AN EVALUATION OF THE DISPUTE RESOLUTION MECHANISMS OF CONCILIATION AND ARBITRATION

by

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DEDICATION

In the memories of my parents Daniel and Phoebe who sent me to school first, I dedicate this work
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SUMMARY

South African labour laws have undergone tremendous amendments before and after independence. This paper focuses on the development after independence, therefore section 34 of the Constitution of 1996, provisions of the Labour Relations Act of 1995 and other laws which deal with labour matters and regulate the labour relations and disputes in the country will be considered.

The labour laws in South Africa provide *inter alia* for the dispute resolution mechanisms, the manner on which disputes should be handled by different organs which are empowered to do so. My focus will be to see how alternative disputes resolution processes of conciliation and arbitration in the Eastern Cape Province aim to transform the South African and global labour market by promoting an integrated simple, quick but efficient and inexpensive dispute settlement services in order to reduce the backlog of cases, maintain labour peace, promote democracy at workplace with the view of advancing economic and social justice.
CHAPTER ONE

This chapter will deal will the general overview of conciliation and arbitration and the purpose of undertaking this study.

- Summary
- Introduction
- Historical background
- Problem statement
- Objectives
- Research Methodology
- Hypothesis
- Limitation of the project

1.1 INTRODUCTION

Public dissatisfaction of justice in democratic societies has been a major problem in many jurisdictions. Governments and judiciaries all over the world from time to time express their concerns over delays of cases, technicalities of adjudicative procedures, time consuming and expensiveness of legal representation. Varieties of approaches have been utilized as possible solutions for administration of justice due to the fact that any credible legal system would prefer to provide and deliver a good quality of justice.¹

Justice is a broad phenomenon as it reflects the basic value underlying a system of law or the objective that it seeks to attain. Its broadness depends on various interpretations and definitions of the term “justice” basing on distributive and corrective justice concepts established during medieval era.²

The test of an effective system therefore is not only that it dispenses justice but also that it does so with expediency, speedy, accuracy and is available to all. In this context, courts and administrative bodies which perform judicial functions are duty bound not to deny justice

¹ Mroso “Alternative Dispute Resolution as a Tool in the Administration of Justice” (1997) The Tanzania Lawyer 16.
anyhow for example by delaying decisions of the cases, or imposing compulsory and rigid procedures in a place of the simpler ones, that means if parties for instance want to resolve their disputes amicably, should not be forced to the mechanized procedures hence alternative means of dispute resolution like mediation, conciliation and arbitration must be utilized.

Conciliation and arbitration mechanisms have been used worldwide to try to curb the problems mentioned above. The idea of resolving disputes outside the courts however is not appealing to every person. Despite the arguments for and against the conciliation and arbitration processes, it is suggested that they represent the procedural innovations of disposing cases in order to complement the adjudicative structures found adversarial and inquisitorial systems for the view of curbing the problems such as the backlog of cases in the courts, diverting from the technicalities of the law, avoiding long time of exposing decisions of the cases and minimizing conflicts and costs in litigating cases.

1 2 GENERAL HISTORICAL BACKGROUND

1 2 1 ORIGIN OF CONCILIATION AND ARBITRATION PROCESSES

In the United States of America the concept of Alternative Dispute Resolution mechanisms (hereinafter ADR) was introduced by Prof. Frank EA Sanders (Harvard Law Professor) in 1976 at the Pound Conference on public dissatisfaction of justice which was sponsored by the American Bar Association. The resolution from the conference was to put ADR mechanisms like conciliation, facilitation, fact-finding, mediation, med-arb, mini-trial, multi-door and arbitration on experimental basis. Subsequently the exercise was found successful and other jurisdictions imported the idea.

In the United Kingdom, ADR was not supported because it was seen as a phenomenon to the USA. However by the late 1980’s this approach superseded in the industrialized common law world by more considered recognition of the part ADR could play to overcome some of the problems of adversarial system such as rigidity of the rules and expensiveness of the litigation.

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Under the alternative mechanisms a third, unbiased or impartial party called mediator/conciliator or arbitrator is used to try to assist the parties to reach agreement and the assumption will be no winner no looser unlike in the case of adjudication mechanism.

122 CONCILIATION AND ARBITRATION PROCESSES IN SOUTH AFRICA

The labour movement has played a major role in South African democracy. Historically conciliation and arbitration were provided for under the Conciliation Act\(^5\) which recognized the establishment of bargaining councils and conciliation boards. Under this law African workers were not employees within the meaning of the Act therefore were denied the right of membership to the registered unions and direct representation to the industrial relations bodies. Though the law covered the white employees only, voluntary centralized collective bargaining was promoted, as a result agreements between employer’s organizations and employee’s trade unions could be reached to establish industrial councils to deal *inter alia* with their disputes. Industrial agreements could be extended to all employers and employees within the jurisdiction of a council\(^6\) if the minister of labour deemed it expedient or satisfied that parties were sufficiently represented. Non-compliance with such agreements could constitute a criminal offence.\(^7\)

With the increase in population, labour activities also expand as a result labour relations, the socio-economical and even political issues touch the society and become more complicated. In 1977 for example due to the labour unrest the government appointed the Wiehahn Commission of Inquiry into labour legislation, it reported its recommendations in 1979 and suggested a number of reforms to be done. The most important and far-reaching proposal was what Du Toit\(^8\) call “from exclusion to inclusion” where black employees were allowed to join the registered trade unions and be accorded with direct representation to the industrial councils and conciliation boards. Apart from that the commission made a proposal to replace the Industrial Tribunal with an Industrial Court (hereinafter IC) which had an extensive unfair labour practice jurisdiction as it had legislative or quasi-legislative as well as determinative powers.

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\(^5\) Act 11 of 1924.

\(^6\) S 9(1)(b) of the Conciliation Act of 1924.

\(^7\) S 9(3) of Act 11 of 1924.

Prior to 1979, there was no specific body to deal with labour issues, the IC mentioned earlier was a tribunal and administrative body which had no control over black employees because of dual labour system existed, its establishment meant to resolve labour disputes but it faced some challenges like the demarcation issues, that means: to identify which dispute fell within its jurisdiction or to know whether the dispute was strike-able or non strike-able or whether it was a dispute of rights or of interests so that the it could have jurisdiction over the matter. If it was a dispute arising out of the contract of employment for example then it would have to be taken to the ordinary civil court for a civil action to claim compensation in form of damages or interdicts.

In 1979, the Wiehahn Commission and the IC introduced an open-ended concept of unfair labour practice (hereinafter ulp). Unfair labour practice disputes therefore were referred to either Industrial council or conciliation board for conciliation if the dispute remained unresolved it had to go to the Industrial Court for adjudication.

Owing to the fact that the definition of ulp was so broad, it was upon the IC to determine as a question of fact as to whether an unfair labour practice existed. Apparently at its beginning in early 1980’s as Christie⁹ observes the ulp lost its concept because it had no statutory framework, for example the Court began to fashion a law of unfair dismissal incrementally out of its power to determine unfair labour practice.¹⁰ It was a foreign funded non-governmental organization which got support from both employees and employers as it demonstrated a remarkable success by giving the stakeholders a deep understanding of collective bargaining, reducing adversarial technicalities and producing a good quality of dispute settlement. A small number of mediators and arbitrators were trained by the British and Americans respectively to serve the purpose.

After independence a large number of employment disputes that were referred to statutory conciliation were not resolved. According to Christie¹¹ ten percent of cases were settled at conciliation while ninety percent remained unresolved, it was in this regards where the Labour Minister’s task team was made to try to establish a dispute resolution mechanism.

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¹⁰ Early in 1980’s the Independent Mediation Service of South Africa (IMSSA) emerged.
¹¹ Christie 346.
which would support the new labour relations and labour laws in a new democratic South Africa.

When we talk of conciliation and arbitration processes therefore, we must not forget the contribution made by the Conciliation boards, Industrial councils, and the IMSSA during apartheid regime. After independence the Commission for Conciliation, Mediation and Arbitration (hereafter CCMA) was established in terms of the Labour Relations Act\(^{12}\) to carry on with the conciliation and arbitration functions of the above-mentioned bodies, there is also private arbitration in terms of the Arbitration Act\(^{13}\) which is still in operation.

13 PROBLEM STATEMENT

The contention that the new Labour Relations Act of 1995 (hereinafter the LRA) has not lived up to its promise because its dispute resolution mechanisms including conciliation and arbitration are becoming relatively complex and technical, private arbitration is more effective than compulsory arbitration and also the CCMA is not interested much in conciliation rather it issues quickly the certificate that a dispute remains unresolved so that the matter can go to arbitration or adjudication and lack of working facilities also such as secretarial services, venues and enough personnel require a thoroughly research to be done.

14 OBJECTIVES

The objectives of this treatise are to examine the perceptions underlying the processes of conciliation and arbitration in resolving the labour disputes in South Africa, Eastern Cape in particular with view of determining their effectiveness and the role they do play in transforming the South African and global labour market. For example South Africa being a part of the global business community as the South African Law Commission suggests\(^{14}\) International co-operation in labour matters with foreign states is very important because globalisation and the rapid growth of international trade means cross-border disputes are inevitable hence effective national and international dispute resolution mechanisms like conciliation and arbitration are required.

\(^{12}\) No 66 of 1995.
\(^{13}\) No 42 of 1965.
In doing so, a research survey was conducted to try to identify whether these processes are becoming technical as some authors have already pointed out that one of the objectives of the LRA is to provide simplified procedures resolution of disputes by means of statutory conciliation, mediation and arbitration, it is disheartening therefore to find that these processes and procedures are not in practice, as simple and straightforward as they were intended to be.\textsuperscript{15}

Taking another example from Bendeman’s\textsuperscript{16} views, the author who did a research of analysing the problems of labour disputes resolution in South Africa, found that the LRA has created a sophisticated system which most of the role players like some employers and individual employees are not capacitated to operate especially within the framework of schedule 8 of the LRA 1995 which deals with dismissal because they do not have knowledge and skills. To me this was a problem that must not be overlooked as it has led to a kind of adversarial nature especially in individual employment relationship which is based on rights, rules and powers. The result of this has been delays of cases, referral increment and costs.

It is from the above view whereby a qualitative research was done by way of questionnaire. The CCMA Commissioners in the Eastern part of the Eastern Cape were selected for this purpose, because the study before has shown generally that the technical nature of internal conflict resolution mechanisms, incapacity of the parties according to Bendeman\textsuperscript{17} who is in agreement with Kantor\textsuperscript{18} have resulted in high referral rate and consequent problems that the CCMA is experiencing. By doing so electronically mailed questionnaires were sent to the commissioners in order to know their current views on these mechanisms, where necessary interviews were conducted.

The sample of participants was chosen randomly and asked various questions. The survey started by seeking to know personal information of the participants in order to know the demographic sample of population. The survey proceeded to ask questions on issues affecting employment, the most recent cases handled, laws and perceptions underlying conciliation and

\textsuperscript{15} Basson et al 335.
\textsuperscript{17} Ibid.
arbitration in Eastern Cape. Lastly the participants were asked to give their views on factors that contribute or hinder the efficient, accurate, and inexpensive labour dispute resolution.

The rationale behind was to see how resolution of labour disputes by ways of conciliation, arbitration and con-arb mechanisms comply with the provisions of the LRA\textsuperscript{19} and other labour laws. The results was organised in different groupings to relate to the objectives and the findings were used by the researcher to do a personal analysis and proposed solutions to the problems identified.

1.5 RESEARCH METHODOLOGY

Researcher used the following procedures in order to achieve the goal of evaluating conciliation and arbitration mechanisms:

- A literary review was undertaken to establish the background, identify the problems and to learn new approaches of curbing those problems. Apart from the questionnaires which were sent to the commissioners, the libraries were used to gather information from the statutes, law reports, textbooks, journal articles and electronic devices.

- A literature survey therefore managed to establish the historical background in order to know the previous and current conditions, the practices that prevail, beliefs and attitudes that are held and the trends that are developing towards these processes in South Africa

- A research survey as mentioned earlier was conducted whereby questionnaires was sent among the CCMA Commissioners in the Eastern Cape Province (both full time and part time) in order to establish the extent to which these dispute resolution mechanisms are conducted and used to resolve labour disputes in the province. Structured and unstructured question formats were used to serve the purpose.

- The data from the literature survey and the sample of respondent’s views (questionnaire responses) were used by the researcher to get the knowledge on the following issues:

\textsuperscript{19} S 1 of Act 66 of 1995.
1. Demographic sample of population (number of the participants) based on respondent’s experience on conciliation and arbitration.

2. Perceptions underlying these mechanisms.

3. Challenges in conciliating and arbitrating labour disputes in Eastern Cape.

4. The socio-economical and political impact of conciliation and arbitration.

- Personal analysis based on data obtained was done and proposal for possible solutions to the problems identified made up a conclusive remark.

Data analysis from the respondent’s views and literature review enabled the researcher to see whether:

- The procedures of conciliation and arbitration under the LRA complex, technical, expensive and available to all especially the poor.

- The increase number of unfair dismissal disputes reflects the backlog of cases at the CCMA and ineffectiveness of commissioners.

- Conciliation in public sector is not appealing compared to private sector.

- Private arbitration is more effective compare to compulsory arbitration.

- The labour laws encourage conciliation and arbitration mechanisms.

- The CCMA is not interested much in conciliation rather it issues quickly the certificate that a dispute remains unresolved so that the matter can go to arbitration or adjudication.

The lessons from the above revealed that there are problems in the whole exercise of conciliating and arbitrating labour disputes. Finally the data above suggest the current knowledge on conciliation and arbitration in resolving labour disputes in the Province.
16 HYPOTHESIS

This research was centred on the premise that alternative means of dispute resolution of conciliation and arbitration are effective, quick, inexpensive also tend to restore harmony between the parties to the dispute compared to adjudication.

17 LIMITATION OF THE PROJECT

This research dealt with evaluation of conciliation and arbitration of labour disputes in South Africa under the new Labour Relations Act and other laws. More focus was put in Eastern Cape Province.

18 ASSUMPTIONS

This paper considered both advantages and disadvantages of conciliation and arbitration processes in order to see whether should be encouraged or not.

19 CONCLUSION

I have chosen to do this research as stated above in the objective section because I believe that the South African labour community still needs a comprehensive dispute resolution system which will keep on trying to minimize and manage the conflicts at workplaces. Using Otto Kahn-Freund’s words who once stated as follows:20

“[The] relation between an employer and an isolated employee is typically a relation between a bearer of power and one who is not bearer of power. It is an act of submission, in its operation it is a condition of subordination which is fulfilled through legal notion of contract of employment…”

In light of the above statement the LRA and other labour laws in South Africa have been always acting as countervailing forces to try to neutralize the inequality of bargaining power which is inherent in employment relationship.

1 10 DISSEMINATION

The findings of the research will be compiled in the form of treatise and a copy placed in the library of the NNMU and the CCMA will get report of the feedback.

1 11 OUTLINE OF THE STUDY

Chapter 1 contains the summary, introduction historical background of conciliation and arbitration concepts and problem statement.

Chapter 2 presents the theoretical elements of conciliation and arbitration mechanisms.

Chapter 3 describes the empirical study and analyses details and the respondent’s views.

Chapter 4 analyses and interprets the results of the survey and proposes solutions to the problems identified.
CHAPTER TWO

This chapter will expand research design and methodology used in this study hence the following will be covered:

- Dispute resolution mechanisms available
- Judicial dispute processing
- Non judicial dispute processing
- Definition of conciliation
- Definition of arbitration
- What is con-arb
- Why conciliation and arbitration in South Africa
- Conclusion to why these processes are crucial

2.1 EXISTING DISPUTE RESOLUTION PROCESSES

There are two major methods of dispute processing referred to as

- Judicial dispute processing
- Non judicial dispute processing

2.2 JUDICIAL DISPUTE PROCESSING

It involves systems like adversarial and inquisitorial whereby rules of adjudication are strictly followed, for instance from pleading to execution stages, this means that all disputes are settled by the courts of law and when the final judgment is reached there is always the winner of the case.

2.3 NON-JUDICIAL PROCESSING

This is the process which draws my interest and compels me to do this research. It involves the settlement of the disputes outside the court realm. Here alternative dispute resolution mechanisms like mediation, conciliation arbitration are used to compliment the adjudicative structures. I will be limited to conciliation and arbitration only though in some cases
conciliation and mediation are regarded inclusive. Unlike judicial processing no strict rules of adjudication are followed. If an agreement is reached by the parties to the dispute, it turns to be a win-win situation which means no overall winner of the case.

The South African scene as Dlamini\textsuperscript{21} contends substitutes the Canadian model of tribunals with statutory structures like the Commission for Conciliation, Mediation and Arbitration, bargaining councils and private arbitration. The Labour Court and Labour Appeal Court, generally adjudicate over technical matters like those relating to unfair discrimination and unfair labour practices. Cases that have immense constitutional implications are from time to time referred to the Constitutional Court.

2.4 WHAT IS CONCILIATION

Is a process whereby the disputants make use of a neutral third party called a ‘conciliator’ to control the dispute settlement procedures, the law\textsuperscript{22} provides that under conciliation, an acceptable third part (the commissioner) is used to assist the employees and employers to arrive at mutually, enforceable and binding solution. In terms of the LRA\textsuperscript{23} therefore conciliation is used to deal with major and minor issues to resolve disputes by:

- defining the problems
- settling the dispute
- managing the conflict
- negotiating contracts
- preventing further conflicts through educating and training the parties directly or indirectly through making recommendation to the parties\textsuperscript{24} on methods and style of decision making which may be used in future.


\textsuperscript{22} S 135 of the LRA 1995.

\textsuperscript{23} S 135.

\textsuperscript{24} S 135(3)(c).
The definition given under the new LRA\textsuperscript{25} is broader than its predecessor\textsuperscript{26} because it involves more processes like meditation, fact finding and making recommendations\textsuperscript{27}. In this regards the commissioner responsible for conciliation is obliged to facilitate communication between the parties by creating environment so that the parties gain confidence to reveal their interests and needs. The law allows the conciliator for example to conduct a telephone interview, use the informal discussions in problem solving by applying different negotiating tactics, employ facilitation and fact finding methods and make verbal or written recommendations. This is in compliance with the CCMA rules\textsuperscript{28}. According to Kantor\textsuperscript{29} the CCMA can be afforded with dual benefits of speed and lightening the administrative burden.

Conciliation therefore encourages parties on working together, maintain their relationship and avoid litigation, if the parties fail to find their own solutions to their problems the conciliator can assist them on technical matters.

\section{WHAT IS ARBITRATION}

Unlike conciliation, arbitration is a process whereby a third party referred to as an arbitrator fairly hears the cases by receiving and considering both evidence and submissions from disputants so that afterwards makes a final and binding decision.\textsuperscript{30} In terms of the LRA\textsuperscript{31} arbitration takes place if the matter was not resolved at the conciliation stage. The arbitrator is empowered by section 143 of the LRA to make final and binding awards.

\begin{itemize}
\item \textsuperscript{25} Act 66 of 1995.
\item \textsuperscript{26} The Labour Relations Act 28 of 1956.
\item \textsuperscript{28} Rule 12 gives the CCMA a proactive role.
\item \textsuperscript{29} At 44.
\item \textsuperscript{30} S 143.
\item \textsuperscript{31} Ss 136, 137 & 138. See the following provisions:
\begin{itemize}
\item S 136(1)(a) - provides that the CCMA must appoint a commissioner to arbitrate … if a commissioner has issued a certificate stating that the dispute remained unresolved.
\item S 137(5) - that deals with appointment of senior commissioner to resolve dispute through arbitration provides that the director’s decision is final and binding.
\item S 138(1) - the commissioner may conduct the arbitration in manner that [he/she] considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
\end{itemize}
\end{itemize}
2.6 WHAT IS CON-ARB

Is a the current process established after the 2002 amendments to the LRA\textsuperscript{32} which requires an arbitration hearing to be conducted immediately once the conciliation proceedings have failed to resolve the dispute especially in the aspects of certain dismissals and unfair labour practices like those relating to probation.\textsuperscript{33} It combines conciliation and arbitration into a single process.

2.7 WHY CONCILIATION AND ARBITRATION IN SOUTH AFRICA

Judiciary in South Africa like all judicial systems worthy of the name of being custodian of democracy and fountain of justice, this is a universal phenomenon that courts of law have duty to see that justice is not denied to members of the public by delaying decisions because justice delayed is justice denied.

This paper intends to contribute the general knowledge in its theoretical and practical perspectives. I shall critically deal with non-judicial processing by examining its achievements in connection with the civil justice reform in South Africa by briefly discussing the various major innovations that have helped to transform South African labour market and relations.

I shall attempt to raise some issues that need consideration in the whole exercise of using conciliation and arbitration mechanisms. For example the rapid increase referral of unfair dismissal cases at the CCMA\textsuperscript{34} concerns every member of labour community and the public at large. The contrary views may be raised that in such situation even the quality of justice to be dispensed can adversely be affected especially to common individual employees.

Taking an example of the case of \textit{Rustenburg Platinum Mines Ltd v CCMA}\textsuperscript{35} the Supreme Court of Appeal overturned the Labour Appeal Court’s decision which refused to intervene the CCMA decision of reinstating a security guard who was dismissed by the employer in

\textsuperscript{32} S 191(5A).
\textsuperscript{34} The CCMA case statistics report \url{http://www.ccma.org.za/} 12/07/07.
\textsuperscript{35} [2006] SCA 115.
2000 for misconduct as he failed to carry out proper search procedures at the mine’s beneficiation plant.

In Rustenburg’s case view at conciliation stage the dispute remained unresolved then was referred to arbitration where the commissioner exhausted all avenues and was convinced that the dismissed employee had no bad disciplinary record for a period of about fifteen years. The issue before the court was whether the dismissal in question was fair. Labour Court and Labour Appeal Court concurred with the CCMA commissioner’s decision that the employee was guilt of misconduct but the sanction of dismissal was severe meaning that in terms of substantive fairness such dismissal was unfair and too harsh for an employee who is economically weak and powerless.

The concept of “fairness” as the LRA suggests\textsuperscript{36} embraces both procedural and substantive fairness so that justice can be seen to be done. The interpretation thereof has not been always easy because what may be seen fair to one person might be seen unfair to another if an account is to be taken on the criteria or scale to be used to measure fairness in terms of the LRA provisions which will at the end of the day connote justice. For example it is not straightforward to interpret the term as follows:

- “Very fair” to mean generous to offender; or
- “More than fair” to mean lenient; or
- “Tough but fair” to mean unfair.

The above view reveals that reforms in any legal system are crucial in order to administer justice by utilizing alternative dispute resolution processes which carry the characteristics of flexibility and informalism.

There is no doubt that in-formalism may attract scholastic interest and discourse, for example opponents may argue that this type of dispute settlement is inadequacy because of its unenforceability nature of the decisions arrived at, however one needs to look beyond the box of formalism for the sake of social justice and fairness.

\textsuperscript{36} Ss 186 and 185.
On the other hand the proponents may raise a counter argument that administration of justice has been infiltrated by powerful economic forces and no longer serves the interest of the ordinary citizens such as individual employees. This unfortunate development has come about partly because the management of cases traditionally has over many years been left entirely in the hands of litigants and their legal representatives with the courts playing only a marginal role hence in-formalism is the best.

To me there is no greater threat to the rule of law than such state of affairs of embracing only formalism. That is why some countries as I mentioned in chapter one have realized this danger and started to put in place remedial measures by taking the management of cases out of the hands of litigants and placing it firmly under the control and supervision of non judicial organs like the CCMA or tribunals. The reason behind is that if any defect is identified at conciliation or arbitration stages and even at adjudication stage, public awareness grows so quickly to rectify the matter. This was evidenced in Rustenburg’s case when the dismissed employee appealed against the decision of the Supreme Court of appeal, the Congress of South African Trade Unions (hereinafter COSATU) sought to intervene and the application thereof was granted by the Constitutional Court. 37

The law therefore in broad sense is so dynamic, it changes with time, the administration of justice depends much on this change. The contributory factors were social, economical, political factors which produce things like the increase of population, business activities, technological innovations and public awareness bring up multitudes of disputes.

2.8 CONCLUSION TO WHY THESE PROCESSES ARE CRUCIAL

The realisation of the above views puts pressure on the society to adopt a creative and activist approach to devise new methods, forge new tools and use new strategies in order to provide social justice to the social partners so that the rule of law becomes meaningful and justice becomes a reality to all. The following chapter will deal with the research findings.

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CHAPTER THREE

This chapter deals with research findings by linking with:

- Conciliation and arbitration in terms of the LRA
- Conciliation and arbitration in terms of other laws
- The role of the CCMA and bargaining councils in conciliating and arbitrating labour disputes
- Disputes that can go to the CCMA for conciliation and arbitration
- Disputes that can’t go for conciliation nor arbitration
- Challenges in conciliation and arbitration of labour disputes

3 1 INTRODUCTION TO RESEARCH SURVEY

The purpose of the research was to investigate the effectiveness of conciliation, corn-arb and arbitration mechanisms in terms of the LRA in the Eastern Cape. More specifically, the researcher wanted to:

- Determine from the relevant literature what were the political, social and economical reasons behind the promulgation of the LRA generally.
- Know the current perceptions on conciliation and arbitration of the labour disputes.

3 2 BRIEF OVERVIEW OF THE CCMA

Before I report the research findings it is better to have an overview of the CCMA. As the law provides, is an autonomous statutory agency with legal personality as provided for under section 112 of the LRA. It is an organ of the state in terms of the Constitution, its establishment, structure, and governance is regulated by the LRA. It is a juristic person independent of the state and is governed by tripartite committee chaired by independent person. It has jurisdiction all over South Africa and has offices in all nine provinces.

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38 Carephone (Pty) Ltd v Marcus NO [1998] 11 BLLR 1093 (LAC) par 11-14.
39 Ss 112, 113, 116, 118, 119 and 121.
41 S 114(1).
The law stipulates that any dispute must be conciliated or arbitrated in the province where the cause of action arose\(^{42}\) unless the head office senior commissioner directs otherwise. \(^{43}\) Rule 24 which stipulates where conciliation or arbitration will take place as Van Zyl \textit{et al} contend\(^{44}\) equally applies to co-arb proceedings. There are instances whereby rule 24 can be deviated, for example where the cause of action arose in more than one province as it was in the case of \textit{Sean Osborne v Tricor Signs}, \(^{45}\) the appellant referred a dismissal dispute to the CCMA in East London, Eastern Cape province, at the commencement of the proceedings the respondent raised a point \textit{in limine} that Eastern Cape office had no jurisdiction to hear the matter because the employer's head office was in Johannesburg where the contract of employment was concluded, that the dispute should have been referred to Gauteng for arbitration and not Eastern Cape. The CCMA in dismissing the point held that in terms of section 114(1) of the LRA the CCMA has jurisdiction in all provinces.

Jurisdictional issues therefore must be lodged in accordance with rule 31 which deals with how to bring an application. A written objection can be raised at the conciliation or arbitration hearing as a point \textit{in limine} as stated earlier in \textit{Sean Osborne} or in the answering statement if called to deliver the same or in the form of special plea.\(^{46}\)

\textbf{3 2 1  FUNCTIONS OF THE CCMA}

According to Du Toit \textit{et al}\(^{47}\) the CCMA has mandatory of conciliating and arbitrating labour disputes in terms of the LRA, assisting in the establishment of workplace forums, compile and publish information and statistics of its activities. \(^{48}\) There are discretionary functions whereby if requested may advise on procedures to be followed by the parties, offer to settle disputes which do not fall under its jurisdiction and conduct pre-dismissal arbitrations. The implication is that the disputes resolution services have been broadened in such a way that it does not deal with dispute in terms of the LRA only, it also deals with other disputes arising in terms of other laws and contract of employment.

\(^{43}\) The CCMA rule 24(1) which regulates the area of jurisdiction of the offices of the CCMA and provides for where the dispute must be conciliated.
\(^{44}\) Van Zyl, Schelsinger & Brand \textit{CCMA Rules 2nd ed} (2005) 335.
\(^{45}\) EC 11307 (CCMA).
\(^{46}\) NB \textit{in limine} means at the beginning of a case.
\(^{47}\) Du Toit \textit{et al} 335.
Directly or indirectly through accreditation to councils and private agencies, CCMA is empowered to delegate powers to bargaining councils, to do consultation and training which means technically both disputes of rights and of interests are entertained by the CCMA. It is encouraging also that it has compiled a set of rules in accordance with the LRA and all its amendments. These rules according to van Zyl are a form of subordinate legislation because they control many labour relations aspects like filling documents, conciliation, arbitration and con-arb proceedings rules, referral procedures to the labour Court and calculation of periods. The rules are procedural mechanisms whose intention is to expedite the resolution of the disputes in a speedy and inexpensive manner.

3.2.2 REQUIREMENTS FOR THE CCMA JURISDICTION

- There must be a dispute between an employer and employee
- The alleged dispute must arise within the employment relationship
- The dispute must not be subject to an agreed procedure
- Parties should not be subject to a bargaining council with jurisdiction
- The referral must be done within the prescribed time limit

The CCMA therefore is the institution at which the LRA pivots. The policy underlying the LRA is that it is the backstop; its services are invoked only when the parties or their principals by accident or design established no dispute resolution system for themselves. This entails that where employer and employees have agreed on procedures on how to resolve their dispute they are free to choose dispute mechanism which they are comfortable with. This means that those employees who do not fall within the threshold in terms of the BCEA (those whose earning exceed R115 572.00) their contracts of employment may substitute the statutory dispute resolution. A good example is the pre-dismissal arbitrations relating the conduct or capacity of employee.

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49 S 127.
51 Van Zyl et al 3.
52 SACCAWU v Speciality Store Ltd (1998) 19 ILJ 557 (LAC) 560D.
54 S 188A is an exception to the general rule that all disputes must be referred to conciliation before they go for arbitration.
3 2 3 IS THE CCMA TRULY INDEPENDENT?

Being free and user-friendly, its services are in heavy demand and place a considerable burden on the state which means the drafters of the LRA created a system designed to “get it done” than “get it right”. The implication thereof is that this kind dispute mechanism may lead to the danger of miscarriage of justice, equality, equity, democracy and fairness in resolving disputes from workplaces. Through the LRA the CCMA must be independent. Eventually the conduct of the CCMA is subject to scrutiny by way of judicial review in the Labour Court. Arbitration awards are quite frequently reviewed because they must satisfy the requirements of regularly and propriety that the common law imposes. Besides that they must also be able to stand when tested against the constitutional mandated criterion of rationality enunciated in the case of Carephone (Pty) v Marcus NO.55

The CCMA in a sense is an administrative tribunal in the same way the Industrial Court was, this was stated in the case of SATOA v President of Industrial Court.56 Being an organ of state in terms of section 239 of the Constitution, it is bound by the Bill of Rights57 and the basic values and principles of public administration.58 The Constitution therefore requires an organ of the state to act impartially, fairly; equitably without bias59 which means the law places the CCMA to act free from the influence of any powerful pressure group in the field of labour law should it be the government, political parties, employer’s organisations or trade unions.60 However being funded largely by the tax payers61 as a matter of fact the CCMA can not be truly independent unlike the Labour Court which enjoys inherent powers. The implication in terms of sections 11662 and 117(1)63 of the LRA is that the CCMA will not avoid external influences.

55 (1998) 19 ILJ 1425 (LAC) at 1430 D-E.
56 1985 (1) SA 597 (A).
57 S 8(1) of the Constitution.
58 Ss 195(1), 195(2) (a) & (b) of the Constitution. Also see s 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000.
59 S 195(1)(d) of the Constitution.
60 SACCAWU v Speciality supra 560B.
61 S 122(1) of the LRA.
62 CCMA is governed by the governing body whereby its acts are acts of 11 persons (a chairperson, 9 members nominated by NEDLAC (National Economic Development and Labour Council) and appointed by the Minister of Labour in terms of Act 35 of 1994.
63 The Governing Body appoints the commissioner as many adequately qualified persons as it considers necessary to perform the functions as the LRA or any other law require.
3 2 4 SKILLS AND COMPETENCE REQUIRED TO SERVE AS A COMMISSIONER

Subsequently if comparison is to be made between the previous Act and the current one, members of the Industrial Court had to have knowledge of law as well as the required measure of competence. However under the new Act this criterion was dropped maybe because the law makers expected some commissioners to act only as conciliators where the knowledge of law is relatively not essential. There are grades of commissioners, normally the appointees are appointed in the lowest grade if they lack qualifications for arbitrations, this has brought a negative effect as Brassey once observed that as the commission becomes more hard-pressed, the lower grade commissioners are asked to arbitrate cases and the effects are sometimes unhappy. Also Grogan in the case of *Dimbaza Foundaries (Pty) v CCMA* stated as follows:

“It has to be note from my experience that not inconsiderably number of CCMA arbitrators do not appear to have the necessary legal understanding both of the substances and of arbitration process.”

The same view is also found in the case of *Mlabo v Masonite Africa Ltd* where the Labour Court held that:

“[i]t is fair to expect everyone appointed as a commissioner under the CCMA to at least be aware that there is a statute [The BCEA] which lays down minimum hours and basic conditions of employment in this country in excess of which an employer of when it applies may not compel an employee to work.”

Both *Dimbaza* and *Mlabo* cases advocate that in resolving labour disputes by ways of conciliation and arbitration, legal skills are inevitable in order to effective the processes, but due to the lack of enough trained commissioners to face the rapid growth of labour disputes, the CCMA is still facing challenges in this area. As a matter of facts the commission is forced to utilize the lower grade skilled commissioners with less arbitration skills to “get it done” than “get it right”.

64 S 17(1)(b) A of Act 28 of 1956.
65 Brassey A7-8.
66 (1999) 20 ILJ 1763 (LC) 1774A.
67 [1998] 3 BLLR 291 (LC) at 300.
3.2.5 ARE CCMA AWARDS BINDING?

The LRA makes it clear that the arbitration awards issued by the commissioners are final and binding as orders of the courts, in this perspective the CCMA may be seen as assisting the Labour Court despite the fact that sections 145 and 158(1) (h) in number of occasions has been used to review these awards.

The labour court has the right to set aside rulings and awards of the CCMA commissioners where there is an element of “misconduct”. If that is the case it is therefore not the arbitrator's decision that is taken on review, rather is the manner in which those awards were arrived at and should be objective and not subjective. What can be termed as arbitrator misconduct may include, among others:

- **Bias** - if the commissioner acts impartially by the way he/she interrogates the witnesses or if refuses to allow a party the right to question witnesses or bring evidence. For example in the case of *Mutual and Federal Insurance Company Ltd v CCMA*, the court held that proof of actual bias of an arbitrator or commissioner was not necessary. The applicant for the review only needed to prove that the arbitrator's conduct indeed gave rise to a reasonable suspicion of bias. In *Nusog v Minister of Health and Social Services* also the labour court found that the arbitrator had aggressively interrogated the applicant employee and that this indicated bias and was therefore grounds for successful review.

- **Improper analysis of evidence** - as it was in the case of *SABC v CCMA and Others* the CCMA had found that the employee had been unfairly dismissed because he was dismissed for misconduct whereas the actual dismissal was related to incapacity which is different from misconduct.

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68 S 143 provides that:

(1) An arbitration award issued by a commissioner is final and it may be enforced as an order of the Labour Court, unless it is an advisory award …

(4) If a party fails to comply with an arbitration award that order the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.

70 [2005] 4 BLLR 373 (LC).
71 [2006] 6 BLLR 587 (LC).
• Failure of the commissioner to apply his/her mind which may lead to misconstruing of evidence - as it was in the case of *American Leisure Corporation, Durbanville v Van Wyk*\(^{72}\) the Labour Court found that the CCMA had misconstrued the evidence and therefore he had decided incorrectly that the employee had been dismissed.

• *Ultra vires* and failure to consider statutory provisions - in *Mlabo’s* case above the arbitrator's award was set aside because he had failed to consider the provisions of the Basic Conditions of Employment Act in arriving at his decision.

Review or rescission of commissioner’s awards can stand only if there are incorrectly decided or if they don’t meet the common law principles of natural justice and fairness. Apparently the Promotion of Administrative Justice Act 3 of 2000 (hereinafter PAJA) applies to CCMA awards.\(^{73}\) The grounds for review under PAJA are more extensive than those set out in section 145 of the LRA then the later may look inferior to the former and give the employer a chance always to use PAJA than LRA.

My view is that like the former Industrial Court, the CCMA should enjoy the privilege of deviating from its own decisions in order to cope with socio-economic changes. Even Brassey\(^{74}\) once suggested that the Industrial Court was under no duty to follow its own decisions. A well-reasoned decision might prove a useful guide but nothing required the presiding officer to defer to an earlier judgement. Being unbound the IC could readily respond to changes in prevailing mores of the society, but uncertainty and inconsistency was inevitable result of the system and this generated much dissatisfaction. However if the commissioner’s awards are well reasoned they must be endorsed quickly by the courts in order to give directions and avoid delays, backlog and costs. This may serve as a cure to uncertainty or inconsistency due to the fact that the CCMA like the IC is not a court but a tribunal with wide ranging investigative power and diverse functions.\(^{75}\)

Even with the higher courts where the English doctrine of *stare decisis* literally means to stand by previous decisions applies, the inferior courts are bound by the decisions made by

\(^{72}\) [2005] 11 BLLR 1043 (LC).

\(^{73}\) *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* [2006] SCA 115.

\(^{74}\) Brassey A7-131.

\(^{75}\) Van Zyl *et al* 9.
the superior courts a good example is the case of Carephone (Pty) v Marcus\textsuperscript{76} where the Labour Appeal Court provided the final answer to whether an arbitration award can be reviewed under section 145 of the LRA, the courts’ answer was “NO” basing on rationality principle. What is encouraging is that the lower court is not bound by the decision of a higher court if it was wrongly decided this is the position taken in the case of Bargaining Council for Clothing Industry (Natal) v Confederation of employers of Southern Africa\textsuperscript{77} this entails that the inferior courts including the CCMA are not supposed to be dragged into wrongly decisions made by the superior courts for paying due regards to the principles of justice and fairness. The good practice of resolving labour disputes whether by the CCMA or the courts is to resolve the labour disputes correctly, justly and fairly even when it means to deviate from the superior orders.

3.3 WHO HAS THE ULTIMATE SAY ON FAIRNESS BETWEEN AN EMPLOYER AND EMPLOYEE?

The onus is placed on employers to show the fairness of a dismissal in both procedural and substantive senses.\textsuperscript{78} When adjudicating a disputed dismissal for instance, the commissioner must take into account the Code of Good Practice on Dismissals listed as Schedule 8.\textsuperscript{79}

It was not intended to require of employers to follow the detailed and technical pronouncements laid down by the Industrial Court regarding procedural fairness. It is disturbing that the CCMA commissioners are required once again especially on unfair dismissals and unfair labour practices to go back to dig deeper and be able to elaborate standards of procedural fairness. Item 4 to Schedule 8 calls on an employer to conduct an investigation (but not a formal enquiry) to determine whether there are grounds for dismissal. The test for procedural fairness under this item is probably an assessment of the process. The commissioner therefore will have to ask himself/ herself as to whether the allegations and evidence of wrongdoing against the employee? Were the allegations openly discussed? Did the employee has an opportunity to explain his version of events and to be able to challenge

\textsuperscript{76} (1998) 19 ILJ 1425 (LAC).
\textsuperscript{77} (1999) 19 ILJ 1458 (LC) at 1463 A-B.
\textsuperscript{78} S 188(1).
\textsuperscript{79} S 188(2).
the employer’s case? If the commissioner won’t consider these questions he/she will definitely face the music under sections 144\(^{80}\) and 145.\(^{81}\)

On substantive fairness, some arbitrators have been tempted to impose their standard for a sanction rather than to assess whether the employer’s sanction is fair. Fairness embodies a range of possible sanctions; to this extent, it is a malleable concept. It is not the task of arbitrators to impose their idea of a sanction on employers unless the latter’s decision is excessive or elicits a sense of shock.

3.4 FAIR AND QUICK

There is always a friction between the two. Under section 17(12)(a) of the previous Act,\(^{82}\) the IC had power to order costs according to the requirements of law and fairness but in the case of *NUM v East Rand Gold & Uranium*\(^{83}\) Goldstone delivering the unanimous judgment of the court held among other things that proceedings in the Industrial Court are frequently a part of conciliation process therefore parties should not be discouraged from approaching the IC. The judge opined that consideration should be given to avoid cost orders especially where there is a genuine dispute. *NUM’s* case suggests that the court, independent and impartial tribunal or forum should be easily accessible to litigants like those who suffer the effect of the unfair labour practices or dismissals and try to avoid cost orders.

Quick dispute resolution, fairness, democracy and peace at workplace are the major objectives of the LRA. The importance of a speedy resolution has long been recognized in labour fields. For example in the case of *ACTWUV v Veldspun Ltd*\(^{84}\) on private arbitration the court in emphasizing on speedy held that expedition is itself an element of justice because “justice delayed is justice denied”. This is a maximum of whose truth we are daily reminded by the protracted processes of civil and criminal litigations.

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80 S 144 allows the commissioner on own accord or on application of any party affected by the commissioner’s award or ruling to vary or rescind an award or ruling if erroneously made of if ambiguous or was granted as a result of mistake common to the parties.

81 Ss (2) of s 145 allows the Labour Court to review arbitration awards if the commissioner committed misconduct, gross irregularity, exceeded power and if that award has been improperly obtained also review is allowed in terms of s 158(1) on grounds permissible in law.

82 Brassey A7-113.

83 (1991) 12 ILJ 1221 (A) at 1241J -1243B.

84 1994 (1) SA 162 at 169 F-H.
For the sake of fairness principle which has become the essence of labour law and practice, it is not only a moral adjunct, that is why a balance between the two must be struck to avoid injustice as stated in *SACWU v Afrox*.\(^{85}\) To balance both speedy and fairness must always be considered in order to avoid injustice to both parties. This means that justice cannot abandon in pursuit of expeditions when the two goals conflict each other as *Shoprite Checkers (Pty) Ltd v CCMA*\(^{86}\) suggests that justice should normally be given precedence.

### 3.5 COLLECTIVE BARGAINING

The LRA was designed to provide a framework for collective bargaining that meets the constitutional requirements. Any duty to bargain over interest issues will be derived from contract and not legislation. This finding would seem to conclude the debate on the duty to bargain.

Moreover a duty to bargain is distinguishable from bargaining in good faith. The latter means the manner in which negotiations are conducted. Shop stewards who act on behalf of the employees are not supposed to pursue a negotiating style which is incompatible with the employment relationship. If bargaining is abusive, disruptive and is done in a rude manner it is against the constitutional values. For example in the case of *Mazingi and Department of Health – Eastern Cape*\(^{87}\) the dismissal of a shop steward was upheld because his behaviour was incompatible with the employment relationship. To the contrary, the dismissal a shop steward on grounds amounted to victimisation was rejected by the Labour Appeal Court in *Kroukamp v SA Airlink (Pty) Ltd*\(^{88}\) where reinstatement was ordered.

Duty to bargain notion applies to both employers and employees; it has always meant to meet the constitutional and international law requirements. The employer withdrawal from wage negotiations and then cancelled the recognition agreement attention is unconstitutional. In *County Fair Foods (a division of Astral Operations) v HOTELICA*,\(^{89}\) the union gave a strike notice to the employer who successfully obtained an interim interdict. On the return date, the Court examined the true nature of the dispute and found that the dispute was about a refusal to bargain, rather than failed collective negotiations. It was held further that the union was

\(^{85}\) (1999) 20 *ILJ* 1718 (LAC) at 1724 para 22.
\(^{86}\) (1998) 19 *ILJ* 892 (LC).
\(^{87}\) [2006] 5 BalR 481 (PHWSBC).
\(^{88}\) [2005] 12 BLLR 1172 (LAC).
\(^{89}\) [2006] 5 BLLR 478 (LC).
obliged to obtain an advisory arbitration award under section 64(2) as a precondition to a strike. Therefore the union had failed so to do and, to this extent, the interdict was justified. On the employer side the court stated that the procedural/technical requirements were not followed then the interdict was discharged.

Section 23(5) of the Constitution recognises the right to engage in collective bargaining. The courts had to interpret the meaning of this section and the extent to which the LRA was constitutionally aligned therewith.

This interpretation process therefore calls for consistency with international law.90 Voluntarism in terms of ILO Convention does not imply free and willing engagement; rather negotiations are often the alternative to economic pressure associated with strikes or lockouts. The consequence of not reaching agreement is one of driving forces behind the voluntarism which implies the freedom to make choices.

3.6 RESEARCH METHODOLOGY

The following procedure was adopted to solve the main and sub-problems stated in chapter one:

- A literature survey was conducted to examine conciliation and arbitration practices in South Africa generally prior to the promulgation of the LRA, in addition to this, objectives contained in the Act were identified to be advancement of economic development, social justice, labour peace and democratisation of the workplace.

- An empirical study consisting of an electronically mailed questionnaire91 was conducted among the CCMA full time and part time commissioners in Port Elizabeth and East London. The questionnaire had four sections:

Section one dealt with personal information of the participants. In this section the following were asked, level of commission they were appointed, their mother language(s), when were

90 The ILO Convention on the Right to Organise and Collective Bargaining (98/1949) requires measures/machinery for Voluntary negotiations and the conclusion of collective agreements to govern terms and conditions of employment.
91 Appendices A & B.
their first appointment as commissioners, what type of employment do they hold, if part-time commissioner what other employment do they have and explanation of the nature of their work.

Section two dealt with the work environment, the participants were asked if they have access to the following working tools (computer, telephone, fax and cell phone). It proceeded with asking which venue do they use to resolve dispute and if these venues have adequate furniture, lighting and are accessible to satisfy their need. A general question on remuneration paid was asked in form of too much, satisfactorily or too little. The participants were asked an average of how many conciliations, con-arbs and arbitrations they can handle per day. Finally on this section the question on whether the working environment is conducive to effective dispute resolution was asked and reasons to motivate their answers.

The third section dealt with the administrative support, the participants were asked whether the CCMA provides conducive work environment and administrative support and state reasons.

The last section dealt with the factors in their views that contribute or hinder the effective, accurate and inexpensive labour dispute resolution.

3.7 RESEARCH FINDINGS

The results of the empirical survey done on the CCMA commissioners at Port Elizabeth and East London, where fourteen participants responded, the feedback can be reported as indicated in the following table:
### 1 PERSONAL INFORMATION

1.1 Level of appointed Commissioners

<table>
<thead>
<tr>
<th>Level</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>6</td>
</tr>
<tr>
<td>B</td>
<td>5</td>
</tr>
<tr>
<td>SENIOR</td>
<td>1</td>
</tr>
<tr>
<td>NIL</td>
<td>2</td>
</tr>
</tbody>
</table>

1.2 Mother language of the Commissioners

*apart from mother language all commissioners are capable of speaking more than one official language*

<table>
<thead>
<tr>
<th>Language</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>ENGLISH</td>
<td>3</td>
</tr>
<tr>
<td>AFRIKAANS</td>
<td>7</td>
</tr>
<tr>
<td>IsiXHOSA</td>
<td>4</td>
</tr>
<tr>
<td>IsiZULU</td>
<td>0</td>
</tr>
<tr>
<td>OTHER</td>
<td>0</td>
</tr>
</tbody>
</table>

1.3 Year of Commissioners’ appointment

<table>
<thead>
<tr>
<th>Year</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995-2000</td>
<td>4</td>
</tr>
<tr>
<td>2000-2005</td>
<td>4</td>
</tr>
<tr>
<td>2005-Todate</td>
<td>4</td>
</tr>
<tr>
<td>Not indicated</td>
<td>2</td>
</tr>
</tbody>
</table>

1.4 Commissioners’ contract of employment

<table>
<thead>
<tr>
<th>Contract</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>FULL TIME</td>
<td>4</td>
</tr>
<tr>
<td>PART TIME</td>
<td>10</td>
</tr>
</tbody>
</table>

1.5 Part time commissioners’ other employment (*Other professions include lecturers, consultants, administrative officers and private trainers. Non legal professions means those part time commissioners who did not indicate their other employment*)

<table>
<thead>
<tr>
<th>Employed as</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney</td>
<td>1</td>
</tr>
<tr>
<td>Advocate</td>
<td>1</td>
</tr>
<tr>
<td>Other legal professions</td>
<td>7</td>
</tr>
<tr>
<td>None legal professions</td>
<td>1</td>
</tr>
</tbody>
</table>

### 2 WORK ENVIRONMENT

2.1 Commissioner’s access to working tools

<table>
<thead>
<tr>
<th>Tools</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Computer</td>
<td>14</td>
</tr>
<tr>
<td>Telephone</td>
<td>13</td>
</tr>
<tr>
<td>Fax</td>
<td>13</td>
</tr>
<tr>
<td>Cell phone</td>
<td>11</td>
</tr>
</tbody>
</table>

2.2 Venues used by commissioners to resolve disputes (*venues other than CCMA office include libraries, hotels, conference centres and town halls, department of labour, municipal halls*)

<table>
<thead>
<tr>
<th>Venue</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>CCMA office</td>
<td>13</td>
</tr>
<tr>
<td>Other</td>
<td>13</td>
</tr>
</tbody>
</table>
2.3 Commissioners’ views on their remuneration

<table>
<thead>
<tr>
<th>Remuneration</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Too much</td>
<td>0</td>
</tr>
<tr>
<td>Satisfactorily</td>
<td>6</td>
</tr>
<tr>
<td>Too little</td>
<td>7</td>
</tr>
<tr>
<td>Not sure</td>
<td>1</td>
</tr>
</tbody>
</table>

2.4 Average number of cases handled by one commissioner

<table>
<thead>
<tr>
<th>Cases per day</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conciliations</td>
<td></td>
</tr>
<tr>
<td>0 - 3</td>
<td>7</td>
</tr>
<tr>
<td>4 - 7</td>
<td>7</td>
</tr>
<tr>
<td>Con-arbs</td>
<td></td>
</tr>
<tr>
<td>0 - 3</td>
<td>9</td>
</tr>
<tr>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Arbitrations</td>
<td></td>
</tr>
<tr>
<td>0 - 2</td>
<td>12</td>
</tr>
<tr>
<td>2 - 3</td>
<td>2</td>
</tr>
</tbody>
</table>

2.5 Commissioners’ views on working environment (conducive environment entails; office and equipment, manpower, interpreters, services and library)

<table>
<thead>
<tr>
<th>Conducive</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>YES</td>
<td>9</td>
</tr>
<tr>
<td>NO</td>
<td>4</td>
</tr>
<tr>
<td>Not sure</td>
<td>1</td>
</tr>
</tbody>
</table>

3 ADMINISTRATIVE SUPPORT

3.1 CCMA provision of facilities and administrative support (facilities, constant regional and national offices' support, having interpreters, administrators, training and motivation)

<table>
<thead>
<tr>
<th>Adequate</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>YES</td>
<td>6</td>
</tr>
<tr>
<td>NO</td>
<td>8</td>
</tr>
</tbody>
</table>

4 FACTORS FOR EFFICIENCY

<table>
<thead>
<tr>
<th>Contributory</th>
<th>Hindrance</th>
</tr>
</thead>
<tbody>
<tr>
<td>screening of the referrals to the CCMA</td>
<td>Lack of screening of referrals to the CCMA</td>
</tr>
<tr>
<td>have clear guidelines</td>
<td>Lack of clear guidelines</td>
</tr>
<tr>
<td>Trained, professional and competent staff</td>
<td>untrained, unprofessional and incompetent staff</td>
</tr>
<tr>
<td>ongoing interaction between management and employees and healthy relationship</td>
<td>lack of ongoing interaction between CCMA management and its employees and unhealthy relationship</td>
</tr>
<tr>
<td>policy on dispute management</td>
<td>lack of policy on dispute management</td>
</tr>
<tr>
<td>information sharing/ transparency</td>
<td>lack of information sharing and transparency</td>
</tr>
<tr>
<td>review of dispute resolution mechanisms</td>
<td>lack of review mechanisms</td>
</tr>
<tr>
<td>familiarity of labour law and CCMA rules</td>
<td>lack of knowledge of labour laws and CCMA rules</td>
</tr>
<tr>
<td>objectiveness</td>
<td>punctuality</td>
</tr>
<tr>
<td>punctuality</td>
<td>peaceful work environment</td>
</tr>
<tr>
<td>peaceful work environment</td>
<td>late referrals</td>
</tr>
</tbody>
</table>
• employees’ (commissioners) willingness to go extra mile
• competent full time commissioners
• mutual respect
• commissioners to "keep it simple"
• honesty
• parties’ willingness to resolve
• easy access
• timeous notification to the parties
• suitable venues
• timeous delivery of awards/rulings
• not too much emphasis on legalities and formalities
• no postponements
• cooperative parties (employers and employees)
• parties’ knowledge of basics in labour relations and laws
• regular training and workshops to the commissioners and other CCMA staff

• lack of relaxed work environment
• lack of employees’ (commissioners) willingness to go extra mile
• lack of competent full time commissioners
• laziness
• dishonesty
• delays on payments of commissioners’ fees
• absence of orientation to new commissioners
• absence of regular workshops
• defective referrals
• volume of cases
• postponements
• overemphasis on legalities and formalities
• defective notices to the parties
• uncooperative parties
According to Figure 2 above, empirical survey revealed that the CCMA commissioners in Eastern Cape fall into three categories which are level A, B and seniors. All commissioners apart from their mother languages which are English, Afrikaans and Isi-Xhosa, they are capable of speaking more than one of these official languages including Isi-Zulu and Sotho though other official languages like Setswana, IsiNdebele, Tshivenda, Xitsonga and SiSwati were not indicated. My view is that commissioners are not experiencing language problems because of capability of knowing more than one languages and administrative support of interpreters. This entails that the CCMA commissioners are capable of communicating with parties during conciliations, con-arbs and arbitrations.
Using the percentage representation, 28.6% of the population constitutes the number of the CCMA commissioners who were employed between 1995 and 2000 years, another 28.6% were employed between 2000 and 2005. From 2005 to date also 28.6% were employed, but it was unfortunate because 14.3% did not indicate when they were appointed as commissioners for the first time. It is likely to believe that the longer the commissioner deals with resolving labour disputes the more the experience he/she gets and hence effective conciliation and arbitration mechanisms.

28.6% of the total number of commissioners holds full-time employment while 71.4% are part-time commissioners who have other employments such as attorneys, advocates, lecturers, administrative officers, consultants and private trainers as shown in Figure 3 though 10% did not indicate whether they have got other jobs. It has been revealed that the CCMA uses a big number of part-time commissioners who have other responsibilities. It is a common sense that due little number of full-time commissioners who can resolve disputes on daily basis the work load is too heavy for both full-time and part-time commissioners as some views came out that workload is among the factors which hinder effective dispute resolution.

3 7 3 SURVEY FIGURE 3

![Commissioners' Other Employments](image-url)
Working environment and administrative support in Survey Figure 4 included working tools, venues, conducive working environment and adequate administrative support. All respondents indicated that they have access to the computer and other working tools such as telephone, fax and cell phone. It is pity that about 10% of the part-time commissioners do not have access to telephone, fax or cell phone, in this situation one may expect work related challenges. The general feeling is that all commissioners use the CCMA offices and other venues like libraries, municipal halls, conference centres, hotels, town halls, department of labour and employers’ premises to resolve the parties’ disputes. Some respondents revealed that other venues do not satisfy their needs, hence are inadequate and not conducive.
On cases handled per day many respondents agreed that they are capable of handling three conciliations and three con-arbs per day, however fulltime commissioners and part-time commissioners with long time experience are capable of handling four to seven conciliations and con-arbs. Overwhelming majority said that they are capable of conducting two arbitrations per day while 14.3% indicated to handle more than two arbitrations per day.
This section dealt with commissioners’ views on remuneration paid. There is a general reaction that remuneration paid is not satisfactory because about 60% of the population (participants who responded with too little and not sure) supports this observation. I think this factor is supported by some respondents’ views that no motivation and commitment towards their job which may lead to the danger of incompetence and incapacity as they may want to “get done” than “get it right”.

3.7.7 FACTORS FOR EFFICIENCY

This research combined both quantitative and qualitative approaches. It is in this context whereby factors that contribute or hinder effective dispute resolution will be analyzed qualitatively.

The survey shows that there are contributory factors towards effective dispute resolution mechanisms such as commissioners’ competence, knowledge of the laws, parties’ collaboration, timeous delivery of awards, transparency, sincerity, relaxed work environment, regular training, having policy, teamwork avoidance of postponements and too much
emphasis on legalities and formalities. The absence of the factors mentioned can hinder efficiency in terms of effectiveness, accuracy and inexpensive labour dispute resolution.

3.8 SURVEY INTERPRETATION

The CCMA conciliation and arbitration functions resemble those of ADR because they both put emphasis on minimizing costs, quick and less formal. From my views the CCMA is succeeding because this survey shows that commissioners’ capacity is to conciliate and arbitrate more than two cases per day. When a commissioner (full-time or part-time) listens to parties’ arguments and submissions and manages to handle more than three disputes a day, it is encouraging and is a success story, one must be proud and bear in mind other responsibilities held by these commissioners. Full-time commissioners also carry a heavy work load of handling up to 7 cases per day as appears in Figures 1 and 5.

The success of the CCMA can be reflected on Mawande’s analysis who contends that in the year of 2006 more than 21000 awards were in favour of employees and that COSATU has adopted what referred to as “Mababuyiselwe” literary meaning reinstate them” to ensure that employers comply with CCMA awards.

It is discouraging to the commissioners when some parties like employers do not respond or adhere to the decisions reached at as it was exposed by Khola when he discussed the mistakes that employers usually make in South African Electrical Contractor’s Association (hereinafter ECA). According to the author common mistakes which are made by employers are

- to ignore the CCMA or bargaining council’s notice to appear
- to simply write a letter to the commission or bargaining council
- to ask an ECA official alone to go to the CCMA or bargaining council

This scenario shows the difficulties which the CCMA face regularly.

92 The Herald Port Elizabeth Monday January 14, 2008 2 as appears in Appendix C.
Every case taken to CCMA or bargaining council therefore will potentially have a different outcome because circumstances differ as do the viewpoints of different arbitrators. It is therefore very important for employers, before dismissing employees for instance to try to get the case analysed by a labour law experts in order to check whether dismissal in question did comply with the LRA requirements so that such dismissal will be acceptable or not.

The CCMA was therefore established in terms of the LRA to provide a more flexibility, cost-effective and constructive mechanism for the resolution of labour dispute through dialogue and joint problem solving.94

Respondents’ comments suggest that the CCMA in Eastern Cape is still facing challenges in terms of remuneration paid, competency, capacity, encouraging work environment and number of full-time commissioners who can deal with arbitration conciliation and mediation on daily basis in order to cope with referral increase pointed out by some authors as well as respondents.

Starting with remuneration paid Figure 6 suggests that 50% of the respondents is satisfied with the salary though the implication may be different because the word “satisfactorily” used in the survey might be interpreted differently. Another 50% of the respondents has indicated that remuneration is too little which means these commissioners are not motivated enough to do their work. Though 7.1% responded with “not sure” answers still remuneration problem can not be undermined.

Considering the problem of incompetence which many respondents counted as a major contributory factor towards effective dispute resolution, my view is that skills shortage is not only experienced at the CCMA, this is a common problem in every sector nationally and internationally. This can only be solved through progress realization of training more commissioners and other staff especially those in case management section which may be regarded as the focal point of the CCMA.

There were concerns about delays pointed out in the survey, some respondents identified the cause of delays to be the fact that all referrals are handled by the regional office which is Port

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Elizabeth. This entails that East London office relies heavily on the regional office. Taking into consideration the intense workload with limited manpower the Port Elizabeth office is overburdened. To solve the problems there were suggestions that the East London office can work better without liaising with the regional office in order to minimise unnecessary delays. To me the respondents’ proposal looks good if it can be a cure. However integration will remain crucial for justice in Eastern Cape.

Postponements of the matters must be discouraged in order to enhance effective dispute resolution mechanisms in terms of speed, accuracy and avoidance of unnecessary expenses so that the CCMA may be attributed with the reputation of the fountain of justice
CHAPTER FOUR

This chapter will deal with the summary of findings and conclusion by considering advantages and disadvantages of conciliation and arbitration mechanisms.

4.1 PERSONAL ANALYSIS

Every organized society has its own system of the law. For instance in the primitive society the laws were relatively few then the system of law enforcement was relatively simple, however the more the society becomes complex the more the numerous and complex of the law.

Back to American legal tradition, settlement of most civil disputes through litigations before the introduction of ADR was emphasized in order to obtain justice. Since the second World War individuals and organizations increasingly resorted themselves to judicial process to resolve their dispute, as a result courts became overburdened with many cases, subsequently the dispute resolution mechanism slowed down and became costly as a result the access to the courts diminished also because of difficulties in accessibility and affordability.

Litigation process therefore encouraged conflicts between parties due to the concept of “one party is right” and the “other party is wrong”. Each party to the dispute has a belief of winning the case if he/she uses his/her own lawyer who could effectively defend his/her case. Such belief encourages the litigation to continue until a judge makes a final judgement as seen in Rustenburg. The outcomes of the case sometimes leave the “hard feeling” between the parties and create a huge gap which is not easily filled.

Alternative means of dispute resolution like mediation, conciliation and arbitration have been practiced in order to encourage compromise between the parties and the contemporary movements to embrace ADR since the Pond Conference in 1976 in the US. In 1990 the ADR Reform movement accelerated rapidly at state and federal levels in both public and private sectors which mandated the use of ADR in all civil cases before trial. The programs were monitored by the judiciary and that is why they were called “Court annexed”.

40
Government funds were used to provide ADR services through organs like Judicial Arbitration Meditation Services companies whose emphasis has been on:

- Speed (quick dispute resolution)
- Low costs
- Privacy for their clients

At federal level senior judges publicly support ADR, for example in 1998 annual report the chief justice William Hubbs Rehnquist in addressing the bar publicly stated that alternative forms of dispute resolution such as meditation and arbitration should be the first choice in resolving most conflicts.

The study shows that the US Federal Judicial Center in 1990 noted among other things the following:

- ADR programs provided more timely case resolutions
- Participants had not viewed ADR as a form of second-class justice
- ADR reduced the overall costs of litigation
- Judges believed that ADR programs reduced their caseload burden
- Majority of participants believed that the expansion of court-annexed ADR

The government passed laws such as the Civil Justice Reform Act of 1990 and Alternative Dispute Resolution Act of 1998, which encouraged all federal courts to have some ADR policy. In 1994 ADR in the US was used to resolve most of civil disputes in health care, medical malpractice and casualty insurance, corporate merger and acquisitions, international and domestic trade and in family issues.

In South Africa the CCMA, bargaining councils and private agencies despite of the factors that hinder their effectiveness, have played a major role in resolving labour dispute by ways of conciliation, con-arb and arbitration.
4.2 RECOMMENDATIONS

Research shows that two schools of thought have evolved towards conciliation, con-arb and arbitration mechanisms. Some legal experts generally favour conciliation and arbitration mechanisms when they submit that the CCMA rules which are form of subordinate legislation are the procedural machinery that are intended to expedite the resolution of dispute in a speedy and inexpensive manner. Others do not favour alternative dispute resolution mechanisms as seen from Basson and Bendeman views. However no matter what each school of thought advocates, it is better to compare both their advantages and disadvantages.

4.2.1 ADVANTAGES

The following can be considered to be advantages of conciliation and arbitration dispute resolution mechanisms in labour disputes.

- There is a wide range of democracy because each party feel at easy and is given an opportunity to consider the settlement of the dispute before adjudication. Each party is in a position to control all processes and the outcomes because not pre-determined by one party only.

- No need of formalized procedures are required as the flow in the settlement comes from good pre-trial scheduling conferences, this saves time and energy which could be used in normal trial for example time which could be used from the filing procedures to disposition of the case.

- There is a feeling of justice, fairness, reasonability and realistic result to the parties if they reach agreements, in this regards justice is seen to be done.

- If an agreement is reached the impression is to have a creative and forward looking solutions, this means that settlements reached in conciliation or arbitration for example

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95 Van Zyl et al 3.
96 Basson et al 335 contend that the new Labour Relations Act of 1995 has not lived up to its promise because dispute resolution has again, become complex and relatively technical. Bendeman agrees with this view that the technical nature of internal conflict resolution mechanisms and incapacity of the parties have resulted in high referral rate and consequent problems that the CCMA is experiencing.
will often reflect the future than a mere payment of damages and reinstatement of the employee(s).

- From economical point of view conciliation and arbitration aim not to use much of society’s scarce resources.

- Speed: conciliations, con-arbs and arbitrations are quicker than adjudication\(^97\) hence a good strategy for economical advancement. For example If a labour matter is successfully settled the commissioner’s award is final and binding to the parties which means there will be no trial nor appeal to follow, in this regards time and money are saved. Furthermore these mechanisms have been designed in a less confrontational approach to manage conflicts at workplaces.

- Conciliation and arbitration encourage confidentiality because it may be seen as a private process unlike in litigation which attracts public forum hence reputation of the parties is not affected because they encourage good relationship between the parties as working together brings understanding.

- Alternative dispute resolution mechanisms of conciliation and arbitration in labour relations are effective methods and have a remarkable track record in generating settlements. This is evidenced in South African CCMA and also worldwide whereby most countries have resorted to these processes in order to curb the problem of caseloads, case delays for the sake of administrations of justice and restoration of broken relationship between employers and employees.

### 4.2.2 DISADVANTAGES

Every dispute resolution mechanism has got its positive and negative effects. This means that there are also disadvantages of conciliation and arbitration which can be described as follows:

- If the dispute is not settled at conciliation, con-arbs or arbitration stages, it may be seen as wastage of time, this may favour the opponents of alternative means dispute

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\(^97\) Kleyn *et al* 209 arbitration has the advantage of being cheaper than litigation and of solving the dispute more speedily and parties have a free choice as to whom the arbitrator is to be.
settlement to say that these mechanisms are used as mere delaying tactics of disposing cases.

- Where the commissioner has lost impartially either at conciliation or arbitration stage, the opponents can use it to build their case in adjudication.

- In the arbitration stage if the appointed arbitrator is not firm, inexperienced, uncooperative, obstructive, and one who seeks to subvert the process he/she may cause loss and the arbitration in question may be protracted and become more expensive, also the awards may attract rescissions and reviews as discussed in 3.4.1.

- Arbitration in ADR or common law courts’ perspective, the compensation is not fulfilling like in adjudication. That means, occasionally parties get smaller amount of recovery compared to what would be obtained in litigation therefore in economical point of view there is party’s financial loss, maybe because the commissioners are not empowered to go beyond the monetary limits.

- Due to the nature of arbitration proceedings where the commissioner has to pay due regards to the law and facts, as in courts it implies win-lose situation\(^98\) which is the case of adjudication hence this may undermine conciliation and arbitration mechanisms.

4.3 RECOMMENDATIONS

Based on what have been discussed above I would like to propose the following solutions to the problems:

- Regular training for the presiding commissioners is required in order to keep them with updates of the law. According to the empirical survey it is obvious that the number of commissioners is not enough therefore, it could be wise to increase a number of commissioners by training or recruiting LLB graduates in order to deal with the current increase of referrals at the CCMA also as way of creating employment in order to reduce poverty in Eastern Cape province.

\(^98\) Kleyn et al 209.
• To have national or international integration horizontally and vertically whereby the Eastern Cape commissioners will be able to learn from other provinces like Gauteng or Western Cape. It is proposed to the commissioners to have opportunities of learning skills from other countries like Canada, the UK, the USA, other developing and even African countries like Tanzania which have been using conciliation and arbitration mechanisms in commercial court. By vertical integration if necessary it is good to learn procedural skills from the superior courts like Labour Court and Labour Appeal Court so that conciliation and arbitration mechanisms may look effective.

• Training in labour relations must extend to employers especially those at the managerial levels who deal with disciplinary issues and the shop stewards who represent the employees. I believe that if these business partners are having the basic required knowledge in labour laws and relations it may help to minimize conflicts at workplaces and avoid unnecessary expenses and engage in productivity than wasting time in resolving workplace disputes. In most cases the CCMA rulings are ignored by the employers as Mawande contends that more and more employers choose to ignore awards calling for reinstatement and compensation of unfairly dismissed employees and seek Labour Court reviews.99 My view is that if fair reasons recognised in law and procedures provided for in the LRA are followed by employers and employees, there is no point of ignoring the CCMA awards and rush to high courts because even these courts sometimes are not ready to interfere with commissioner’s awards if they are fairly decided as supported by Ngcobo AJP [that the commissioner’s awards are final and the Labour Court has limited power to intervene]100 and the case of Chirwa v Transnet Limited.101 I think the parties tend to seek Labour Court reviews because of ignorance.

• Both employers and employees should not perceive employment conflicts in a negative, for instance by trying to avoid them rather they must be prepared to work together by innovating techniques of reducing conflicts timeously in an acceptable manner

• Effective use of the CCMA, bargaining councils and accredited agencies may assist in minimising strike actions, lockouts and replacement labour. Furthermore this may

99  The Herald Port  Appendix C.
100  County Fair Foods (Pty) v CCMA (1999) 20 ILJ 1701 at 1707G-1.
101  Case CCT 78/06 Case CCT 78/06 [2007] ZACC 23.
advance productivity by avoiding unnecessary losses of workdays and create good working environment, peace and democracy which the LRA is striving for.

• Dissemination of the role of CCMA to the public through mass media like Television, newspapers and journals may help to educate conciliation and arbitration dispute resolution mechanisms to the public at large.

• Defects in internal disciplinary procedures especially in small and medium business entities must be identified and rectified quickly. Transparency about internal procedures must be encouraged to avoid unfair labour practices, discrimination and victimisation.

• Condonation in terms of sections 191(2) and 136(1) of the LRA and section 10(3) of the EEA which are read together with Rules 9 and 35 of the CCMA Rules empower the commissioners to allow late referrals on good cause, however if not used wisely may connote delaying tactics, to avoid this point scoring system can be used whereby parties can be encouraged to act within timeframes, otherwise the dispute will have to move to the next stage if the time has expired.

4.4 CONCLUSION

The purpose of the LRA is to advance economic, social justice, labour peace and democratisation of the workplace by giving effect the fundamental rights accorded in section 27 of the Constitution. The law places obligations to the employers, employees, trade unions and employer’s organisations to provide framework for collective bargaining and formulate industrial policies. Orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision making at workplace and effective dispute resolution of labour dispute are to be promoted.

Conciliation, con-arb and arbitration mechanisms if used effectively can achieve the objectives designed thereof.
APPENDIX A: Covering letter

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Cell: 0722228277
Fax 041-504-9332
E-Mail: landimurwimo@nmmu.ac.za

Re: QUESTIONNAIRE ON EVALUATION OF CONCILIATION AND ARBITRATION MECHANISMS

Dear Participant,

I am currently studying towards a Master’s Degree in Labour law at the Nelson Mandela Metropolitan University in Port Elizabeth.

In order to meet the requirements of this qualification, I am undertaking a Treatise with the title “Evaluation of Conciliation and Arbitration mechanisms”.

The research questionnaire is directed at the CCMA commissioners (both full-time and part-time) based in Eastern Cape Province. I would like to request your assistance in completing and returning the attached questionnaire related to the treatise.

Please note that all information shall be handled with great confidentiality and is for academic purposes hence your time and cooperation will be highly appreciated. There are five sections please answer all questions.

Yours sincerely
Leah Alexis Ndimurwimo

Researcher.
APPENDIX B: Questionnaire for CCMA Commissioners

One of the objectives of the LRA is to provide quick, efficient, accurate and inexpensive labour dispute resolution services. The purpose of this questionnaire is to determine whether the alternative dispute resolution mechanisms of conciliation and arbitration are effective. The following questions are asked for statistical reasons and will remain confidential.

*N:B Effective for the purposes of this research means (quick, not technical, accurate, inexpensive and available to all)*

1. **Personal information of the participant**

*Please tick (V) in the suitable box or choose what is relevant to each question*

1.1 What level commission are you appointed as?

1.2 What is your mother language?

1.3 Apart from mother language which of the following languages can you speak

<table>
<thead>
<tr>
<th>English</th>
<th>Afrikaans</th>
<th>Isi-Xhosa</th>
<th>Isi-Zulu</th>
<th>Other languages (state)</th>
</tr>
</thead>
</table>

1.4 When were you appointed as a commissioner for the first time?

1.5 Are you employed on full time or part time basis?

| Part time basis | Full time basis |

If part-time commissioner what other employment do you hold?

1.6(a) An advocate?

Yes
No

1.6(b) An attorney?

Yes
No

1.6(c) Other positions?

Yes
No

1.6(d) If 1.6(c) explain the nature of your work?
2. **Work environment**

Do you have access to the following working tools available to use for your CCMA work?

<table>
<thead>
<tr>
<th>Tool</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Computer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Telephone</td>
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<td></td>
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<tr>
<td>Fax</td>
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<td></td>
</tr>
<tr>
<td>Cell phone</td>
<td></td>
<td></td>
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</tbody>
</table>

2.2 Which venue do you use to resolve dispute?

- The CCMA office
  
<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>

- Other venues
  
<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>

- If other venues, what are they? *Mention them*

- Do these venues have adequate furniture, lighting and accessible to satisfy your need?
  
<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
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</thead>
</table>

2.3 What are your views in terms of remuneration paid? *Use the following scale for no 2.3 and 2.4 and tick (V) in a suitable box*

<table>
<thead>
<tr>
<th>Scale</th>
<th></th>
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<tbody>
<tr>
<td>Too much</td>
<td></td>
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<tr>
<td>Satisfactorily</td>
<td></td>
</tr>
<tr>
<td>Too little</td>
<td></td>
</tr>
</tbody>
</table>

2.4 How many cases do you handle on average per day?

<table>
<thead>
<tr>
<th>Type</th>
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</thead>
<tbody>
<tr>
<td>Conciliations</td>
</tr>
<tr>
<td>Con-Arbs</td>
</tr>
<tr>
<td>Arbitrations</td>
</tr>
</tbody>
</table>

2.5 Is the working environment conducive to effective dispute resolution?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>

2.6 If 2.5 is yes, what are the reasons for your answer?
3. **Administrative support**

3.1 Does the CCMA provide sufficient and adequate administrative support?

| Yes | No |

3.2 Give reasons for your answer in 3.1

---

4. **Factors that contribute to efficient, accurate and inexpensive labour dispute resolution**

4(a) In your view list the factors that contribute to efficient, accurate and inexpensive labour dispute resolution

4(b) In your view list the factors that hinder effective, accurate and inexpensive labour dispute resolution

Thank you
APPENDIX C

CCMA: more firms are ignoring rulings

Employers seeking Labour Court review of worker awards

MORE and more employers choose to ignore awards by the Commission for Conciliation, Mediation and Arbitration (CCMA) calling for the reinstatement and compensation of unfairly dismissed workers and seek Labour Court reviews.

CCMA chief executive officer Nerino Khan said last week that employers failed to implement 10 026 CCMA certified awards of compensation for unfair dismissal last year.

This was an almost three-fold increase in two years.

Labour law experts have also warned employers against the dangers of ignoring these awards, which were, "in general, final and binding, subject only to a limited right of review by the Labour Court".

Khan said a large number of companies perceived the CCMA as being heavily biased against them.

An example was a recent case in which Volkswagen SA refused to reinstate 17 workers dismissed in 2005 for gambling on company premises.

The National Union of Metalworkers of South Africa (Numsa) then took the matter to a private arbitrator, which called for the reinstatement and compensation of the workers by VWSA.

Faced with this kind of attitude by employers, Cosatu has adopted Numsa's Multi-employer (restate them) campaign to ensure companies comply with CCMA awards.

Another case was Goodyear being ordered to reinstate and pay R510 000 to unfairly dismissed worker Thembela Makhubelo. The tyre maker took the CCMA ruling on a review and later appealed after the Labour Court refused to interfere with the CCMA order.

Another instance cited by Cosatu involved the CCMA ordering the reinstatement and R430 000 compensation of 57 Grosberg and Schubert workers unfairly dismissed for participating in a strike.

Some employers who could not afford to pay the debt sought by the sheriff found themselves stuck with a court order they could not execute.

HAVE YOUR SAY

text us, write news, followed by your message.

prefabricated cable harnesses for the automotive industry, challenged the ruling in the Labour Court but failed.

Labour law expert Ilvraan Mohamed said employers were sometimes ignorant of the fact that the "CCMA has wide ranging powers emanating from the Labour Relations Act". Unfair dismissals were usually caused by failing to adhere to fair procedure and were not close in terms of reasons recognized in law.

The CCMA told parliament's labour committee in 2006 that of the more than 21 000 awards in favour of employees in 2004/05 year, close to 3 000 were still not settled at the end of that financial year.

Khan said court selectronics, who demand exorbitant advance payments to execute court orders on behalf of employees, were partly to blame for the outstanding awards.

Some employees who could not afford to pay the debt sought by the sheriff found themselves stuck with a court order they could not execute.

HAVE YOUR SAY

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