the same position in Namibia.

Similarly, parties are at liberty to choose to resolve their dispute by private arbitration; this is done by either engaging a private arbitrator directly or by application to the Labour Court in an event of a dispute over an arbitrator.[165] These established institutions are therefore created to resolve conflict in the workplace effectively, through conciliation as a consensus seeking process and where conciliation fails, through arbitration. The Labour Court is therefore established to supervise these institutions and produce authoritative jurisprudence.[166]

This Chapter will therefore look and analyse these institutions, determine their jurisdiction and/or functions. So as to enable the users of the new labour dispute resolution system understand each institution's jurisdiction and the extent to which they are empowered to prevent or resolve the disputes.

3.2 LABOUR INSPECTORATE

Section 124(1), of the Labour Act, 2007 empowers the Minister (responsible for labour,) to appoint labour inspectors to enforce the Labour Act or any decision, award or order made in terms of the Act. In confirming the said appointment by the Minister, the Permanent Secretary (responsible for labour) must issue each appointed labour inspector with a certificate confirming the appointment.[167] A similar provision in South Africa, is found [s63][168] which

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162 S 73(1) of the Labour Act, 2007 (Act No 11 of 2007).
163 S 73(2)(a) (b) of the Labour Act, 2007 (Act No 11 of 2007).
164 *Mthimkhulu v CCMA* (1999) 20 *ILJ* LC par 26-27 and *SAB v CCMA* (2002) 9 BLLR 894 *(*LC) Par 14- 15.
165 S 91 of the Labour Act, 2007 (Act No 11 of 2007).
166 Du Toit *et al* (2006) p 89.
167 S 124(2) of the Labour Act, 11 of 2007.

provides for the appointment of labour inspectors to ensure the monitoring and enforcement of the basic conditions of employment. In addition, they too have powers to issue compliance orders to ensure full compliance with the Basic Conditions of Employment Act.[169] What is different though, is the fact that in Namibia, labour inspectors have jurisdiction to enforce the Labour Act which encamps the basic conditions of employment and the dispute resolution provisions [s126 (1)[170] and not necessarily only basic conditions of employment as is the case with labour inspectors in South Africa.

The Labour Act, 2007,[171] gives a variety of powers to appointed labour inspectors. Amongst them, which are relevant, to dispute resolution includes[172] -

> "The power to assist any person (complainant or respondent) in –
> (i) any application , referral or complaint under the Act;
> (ii) settling any application, referral or compliant under the Act."

Moreover, labour inspectors have bestowed powers in terms of the Act to issue compliance orders.[173] The Act provides as follows -

> *"An inspector who has reasonable grounds to believe that an employer has not complied with a provision of the Act, may issue a compliance order in a prescribed form.[174] Once the inspector has issued a compliance order, the employer must comply unless the employer appeals to the Labour Court,[175] against a compliance order within 30 days after receiving it."*[176]

The labour inspectorate is therefore statutory established hence a law enforcement machinery established to ensure full compliance with the provisions of the labour legislation. Labour inspectors have statutory powers to issue compliance orders to employers who fail to comply with "*any*" provisions of the Labour Act. This can be construed to mean that it is not limited to basic conditions only but any other provisions of the Act.

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168 Basic Conditions of Employment Act 75 of 1997.
169 *Supra*.
170 Act No 11 of 2007.
171 S 125 of the Act, 2007 (Act No 11 of 2007).
172 S 125(2)(i) (i) (ii) of the Labour Act, 2007 (Act No 11 of 2007).
173 S 126 of the Labour Act, 2007 (Act No 11 of 2007).
174 S 126(1) of the Labour Act, 2007 (Act No 11 of 2007).
175 S 126(2) of the Labour Act, 11 of 2007.
176 S 126(3) of the Labour Act, 11 of 2007.

With this new revolutionary provision of the Labour Act, 2007, labour inspectors have powers to attempt to settle any application, referral or complaint before it reaches the Labour Commissioner. This approach is intended to reduce the number of disputes going to the Labour Commissioner, which can be settled by a labour inspector on a plant level. It is therefore clear that in most instances, as has been the case during the reign of the first Labour Act, 1992. Labour Inspectorate may still be the first port of call in most cases for labour dispute prevention, until the Labour Commissioner finds ground for dispute resolution.

The provision empowering the labour inspectors to settle any application, referral or complaint, seem to emanate from the old and now defunct Rules of the District Labour Court, which has been faced out by the new Labour Act, 2007. In terms of the Rule 6 of the District Labour Court,[177] applicable in terms of the first Labour Act,[178] it provide as follows:

(1) upon the filling of a complaint, the Clerk of the Court shall, unless good grounds exist not to do so, refer the complaint for settlement or further investigation by a Labour Inspector.
(2) That the complainant and the respondent shall be informed of the date and place of any conference for the purpose of sub-rule (1) above, by the labour inspector.
(3) That the parties shall cooperate with the Labour Inspector and attempt to settle their dispute.

In this respect, the Labour Court held that Rule 6 Conference is intended to facilitate the clarification of issues and to afford the parties a chance to settle the complaint.[179] The new approach of assistance will be up to certain extent only, by means of informal mediation in an event of a dispute, or issuing a Compliance Order should the issue in dispute be a compliance matter. I.e. non-payment of wages. All in all, is that should the dispute require formal conciliation and/or arbitration, the labour inspectors will assist in making such a referral to the Labour Commissioner.

177 DLC.
178 Act No 6 of 1992
179 *Transnamib Holdings Ltd v Goroeb NLLP* 2004 (4) 68 NLC, (Case Number LCA 30/2001.

3.3 LABOUR COMMISSIONER

3.3.1 STATUS

The Labour Act, 2007[180] provides for the appointment of the Labour Commissioner and the Deputy Labour Commissioner by the Minister responsible for labour and that they must be persons who are competent to perform the functions of a conciliator and arbitrator.

Reference to the Labour Commissioner, refers to the "Individual" appointed in terms of [s120 (1)] of the new Labour Act, 2007. The Labour Commissioner is not created as an independent institution or as an agency of State. Thus he/she is not independent of the state, but, rather an individual in charge of the dispute resolution component within the Ministry which is responsible for labour.[181] However, he /she is expected and required to deal with disputes independently without any interference or influence by the State or social partners.

It appears, that initially, that the now Ministry of Labour and Social Welfare had sought to appoint the Labour Commissioner and Deputy Labour Commissioner from outside the Public Service, to ensure the independence of the Labour Commissioner (in respect of the Public Service) but this could not be realised.[182] The Commission for Conciliation, Mediation and Arbitration,[183] on the other hand, operates as an autonomous statutory agency with legal personality [s112][184] and being an independent agency of the State,[185]

Notwithstanding the fact that the Labour Commissioner is a government employee or civil servant,[186] the Labour Act, 2007[187] requires arbitrators (including the Labour Commissioner) to be independent and impartial in the performance of their duties. It is therefore expected that despite their status as government officials, it should not influence their making or reaching decisions.

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180 S 120(1) of the Labour Act 11 of 2007.
181 See Ministry of Labour Structure 2007/8 and Annual Report 2007/08.
182 Extract from the Keynote speech by the Permanent Secretary of the Ministry of Labour at the 11th Round Table on Labour Relations Dispute Resolution – Consultations and Involvement of third Parties.
183 Herein referred to as CCMA.
184 Of the Labour Relations Act 66 of 1995.
185 S 113 of the Labour Relations Act 66 of 1995.
186 Appointed as civil servant in terms the Public Service Act, 1995 (Act No 13 of 1995).
187 S 85(6) of the Labour Act 11 of 2007.

Given the above, status, The Labour Commissioner has jurisdiction overall offices in Namibia and a dispute can be reported at any labour office, in any region.[188] It is however a requirement that the dispute be conciliated or arbitrated in an area where the cause of action arose,[189] as is the case with the CCMA.[190]

The Minister responsible for labour also appoints both full time and part-time conciliators and arbitrators in terms of the laws governing the Public Service.[191] The Labour Commissioner in turn, designate from the appointed conciliators and arbitrators to conciliate a dispute [s82 (3) and/ or arbitrate the dispute [s85 (5). All full-time conciliators and arbitrators enjoys job security as they are appointed on an indefinite terms, but strictly in accordance with the Public Service Act. Unlike the CCMA Commissioners who do not enjoy the security of tenure [s117 (2)].[192] However, despite this security of tenure, the appointed commissioners and arbitrators may be withdrawn by the Minister for good cause shown.[s82 (6) and s85 (3) (5).[193] The good cause may include grounds such as misconduct, incapacity or serious breach of codes of conduct.[194] In the end, the Labour Commissioner, conciliators and arbitrators are immune from liability for acts and omissions in good faith,[195] committed in the cause of their official duties.

3.3.2 FUNCTIONS OF THE LABOUR COMMISSIONER

The primary functions of the Labour Commissioner are to conciliate and arbitrate disputes referred to him/ her in terms of the Labour Act and other statute. The Labour Commissioner Regulations includes prescribed forms for referring different types of disputes for conciliation and / or arbitration and other requests for the Labour Commissioner's intervention.[196] This is a similar provision as the CCMA.[197]

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188 S 86(1)(a) (b) of the Labour Act 11 of 2007.
189 S 24 (Annexure 3) Rules relating to the conduct of conciliation and arbitration before the labour commissioner (GG No 4151) 31 October 2008.
190 CCMA Rule 24 (1).
191 S 82(6) and 85(9) of the Labour Act 11 of 2007.
192 Labour Relations Act 66 of 1995.
193 Of the Labour Act, 2007 (Act No 11 of 2007).
194 S100(a)(iii) codes of ethics for conciliators and arbitrators which are similar to the ones provided for in section 117(7) of the Labour Relations Act, 66 of 1995 which the Namibian codes emanates.
195 S 134 of the Labour Act 11 of 2007.
196 S 135 of the Labour Act 11 of 2007.
197 CCMA Regulation: GNR 1442 of 10 October 2003.

The Labour Act, 2007 [s121] provides for the following wide functions of the Labour Commissioner:

(a) to register disputes from employees and employer over contraventions, the application, interpretation or enforcement of the Labour Act and to take appropriate action;

(a) to attempt, through conciliation or by giving advice, to prevent disputes from arising;

(b) to attempt, through conciliation, to resolve disputes referred to the Labour Commissioner in terms of the Act or any other law;

(c) to arbitrate a dispute that has been referred to the Labour Commissioner if the dispute remains unresolved after conciliation, and –

(i) the Act requires arbitration; or
(ii) the parties to the dispute have agreed to have the dispute resolved through arbitration; and

(d) to compile and publish information and statistics of the Labour Commissioner's activities and report to the Minister.

The Labour Commissioner may also perform other functions which includes –

(a) rendering advisory to any part to a dispute about the procedure to follow;

(b) offer to resolve a dispute that has not been referred to the Labour Commissioner through conciliation;

(c) intervene in any application made to the Labour Court in terms of section 79[198] of the Labour Act;

(d) apply on the Labour Commissioner's own initiatives , to the Labour Court for a declaratory order in respect of any question concerning the interpretation or application of any provision of the Act.

Moreover, section 121(3) of the Labour Act, 2007 provides that the Labour Commissioner may, where possible provide registered employer's organization and registered trade union with advice and training relating to the objects of the Act including -

(a) designing and establishing procedures for the prevention and resolution of disputes;
(b) the registration of trade unions;
(c) the design any contents of collective agreement; and
(d) dismissal procedures.

On the other hand, the CCMA is the centrepiece of the Labour Relations Act.[199] It plays a major role in the overall dispute resolution system and it is a tripartite body directed by an eleven- person governing body made of:

- an independent chairperson;
- a director who does not have voting powers;
- three persons nominated by employers;
- three persons nominated by labour; and
- three persons nominated by the State.[200]

Brand *et al* (1997), state that, the establishment of the independent Commission (the CCMA) represents a major shift in labour dispute resolution policy. In that employers, labour and the state share responsibilities jointly. On the other hand, The Labour Act, 2007 [s92,93 & 94] provides for the establishment and functions and composition of the Labour Advisory

198 S 79(1)(b) Labour Act 11 of 2007, provides that the Labour Court must not grant an urgent order interdicting a strike, picket or lockout that is not in compliance with Chapter 7 of the Act, unless, the applicant has served a copy of the notice and the application on the Labour Commissioner.

199 Act 66 of 1995.

200 Brand *et al* (1997) at page 65. See also s 116 of the Labour Relations Act 66 of 1995.

Council.[201] The Labour Advisory Council is responsible to supervise the performance of dispute prevention and resolution by the Labour Commissioner and supervise any other activities of the Labour Commissioner.

It is comprised of a chairperson, who must be a Namibian citizen and twelve other members, comprising –

- four individuals to represent the interest of the State;
- four individuals to represent the interest of registered trade unions; and
- four individuals to represent the interest of registered employers organisation.[202]

It can therefore be deduced that the success of the Labour Commissioner in labour dispute resolution would be a shared responsibility by the Labour Advisory Council, despite the fact that the Labour Commissioner reports directly to the Minister of Labour and is not a member of the Council. The tripartite Council will have to play a major role in ensuring the success of the dispute resolution by the Labour Commissioner.

3.4 PRIVATE DISPUTE RESOLUTION AGENCIES

The Labour Act, 2007 does not provide much information on private disputes resolution agencies. It however, provides for the procedure to refer a dispute to private arbitration.[203] The Act provide just a statutory private platform that parties to a dispute contemplated under the Act may agree in writing to refer that dispute to arbitration under [s91], which provides for private arbitration.

At the time of writing, there was only one private arbitration agency in existence in Namibia, the Professional Arbitration and Mediation Association of Namibia.[204] The Labour Act, 2007 expects private dispute agencies to play a major role in the dispute resolution system. In South Africa, this role is done by either agencies accredited by the CCMA or private bodies.[205]

Brand *et al* (2007) 73, established that private agencies may perform dispute resolution functions with or without accreditation. That they may be both accredited to perform those

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201 LAC.
202 S 94 of the Labour Act 11 of 2007.
203 S 91 of the Labour Act, 2007.
204 Herein as PAMAN.
205 Brand *et al* (1997) page 73, see also s 127 of the Labour Relations Act 66 of 1995.

dispute resolution functions permitted by accreditation and perform other dispute function for which they are not accredited. Or alternatively that they may be entirely non-accredited and perform any dispute resolution function they choose for a fee. This may be the scope within which the Namibian Private arbitration institutions may operate without necessarily being accredited by the Labour Commissioner, in the absence of accreditation legislation provision.

3.4.1 LABOUR COURTS

Continuation and powers of Labour Court

Section 115 of the Labour Act, 2007 makes reference to the provisions of the first Labour Act,[206] with regard to the establishment of the Labour Court and its continuation as a Division of the High Court.

In terms of the above reference, the Labour Court has powers to deal with all matters necessary or incidental to its functions under the Labour Act, including any labour matter, whether or not governed by the provisions of the Act, or any other law or common law.[207] In *Cronje v Municipality Council of Mariental*[208] The Supreme Court of Appeal held that generally the Labour Court has no jurisdiction but that [s18] of the Labour Act, 1992 gives very extensive and wide powers to the Labour Court- that includes jurisdiction to make an order for reinstatement.

Section 117 of the Labour Act, 2007 provides the wide exclusive jurisdiction of the Labour Court. These includes –

(a) Determining **appeals** from-
   (i) decisions of the Labour Commissioner made in terms of the Labour Act, 2007;
   (ii) arbitration tribunal's award, in terms of section 89;
   (iii) compliance orders issued in terms of section 126.

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206 Act No 6 of 1992 s 15.
207 S 18(1)(g) of the Labour Act 6 of 1992. The same provision is retained in the new Labour Act 11 of 2007 s 117(1)(i).
208 NLLP 2004 (4) 129 NSC (Case Number SA 18/2002).

(b) **review** –

(i) arbitration tribunals' award in terms of the Act; and

(ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of-

(aa) the Act; or

(bb) any other Act relating to labour or employment for which the Minister is responsible;

(c) review despite any other provision of any Act, any decision of any body or official provided for in terms of any other Act, if the decision concerns a matter within the scope of the Labour Act;

(d) grant a declaratory order in respect of any provision of the Labour Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought;

(e) to grant urgent relief including an urgent interdict pending the resolution of a dispute in terms of Chapter 8;

(f) to grant an order to enforce an arbitration award;

(g) determine any other matter which it is empowered to hear and determine in terms of the Labour Act;

(h) make an order which the circumstance may require in order to give effect to the objective of the Labour Act;

(i) generally deal with all matters necessary or incidental to its function under the Labour Act concerning any labour matter, whether or not governed by the provisions of the Labour Act, or any other law or the common law

(2) The Labour Court may-

(a) refer any dispute contemplated in subsection (1) (c) or (d) to the Labour Commissioner for conciliation in terms of Part C, of Chapter 8;

(b) request the Inspector General of the Police to give a situational report on any danger to life, health or safety of persons arising from any strike or lockout.

The Supreme Court, in *Cronje's* case above, held that the decision of the Labour Court should bring finality to the matter and that an appeal to the Supreme Court should be restricted on the question of law and that if law is decided upon facts in disputes should they become difficult and contentious issue, the most practical, less costly and fairest cause would be for the Supreme Court to decide the merits of the case on appeal at Par 135.

On the supremacy note, the Supreme Court held that it is not bound to follow as a binding precedent, any decision or judgment of lower courts, whether that decision was wholly or in part *obiter dicta* or not. The previous decisions of the Lower Court including the Labour Court, only have the status of persuasive authority, which the Supreme Court of Namibia will give weight to, according to various criteria, including the soundness of the reasoning in the view of the Supreme Court.[209]

This entails that a labour matter may not just end in the Labour Court but may even be heard in the Supreme Court, especially when it concerns with the fundamental rights of employees, despite the absence of such provision in the Labour Act. But it has been the practices in the previous system of dispute resolution mechanisms.

[209] See footnote 52 above.

A similar comparison of the Labour Court is to be found in [s151] of the Labour Relations Act,[210] which provides for the establishment and status of the Labour Court. In that, the Labour Court is established as court of law and equity, and that is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equally to that which a court of a Provincial Division of the Supreme Court has in relation to the matters under it jurisdiction and that it is a court of record.[211]

Section 167, of the Labour Relations Act,[212] make provision for the establishment and status of the Labour Appeal Court. The Labour Appeal Court is said to be the final court of appeal in respect of all judgements and orders made by the lower courts in respect of the matters within its jurisdiction [s167 (2) of the LRA. However, a matter may be heard or referred to the Constitutional Court, where and when the matter raises constitutional issues.[213] In Namibia, the Supreme Court, which is also the Constitutional Court in practice, would ordinarily bring the matter to finality. [214]

3.5 CONCLUSION

In conclusion, it is important to note that a number of institutions have been created by the Labour Act, 2007[215] to perform dispute resolution functions. These are; the Labour Inspectorate, the Labour Commissioner, the Labour Court and even, as may be necessary the Supreme Court.

Each institution has its own specific jurisdiction and can deal only with disputes that fall within its jurisdiction.[216] Moreover, although the Labour Act, 2007, creates these institutions for dispute prevention and resolution and prescribes the procedures that must be followed when resorting to these institutions, parties are at liberty to determine their own dispute resolution mechanisms through collective agreements. Where such dispute procedures are operational, these collective agreement may be followed and not the Labour Act.

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210 Act 66 of 1995.

211 Landman, Van Niekerk and Wesley *Practice in the Labour Courts* (1998).

212 *Supra*.

213 *Sidumo v Rusternburg Platinum Ltd & CCMA* (2007) ZACC22 (Case No CCT 85/06).

214 *Cronje v Municipality Council of Mariental* NLLP 2004 (4) 129 NSC (Case No 18/2002) and *Erundu Stevedoring (Pty) Ltd v Namibia Seaman & Allied Workers Union* NLLP 2004 (4) 187 NLC (Case No 20/2002).

215 Act No 11 of 2007.

216 Bosch *et al The Conciliation and Arbitration Hand Book. A Comprehensive Guide to Labour Dispute Resolution Procedures.*

Equally, parties are free to use the service of private arbitration by engaging a private arbitrator for a possible fee. These institutions are therefore created to resolve labour disputes in the workplace effectively through conciliation and consensus seeking and, if this process fails, to arbitration where the dispute requires arbitration.

CHAPTER 4

CONCILIATION OF DISPUTES

4.1 INTRODUCTION

Normally labour legislations of various countries, including the International Labour Organisation,[217] and Namibia not an exception, tend to differentiate between disputes over rights and disputes over interest. The difference hereof has been discussed in details in Chapter2. However, for purpose of understanding the process of resolving disputes of mutual interest and rights disputes, I will re-look briefly at the differences of these concepts for purpose of conciliating such disputes.

Disputes over rights, are sometimes known as legal disputes where a worker or group of workers claim that they have not been treated in accordance with the rules laid down in collective agreements, in individual contracts of employment, in laws and regulations or elsewhere. These disputes are resolved through Con-Arb, but ultimately, end up at arbitration.

[217] ILO.

On the other hand, *interest disputes*, are sometimes known as economic or bargaining disputes. Here the parties are faced with a conflict opposing the interest of the workers, usually expressed through their trade unions and those of the employers or employer's association. In these disputes there is no question of interpreting what the rights of the parties are, but the question is rather what those rules should be. Accordingly, interest disputes involve the establishment of terms and conditions of employment or rules regulating various aspects of the employment relationship between the trade unions and employers.

In principles, interest disputes arise when the trade union and employer or employers association reach a deadlock in collective bargaining. I.e. when they cannot agree on all or some of the issues upon which they had been negotiating. The next is, what then is the way out of such deadlock, if collective bargaining appears to the parties futile? In reality, there remain only two possibilities, launching or continuing a strike (or lock-out) or other forms of economic pressure (such as boycott of products or services) or third party intervention in the dispute. Normally, the third parties are brought in to help resolve a labour dispute through conciliation, mediation and arbitration.[218]

The solution parties find through a consensus – seeking process are often better than the outcome that arbitration or adjudication can deliver. Conciliation solutions or outcomes take into account the needs and interest of all the parties. Through this module of dispute resolution, the parties have a batter chance of addressing issues that are important for them and may therefore keep the relationship intact that may have become strained in the context of the dispute. Bosch *et al* (2004).

Consensus should always be thought before resorting to power or adjudication.[219] This is one of the important features of dispute resolution under the new Labour Act, 2007. The Act, contemplates mediation, and conciliation as the primary consensus seeking processes. This Chapter therefore focuses in details on conciliation, both substantive aspects and the procedural issues or steps involved in conciliation of a dispute. Any reference to the Labour Act, in this Chapter, refers to the Labour Act, 2007 (Act No 11 of 2007).

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218 Gladstone *Voluntary Arbitration of Interest Dispute*: *A Practical Guide* (1984).

219 Brand *Labour Dispute Resolution* (1997).

Due to lack of sufficient available jurisprudence on the subject mater in Namibia, focus on case law or precedents will heavily relay on the CCMA, on which the Namibian dispute system is somehow derived from.

4.2 CONCILIATION CONCEPT

The Labour Act, 2007 defines conciliation to include -[220]

(a) mediating a dispute;

(b) conducting a fact finding-exercise and

(c) making an advisory award if-

  (i) it will enhance the prospects of settlement; or

  (ii) the parties to a dispute agree.

While the above definition of conciliation includes mediation as well as other process, it is most often used as synonym for mediation.[221] The other processes encompassed by the term conciliation as used both in the Labour Act, 2007 and the Labour Relations Act,[222] are fact-finding and making an advisory arbitration award to the parties.

The International Labour Organisation[223] defines conciliation to refer to the intervention of a third party, usually neutral, in the continuation of negotiations between the parties. The conciliator attempts to conciliate or bring together the parties to the dispute by exploring with them and eliciting from them changes in their respective demands and positions. This is normally done by a variety of means short of coercion. Conciliation may or may not include settlement proposals on the part of the conciliator, but it is not the accepted role of conciliators (unlike arbitrators) to substitute their judgement for that of the parties and possibly impose a solution with the substance of which the parties may not agree (Gladstone 1984)

On the other hand, Du Toit *et al* (2006) 110,[224] defines conciliation to mean to reconcile or bring together especially opposing sides in an industrial dispute. That conciliation by it very

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220 S 1 of the Labour Act 2007 (Act No 11 of 2007).

221 Boulle and Rycroft *Mediation Principles, Process and Practice* (1997) 62-63.

222 66 of 1995 s 135(5).

223 ILO.

224 Du Toit *et al Labour Relations Law*: *A Comprehensive Guide*.

nature is private, confidential and without prejudice.[225] Conciliation is intended for the parties to arrive at their own solution rather than enforcing the law. Moreover that conciliation may become a process in which the neutral expert evaluates the merits of a dispute, shuffles between the parties seeking bottom lines and ultimately pressuring them to accept a recommendation that the "expert" considers appropriate.

However, on the recommendations of the "third party or neutral expert" conciliator, the Labour Court has warned that commissioners[226] (conciliators) should not advice parties on matters of substance and should be careful not to place them under undue pressure to settle.[227]

Given the above, the conciliator's role should be to bring the parties to the table and facilitate discussion between them. The conciliator should further play an active role in helping the parties to develop options, consider alternatives and reach a settlement agreement that will address the parties' needs.

In this process, the conciliator usually:

- attempts to open the channels of communication between the parties;
- creates an environment for the parties to reveal their needs and interests for him/ her in confidence, which could be to guide the parties to a settlement;
- seek to distil issues and separate them;
- explains how the law may deal with the disputed issues;[228]
- explore ways in which the interest of both parties may be promoted by a settlement; and

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225 Rule 13 Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner GG No 4151 (31 October 2008).

226 A CCMA Commissioner appointed in terms of s 133 of the Labour Relations Act 66 of 1995. See also the Conciliators appointed in terms of s 82(2) and (3) of the Labour Act 2007 (Act No 11 of 2007).

227 *Kasipersad v CCMA* [2003] 2 BLLR 187 (LC), where Pillay J, gives a useful overview of the role of a conciliator.

228 In *Kasipersad v CCMA* par 26, the judge held that a conciliator may not advise parties in a manners that compromises the conciliators impartiality. However, *Bosch et al* (2006). P47-48 submits that it is essential that conciliators be given some leeway in exploring the parties, that part of the process should involve exploring what may or what is likely to happen if the case goes to arbitration or adjudication. Further that a commissioner should be free to make recommendations to the parties without them having asked for one and in a form other than as advisory arbitration award, provided that the conciliator does not compromise impartiality.

- may make recommendations on how to resolve the dispute, provided the recommendations is not *ultra vires* and does not compromise on the conciliators impartiality.

Brand (1997) 80, state that, as part of the conciliation process; the conciliator may consider separating the parties in side meetings. This may be done if it is considered that a joint-meeting is not conducive to consensus building and that the process may be better managed by having side meetings. Similarly, that, the conciliator should bring the parties together after side meetings when a joint meeting will be helpful to the process. Side meetings, may be necessitated by high level of emotions or abuse or a need for confidential discussions between the parties. Equally, side meetings may be used to promote the settlement seeking process, explore options, develop proposals, and explore the potential movements and to challenge parties.

The conciliator should ascertain information to be conveyed from one side –meeting to another and should obtain authority in his regard before making disclosure.[229] Moreover, that, parties are free to request time to caucus on their own without the conciliator or other part being present.

4.3 CONCILIATION UNDER THE AUSPICES OF THE LABOUR COMMISSIONER

Section 82(1),[230] empowers the Minister,[231] to appoint conciliators in terms of the Public Services laws, to perform the duties and functions conferred on a conciliator in terms of the Labour Act, 2007. These may be both full time and part-time conciliators.[232] The Labour Commissioner, in turn, designates from the appointed conciliators, in an event of reported dispute, to try to resolve by conciliation the dispute referred to the Labour Commissioner, [s82(3)] of the Labour Act.

Once a conciliator has been designated to conciliate the dispute, the conciliator has the discretion to determine the process to be used during conciliation[233] and may include

229 Rule 13 see footnote 9 above.
230 Labour Act 2007 (Act No 11 of 2007).
231 The Minister responsible for Labour.
232 S 82(2) of the Labour Act 2007.
233 S 82(11)(a) of the Labour Act 2007 (Act No 11 of 2007).

mediation, fact-finding and/ or making recommendations to the parties, which could include an advisory award[234] [s1] of the Labour Act. It is a requirement that all disputes must be conciliated before they can proceed to arbitration.[235]

The Labour Act, requires that the conciliator must attempt to resolve the dispute through conciliation within 30 days of the date the Labour Commissioner received the referral of the dispute or any longer period agreed to in writing by the parties.[236] Before a dispute is referred to the Labour Commissioner, the party who refers the dispute has a duty to satisfy the Labour Commissioner that the parties involved have taken all reasonable steps to resolve or settle the dispute on their own but that they have failed to do, [s82 (9)] of the Act. This means that before a dispute is referred to conciliation, the company's internal disciplinary, grievance or dispute resolution procedure must be utilised. Any internal dispute resolution procedure may be in place by agreement at the company, for example by way of a collective agreement;[237] this could serve the same purpose.

Although the Labour Act, 2007 does not require a party to allege a cause of action, it should be necessary on the party to allege a dispute within the jurisdiction of the Labour Commissioner. Hence, to do so, the following jurisdictional facts must be asserted or must appear when referring a dispute to conciliation:[238]

- that there is a dispute;
- the dispute has arisen within an employment relationship;
- the dispute falls within the jurisdiction of the Labour Commissioner;
- the issue in dispute is not subject to a collective agreement; and
- the referral is timeous.

234 The recommendation could also take a form of a draft settlement agreement by the conciliator after listening to the issues in dispute (See Bosch 2004 –10).

235 Rule 20 of the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner (GG 4151 dated 31 October 2008).

236 S 82(10)(a) (b) of the Labour Act 2007 (Act No 11 of 2007).

237 Bosch *et al* (2004) 71.

238 Du Toit *et al Labour Relations Law* (2006) 100.

4.4 REFERRAL OF DISPUTES

Section 82 (7) of the Labour Act, provides that a party to a dispute may refer the dispute in a prescribed form to-

(a) the Labour Commissioner; or
(b) any labour office

Similarly, the Labour Act require that the referring party must satisfy the Labour Commissioner that a copy of the referral has been served on all parties to the dispute.[s82 9]. Moreover, Rule 11,[239] requires that –

Firstly, a party must refer a dispute to the Labour Commissioner for conciliation by delivering a completed Form LC12, or Form LC 21, in case of any other dispute ("the referral document"). Secondly, that the referring party must sign the referral documents in accordance with Rule 5.[240]

Thirdly, to attach to the referral document written proof in accordance with Rule 7,[241] that the referral document was served on the other party to the dispute. If the referral document is filled out of time, to attach an application for condonation, in accordance with Rule 10 of the Labour Commissioner's Rules. It is important to take note that these rules of the Labour Commissioner are similar but not really the same to the CCMA rules. Hence, I will relay more on the South African's CCMA case law (judicial precedents) in arguing the substantiveness of these matters.

In *Sithole v Nogwaza NO,*[242] the court held that although the Labour Relations Act[243] does not specify a time limit within which a dispute over a mutual interest may be referred, it was held

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239 Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (GG No 4151 31 October 2008).

240 Rule 5 provides for who must sign documents (1) a document that a party must sign in terms of the Act or these rules may be signed by the party or by a person entitled in terms of the Act or these Rules to represent that party in the proceedings. (2) That if the proceedings are jointly instituted or opposed by more that one employee, document may be signed by an employee who is mandated by the other employees to sign documents. A list of the employees, who have mandated the employee to sign on their behalf, bearing their signature, must be attached to the referral document.

241 Rule 6 deals with how to prove that a document was served in terms of the rules, listing out criteria to prove service of document.

242 (1999) 12 BLLR 1348 (LC).

243 66 of 1995.

that the CCMA (The Labour Commissioner in our context) is not obliged to accept disputes if there has been unreasonable delay between the date on which the dispute arose and the date of referral. The Labour Act, 2007 too, does not provide for time limit within which mutual interest disputes- may be referred to the Labour Commissioner. It would therefore be expected of the Labour Commissioner to take into account what is reasonable time, within which, such cases may be referred, taking into account the above persuasive judgement.

4.4.1 WHO MAY REFER?

Generally, any party to a dispute may refer a dispute to conciliation.[244] A party to a dispute is a person with direct interest in that dispute. In *Rustenburg Platinum Mines Ltd v CCMA*[245] it was held that, while referral may be made by a trade union, the term "any party" cannot be construed as including labour consultancy acting on behalf of the employee. This decision by that court could be premised on the fact that consultants are not permitted at conciliation proceedings before the CCMA. However, the situation is not similar in Namibia, [s82 (13) (b)] of the Labour Act, provides that a conciliator may permit "any other individual" to represent a party to a dispute in conciliation proceedings.

This provision generally, could include even consultants or ordinary persons in the absence of strictly regulation and requirement thereof; hence they may refer the dispute on behalf of their clients to the Labour Commissioner. However, in dismissal disputes only an employee can refer the dispute to conciliation or arbitration and not by an employer. Such a dispute can also be referred by a trade union on behalf of an employee or any other individual, which may include a consultant on behalf of the employee in the Namibian context. [My emphasis]

In *Numsa v CCMA*[246] Landman J, found that the persons entitled to represent parties at conciliation also has implied authority to sign a referral form on behalf of a dismissed employee to refer the dispute either to conciliation or arbitration. The court stressed that unless the principal is required by law to perform the act personally. If a document must be signed personally, the legislature generally states so in clear terms. That the statutory referral form requires a signature by the person who submits the form does not mean that a duly authorised representative cannot sign it. The court cited Rule 4(2) of the CCMA, which is

244 Du Toit *et al* (2006) 104.
245 (1997) 11 BLLR 1475 at 1479.
246 (2000) 11 BLLR 1330 LC.

exactly similar in design and content to Rule 5(2) of the Labour Commissioner‘s Rules, in that if more than one employee is involved, one mandated employee, can sign the documents on behalf of all, and attaching the list of employees who mandated the signatory.

Any person who may represent a party in a conciliation or arbitration proceedings may refer a dispute to conciliation or arbitration on behalf of that party.[247] However, in the CCMA proceedings, capacity is restricted to persons who may appear in conciliation or arbitration proceedings. These includes union officials and legal practitioners, but excluding consultants.[248] In Namibia though, representation is extended beyond the CCMA restrictions to include, any individual, [s82 (13) (b)] of the Labour Act, this provision is now as it stands, open ended, and the Labour Advisory Council is working on the regulations and the requirement to define the category of any other individual. Until then, it is open for abuse, if conciliators allow such representation.

It follows that a dismissed employee can validly authorise a union official, legal practitioner (any individual) to sign a referral form on his or her behalf. However, in a latter judgement in *Rustenburg Platinum Mines Ltd v CCMA*,[249] The Judge made an *obiter* statement in that, to him, the requirement that an employee must refer a dismissal dispute does not mean that the dismissed employee cannot be assisted in referring the dispute, however, that the assistance should be limited for instance, filling the referral forms on behalf of the dismissed employee is still rendering assistance. But that actual signing of the referral form on behalf of the dismissed employee presents problem. That it is starching assistance too far.

The requirements therefore should have strictly interpretation, so that the intended purpose is not put at risk.

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247 The CCMA Rule 4, is similar to Rule 4 of the Labour Commissioner. These rules provides that any document that a party must sign in terms of the Act or the Rules may be signed by any person entitled to represent a party to the proceedings, and Rule 25 of the CCMA which is the equivalent to Rule 25 of the Labour Commissioner, sets out who may represent a party in arbitration and conciliation proceedings. See also *NUMSA V CCMA* (2000)11 BLLR 1330 LC in which the court confirmed that a union official or legal practitioner (in Namibia would include any individual) may sign a referral form on an employee’s behalf and that in the absence of a clear provision that the form must be signed personally, the general rule that a person may authorize another competent person at act on his behalf or her behalf applies.

248 Bosch *et al* (2004) page 249.

249 (1997) 11 BLLR 1475 LC at 1478 to 1479.

On the other note, disputes of mutual interest section 64(A)[250] requires that a party to the dispute must refer it for conciliation to the bargaining council that has jurisdiction over the dispute, or where there is none, to the CCMA. A similar provision is [s74] of the Labour Act. The Labour Court held that it makes no difference who refers it. Employees can rely on a referral made by the employer to strike and vice versa.[251]

4.4.2 FORMULATING THE DISPUTE

The Labour Commissioner's Form LC 21, provides various categories of the disputes that may be referred to the Labour Commissioner. Bosch *et al* (2004) 252, states that it is important to frame the dispute properly in order to avoid difficulties when referring the matter to the next step in the process, be it arbitration or Labour Court adjudication. Both the Labour Relations Act,[252] and the Labour Act[253] requires that a dispute must first be referred for conciliation and the conciliator must attempt to resolve the matter through conciliation before it can be arbitrated.[254] Therefore, the dispute referred to arbitration must be the same dispute that was referred to conciliation even if it is not formulated in precisely the same manner.

In *Numsa v Driveline Technologies (Pty) Ltd,*[255] the Labour Appeal Court ruled that the parties were not bound by the manner in which conciliating commissioners (conciliators) characterised the dispute in the certificate. That such characterisation has no bearing on the future conduct of the proceedings. Further that the forum for subsequent proceedings is determined by what the employee alleges the dispute to be. It is therefore the allegations of the employee party or the referring party made in the referral that establish the jurisdiction of the CCMA or the Labour Commissioner. An implied allegation would not suffice to establish jurisdiction. An employee is required to make express allegations.[256] In *Zeuna – Starker BOP (Pty) Ltd v NUMSA*[257] the court held that if the commissioner (conciliator)'s categorisation is wrong, it may be reviewed.

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250 Labour Relations Act 66 of 1995.
251 *NTE Ltd v Ngubane* (1992)13 *ILJ* 910 LAC decided under the old act but cited with approved in *Afrox Ltd v South Africa Chemical Workers Union* (1997) 18 *ILJ* 399 (CC) at 404C.
252 LRA s 136.
253 Labour Act No11 of 2007; s 86(5).
254 Rule 20, of the Labour Commissioner rules see footnote 20 above.
255 (2000) 1 BLLR 20 LAC.
256 *Future Mining (Pty) Ltd v CCMA* 1998 (7) (LC).
257 (1998) 11 BLLR 110 (LAC).

4.5 TIME LIMITS FOR REFERRAL

The Labour Act, 2007 and the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner does not prescribe time limits for referral of the mutual interest disputes to conciliation. Unless these disputes can be construed to fall within the categories of any other disputes which are required to be referred within 12 months after the dispute arising. [s86 (2) (b)],of the Labour Act. If not so, it would be accepted that such disputes be referred within a reasonable time from the date they arose. (Bosch *et al*, 2004). However, in case of dismissal dispute, it has to be referred to conciliation within six months after the date of dismissal [s86 (2) (a)].

4.6 SET DOWN

The Labour Commissioner is required to conciliate or designate a conciliator to conciliate a dispute within 30 days from the date on which the referral was received, unless the parties agree to extend the 30-day period.[258] The Labour Commissioner is further required to give the parties at least seven (7) days written notice on form LC 28 of the conciliation date.[259] The Labour Commissioner should determine the date, venue and time for the first conciliation meeting.[260] In *Louw v Micor Shipping*[261] it was held that it is obligatory for a conciliation meeting to be called within the prescribed period, unless the parties agree to an extension, and that the conciliator does not have the power to extend it. Where there is no consent, the conciliator's hands are tied and any conciliation meeting held after the expiry of the 30-day period is a nullity.

The court further held that, this does not however, affect the jurisdiction of the Labour Court, CCMA or (the Labour Commissioner in Namibia) to adjudicate or arbitrate the dispute. The court held such jurisdiction to be derived only from timeous referral of a dispute and the issuing of a certificate of non-resolution after the second 30 day period has elapsed, even if the conciliation meeting is out of time, a certificate issued after expiry of the 30 day period is sufficient to find jurisdiction.

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258 S 82(10)(a) (b) of the Labour Act 2007 (Act No 11 of 2007).
259 Rule 12 of the Rules for the conduct of conciliation and arbitration before the Labour Commissioner.
260 S 82(9)(b) of the Labour Act 2007 (Act No 11 of 2007).
261 (1999) 12 BLLR 1308 LC at par 7.

4.7 ATTENDANCE AND REPRESENTATION

In any conciliation proceedings, a party to dispute may appear in person or be represented,[262] only by:

(a) a member, office bearer, or official of that party's registered trade union or registered employers' organization;

(b) if a party is an employee, a co-employee ; or

(c) if the party is a juristic person, a director, member or employee of that juristic person, but a person who is a legal practitioner must not appear on behalf of a party except in circumstances as my be allowed by the conciliator.

(d) The conciliator has statutory discretion to subpoena any person to attend a conciliation hearing if the conciliator considers that persons' attendance will assist in the resolution of the dispute.[263]

Section 82(13),[264] makes provisions for a conciliator to permit legal representation if –

(i) the parties to the dispute agree; or

(ii) at the request of a party to a dispute, the conciliator is satisfied that –

(aa) the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; and

(bb) the other party to the dispute will not be prejudiced

The Labour Act, further extends representation of a party by any other individual to a dispute in conciliation proceedings if -[265]

- the parties to the dispute agree; or
- at the request of a party to a dispute, the conciliator is, satisfied that -

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262 S 82(12) Labour Act 2007 (Act No 11 of 2007).
263 S 82(18)(a) Labour Act 2007 (Act No 11 of 2007).
264 Labour Act 2007 (Act No 11 of 2007).
265 S 82(13)(b) Labour Act 2007 (Act No 11 of 2007).

- representation by that individual will facilitate the effective resolution of the dispute or the attainment of the objectives of the Labour Act;
- the individual meets the prescribed requirements;
- The other party to the dispute will not be prejudiced

The Act is so generous that once legal representation is applied and permitted, and the applicant is unable to secure such representation due financial difficulties, the applicant can apply to the Permanent Secretary[266] for financial assistance in terms, Section 140, of the Labour Act. The challenge thereof for the Ministry will be to have a budget provision for this purpose, which is not seem to be budgeted for in the current financial year 2008/09. Normally, the cost for legal representation, for which the state provides on application, resorts under the Legal Aid Directorate of the Ministry of Justice.

In deciding representation, the conciliator must take into account Rule 25 (1) of the Labour Commissioner's Rules, while legal representation may be permitted at conciliation in Namibia, although not an absolute right, at CCMA conciliation proceedings, legal representation is not allowed. Representation is limited to –

- A director or an employee of an employer party, or if the party is a close corporation, also a member thereof. [CCMA Rule 25 (1);[267]
- A member, office bearer or official of an employee's party registered trade union or an employer' party registered employer organisation.[CCMA Rule 25 (2).

Legal representation is however, allowed in Con-Arb [CCMA Rule 17 (6)] and therefore to that party of the proceedings devoted to conciliation.[268] In *Mavundla v Vulpine Investment Ltd t/a keg and Thistle*,[269] the Labour Court held that a commissioner (conciliator) does not have the discretion to allow a person not falling within the categories listed above to represent a party, even if the parties agree. The court submitted that conciliation is meant to assist with the settlement of a dispute and if parties are comfortable with their counterpart being

266 Permanent Secretary responsible for Labour (s 1 of the Labour Act 2007 (Act No 11 of 2007).

267 In *Mafuyeka v CCMA* (1999) 9 BLLR 953 LC – the court held that it may order a company to furnish information relating to the appointment of a director, where the employee party alleges that the appointment is a sham aimed at circumventing the LRA or the Labour Act limitation on representation during conciliation.

268 Du Toit *et al* (2006) 109.

269 (2000) 9 BLLR 1060 LC.

represented by other categories of representatives, a conciliator should not interfere unless there is good reason for doing so.

Moreover, the Court went further to find that a conciliator is under a duty to ensure that parties representatives not only have authority to represent them at a conciliation meeting but also have a mandate to enter into a settlement agreement on their behalf. One can logical submit that, this will in fact minimise unnecessary adjournment of conciliation meetings for the parties to seek further mandates when they should have been mandated by their principals.

4.8 THE CONCILIATION PROCESS

The process of conciliation can be divided into distinct steps. There are no rigid divisions between these steps and conciliators and writers often separate the process into few or more steps. The overall content of the process is usually very similar, involving four broad stages. Namely: Introduction, story-telling, problem-solving and agreement.

For the purpose of this Chapter, the discussion will look briefly, at eight steps of the conciliation process as suggested by Brand *et al* (1997) 85-96 and also based on the ILO Swiss Project module, used for the Labour Commissioner's conciliation training manual.

4.8.1 STEP ONE: INTRODUCTION AND HOUSEKEEPING

Here the conciliators begin to develop trust and rapport with the parties and to deal with all essential preliminary and housekeeping matters.

The conciliator is required to do the following:

- Checks on the venue for the conciliation to ensure that it is appropriate.
- Check on the language requirements of the parties.
- Makes a personal introduction and asking the parties to introduce their teams and ask them to indicate how they would like to be addressed.
- Checks that all interested parties are present at the conciliation so that any settlement that may be achieved is arrived at with the participation of all parties that may be affected.

- If necessary, disclose any conflict of interest.
- Checks on start and finish times and determine how interruptions to the process are to be handled.
- Indicating whether the conciliator has recovered any documentation on the dispute although it is not necessary for the conciliator to disclose the nature or content of the documentation

The conciliator should use effective interpersonal skills such as listening, paraphrasing, summarising and dealing with emotion including anger and threats.

4.8.2 STEP TWO: EXPLAINING THE CONCILIATION PROCESS AND ITS GROUND-RULES

Here the conciliator should ensure that the parties have a basic understanding of the conciliation process. The conciliator must create an understanding for the parties to differentiate between conciliation as a consensus-seeking process and adjudicative process like arbitration and court. Moreover, parties need to understand that the conciliation will not impose an outcome upon them but may make recommendations as may be required.

- The conciliator should briefly explain the conciliation process and his role as to help the parties reach a mutual acceptance agreement.
- Explaining the conciliator's power and duties.
- Outline the consequences of a failure to settle in the conciliation.
- Proposing and trying to get the parties to agree to ground – rules.

4.8.3 STEP THREE: OPENING STATEMENT

The purpose hereof is for the conciliator to begin to develop an understanding of the issues in dispute and to allow parties to "let off steam". The conciliator will also at this stage establish whether he/she has jurisdiction and generally to decide early what approach to take.

- Each party should be invited to address the conciliator on the dispute to be conciliated by telling as much about the dispute as they are comfortable to disclose at this stage.

- After story telling, each party may have the opportunity to ask questions of clarity and to respond. Debates and arguments should be discouraged at this stage.

- The conciliator should ensure that all the issues in dispute have been identified.

4.8.4 STEP FOUR: CONSIDERING AND EXPLAINING THE PARTICULAR PROCESS TO BE FOLLOWED

It is for the conciliator to choose a procedure, which is quick and effective as practical in the circumstances, and to ensure that parties know what to expect in the conciliation.

- The conciliator should consider what is appropriate procedure to follow i.e. he/she has to decide whether to proceed in a joint meeting and if not, with which party to meet first in side-meetings.
- Explaining the choice of procedure to the parties and where necessary to get their agreement to the procedure.

4.8.5 STEP FIVE: ANALYSIS OF THE DISPUTE

The purpose here is to develop the full understanding of the dispute. The positions of all the parties on all the issues need to be identified. The conciliator need to know the real underlying needs of all the parties and the value that the parties place on their positions and needs and what priority they attach to each issue.

The conciliator need to do a reality test by encouraging the parties to analyse their best alternative-to- negotiated – agreement (BATNA), probing questions should be asked to establish the causes, positions, expectations, needs, values priorities which the parties place on their positions.

4.8.6 STEP SIX: EXPLORING OPTIONS FOR SETTLEMENT

The purpose is for the conciliator to:

- assist the parties develop and consider a wide and creative range of options for possible agreement;
- moderate positions and expectations;

- harmonise needs;
- find joint gains and mutually beneficial trades; and
- achieve outcomes which are practical i.e. win/win outcomes.

4.8.7 STEP SEVEN: CHOOSING OPTIONS FOR SETTLEMENT

The purpose of this stage is for the conciliator to assist the parties to agree to solutions, which are practical, cost effective, which maximise the mutual satisfaction of the parties' needs.

4.8.8 STEP EIGHT: FINALISING AGREEMENT OR CONFIRMING DEADLOCK

Here the conciliator assists the parties to reach agreement and effective implementation or to confirm deadlock and define the differences between the parties for any future process.

In an event of an agreement reached –

- The conciliator should ensure that the agreement on each issue is understood.
- The conciliator or the parties must reduce the agreement to writing.
- Encourage the parties to sign the agreement if appropriate, and
- Completing the certificate declaring the dispute resolved.

In an event of deadlock-

The conciliator should complete the certificate declaring the dispute deadlocked and inform the parties of options available to them, either taking industrial action or if arbitration is the next step the procedure to be followed.

4.9 CONSEQUENCES FOR FAILING TO ATTEND CONCILIATION MEETINGS

The Labour Act, 2007,[270] provides that the conciliator may –

> (c) dismiss the matter if the party who referred the dispute fails to attend a conciliation meeting; or

[270] S 83 of the Labour Act 2007 (Act No 11 of 2007).

(d) determine the matter if the other party to the dispute fails to attend the conciliation meeting.

However, the Labour Act provides recourse to a party finding itself under those circumstances.[271] The Labour Commissioner has vested powers to reserve a decision made by a conciliator in the above circumstances if-

(a) an application is made in the prescribed form and manner; and

(b) the Labour Commissioner is satisfied that there were good grounds for failing to attend the conciliation meetings.

The conciliator must nevertheless continue to try and conciliate the dispute even if the strike or lockout has commerce.[272] The conciliator does not have to hold a joint meeting in order to commerce conciliating in these circumstances. The conciliator may shuffle between the parties if they do not wish to meet.[273]

4.10 CERTIFICATE OF OUTCOME

Section 82(15 and 16) The Labour Act, 2007, require the conciliator to issue a certificate of outcome at the end of the conciliation that a dispute is unresolved if-

(a) the conciliator believes that there is no prospect of settlement at that stage of the dispute; or
(b) the period of 30 day or any extended period agreed to by the parties has expired.

Moreover, the Act requires that when issuing a certificate of non-settlement, the conciliator must, if the parties have agreed, refer the unresolved dispute for arbitration.[274]

In *Numsa v Driveline Technologies (Pty) Ltd*,[275] the court held that meaningful conciliation is a requirement for issuing a certificate. Moreover, in *Mthembu Mahomend Attorneys v*

271 S 83(3) of the Labour Act 2007 (Act No 11 of 2007).
272 S 82(17)(a) (b) Labour Act 2007 (Act No 11 of 2007).
273 Conciliation and Arbitration Participants workbook. Workshop for representatives of the Public Service. Namibia. September 2006 Improving Labour System in Southern Africa (ILSSA) Project.
274 S 82(16) of the Labour Act 2007 (Act No 11 of 2007).

CCMA,[276] it was held that an attempt at conciliation is sufficient. Similarly, in another related matter, the court held that a certificate of outcome issued by a commissioner (conciliator) is sufficient proof that conciliation of the dispute has been attempted.[277]

Bosch *et al* (2004) 8, state that the outcome certificate should correctly reflect the nature of the dispute that has been conciliated because only the same matter/ dispute may be arbitrated. Where the matter has not been conciliated, the CCMA or the Labour Commissioner may lack jurisdiction to arbitrate the matter.

An example would be where a certificate reflects that an unfair labour practice dispute was conciliated but, upon commencement of the arbitration, the arbitrator discovers that the real issue in dispute is an alleged unfair dismissal; the arbitration may not proceed for lack of jurisdiction. The arbitration hearing may be stayed and the referring party will be required to lodge a new referral for conciliation so that the dispute can be conciliated.

Once a certificate of outcome has been issued, a copy should be handed to the parties, who should be able to examine it and verify that the dispute has been correctly formulated. If the dispute is to be referred to arbitration, a copy of the outcome certificate must be attached to the arbitration referral form LC21.

Although the Labour Act, 2007 provides that if no resolution of a dispute is achieved within 30-day period or the agreed extended period, a certificate of non-resolution must be issued, there is however, no time limit is provided within which the certificate must be issued. In *Louw v Micor Shipping*[278] the court held that the commissioner (conciliator) may issue the certificate "at any time after the 30-day period". Despite this position, in *Devries v Lionel Murray Schwormstedt and Louw*[279]the court held that [s135] of the LRA,[280] the equivalent to [s82 (15) and (16)] of the Labour Act, 2007, require the conciliator to issue the certificate after the expiry of the 30-day period. In both cases, the court made *obiter* pronouncements.

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275 (2000) 1 BLLR 20 (LAC).
276 (1998) 2 BLLR 150 (LC).
277 *Fidelity Guards Holdings (Pty) Ltd v Epstein NO* (2000) 12 BLLR 1389. See also *Sapekoe Tea Estate (Pty) Ltd v Maake* (2002) 10 BLLR 1004 LC at par 8.
278 (1999) 12 BLLR 1308 LC at par 8. See also *NUM V Hermic Exploration (Pty) Ltd* (2001) 2 BLLR 209 LC at par 12.
279 (2001) 8 BLLR 902 LC at par 17.
280 66 of 1995.

The fact that these were *obiter* pronouncements, not binding, Du Toit *et al* (2003) LRA 7-25, respectively submits that, [s135 (5) of the LRA (82 (15 & 16) of the Labour Act should be interpreted as referring to a reasonable time after the end of the 30-day period.

4.11 CONCLUSION

It is essential to take note that conciliation is the first step in most dispute resolution process prescribed by the Labour Act. The Act envisages many disputes would be resolved at first instance and only a relatively small number of disputes will be referred for resolution by means of arbitration, adjudication or strikes and lock-outs. Conciliation process focuses on consensus or agreement. The conciliator, who is a neutral third party, does not impose a settlement on the parties but tries to get the parties themselves to agree to a settlement that is mutually acceptable.

In terms of the Labour Act, conciliation usually is a compulsory process; still a voluntary engagement where one party (such as the employee) will refer a dispute to the Labour Commissioner and the other party is obliged to attend. A certification by a conciliator that the dispute remains unresolved is a jurisdictional requirement for arbitration, adjudication or even strikes or lockouts.

Resolution of labour disputes by means of conciliation is regulated by section 82-83 of the Labour Act, 2007 (Act No 11 of 2007). The Act prescribes that the conciliator must attempt to resolve the dispute within 30 days of the referral or after the agreed extended period. If conciliation fails after this prescribed period, the conciliator must issue a certificate stating whether or not the dispute has been resolved. Representation at conciliation is at the discretion of the conciliator, while taking into account the Labour Commoner's Rules.

All in all, the Labour Commissioner's module on conciliation and including the process and rules are similar to the CCMA. In most instances, they are a replica of each other in style and content.

CHAPTER 5

ARBITRATION OF DISPUTE UNDER THE AUSPICES OF THE LABOUR COMMISSIONER

5.1 INTRODUCTION

The Labour Act, 2007,[281] defines arbitration to mean arbitration proceedings conducted before an arbitration tribunal established in terms of [s 85] of the Labour Act. Section 85 of the Labour Act, 2007 makes reference to Article 12(1)(a) of the Constitution,[282] which provide for the establishment of arbitration tribunals for the purpose of resolving disputes.

The Labour Act, 2007 contemplates that statutory arbitration tribunals will operate under the auspices of the Labour Commissioner who shall have the jurisdiction to –

(a) Hear and determine any dispute or any other matter arising from the interpretation, implementation or application of this Act; and
(b) Make an order that he/she is empowered to make in terms of any provision of the Labour Act.

281 S 1 of the Labour Act 2007 (Act No 11 of 2007).
282 The Namibian Constitution.

Secondary literature extends the definition of arbitration to mean and/ or include a decision – making process in which the parties to a dispute rely upon a third party to make a final judgment or award resolving that dispute.[283]

Bosch *et al* (2004) 83, further defines arbitration as a process whereby a dispute is referred by one or all of the disputing parties to a neutral or acceptable third party, arbitrator, who fairly hears their respective cases by receiving and considering evidence and submissions from the parties and then makes a final and binding decision.[284]

Namibia adopted or took this approach outlined by Bosch *et al* as embedded in the Labour Relations Act 66 of 1995. Arbitration system has been created as a means to resolve labour disputes and has been so developed mainly in response to the inadequacies of the previous statutory adjudication process contained in the first Labour Act of 1992.[285] These procedures have been lacking in satisfying the stakeholders needs and expectations as they were too technical, complicated and cumbersome. Similar sentiments were expressed in South Africa at the adoption of the Labour Relations Act,[286] from the old Labour Relations Act of 1956.

The explanatory memorandum to the Labour Relations Act of 1995, which have similarities to the concerns raised by social partners at various consultative meetings or workshops on the reform of the labour dispute in Namibia, reads as follows -

> "the existing statutory conciliation (and adjudication) procedures are length, complex and pitted with technicalities, successful navigation through the procedures require a sophisticated and expertise beyond the reach of most individual and small business. The merits of the dispute often get lost in procedural technicalities. Errors made in the initiation of conciliation and (adjudication) procedures can be fatal to an applicants claim for relief".

Both the Labour Act, 2007 and the LRA place great emphasis on the use of arbitration as a means of resolving disputes. One of the common purposes contained in both the statute is – to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration. For this purpose the Labour Commissioner is appointed.[287]

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283 Gladstone *Voluntary Arbitration of Interest Dispute. A Practical Guide* (1984).

284 Bosch *et al The Conciliation and Arbitration Handbook. A Comprehensive Guide to Labour Dispute Resolution Procedures.*

285 Labour Act 1992 (Act No 6 of 1992).

286 LRA 66 of 1995.

287 S 121 Labour Act No 11 of 2007.

Arbitration has some similarities to adjudication to a certain extent, however, less formal. Arbitration is often expedited process to resolve factual disputes once and for all, whether compulsory under the Labour Act, or voluntary, arbitration has been designed to dispose of a dispute finally through an award which is subject to review but not to appeal on merits. Arbitration is primarily used to resolve factual disputes and is usually a hearing *de novo* of all disputed issues. While resembling adjudication, it remains a *quasi-judicial* process rather than adjudication. (Bosch *et al* 2004)

This Chapter analyses in details the arbitration concepts introduced in terms of the new Labour Act, 2007 (Act No 11 of 2007). The analysis looks at both substantive and procedural issues required for an effective and successful arbitration.

5.2 ARBITRATION BY THE LABOUR COMMISSIONER

The Labour Act empowers the Minister,[288] to appoint both full time and part-time arbitrators to perform the duties and functions or to exercise the powers conferred on arbitrators in terms of [s85(3) (4)] of the Labour Act. At the time of writing this Chapter, the Minister of Labour, had appointed arbitrators, including writer hereof, in terms of this provision after the Act came into force on the 1st November 2008.

From the appointed pool of arbitrators, the Labour Commissioner may designate one or more arbitrators to constitute an arbitration tribunal to hear and determine the dispute.[289] It is required therefore that arbitration under the Labour Act, 2007 must be fair and equitable; the arbitrator must be impartial and unbiased in the performance of the duties in terms of the Act.[290]

The arbitrator must have jurisdiction and not exceed his or her powers; the decision must be consistent with the Act and the Constitution; the award must be justified in relation to the information placed before the arbitrator,[291] and the reasons given for it. In Con-Arb

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288 Minister responsible for labour (s 1).

289 S 85(5) of the Labour Act 2007 (Act No 11 of 2007).

290 S 85(6) of the Labour Act 2007 (Act No 11 of 2007).

291 In *Rustenburg Platinum Mines Ltd v CCMA* [2006] JOL 18359 (SCA) at para 21-23, 29,31, the Supreme Court of Appeal held that the issuing of an award by the CCMA is an administrative action, in terms of

proceedings, the conciliator or arbitrator must immediately proceed to arbitrate the dispute if conciliation fails.[292] In all other cases, if a dispute remains unresolved after conciliation, the Labour Commissioner must arbitrate if -

(a) the Act require the dispute to be arbitrated and any party to the dispute has requested that the dispute be resolved through arbitration; or

(b) all parties to a dispute in respect of which the labour court has jurisdiction have consented in writing to arbitration under the auspices of the Labour Commissioner.[293]

The absence of this vital jurisdictional fact cannot be condoned by the Labour Commissioner (or the CCMA) nor can the parties confer jurisdiction to arbitrate where the Act does not provide for it.[294] The referring part must therefore "allege" facts that bring the dispute within the jurisdiction of the Labour Commissioner, or (the CCMA) in terms of the Labour Relation Act, failing which the court held, the commissioner or arbitrator must decline jurisdiction.[295]

Moreover, in *SACCAWU v Woolworths (Pty) Ltd*,[296] the court came to a similar conclusion, finding that it did not have jurisdiction to adjudicate a dispute concerning the interpretation or application of a collective agreement as it was a matter for arbitration. [A] dispute which is required to be resolved through arbitration, Revelas J, held, is where a party to the dispute has the right to have it referred to arbitration.

A remedy for any defect in the arbitration process may only be sought through Labour Court review [s89] of the Labour Act.[297]

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the Promotion of Administrative Justice Act 3 of 2000. This proposition is yet to be determined on application to the Labour Court in the Namibian jurisdiction.

292 S 86(5) (6) of the Labour Act 2007.

293 An example would be disputes contained in s 7 of the Labour Act 2007 (Act No 11 of 2007).

294 *NUM v East Rand Gold & Uranium Co* (1999) 2 BLLR 225(CCMA).

295 In *Nehawu v Newhaven Chronic Sick Home* [1999] 4 BALR 416 CCMA, commissioner Grogan, faced with an alleged dispute about a collective agreement, held that the facts relied on by the applicant did not found jurisdiction for the CCMA to arbitrate in terms of [s24 of the LRA] equivalent would be [s73] of the Labour Act, if on the referring party's own version, the facts do not disclose an arbitration claim, is was submitted the respondent is entitled to ask that the matter be dismissed.

296 [1998] 1 BLLR 80 LC.

297 See also s 145 of the LRA 66 of 1995.

5.3 ADVERSARIAL OR INQUISITORIAL PROCESS

Section 86(7) of the Labour Act, provides that [s]ubject to any rules promulgated in terms of the Act, the arbitrator may –

(a) conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly; and
(b) must deal with the substantial merits of the dispute with minimum of legal formalities and may determine the dispute without applying strictly the rules of evidence.[298]

Moreover the Labour Act provides that subject to the discretion of the arbitrator or by the agreement of the parties as to the appropriate form of proceedings, a party to the dispute may give evidence, call witnesses, question witnesses of any party and address concluding remarks.[299]

Bosch *et al* (2004) 89, elaborates inquisitorial process to include where the arbitrator plays a very active role in finding the facts, actual investigating the dispute him or herself and that this role can be extended as far as the arbitrator having the sole right to call witnesses and cross-examine them.

The Labour Court has been ambivalent in its assessment of the proper role of a Commissioner/arbitrator. In *Naraindaft v CCMA*[300] Walks AJ, noted that it is not only a traditional adversarial process that conforms to the rules of natural justice. Hence, in *Armstrong v Tee,*[301] It was held that an investigative process places a heavy burden on the Commissioner who must take control and responsibility for the discretion of the proceedings, including calling for evidence and witness asking relevant and searching questions to get to the truth.[302]

In *Mutual and Federal Insurance Co Ltd v CCMA,*[303] on the other hand, the court cautioned that active intervention by a Commissioner (Arbitrator) aught to lead to an apprehension of

298 Rule 17, Rules for the conduct of conciliation and arbitration before the Labour Commissioner.
299 S 86(10) of the Labour Act 2007 (Act No 11 of 2007).
300 (2000) 6 BLLR 716 (LC).
301 (1999) 20 *ILJ* 2568 (LC).
302 Du Toit *et al Labour Relations Law* (2006) 127.
303 (1997) 12 BLLR 1610 LC.

bias. It was therefore submitted that a Commissioner (Arbitrator) need to strike a careful balance and should intervene in proceedings only to the extent that it is necessary to clarify the merits of the dispute, that this approach is likely to apply particularly in respect of unrepresentated parties who experience difficulties in presenting their case.[304]

Essentially, the responsibility of the Commissioner/Arbitrator, it is submitted, is to identify the material issues in dispute, to clarify the relevant legal framework, to advice parties where the onus of proof lies, to admit relevant evidence and exchange relevant evidence. The power set out in section 142[305] and section 86[306] should be seen as a means to this end. Rulings by the Labour Court permitting greater flexibility it is submitted are preferable and should be followed.[307]

5.4 REFERRAL OF DISPUTES TO ARBITRATION

The Labour Act, 2007 provides for the procedure to refers a dispute to the Labour Commissioner, in that unless the collective agreement provides for the referral of dispute to private arbitration, any party may refer the dispute in writing to –

(a) Labour Commissioner; or
(b) Any Labour Office [308]

However, on referral of the dispute, the party who refer the dispute must satisfy the Labour Commissioner that a copy of the referral has been served on all other parties to the dispute. Only when so satisfied, will the Labour Commissioner refer the dispute to an arbitrator to attempt to resolve the dispute through arbitration.[309]

Referral of a dispute to the Labour Commissioner is governed by Rule 14 of the Rules of the Labour Commissioner and at CCMA is Rule 18. A party may request the Labour

304 *Klaasen v CCMA* (2005) 10 BLLR 964 (LC) when the court found that the Commissioner had erred by failing to warn the unrepresented employee of the consequences of failing to testify under oath. At the very least it was held, the Commissioner should have re-opened the proceedings when it because apparent on receipt of the applicant's matters submissions that his vision had not been fully presented in evidence.
305 Labour Relations Act 6 of 1995.
306 Labour Act 2007 (Act No 11 of 2007.
307 Du Toit *et al Labour Relations Law* 128.
308 S 86 of the Labour Act 11 of 2007.
309 S 86(a) of the Labour Act 2007 (Act No 11 of 2007).

Commissioner to arbitrate a dispute by delivering a document on Form LC 21 (the referral document),[310] the referring party must sign the referring document in accordance with Rule 4, a copy of the referral form must be served on the respondent. Proof of such service must be attached to the original referral form and the form must be lodged with the Labour Commissioner[311] If the referral document is out of time, an application for condonation must be made.[312]

If these steps have not been complied with, the Labour Commissioner may refuse to accept the referral, as is the case with the CCMA Rule 18 (3). Once the referral form has been properly completed and signed, a copy thereof must be delivered to the respondent in a manner outlined in terms of Rule 6. The Act further requires the party to satisfy the Labour Commissioner that a copy of the referral form has been served on the respondent.[313] This is done by attaching one of the following-

- A copy of the registration slip if the document was sent by registered mail;
- A copy of the email transmission report sent to the other party;
- A copy of the telefax transmission report; or
- In the case of hand delivery, a copy of the receipt signed by the person who accepted the document, which must clearly indicate the name and designation of the person who received the document, as well as the place, time and date of service. See Form LG36 in this respect.

The completed referral form with its attachments, that is, proof of service and, if necessary, an application for condonation must be lodged with the Labour Commissioner. This is done, in terms of Rule 8, of the Rules of the Labour Commissioner, by means of the following-

- by handing the document to the Office of the Labour Commissioner at the address listed in schedule one of the Rules;

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310 Rule 13(1) of the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner.

311 Rule 13(2)(a) (b) Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner.

312 Rule 13(2)(c) Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner.

313 S 86(3) of the Labour Act 2007 read with Rule 6(1) (2) (3) Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner's Rules.

- by sending a copy of the document by registered post to the head office of the Labour Commissioner at the address listed in schedule one of the Rules;
- by faxing the document to the head office of the Labour Commissioner at a number listed in schedule one;
- by emailing the document to the electronic address listed in schedule one.

Rule 8(3) of the Rules of the Labour Commissioner provides that a document is filled with the Labour Commissioner when –

(a) the document is handed to the Office of the Labour Commissioner;
(b) a document sent by a registered post or mail is received by the office of the Labour Commissioner; or
(c) the transmission of a fax is completed.

It is further a requirement that [a] party must file the original of a document filed by fax or email together with a report confirming transmission, if requested to do so by the Labour Commissioner, within 5 days of the request. Therefore [a]ny document sent by registered mail/ post by a party to the Labour Commissioner is presumed to have been received seven days after it was posted, unless the contrary is proven.[314]

These Rules and Procedures are more similar to the CCMA Rules, they are in infact, sourced from the CCMA Rules.

5.5 TIME LIMITS

Section 86(2) requires that a dispute must be referred to arbitration within six (6) months after the date of dismissal, if the dispute concerns dismissal, or within one year after the dispute arising, in any other dispute. On good cause shown, the Labour Commissioner may condone a late referral,[315] if the applicant lodges a referral with the Labour Commissioner outside the prescribed period, an application for condonation must be attached to the referral form.

314 Rule 8 of the Rules for the conduct of conciliation and arbitration before the Labour Commissioner.
315 Rule 33 of the Labour Commissioner's Rules.

An application for condonation should be brought in terms of Rule 10 and 33 of the Rules of the Labour Commissioner. The application must be made in writing,[316] signed by the applicant and supported by an affidavit. The applicant should address the following –

(a) the degree of lateness
(b) the reason for the lateness
(c) any prejudice on the other party
(d) prospects of success and
(e) any other relevant factors.

A copy of the application must be delivered to the respondent, who may oppose condonation by filling its opposition on Form LC 38, together with a supporting affidavit, no later than seven days after filling of the referral document.

5.6 SET DOWN

When a referral in which condonation is not requested, is received by the Labour Commissioner, the matter must be arbitrated.[317] The Labour commissioner will appoint an arbitrator to arbitrate and the matter will be set down for a hearing.[318] The Labour Commissioner must give the parties at least fourteen days notice, in writing, of the place, date and time on Form LC 28 of an arbitration hearing, unless the parties agree to a shorter period.[319]

Once the arbitration is scheduled, during the hearing, the arbitrator have the discretion to conduct an arbitration hearing in an manner that he/she considers appropriate, however, subject to the duty to arbitrate fairly and expeditiously.[320] The Labour Commissioner/

316 The application for condonation must be made on form LC37.
317 S 85(5) of the Labour Act 2007 (Act No 11 of 2007), see also CCMA s 136(1) of the Labour Relations Act 66 of 1995.
318 S 8(4)(a) (b) of the Labour Act 2007 (Act No 11 of 2007).
319 Rule 15 of the Labour Commissioner's Rules. At CCMA the Commission must give at least 21 days notice of the date of the hearing (CCMA Rule 21).
320 S 86(7)(a) of the Labour Act 2007 (Act No 11 of 2007) read with Rule 17(1) (2) of the Labour Commissioners Rules.

arbitrator should not set a self- imposed time limit to conclude the hearing or place the parties under undue pressure.[321]

The arbitrator or the commissioner must deal with all the issues in dispute and must do so with the minimum of legal formalities [s86(7)b)] of the Labour Act. In general he/ she must consider all the materials properly available at the time of the hearing[322] and, if the parties agree, attempt to conciliate the dispute.[323]

5.6.1 POSTPONEMENT OF HEARING

An arbitration hearing may be postponed by agreement between the parties or by application on notice to the other party, [Rule29] of the Labour Commissioner's Rules.[324] If all parties agree and a written agreement to postpone is received by the arbitrator (Labour Commissioner) more than seven days prior to the scheduled arbitration date, postponement must be granted [Rule 29 (2) (a) (b)]. Otherwise any party may apply for postponement by delivering a copy of the notice to all other parties and filling a copy with the Labour Commissioner (arbitrator) before the date of the hearing, after considering the application, the arbitrator or the Labour Commissioner may postpone the matter without convening a hearing or convene a hearing to determine whether to postpone, [Rule 29 (4) (a) (b)] Rules of the Labour Commissioner. If an application for postponement is made during a hearing, the arbitrator must seek the view of the other party and consider the grounds for the application before deciding.[325]

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321 *Dairybelle (Pty) Ltd v CCMA* (1999) 10 BLLR 1033 LC; see also Du Toit *et al Labour Relations Law* 126.

322 *Carephone (Pty) Ltd v Marcus NO* (1998) 19 *ILJ* 1425 (LC). See also *Malelane Toyota v CCMA* (1999) 6 BLLR 555 (LC) where the Commissioner found that his primary focus should be on the evidence available to the employer at the time of dismissal, the court held that this improperly excluded materials properly available to him.

323 S 86(11) of the Labour Act 2007 (Act No 11 of 2007); see also similarities in s 138(3) of the Labour Relations Act 66 of 1995. This arrangement was accepted in *Nginza v Food NO* (J 3599/98 unreported LC 5 January 2000).

324 See equivalent CCMA Rule 23.

325 *Masters (Pty) Ltd t/a Builders Warehouse v CCMA* (2006) 6 BLLR 577 (LC).

5.7 ATTENDANCE AND REPRESENTATION

On the day the case is scheduled, the parties must attend the arbitration hearing, unless postponement of the matter has been requested and granted.[326] If the applicant or its representative fails to appear at the arbitration hearing, the commissioner/arbitrator may dismiss the matter by issuing a written ruling. Where the respondent or its representative is absent, the matter may be postponed or the arbitrator may continue with the hearing in the absence of the respondent.[327]

Representation at arbitration is governed by [s86 (12) (13)] of the Labour Act read with Rule 25 of the Labour Commissioner's Rules. Detailed discussion of this subject was discussed in Chapter 4, the representation is similar in conciliation and arbitration. What is important thereof is that representation is solely at the discretion of the conciliator and arbitrator. In the absence of any case law to this effect on the new provision, the provision is yet to be interpreted by our courts.

5.8 THE CON-ARB PROCESS

Section 86(5) of the Labour Act, 2007, provides for a Con-Arb process in that "Unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration." Further that only if the conciliation attempts are unsuccessful. Will the arbitrator then begin with arbitration. Similarly, [s86 (11)] of the Act, provides that with the consent of the parties, the arbitrator may suspend the proceedings and attempt to resolve the dispute through conciliation.

In *Nginza v Ford NO,*[328] in this matter, the court interpreted the sub-section,[329] as permitting a "con-arb" process. In the matter, the parties had agreed at conciliation that, if internal proceedings failed, the statutory process would resume as a "con-arb" process. Ngwenya AJ found that , though the LRA does not specifically provide for "con-arb" (as is the case in Labour Act), it does so indirectly in terms of section 138(3), in that, given the parties

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326 Bosch *et al* (2004) 143, states that unless parties are informed that a postponement has been granted, they should assume that arbitration will proceed on the scheduled date.

327 Rule 27 of the Labour Commissioner's Rules; s 83 of the Labour Act 2007 (Act No 11 of 2007). See also s 138(5) of the LRA 66 of 1995 and CCMA Rule 30.

328 (2000) 4 BLLR 442 (LC).

329 S 138(3) of the LRA 66 of 1996.

agreement, there is nothing untoward if the arbitrator in terms of the section were to proceed with the arbitration after conciliation. In terms of the Namibian Labour Act, 2007, it is a pre-requisite to attempt to conciliate the dispute before resorting to arbitration.

5.9 THE ARBITRATION HEARING PROCESS

The Labour Act, 2007 gives discretion to an arbitrator to conduct the arbitration hearing in a manner that the arbitrator deems appropriate in order to determine the dispute fairly and quickly, but while dealing with the substantial merits of the dispute with a minimum of legal formalities.[330]

Bosch *et al* (2004) 144, states that commissioners and / or arbitrators are likely to be rather robust in their decisions on procedures, to play more of an inquisitorial role, rather than just listening to the evidence and arguments of the parties, and to put pressure on the parties to complete the presentation of their case in a short time as possible. Moreover, that arbitration hearing normally takes the form of a trial where the parties gives opening statements and each party presents its case by calling witnesses to testify under oath or affirmation. Further those witnesses are cross examined by the opposing party and thereafter, the hearing is concluded by each party submitting closing arguments.[331]

Bosch *et al* (2004) is of the view that it is important to create a proper understanding so that parties and their representatives know when it is their turn to speak or present evidence.

The arbitration process should therefore, normally include the following stages:

1. Preliminary matters

   Step one : Introduction and housekeeping

   Step two: Opening statements by the parties

   Step three: Introduction of documentary evidence

   Step four : Confirmation of jurisdiction

   Step five : Narrowing the issues

330 S 86(7)(a) (b) of the Labour Act 2007.
331 S 86(10) of the Labour Act 2007 (Act No 11 of 2007).

2. Presentation of the case by the party who has to begin by calling witnesses

   Step six: Evidence in chief of witnesses

   Step seven: Cross examination of witnesses

   Step eight: Re- examination of witnesses

   Step nine: Once all witnesses have testified, the case is closed. Then the other party will present its case.

3. Presentation of the case by opposing party by calling witnesses

   Step 10: Evidence in-chief of witness

   Step 11: Cross examination of witness

   Step 12: RE- Examination of witness

   Step 13: Once all witnesses have testified, the case is closed

   Step 14: Closing arguments by parties. The party who began submits closing arguments starts first, the other party responds and then the first has an opportunity to reply.

Arbitrators should briefly explain this process to the parties at the commencement of the arbitration and assist the parties throughout the hearing by prompting and directing parties as to the procedure. On the other hand, Rule 34 of the Rules of the Labour Commissioner, requires the arbitrator to keep records of –

(a) any evidence given in an arbitration hearing;
(b) any sworn testimony given in at the proceedings before the arbitrator;
(c) any arbitration award or ruling made by an arbitrator.

Further that in terms of Rule 34 sub-rule (2) of the Rules of the Labour Commissioner, the records may be kept by legible hand-written notes or by means of an electronic recording.

5.10 TYPES OF AWARD THE ARBITRATOR MAY AWARD OR ISSUE

Section 86(15) of the Labour Act, 2007, specifically list different awards which the arbitrator is empowered to issue, these may include:

(a) an interdict;

(b) an order directing the performance of any act that will remedy a wrong;
(c) a declaratory order;
(d) an order of reinstatement of an employee;
(e) an award of compensation;
(f) an order for cost where a party or the person who represented the party in the arbitration proceedings acted in a frivolous and vexation manner.
(g) advisory award [s87(1)(a)]

5.11 CONCLUSION

Arbitration derives its authority from the Constitution, as a tribunal of record. The purpose thereof is to hear and determine disputes by a third party who bring finality to the dispute, after hearing, assessing and evaluating the testimonies and arguments advanced by the parties to the dispute. Although, arbitration may be likened to adjudication, it remains a *quasi-judicial process* rather than adjudication.

Arbitration is therefore compulsory in terms of the Labour Act, 2007 (Act No 11 of 2007) under the auspices of the Labour Commissioner, compulsory in that the parties are compelled to attend the hearing, failure which the arbitrator may determine the dispute. At the arbitration hearing, the arbitrator has an inquisitorial role to play and have discretion to conduct the hearing in a manner he/ she may consider appropriate in order to determine the dispute fairly and quickly and should deal with the substantial merits of the dispute with minimum of legal formalities.

The dispute should be referred within the prescribed time limits and in accordance with the prescribed procedure; failing to adhere to the time limits may requires an additional application for condonation. Representation is limited to categories of persons defined in the Act, legal representation at arbitration hearing is not an absolute right, but it is subject to the discretion of the arbitrator and the written agreement between the parties. The Labour Act, requires that most if not all disputes be conciliated before resorting to arbitration, unless conciliation fails, should the arbitrator, arbitrate the dispute, this is therefore referred to as con-arb process.

In the end, the arbitrator is empowered to issue different types of award provided for in the Act. Although an arbitration award is final and binding, the award may be subject to an appeal on the question of law and facts or review in an event of irregularities in the process.

CHAPTER 6

ARBITRATION AWARD

6.1 INTRODUCTION

Bosch *et al* (2004) provides that once a dispute has been arbitrated, the arbitrator is obliged to issue an arbitration award, the award which should be the arbitrator decision or judgment in the matter. [s86 (18)][332] provides that within 30 days of the conclusion of the arbitration proceedings, the arbitrator must issue an award giving concise reasons and signed by the arbitrator. At the CCMA though, the arbitration award must be issued within 14 days of the conclusion of the arbitration proceedings.[333]

6.2 ISSUING AN ARBITRATION AWARD

Rule 21[334] supplements [s86 (18) of the Labour Act, 2007 and stipulate as follows:

(1) The arbitrator must deliver his or her award giving concise reasons and signed by the arbitrator within 30 days of the conclusion of the arbitration proceedings;
(2) That the award shall specify the period within which the award is to be complied with and the arbitrator must allow such time for such compliance as he/ she may deem reasonable in the circumstances of the case;

332 Labour Act 2007 (Act No 11 of 2007).
333 S 138(7) Labour Relations Act 66 of 1995.
334 Rules for the Conduct of Conciliation and arbitration proceeding before the Labour Commissioner made in terms of [s135] of the Labour Act 2007. GG NR4151 dated the 31st October 2008.

(3) That the award in a class dispute shall include and define those members whom the chairperson finds to be members of the class and shall specify those members who have requested exclusion;
(4) Every arbitration award shall be send to the parties with an accompanying notice informing the parties of their rights to appeal the award to the Labour Court on issues of law or to apply to the Labour Court to review the award of the arbitrator;
(5) That administrative and clerical mistake in the award may at any time be corrected by the arbitrator on notice to the parties, but without such corrections being subject to any appeal.

In the South African jurisdiction, the court held in respect of the CCMA, that failure to issue the award within 14 days (30 days in our Labour Act) or the extended period does not invalidate the award. Both the LRA and the Labour Act, are silent on the consequences if the arbitrator does not comply with the time limits for the awards. The Labour Courts in South Africa, thus rules that handing down an award a few days late does not constitute a ground for having the award set aside.[335]

Similarly, Bosch *et al* (2004) 115 states that where there are valid reasons for a period longer than 14 days (30 days in our case)and where the parties have agreed to the arbitrator having leeway in this respect, the arbitrator is said not to be bound by the 14 days period (or 30 days period). Valid reasons may therefore according to the court include; the length of the arbitration hearing, the volume of the materials to be considered by the arbitrator and the complexity of the matter.[336]

6.2.1 CONTENTS OF AN ARBITRATION AWARD

An arbitration award should give a summary of the evidence led by the parties as well as the arbitrator's analysis of that evidence. [s86 (18)] of the Labour Act, requires that the arbitrator give "concise reason" for the decision. The similar provision contained in section 138(7) of

335 In *AA Ball (Pty) Ltd v Kolisi* [1998] 6 BLLR 560 LC, judge Reveals held that issuing an award a few days late does not constitute a defect for review as envisaged in s 145 of the LRA or [s89] of the Labour Act. Similarly, in *Free States Building Association Ltd t/a Alpha Pharm v SACCAWU* [1999] 3 BLLR 223 (LC) at para 16, judge Landman concluded that the 14 days (30 days in Labour Act) rule was not peremptory (compulsory) but rather a guideline.

336 In the *Department of Justice v CCMA* (2004) 4 BLLR 297 (LAC), Judge President Zondo, held that, in this context, a delay of two months in issuing an award is not inordinately long.

the LRA, was interpreted in *Country Fair Foods (Pty) Ltd v CCMA*,[337] Ngcobo AJP provided the following interpretation –

> "… though desirable … it is not expected of commissioners (arbitrators) to write well researched and scholarly awards. Awards must be brief and the proceedings before commissioner/ arbitrators must be dealt with expeditiously … however, failure to deal with an important facet may, depending on the circumstances of the case, provide evidence that the commissioner / arbitrator did not apply his/ her mind to that particular facet".

The arbitrator will be unlikely therefore to deal with each and every aspect of the case that was presented at arbitration. However, the award, although may be brief, must give sufficient reasons to justify the conclusion.[338]

In essence, Bosch *et al* (2004) states that the commissioner/arbitrator in his/her award should refer to legal principles and to give an explanation of how the principles and case law used have been applied to reach the findings and the award. In arriving at the decision, the arbitrator must take into account Codes of Good Practice i.e. Dismissal, issued or published in terms of [s137] of the Labour Act.

In addition to the principles and case law used, the award must be clearly written. It is submitted that if it is vague, it will be unenforceable. For example where an order of compensation is made, the basis or formula must be included and the date when payment is due should be stipulated. (Bosch *et al* (2004) 116). Essentially, the award must deal or address all the questions that had to be decided so that no matter is left unsettled. The award must, bring finality to the dispute.

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[337] (*1999) 11 BLLR 1117 (LAC) at Par 39.*

[338] *In Dairybelle (Pty) Ltd v CCMA (1999) 10 BLLR 1033 (LC)* Marcus AJ found that the furnishing of reasons for arbitration award is an essential element of administrative justice and must demonstrate a rational objective basis justifying he connection made by the administrative decision maker between the material properly available to him/her and the conclusion he/she eventually arrived at. In Namibia though, the courts are yet to interpret or determine whether arbitration awards by the Labour Commissioner / arbitrators should be construed as a administrative action, as the office is not a juristic person. This was discussed in chapter 3 of this document. Notwithstanding the decision in Dairybelle, in *Afrox Ltd v Laka (1999) 5 BLLR 467 (LC*), Judge Zondo held that the courts should not be quick to set aside a decision simply because no reasons have been given for it.

6.2.2 REASONS FOR THE AWARD

Section 86(18) of the Labour Act, 2007, require the arbitrator to give concise reasons for an award or ruling. The reasons required therefore need be no more than a summary of the issues, evidence, arguments, factual findings and the decision itself. The courts in South Africa held that the reasons must obviously relate to the decision and that the award must be justifiable in relation to the reasons given.[339]

6.3 LEGAL EFFECT OF AN AWARD

Section 87 of the Labour Act, 2007, provides that –

(1) An arbitration award made by the arbitrator
   (a) Is binding unless the ward is advisory;
   (b) becomes an order of the Labour Court in filling the award in the court by –
      (i) any party affected by the award, or
      (ii) the Labour Commissioner.

(2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of the Prescribed Rates of Interest Act, 1975 (Act No 55 of 1975) unless the award provides otherwise.[340]

It is essential to note that, not all decisions made by an arbitrator constitute an award. It was submitted that, for an award to exist, specific requirements included in the Labour Act or (LRA) and common law, must be met. These includes that the award must determine and finally dispose of the dispute between the parties. It must be in writing and contains reasons for the decisions or award and it must be signed by the arbitrator. It is further submitted that if the award lacks these essential elements, it cannot be enforced and that it may be set aside on review in the Labour Court.[341]

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339 *Carephone (Pty) Ltd v Marcus NO* (1998) 11 BLLR 1093 (LAC); *Country Fair Foods (Pty) Ltd v CCMA* (1999) 11 BLLR 117 LAC; *Shoprite Checkers (Pty) Ltd v Randaw NO* [2001] 9 BLLR 1011 and *Sedumo v Rustenburg Platinum Mines* (2007) ZACC 22 (CCT 85/06).

340 See equivalent provision [s143 (1) (2) of the LRA 66 of 1995.

341 Bosch *et al* (2004) 122.

An arbitration award is final and binding. There is no right of appeal against it. In the South African jurisdiction, the Labour Appeal Court held in *Librapac CC v Fedcraw,*[342] that an arbitration award being final and binding, does not need to be made an order of court to acquire such status. That being made an order of court is only "an aid" to its practical enforcement by enabling the applicant to execute upon it.[343]

Moreover, the court held that all that needs to be alleged for an application in terms of [s143 (1)][344] or [s87 (1) (b) of the Labour Act, to succeed is that there is an arbitration award issued by the arbitrator, that it is not an advisory award and further that despite the respondent's knowledge thereof, it has not been complied with.[345]

The Labour Act, 2007 [s90] equally provides that the parties to an arbitration award, may apply to a labour inspector in the prescribed form requesting the inspector to enforce the award by taking such steps as are necessary to do so, including the institution of execution proceedings on behalf of an applicant party. Inspectors are still to be trained in the enforcement of arbitration award and effective execution proceedings.

6.4 VARIATION AND RESCISSION OF AN ARBITRATION AWARD

The Labour Act[346] provides that an arbitrator who has made an award may vary or rescind the award, at the arbitrator's instance, within 30 days after services of the award if-

(a) It was erroneously made in the absence of any party affected by that award;
(b) It is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
(c) It was made as a result of a mistake common to the parties to the proceedings.

6.4.1 TEST FOR RESCISSION

With reference to the South African jurisdiction, the Labour Court in *Halcyon Hotels (Pty) Ltd t/a Baraza v CCMA,*[347] the court described an order or judgment as erroneously granted if

342 (1999) 6 BLLR 540 (LAC).
343 Du Toit *et al* (2003) LRA7-56 Labour Law through cases.
344 LRA 66 of 1995.
345 *Chiloane v Nhluneto Agricultural Project* [2000] 4 BLLR 392 (LC) at para 14.
346 S 88 of the Labour Act 2007 (Act No 11 of 2007).

there is an irregularity in the proceedings, or if it is not legal competent for the court to have made the order or judgment, or there existed at the time of issue a fact of which the judge was unaware, which would have precluded the granting of judgment and which have induced the judge, if he had been aware of it, not to grant the judgment.[348]

Moreover, the court qualifies an error to mean that the judgment does not reflect the intention of the judicial officer concerned. It held that it does not refer to the correctness or otherwise the decision.[349] Similarly, the Labour Court in *Foschini Group (Pty) Ltd v CCMA*,[350]held that where a party at all times intended to defend proceedings and default is not willful, then granting an award in that party's absence may constitute an error sufficient to justify rescission even though the party may formally have received notice of the arbitration.

In *MIT Tissue v Theron*,[351] the Labour Court held that rescission is permissible only when there was an irregularity in the proceedings, where the award or where the commissioner/ arbitrator was at the time unaware of facts which, had he been aware of them, would have precluded him from making the award.

6.5 APPEALS OR REVIEW OF ARBITRATION AWARDS

Section 89 of the Labour Act, 2007 provides the basis of appeal or circumstances under which the Labour Court may consider the review of arbitration awards issued or made by the arbitrator. [s89 (1)][352] states that a party to a dispute may appeal to the Labour Court against an arbitrator's award-

(a) on any question of law alone; or

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347 (2001) 8 BLLR 911 (LC).

348 *CAWU v Federate Stene* (1998) 19 *ILJ* 642 (LC), where it was stated that [a]n order or judgment is erroneously granted if there … existed at the time of its issue a fact of which the judge was unaware, and which would have precluded the granting of the judgment and which would have induced the judge, if he / she had been aware of it, not to grant the judgment.

349 *First Consolidated Leasing Corporation Ltd v McMullin* 1975 (3) SA 606 T at 608 E-F; see also *Health & Hygiene (Pty) Ltd v Yawa NO* [2000] 12 BLLR 1434 (LC).

350 [2002] 7 BLLR 619 (LC) at para 16-17.

351 [2000] 8 BLLR 947 (LC).

352 Labour Act 2007 (Act No 11 of 2007).

(b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a),[353] on a question of fact, law or mixed fact and law.

The Act further provides that in lodging an appeal on the grounds listed above, the appellant must note an appeal in accordance with the Rules of the High Court, within 30 days after the award being served on a party.[354] In an event of late noting of an appeal, the Labour Court may condone such, on good cause shown by the appellant.[355]

Once an appeal is noted or an application for review is made to the Labour Court, such an appeal or application for review operates to suspend any part of the award that is adverse to the interest of an employee and does not operate to suspend any party of the award that is adverse to the interest of an employer.[356]

The Act, gives recourse to the employer against whom an adverse award has been made to apply to the Labour Court for an order varying the effect of such an award and the Court may make an appropriate order.[357] In considering such an application the Labour Court must -[358]

(a) consider any irreparable harm that would result to the employee and the employer respectively if the award, or part of it, were suspended, or were not suspended;

(b) if the balance of irreparable harm favours neither the employer nor the employee conclusively , determine the matter in favour of the employee.

353 The section refers to disputes referred to the Labour Commissioner within the scope of the Act and Chapter 3 of the Namibian Constitution.
354 S 89(2) Labour Act 2007 (Act No 11 of 2007).
355 S 89(3) *supra*.
356 S 89(6) of the Labour Act 2007 (Act No 11 of 2007).
357 S 89(7) *supra*.
358 S 89(8) of the Labour Act 2007.

6.5.1 GROUNDS OF REVIEW OF THE ARBITRATION AWARD

The Act, provides that if there are allegations of defects in an arbitration proceedings, the party who alleges may apply to the Labour Court for an order reviewing and setting aside the award[359]-

(a) within 30 days after the award was served on the party, unless the defect involves corruption;
(b) if the alleged defect involves corruption, within 6 weeks after the date the applicant discovers the corruption;

The Act, defines the defect referred to above to mean that the arbitrator-[360]

(e) committed misconduct in relation to the duties of an arbitrator;
(f) committed gross irregularity in the conduct of the arbitration proceedings; or
(g) exceeded the arbitrator's powers and,
(h) a review may be allowed where a party improperly obtained the award.

Du Toit *et al* (2003) 57-60, argues that there is a fundamental difference between appeal and review. This argument is premised on the authority found in *Lekota v First National Bank of SA Ltd,*[361] where the court held that when reviewing the arbitration award, it is not the function of the court to decide whether the commissioner/arbitrator acted correctly, but whether he/she committed misconduct or a gross irregularity or exceeded his or his powers within the meaning of section 145 of the LRA or section 89(5) of the Labour Act, 2007.

6.5.1.1 Misconduct in relation to the duties of an arbitrator [s 89(5)(a)(i) Labour Act, 2007 (Act No 11 of 2007)

The South African case law elaborates the element of misconduct as follow- that misconduct denotes some moral wrongdoing[362] and that gross negligence may show an element of

359 S 89(4) Labour Act 2007 (Act No 11 of 2007).
360 S 89(5) *supra*.
361 [1998] 10 BLLR 1021 (LC) at para 11.
362 *Mutual and Federal Insurance Co Ltd v CCMA* [1997]12 BLLR 1610 (LC).

misconduct, as might a gross mistake of law or fact.[363] Misconduct was held to include bias.[364] The test therefore is whether the conduct complained of would lead a reasonable litigant to doubt the impartiality of the presiding officer.[365] In addition, the following range of defects in the conduct of proceedings has been held to constitute misconduct; for example:

- misconstruction of evidence;[366]
- retracting permission for proceedings to be recorded;[367]
- failure to guide lay persons on evidence to be presented or advice them of the need to call witnesses for providing document;[368] and
- applying the criminal law test of proof beyond reasonable doubt in arbitration proceedings.[369]

The court held that in an alleged complaint of misconduct, clear evidence of misconduct complained of is essential, otherwise unsubstantiated claims of impropriety against commissioners / arbitrators has been dismissed as bordering on contempt.[370]

6.5.1.2 Gross irregularities in the conduct of arbitration hearing [89(5)(a)(ii)] Labour Act, 2007 (Act No 11 of 2007)

Du Toit *et al* (2006), states that not all irregularities are "gross". The court held that the test therefore is whether the irregularity was material[371] and whether it precluded a proper and fair hearing.[372] It is submitted that, where a procedural irregularity does not affect the outcome, the court may issue a declarator to that effect rather than setting the award aside and remitting it for rehearing.[373]

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363 *Cox v CCMA* [2001] BLLR 141 (LC) para 19-21 and *Mzeky v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857 (LAC).

364 *Venture Holdings t/a Williams Hunt Delta v Biyana* (1998) 19 *ILJ* 1266 (LC).

365 *BTR Industries SA (Pty) Ltd v MAWU* (1992) 13 *ILJ* 803 (A). The Code of Conduct for CCMA commissioner provides that the commissioner must disclose any interest or relationship likely to affect their impartiality or which might create the perception of impartiality. [item4].

366 *Metcash Trading Ltd t/a Metro Cash and Carry v Fobb* [1998] 11 BLLR 1136 (LC) at para 8.

367 *Mthembu & Mahomed Attorney v CCMA* [1998]2 BLLR 1027 (LC).

368 *East Cape Agricultural Cooperative v Du Plessis* [1998]11 BLLR 1027 (LC).

369 *Fourie's Poultry Farm (Pty) Ltd v CCMA* [2001] 10 BLLR 1125 (LC).

370 Per Cheadle AJ in *Coetzee v Lebea NO* [1999] 20 *ILJ* 162 (LC) at para 4. See also Du Toit *et al Labour Relations Law* 168.

371 *Reunert Industries (Pty) Ltd v Naicker* [1997] 12 BLLR 1632 (LC) at 636.

372 *Country Fair Foods (Pty) Ltd v CCMA* (1999) 20 *ILJ* 2609 (LC) at 2618C-2619A.

373 *Solomon v CCMA* (1999) 20 *ILJ* 2960 (LC), where Stelzner AJ, without considering whether the irregularity was gross, set aside an award although no prejudice was shown and the commissioner's decision was probably correct.

Below are some of the conducts that the Labour Court may regard as grossly irregular:

- granting legal representation inappropriately;
- creating a reasonable impression of bias;
- refusing to grant a postponement where a postponement was appropriate;
- conciliating a dispute at arbitration stage without the consent of both parties;
- misconstruing jurisdiction;
- failing to determine the dispute;
- undermining a party's right to lead evidence on the substantive issues in dispute;
- refusing a party the right to cross- examination;
- hearing evidence from a witness in the absence of both parties without their consent;
- failing to advice a lay representative of the consequences of not challenging the other party's evidence;
- basing an award on documents not admitted as evidence;
- making finding not justified on the evidence; and
- committing a material error of facts or gravely misunderstanding evidence. [374]

6.5.1.3 Excess of power [s89(5)(a)(iii)] Labour Act, 2007 (Act No 11 of 2007)

In *Le Roux v CCMA,*[375] the court held that a commissioner/arbitrator exceeds his or her powers or act *ultra vires,* by making an award which he/she did not have the power to make. This, the court held, could include failure to exercise a power or a discretion that ought to have been exercised.

The court held *inter alia* that the commissioner/arbitrator exceeds his/ her powers by-

- committing a material error of law, , which may relate to proper characterization of the dispute, or ignoring or misconstruing the appropriate statute or legal principle;
- failing to apply the proper test to interpret relevant statutory or case law, including the law of evidence;
- making findings that are not justified by the evidence;

374 Du Toit *et al Labour Relations Law* 167.
375 [2000] 6 BLLR 680 (LC).

- determining issues that are not in dispute;
- failing to consider "appropriate material".[376]

6.5.1.4 The award was improperly obtained [s89(5)(b)] Labour Act No 11 of 2007

The Labour Court, held in *Moloi v Euijien NO*[377]that [s145(2)(b)],[378] equivalent and /or similar to our [s89(5)(b),[379] is concerned primarily with the conduct of the successful party,[380] for example, in resorting to bribery or fraudulent representation to obtain an award.[381]

6.5.2 REMEDIES ON APPEAL OR REVIEW APPLICATIONS

In terms of section 89(9) (10) of the Labour Act, the Labour Court has jurisdiction to order that all or part of the award be suspended and may attach conditions to its order, including but not limited to –

(i) conditions requiring the payment of a monetary award into court; or

(ii) the continuation of the employer's obligation to pay remuneration to the employee pending the determination of the appeal or review, even when the employee is not working during that time.

Similarly, where the award is set aside on an appeal, the court may determine the dispute in the manner it considers appropriate or refer it back to the arbitrator or require that a new arbitrator be designated to the matter. Moreover, the court is at leeway to make an order it considers appropriate about the procedure to be followed to determine the dispute. The South African courts held that it may resolve the matter on review by making a final order and is likely to do so if the facts are not in dispute.[382]

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376 See footnote 42 above at 168.
377 [1997] 8 BLLR 1022 (LC).
378 Labour Relations Act 66 of 1995.
379 Labour Act 2007 (Act No 11 of 2007).
380 *Shoprite Checkers (Pty) Ltd v Ramdow NO* [2000] 7 BLLR 835 (LC) at para 54.
381 Du Toit *et al Labour Relations Law* (2003) 168.
382 *Nedbank v CCMA* [1999] 6 BLLR 594 (LC) at para 14.

However, it was held that the court will not readily substitute its decision for that of a commissioner/arbitrator.[383] Similarly, that if the records are not available, the court cannot determine the dispute on the papers and may refer it back to the CCMA (the Labour Commissioner)[384] to be heard by a different commissioner/arbitrator.[385] Moreover, that the court can equally, remit a single issue which had been omitted to be heard by the same commissioner/ arbitrator.[386]

In any appeal or review application, which involves the interpretation, implementation, or application of the Labour Act, the Minister may intervene in the proceedings on behalf of the State if the Minister considers it necessary for the effective administration of the Act.[387]

6.6 CONCLUSION

The Labour Act, 2007 (Act No 11 of 2007) requires that the arbitrator must issue an award within 30 days after the conclusion of an arbitration hearing. The court held that this time limit should be adhered to, unless in exceptional cases, i.e. where for example the arbitrator has been given a leeway to extend the period, due to voluminous material presented at the hearing. However, the Labour Act does not provide for consequences for failure to adhere to this time lines.

The Labour Act further requires that concise reasons must be given for an arbitration award issued and that having considered the arguments submitted by the parties, the arbitration award should refer to legal principles and case law with an explanation as to how these influenced the decision of the arbitrator.

That once the arbitration award is issued, it is final and binding on the parties. Therefore there is no right of appeal against it. But in certain circumstances such as on the question of law and facts, any party aggrieved thereto may appeal the award. Review of arbitration awards, is also provided for in the Labour Act.

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383 In *South Africa Fibre Yarm Rugs Limited v CCMA* [2005] 6 BLLR 608(LC) the court held that it may do so only in exceptional circumstances, the most important consideration being whether the result would be a foregone conclusion if the matter were remitted to the CCMA.

384 S 117(1)(a) of the Labour Act No 11 of 2007.

385 *Mondi Kraft (Pty) Ltd v PPWAWU* [1999] 10 BLLR 1057 (LC)

386 See footnote 49 above at 171.

387 S 89(11) of the Labour Act 2007.

All in all is that the substance of the arbitration award is that it brings finality to the dispute within a very limited period, which become binding on the parties.

CHAPTER 7
CONCLUSIONS / FINDINGS

Premised on all the Chapters written herein, the deduction therefrom is that due to the dynamic and economic conditions in Namibia, the situation gave rise to the need by social tripartite partners (Government, Labour and Employers) seating in the Labour Advisory Council to agree to review the labour legislation. Several protracted strikes, cumbersome District Labour Court systems viewed as adversarial and expensive, the legalistic language of the Labour Act, 1992 (Act No 6 of 1992) all were some of the reasons advanced for the repeal of the Labour Act, 1992.

Both parties agreed that a completely new Labour Act should be drafted with a provision on dispute prevention and resolution to replace the District Labour Court system, which will be quicker and more economical system of alternate dispute resolution through arbitration and conciliation concepts.

The debates hence led or resulted in the Labour Act of 2004, (Act No 15 of 2004) which was passed and signed into law, but was never fully implemented. The reasons thereof were related to several shortcomings identified by both government, employers and trade unions and including the ILO experts involved. These debates further continued and ultimately led to the new Labour Bill which was tabled in Parliament in 2007. After being passed and signed into law, the Bill became the Labour Act, 2007 (Act No 11 of 2007) which sets the framework for Namibia's labour relations and working conditions for years to come.

The major parts or sections of the new Act were agreed to by consensus. In particular, the provisions introducing a new system of dispute prevention and resolution. Since its coming into force on the 1st November 2008, all parties or stakeholders expect the new system to result in a better and faster resolution of labour disputes.

On other note, the new Labour Act, 2007 differentiates between disputes of rights and disputes of interest. In that, disputes of interest are economic disputes to which the employees or workers aspire to have and if not resolved by conciliation, the parties may elect to embark

on industrial action. Rights disputes are statutory or contractually derived disputes and may be finally resolved by arbitration.

At the end of each Chapter of the new Act, there is a provision for the resolution of disputes. These could be either for the interpretation or application disputes. The Act requires that disputes must first be conciliated before they can proceed to arbitration or adjudication.

It has therefore been established that the isolation of disputes is important because disputes must be dealt with by specific process and specific dispute resolution bodies.

Experience drawn from the CCMA, where our system was borrowed, it was established there that if parties choose the wrong process or go to the wrong body, they may find that their efforts to resolve the dispute are delayed and frustrated.

On the other hand, the new Labour Act, 2007, creates a number of institutions or bodies to perform dispute prevention and resolution functions. These includes amongst others; the Labour Commissioner, and the Labour Courts. Each of these institutions have their own specific jurisdiction and can only deal with disputes that fall within their jurisdiction up to a certain extent.

The Labour Commissioner's primary functions include; conciliation and arbitration of labour disputes referred to him/ her in terms of the Labour Act and other applicable statutes. The Labour Court on the other hand, has powers to deal with all matter necessary or incidental to its functions under the Labour Act, including any labour matter, whether or not governed by the provisions of the Act, or any other law or common law. This provision of the Labour Act, gives very extensive and wide powers to the Labour Court including the jurisdiction to make an order for reinstatement.

On the dispute resolution processes, the Labour Act, places prime emphasis on conciliation as consensus –seeking process often viewed as better that the outcomes that arbitration or adjudication can deliver. The reasons being that conciliation solutions or outcomes take into account the needs and interest of the parties. The parties have a better chance of addressing issues that are more important for them and may therefore keep the relationship intact that may have become strained in the context of the dispute.

Arbitration process on the other hand, is a decision making process in which the parties to a dispute rely upon a third party to make a final judgment or award resolving the dispute. The arbitrator makes a final and binding decision. The process is said to be an inquisitorial one and less formal than formal adjudication.

The published Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner, made in terms of the Labour Act, 2007, Section 135, provides a clear illustration on the process of conciliation and arbitration and serve as a guidelines on embarking on such a process. These rules are therefore useful to all the users of the new Labour Act's dispute resolution system that it introduces.

At the conclusion of an arbitration hearing, the arbitrator is obliged to issue an arbitration award, which is the arbitrator's decision or judgment in the matter, within 30 days of the conclusion of the arbitration hearing, and should give concise reasons for such a decision.

The award becomes final and binding on the parties to the dispute, unless it is an advisory award. Appeals are restricted to any question of law or on a question of fact, law or mixed fact and law. Review is permissible if it relates to the conduct of arbitration process, where the conduct of the arbitrator is questioned.

For the new dispute resolution system to be successful, it should be efficient and effective. Efficiency is said to be "the holy grail" of dispute resolution. Disputes should be resolved as quickly and informally as possible, with little or no procedural technicalities. The existence of a labour dispute mechanism brings with it the need of the disputing parties to have the dispute resolved – the dispute cannot be allowed to drag on indefinitely, as some solution has to be found.

Moreover, the efficiency aspect of the dispute resolution entails that parties should have easy access to the dispute resolution system. They should know who to approach and how to involve the dispute resolution institution in their dispute. There should be the minimum formalities in obtaining the assistance of the dispute resolution mechanisms such as the Labour Commissioner.

The new system presupposes that once the dispute has been referred to the Labour Commissioner, it should be dealt with in a practical and efficient manner, and as little time as possible should be devoted to compliance with procedural formalities, because the parties need to have the dispute resolved is, from their point of view, urgent. Unlike the old District Labour Court system where no time frames were set to resolve the dispute, hence efficiency was not an issue.

Similarly, efficiency is not made by machines; efficiency in dispute resolution can only be achieved by human beings with the necessary tools and skills. The people manning the Labour Commissioners' office will play a decisive role in determining how efficiently the new system works. It is those conciliators and arbitrators and other clerical staff that must strike the balance between countervailing considerations of practical and informal dispute resolution on the one hand and the maintenance of fairness, justice, impartiality and order on the other hand.

Not only will the human resources of the Labour Commissioner determine, to a large extent, the efficiency of the system, but they will also determine the views and the attitudes that employers, employers' organizations and trade unions (and, for that matter, even individual employees) take of the dispute resolution system introduced by the Labour Act, 2007 (Act No 11 of 2007).

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