A CRITIQUE OF DISPUTE RESOLUTION IN THE PUBLIC SERVICE

by

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SUMMARY

Effective, efficient and expeditious resolution of labour disputes plays a crucial role in terms of the realization of one of the primary objectives of the Labour Relations Act \(^1\) (hereinafter referred to as “the Act”) which is the achievement of labour peace.

Although there is no proper definition of a dispute offered by the Act, \(^2\) there are several elements raised by authors within the labour relations and labour law fields which constitute a dispute. Two types of disputes are discussed, namely disputes of right (emanating from entitlement) and disputes of interest (based on demands not provided for, and these are also known as disputes based on matters of mutual interests).

Labour relations in South Africa has a history that is tarnished by segregation and dualism, where there was a system of labour relations and labour statutes for all races (except for Africans). The first statute dealing somewhat comprehensive with labour disputes, the Industrial Conciliation Act, \(^3\) did not apply to Africans. This situation (exclusion of Africans) prevailed until the early 1980’s. Therefore, although the apartheid system was legislated in 1948, its segregation practices based on race existed long before 1948 and also extended to the workplaces. The turning point in the labour relations arena in South Africa was the appointment of the Wiehahn Commission \(^4\). As a result of the recommendations by this Commission, African Workers were for the first time included in labour legislation. So, of great interest is the fact that African Workers attained labour rights before the demise of the apartheid system.

The birth of the Act \(^5\) with its dispute resolution fora like the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as “the CCMA”), Bargaining Councils, Labour Court and the Labour Appeal Court, revolutionized dispute resolution in the country. However, there are some challenges that have emerged even within the new system.

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1. 66 of 1995.
2. Ibid.
3. 11 of 1924.
4. Commission led by Professor Wiehahn appointed to look at the state of labour relations in South Africa in the wake of strikes in the 1970's.
5. 66 of 1995.
Prior to 1993, labour relations in the public service, simply just did not exist. This was mainly due to the fact that the public service was excluded from mainstream legal framework governing labour relations. The State was very much in control of what was happening with regards to employment relations in the public service.

There were some structures developed for engagement with the State like the Public Service Commission (PSC) which was politicized to push the agenda of apartheid, Public Servants Association (PSA) for White Public Servants, Public Service Union (PSU) for Indian Public Servants and Public Service League for Coloured Public Servants. There was no structure established for African Public Servants though. Nevertheless, these established structures were useless.

One of the recommendations of the Wiehahn Commission was the inclusion of public servants within the mainstream labour relations framework and this was never pursued by the then government. It took the wave of strikes in the early 1990’s for the Act⁶ to be extended to the public service.

Even with the inclusion of public service within the scope of the Act,⁷ there are still challenges pertinent to the public service. Central to these challenges is the problem of fragmentation in terms of approach regarding dispute resolution and the fact that there are too many pieces of legislation dealing with dispute resolution. This situation has also resulted in a jurisdictional debacle within the public service. Also, there is a huge challenge in terms of dealing with abscondments / desertion within the public service.

In terms of the way forward, there is an initiative to streamline the public service. In this regard, there is a Draft Single Public Service Bill⁸ and also the Public Service Amendment Bill.⁹

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⁷ Ibid.
⁸ Published in the Department of Public Service and Administration Website – http://www.dpsa.gov.za.
⁹ 31B of 2006.
CHAPTER 1
INTRODUCTION

Dispute resolution forms an integral part of labour relations, and one of the primary objectives of the Act\(^{10}\) is to achieve labour peace by providing framework for the effective and expeditious resolution of labour disputes. Labour peace is of critical importance in any workplace and the achievement thereof depends mostly on the effective, efficient and expeditious resolution of labour disputes.

According to Section 213 of the Act\(^{11}\), the term “dispute” includes an alleged dispute but surprisingly, it is not defined. However, all is not gloom and doom as there are several explanations offered by authors in the fields of labour relations and labour law. Emanating from those explanations are critical elements that constitute a dispute and thus providing a better basis for understanding the (dispute) concept.

A dispute is said to exists when a party maintains one point of view and the other a different one. Furthermore, for a dispute to exist, at the very least a demand should be communicated to another party and that party should be given an opportunity to comply.\(^{12}\) It is emphasized that the demand should be in writing and the other party be given a specific period to respond, and therefore, it would not be enough simply to make a demand and then immediately refer the dispute to the appropriate fora like the CCMA or a Bargaining Council.\(^{13}\)

Bosch\(^{14}\) goes on to mention that a matter is not a dispute as contemplated in the Act\(^{15}\) merely because a party feels aggrieved, a mere allegation that there is a dispute will not suffice, and that a simple argument between an employee and employer would not constitute a dispute.

\(^{10}\) 66 of 1995.
\(^{11}\) Ibid.
\(^{14}\) Bosch et al The Conciliation and Arbitration Handbook 5.
\(^{15}\) 66 of 1995.
Also, it was held in *SAPU & another v National Commissioner of the South African Police Service*\(^{16}\) that while a mere demand form the subject matter of a dispute, it is only once a demand has been rejected that a dispute arises and that such a dispute rather than the original demand, becomes the issue in dispute.

Where an agreed dispute resolution procedure exists, it could be argued that a dispute does not arise until the procedure has been exhausted.\(^ {17}\) Labour dispute resolution institutions like the CCMA and Bargaining Councils must be convinced that internal procedures have been exhausted before a dispute is declared and referred to these institutions, this is clearly stated in their dispute resolution referral forms.

The public service dispute resolution is peculiar with unique features in terms of legislation (specific relevant statutes only applicable to the public service), policies and procedures. Nevertheless, dispute resolution in the public service is mainly regulated by the Act.\(^ {18}\)

In this treatise, firstly, there is a brief overview of the dispute resolution system in South Africa. The areas of focus in this regard are the sources of labour disputes, dispute types, history and development of dispute resolution, dispute resolution processes and their institutions, private dispute resolution, dispute resolution in essential service as well as the challenges emanating from the system with possible solutions/recommendations.

Thereafter, there is an evaluation of the public service dispute resolution. In this regard, there will be a brief overview of the public service dispute resolution (this is done to avoid repetition as there are areas of similarity with the general system of dispute resolution). This is then followed by an analysis of the public service dispute resolution system vis-à-vis the general system of dispute resolution in South Africa at large.

\(^{16}\) [2006] 1 BLLR 42 (LC).
\(^{17}\) Du Toit et al *Labour Relations Law* 93.
\(^{18}\) 66 of 1995.
CHAPTER 2
OVERVIEW OF THE DISPUTE RESOLUTION SYSTEM IN SOUTH AFRICA

2.1 Dispute Types
Labour law distinguishes between disputes of right and of interest, and in practice the distinction between the two is said not to be always an easy one. It is very interesting to note that the Act does not expressly distinguish between disputes of interest (matters of mutual interest) and disputes of right. This is very unfortunate because the Act is supposed to offer some guidance in terms of matters pertaining to employment relations.

It is generally accepted that a dispute of interest arises when one party claims a benefit to which it is not entitled in law which the other party is not prepared to grant, while a right dispute arises when parties cannot agree whether one of them is legally entitled to the benefit claimed. Grogan elucidate the distinction between the two further by stating that rights disputes are those arising from breaches of rights or failure to discharge duties expressly conferred or imposed by the Act or other statutes, by collective agreement or by individual contracts of service. Furthermore, rights disputes are justiciable in terms of the Act by either arbitration or adjudication, and that all other disputes are matters of interest and therefore non-justiciable and of necessity to be resolved by industrial action if parties cannot come to a negotiated settlement.

In Bosch et al, disputes of right are also defined as concerning those disputes that emanate from an infringement of an existing right which has been obtained by virtue of an employment contract, legal provision, collective agreement and so forth, and a dispute of interest generally arises when a party seeks to have employment conditions changed, such as an increase in wages.

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20 66 of 1995.
21 Ibid.
23 Grogan Workplace Law 357.
25 Ibid.
It is clear from the explanations reflecting above that a dispute of right pertains to a right that is provided for somewhere (legislation, collective agreement, contract, etc), and interest dispute emanate from something that is not provided for anywhere (wage increase, etc).

2.2 Sources of labour disputes

There are several sources of labour disputes. A common source of labour disputes are unresolved grievances. Aggrieved employees lodge their grievances at their workplaces through acceptable and set procedures. If this does not yield desired or acceptable outcome, disputes are declared against employers. In Brand27 a dispute is said to be a highly formalized manifestation of conflict in relation to workplace related matters which may include a failure to address a grievance. Most grievances lodged in the public service are in respect of alleged unfair labour practices.

Another common source of labour disputes are unfavourable outcomes of disciplinary actions instituted against employees. If found guilty and a sanction is imposed, an official appeals and if this is unsuccessful, a dispute is declared. This is emphasized in Slabbert,28 where it is stated that when an employee is not happy about a disciplinary process being instituted against him/her, and after an appeal is unsuccessful, such an employee declares a dispute.

Demands on matters of mutual interest by employees are another common source of labour disputes. An example is a demand of wage increment or unhappiness with an increment offer. If parties do not agree, a dispute is then declared.

2.3 History and development of dispute resolution in South Africa

The first legislative provisions in South Africa to establish mechanisms for the resolution of labour disputes were promulgated in 1909,29 and the first statute dealing somewhat comprehensively with labour disputes though was the Industrial Conciliation Act,30 although it did not apply to African employees.31

30 11 of 1924.
31 Bosch et al The Conciliation and Arbitration Workbook 84.
Conciliation Act\textsuperscript{32} is said to have been primarily suited to resolve interest disputes and those interest disputes were referred to the Industrial Councils or Conciliation Boards for conciliation, if unresolved employees were able to strike and employers to lock-out employees. Rights disputes were referred to ordinary courts to be decided on the basis of the law of contract.

Industrial Councils and Conciliation Boards were first instituted in 1924 and the Industrial Court in its original form was established in January 1957.\textsuperscript{33} An Industrial Council was a body corporate, the function of which was to endeavour to prevent or settle disputes which had arisen and to take steps as were necessary for the regulation of matters of mutual interest to employers and employer organizations and employees or trade unions in terms of section 23 of the Labour Relations Act\textsuperscript{34} (hereafter referred to as “the LRA”).\textsuperscript{35}

In terms of the LRA,\textsuperscript{36} interest disputes had to be referred to Industrial Council for conciliation. If there was no Industrial Council, a request could be made for the establishment of an ad hoc Conciliation Board and if no agreement could be reached, the matter could be referred for mediation or arbitration, or the employees could just embark on an industrial action. For a dispute of right, the matter could also be referred to Industrial Council for conciliation and if there was no Industrial Council a request could be made for the establishment of an ad hoc Conciliation Board. If no agreement could be reached, the matter could then be referred to the Industrial Court as per section 46(9) of the LRA.\textsuperscript{37}

The Industrial Conciliation Act\textsuperscript{38} was replaced by the Industrial Conciliation Act,\textsuperscript{39} which later became known as the LRA\textsuperscript{40} in 1981 as a result of the Labour Relations

\textsuperscript{32} 11 of 1924.
\textsuperscript{33} Van Jaarsveld & Van Eck Principles of Labour Law 415.
\textsuperscript{34} 28 of 1956.
\textsuperscript{36} 28 of 1956.
\textsuperscript{37} 28 of 1956 as amended in 1979.
\textsuperscript{38} 11 of 1924.
\textsuperscript{39} 28 of 1956.
\textsuperscript{40} Ibid.
Amendments Act,\textsuperscript{41} in terms of which an Industrial Tribunal was created to arbitrate disputes.

In terms of the LRA,\textsuperscript{42} employees were free to engage in industrial action in regard to any matter not covered by an agreement or determination, provided that the disputed issue concerned an employment relationship.\textsuperscript{43} This meant that they could strike even over right disputes, whereas in terms of section 65(1)(c) of the Act,\textsuperscript{44} a strike is prohibited over a right dispute. Before, employees could choose which structure to use when there was a dispute, between an Industrial Court and Ordinary Court,\textsuperscript{45} depending on how they classified their disputes. On one hand, if a dispute was classified as an unfair labour practice, the Industrial Court had jurisdiction, on the other hand, if a dispute was classified as a breach of contract, the matter could be referred to either a Magistrate’s Court or Supreme Court depending on the nature of the issue(s) involved and the amount of claim for compensation, if any.

As a result of the recommendations by the Wiehahn Commission,\textsuperscript{46} amongst other things, the exclusion of African employees was removed from the LRA,\textsuperscript{47} the concept of unfair labour practice was introduced into the South African Labour Law and the Industrial Court replaced the Industrial Tribunal. The Industrial Court first saw the light after changes to the LRA\textsuperscript{48} introduced a single system of labour laws for white and black workers alike.\textsuperscript{49} The Industrial Court replaced the Industrial Tribunal which has been established by the Industrial Conciliation Act\textsuperscript{50} on 1 January 1957.\textsuperscript{51}

Before the implementation of the Act,\textsuperscript{52} the erstwhile Industrial Court and the former Labour Appeal Court borrowed heavily from administrative law when developing the

\begin{footnotesize}
\begin{enumerate}
\item 57 of 1981.
\item 28 of 1956.
\item Grogan \textit{Workplace Law} 8\textsuperscript{th} ed (2005) 441-442.
\item 66 of 1995.
\item Commission lead by Professor Wiehahn appointed to investigate the state of labour relations in South Africa in the wake of strikes in the 1970’s.
\item 28 of 1956.
\item 28 of 1956.
\item Du Toit \textit{et al Labour Relations Law} 10.
\item 28 of 1956.
\item 66 of 1995.
\end{enumerate}
\end{footnotesize}
procedural requirements of a fair dismissal under the unfair labour practice jurisdiction.\(^{53}\)

It must be stressed that before the Act\(^{54}\) came into existence, the dispute resolution system in South Africa was marred by problems. Its statutory procedures were considered to be ineffective, lengthy, complex and full of technicalities, and instead of reducing the number of disputes, they created additional disputes and intensified industrial action.\(^{55}\) In Baker and Olivier\(^{56}\) it is stated that research done showed that the South African system of adjudication of unfair dismissals was probably one of the most lengthy and most expensive in the world, despite the fact that it did not deliver meaningful results and also did not enjoy the confidence of its users. Also, due to the fact that statutory conciliatory procedures of the LRA\(^{57}\) were ineffective, its procedures lengthy and complex, this sometimes resulted in a situation where merits of disputes were lost in the procedural technicalities.\(^{58}\) In essence, the system was just not working.

Brand\(^{59}\) goes on to mention that the old system of dispute resolution simply did not work (reference in this regard was made to statistics to support this contention), was not user-friendly and as a result expertise and technical knowledge of proceedings were needed. Furthermore, to make matters worse, the Industrial Court was outside of the legal hierarchy\(^{60}\) and as such had low status, and also there were delays in appeals from Industrial Court to Labour Appeal Court. In one extreme case, \textit{Chevron Engineering (Pty) Ltd v Nkambule}\(^{61}\) it took about 10 years for the matter to be finalized, from March 1995 when workers were dismissed for participating in an unlawful strike to June 2003 when the matter was finalized by the Supreme Court of Appeal.

\(^{54}\) 66 of 1995.
\(^{56}\) Backer & Olivier \textit{Guide to the New Labour Relations Act} 8.
\(^{57}\) 28 of 1956.
\(^{58}\) Du Plesiss \textit{et al} \textit{A Practical Guide to Labour Law} 295.
\(^{59}\) Brand \textit{et al} \textit{Labour Dispute Resolution} 26.
\(^{60}\) In \textit{SA Technical Officials Association v President of the Industrial Court} (1985) 6 \textit{ILJ} (A), the then Appellate Division held that the Industrial Court was neither a superior court nor a court of law.
The new Act\textsuperscript{62} revolutionized dispute resolution in South Africa drastically when it came into existence. Section 112 of the Act\textsuperscript{63} established an independent body, the CCMA which would actively seek to resolve disputes through conciliation, mediation and arbitration. The CCMA in effect replaced the old Conciliation Boards of the LRA\textsuperscript{64} and assumed many of the arbitral functions of the Industrial Court, other arbitral functions were taken over by the Labour Court.\textsuperscript{65} The CCMA is the centerpiece of the Act\textsuperscript{66} and was intended to play a key role in the overall dispute resolution system.\textsuperscript{67} The establishment of the independent commission was a major shift in labour relations policy in that in the past the State took primary responsibility for the resolution of disputes. Under the new Act,\textsuperscript{68} that responsibility is shared between Employers, Labour and State jointly.

The jurisdiction of the CCMA is limited to what the Act\textsuperscript{69} provides for, it cannot conciliate or arbitrate disputes unless those fall within the categories of disputes provided for by the Act.\textsuperscript{70}

2.4 Dispute resolution processes and their Institutions

2.4.1 Conciliation

Conciliation is the first step in the dispute resolution process,\textsuperscript{71} and involves the use of a neutral or acceptable third party to assist parties to arrive at a mutually acceptable, enforceable and binding solution.\textsuperscript{72} In essence, conciliation refers to a process of reconciling or bringing together opposite sides in an industrial dispute. It is of critical importance to emphasize the fact that conciliation is the cornerstone of the legislation relevant to dispute resolution in South Africa. Most endeavors for resolving labour dispute in South Africa start with conciliation, irrespective of whether the issue concerns a matter of right or interest. The only deviation from this approach is only in

\begin{thebibliography}{9}
\bibitem{62} 66 of 1995.
\bibitem{63} Ibid.
\bibitem{64} 28 of 1956.
\bibitem{65} Grogan \textit{Workplace Law} 239.
\bibitem{66} 66 of 1995.
\bibitem{67} Brand et al \textit{Labour Dispute Resolution} 65.
\bibitem{68} 66 of 1995.
\bibitem{69} Ibid.
\bibitem{70} Ibid.
\bibitem{71} Jordaan & Stelzner \textit{Labour Arbitration} 1.
\bibitem{72} Bosch et al \textit{The Conciliation and Arbitration Handbook} 11.
\end{thebibliography}
private dispute resolution where parties are allowed to agree to refer disputes straight for the arbitration process.

According to section 115(1)(a) of the Act, the CCMA is established to attempt to resolve disputes referred to it through conciliation, and also in terms of section 127(1)(a) of the same Act, any private agency or bargaining council may be granted accreditation to conduct conciliations by the CCMA, and due to its cases overload, the CCMA will not hesitate to grant the accreditation. This view is echoed in Patel where it is stated that the CCMA has a sufficiently demanding workload, so it will gladly welcome handing over to another proper forum instead of competing for jurisdiction. So, both the CCMA and Bargaining Councils do conduct the conciliation process where such structures have jurisdiction. However, certain disputes must be dealt with by the CCMA.

A dispute must be referred for conciliation within 30 days if it relates to alleged unfair dismissal or 90 days if such dispute relates to an alleged unfair labour practice. If such referral is outside of the stipulated time-frames, an application for the condonation of the lateness must be made in terms of section 191(2) of the Act and CCMA Rules 9 & 31. In this regard, the applicant must bring an application for condonation, on affidavit (sworn statement) explaining why the referral is late and why the CCMA or Bargaining Council should allow the matter to continue (condonation). Such application must cover the degree of lateness where the applicant must indicate the number of days that the referral is late, reason(s) for lateness where there must be an explanation as to why the application was late by explaining the steps taken prior to referring the case to the CCMA, prospects of success on the merits of the case giving the reasons why the case should succeed as well as any prejudice to the other party if granted. It was held in NUMSA & another v Voltex (Pty) Ltd t/a Electric Center & others that a decision regarding

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73  66 of 1995.
74  Brand et al Labour Dispute Resolution 7.
76  See s 127(2) of the Labour Relations Act 66 of 1995.
77  S 191(1) of the Labour Relations Act 66 of 1995.
78  66 of 1995.
condonation is not an award and hence not reviewable under section 145 of the Act and instead section 158(1)(g) of the same Act was said to be the correct section under which to bring applications for review of decisions regarding condonation. Rulings on condonation applications may also rescinded by the CCMA in proper circumstances.

There are also other jurisdictional issues that must be considered before the CCMA or Bargaining Council attempts to resolve a dispute. First and foremost, there must be a dispute, which has arisen within an employment relationship, and falls within the jurisdiction of the CCMA. Also, the issue in dispute must not be subject to a collective agreement, and the parties must not belong to a bargaining council with jurisdiction.

At a conciliation meeting the employer may appear in person or may be represented by a director or another employee, or employers organization. The employee may be represented by any office bearer or official of that party’s registered trade union. Legal representation is precluded from the conciliation process and so are consultants. This makes sense considering the fact that during the process, parties must reach an agreement by themselves, lawyers and consultants would want the disputes to drag as much as possible for them to make more money from their clients.

The Commissioner appointed may determine which process the conciliation hearing could follow, it may include mediation, facilitation or making recommendations in the form of an advisory award. During the conciliation process, parties are encouraged to share information and to come forward with ideas on how their differences can be settled. Generally, evidence is not necessary at the conciliation stage. By its nature, conciliation is private, confidential and without prejudice and whatever any party say or do during the process cannot be used against the party later on. This encourages parties to participate with an open mind for flexibility (bargaining) without

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80 66 of 1995.
81 See Kungwini Residential Estate & Adventure Sport Centre Ltd v Mhlongo NO & others [2006] 5 BLLR 423 (LAC).
82 Du Toit et al Labour Relations Law 92.
84 Du Toit et al Labour Relations Law 102.
fear of information being used against them later on. Parties can make offers without fear or prejudice.

Depending on the nature and complexity of the dispute, and sometimes even the distance between parties in terms of locality, CCMA / Bargaining Council may decide to conduct a telephonic conciliation in terms of CCMA Rule 12. In terms of this approach, a Commissioner will attempt to resolve the dispute telephonically instead of scheduling and holding a hearing. This is mostly done with one party present at the CCMA.

If a dispute is properly referred to the CCMA according to section 133 of the Act, a commissioner must be appointed to try and resolve the dispute within 30 days, afterwards a certificate be issued indicating whether the dispute was resolved or not. In terms of section 135(5) of the Act, even if 30 days lapse without the matter being conciliated, the referring party has a right to a certificate of non-resolution in order to take the next step, whether being arbitration, adjudication or industrial action, depending on the issue(s) involved. However, if the dispute is settled, the Commissioner will draw up a settlement agreement which both parties sign and a certificate issued recording that the dispute is settled. A conciliation agreement is final and binding on both parties, and if either party fails to uphold the agreement, it can be made an award and thereafter certified as an order of court.

If a dispute is not settled at conciliation, there are options available as recourse. If the dispute relates to probation, the matter must continue on Conciliation-Arbitration (Con-arb) basis in terms of section 191(5A) of the Act. If the matter relates to dismissal (conduct or incapacity) or unfair labour practice and the parties do not object to the process, the matter may also continue on Con-arb basis. Alternatively, a Commissioner may issue a certificate indicating that the matter was not resolved and the applicant then apply for arbitration. Furthermore, if the matter pertains to an alleged automatic unfair dismissal in terms of section 187(1) of the Act, unfair

86  Ibid.
87  66 of 1995 as amended.
discrimination in terms of section 6 of the Employment Equity Act\textsuperscript{89} (hereafter referred to as “EEA”), interpretation and application of EEA,\textsuperscript{90} etc, the matter must be referred to the Labour Court for adjudication. Nevertheless, parties may agree for certain disputes like unfair discrimination disputes to be arbitrated at the CCMA instead of referring them to the Labour Court for adjudication in terms of section 133(2)(b) of the Act.\textsuperscript{91} Alternatively, for an interest dispute, employees may serve a strike notice and as a response thereto, employers can issue out lock-out notices.

\textbf{2.4.2 Conciliation-Arbitration (con-arb)}

The con-arb dispute resolution process came into existence as a result of the Labour Relations Amendments Act\textsuperscript{92} in 2002. In terms of section 191(5A) of the Act,\textsuperscript{93} an arbitration hearing must immediately follow the conciliation proceedings once a certificate on non-resolution has been issued in disputes concerning dismissals or unfair labour practices relating to probation. If no objection is received from either party, con-arb may be used for any other dispute (conduct, capacity, continued employment intolerable, less favourable terms of section 197 or section 197A transfers, reason for dismissal unknown, or an unfair labour practice). The crux of the process is that conciliation is immediately followed by arbitration.

In \textit{Ceramic industries Ltd v CCMA & another}\textsuperscript{94} it was confirmed that when applicable, CCMA may utilize con-arb procedure only in circumstances specified in the Act,\textsuperscript{95} or if both parties agree. However, it must be noted though that the con-arb process may not be used for dismissals relating to unprotected strikes, these disputes will be referred to the Labour Court.

Time-frames for con-arb referrals are the same as with the conciliation process (discussed earlier on). For alleged unfair dismissal, the dismissed employee must refer the matter to the CCMA or Bargaining Council for con-arb within 30 days of the date of dismissal. For alleged unfair labour practices, a dispute for con-arb must be

\begin{footnotesize}
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\item \textsuperscript{89} 55 of 1998.
\item \textsuperscript{90} S 52(3) of the Employment Equity Act 55 of 1998.
\item \textsuperscript{91} 66 of 1995.
\item \textsuperscript{92} 12 of 2002.
\item \textsuperscript{93} 66 of 1995 as amended.
\item \textsuperscript{94} [2005] 12 BLLR 1235 (LC).
\item \textsuperscript{95} 66 of 1995 as amended.
\end{itemize}
\end{footnotesize}
referred within 90 days of the date of the act or omission which allegedly constitutes unfair labour practice. If the referral is late, an application for the condonation of lateness must be submitted by the referring party.

The absolute exclusion of legal practitioners from conciliation proceedings is overruled in respect of conciliation in the context of con-arb hearings.\footnote{Du Toit et al. Labour Relations Law 109.} Having legal practitioners being involved during the conciliation process, may drag or hinder expeditious resolution of disputes unnecessarily (a point raised earlier on). To increase the prospects of parties settling at the conciliation phase, perhaps this must be reconsidered and legal representation only be allowed at the arbitration phase (if the dispute gets to that stage).

The con-arb process starts with conciliation and if the dispute is certified unresolved, then the arbitration process immediately starts. However, a commissioner is allowed to postpone the matter for another date for arbitration and there will be no need for a new referral. This, however, defeats the main purpose of the process of finalizing disputes on one go. Perhaps there must be reconsideration in this regard as well.

If parties settle by themselves at the conciliation stage, an agreement is signed by both parties and a certificate of resolution is issues. However, if the matter goes for arbitration, an arbitration award thereof is issued to both parties. Such award is final and binding cannot be subjected to an appeal process but can be referred for review.

2.4.3 Pre-Dissmissal Arbitration
The 2002 amendments\footnote{Labour Relations Amendments Act 12 of 2002.} also brought into existence the pre-dismissal arbitration process for the resolution of labour disputes. In terms of section 188A of the Act,\footnote{66 of 1995 as amended.} the process of pre-dismissal arbitration is introduced which is intended replace a disciplinary enquiry and subsequent proceedings at the CCMA or Bargaining Councils. Of critical importance to this process is that in terms of section 188A(1) of
the Act, 99 the pre-dismissal arbitration is triggered by agreement between employer and the employee. An employer may, by agreement with the employee, request the CCMA or Bargaining Council to conduct this pre-dismissal arbitration if it relates to conduct or capacity of that employee. The process can be made part of employment contract for those employees earning above the threshold and if this happens the agreement between parties ceases to be a requirement.

In the pre-dismissal arbitration process, the parties may appear in person or be represented in terms of section 188A(5) by a co-employee, a director or employee, any member, office bearer or official of that party’s registered trade union or registered employers’ organization or by a legal practitioner if both parties agree. Even if both parties agree, the Commissioner must still make a determination of whether legal representation is really necessary.

In terms of section 188A of the Act, 100 the CCMA may, at the request of an employer, and with the employee’s consent, supply a commissioner to conduct a pre-dismissal arbitration to establish whether the employee is guilty of misconduct or not and, if so, the sanction to be applied. Although, the process is termed pre-dismissal arbitration, the sanction emanating from the process does not have to be a dismissal (even where dismissal is not warranted). A Commissioner in these pre-dismissal hearings may impose any sanction he/she deem appropriate from dismissal to any sanction short of dismissal.

The same provisions for arbitration proceedings as set out in section 138 of the Act, 101 also apply to pre-dismissal arbitrations.

It was held in Department of Labour v Nxawe 102 that a commissioner conducting the pre-dismissal arbitration must also take into account the disciplinary code applicable to that employer.

100 Ibid.
102 [2006] 1 BALR 1 (GPSSBC).
An arbitration award from the pre-dismissal arbitration is also final and binding, may be made an order of court. Furthermore, these arbitration awards also cannot be subjected to an appeal but can be referred for review.

2.4.4 Arbitration

In Bosch, arbitration is defined as a process whereby a dispute is referred by one or all of the disputing parties to a neutral or acceptable third party, the arbitrator, who fairly hears their respective cases by receiving and considering evidence and submissions from the parties and then make a final and binding decision. According to section 146 of the Act, the Arbitration Act does not apply to any arbitration under the auspices of the CCMA.

According to section 115(1)(b) of the Act, the CCMA is also established to conduct arbitrations if a dispute remain unresolved after conciliation and, also in terms of section 127(1)(b) of the Act, any private agency or bargaining council may be granted accreditation to conduct arbitrations by the CCMA. Once again, certain disputes cannot be dealt with by accredited agencies but must be dealt with by the CCMA.

A party must refer a dispute for arbitration with CCMA or Bargaining Council within 90 days after certificate of non-resolution from the conciliation process is issued. If such referral is outside of the stipulated time-frame, an application for the condonation of the lateness must be made. The arbitration process and award thereof becomes null and void if the late referral of the dispute for conciliation has not been condoned, this was emphasized in Hi Alloy Castings (Pty) Ltd v Smith & others.

Bosch goes on to mention that a dispute may be arbitrated by the CCMA only if it has been conciliated, or if 30 days lapse without a date being set for conciliation. A certificate of non-resolution is a legal prerequisite for arbitration by the CCMA or

103 Bosch et al The Conciliation and Arbitration Handbook 84.
104 66 of 1995.
105 42 of 1965.
107 Ibid.
108 See s 127(2) of the Labour Relations Act 66 of 1995.
Bargaining Councils. It must be emphasized though that adequate conciliation is not a pre-condition for commissioner’s acting as an arbitrator, a mere certificate of non-resolution of the dispute after the 30 days lapse will suffice, this was also the view of the Labour Appeal Court in *NUMSA v Driveline (Pty) Ltd & another*.\(^{111}\) It was also stressed in *NUM v East Rand Gold & Uranium Co.*\(^{112}\) that the CCMA or Bargaining Council may only arbitrate matters it is required to arbitrate by the Act.\(^{113}\)

Furthermore, although questions of law may be arbitrated, arbitration is primarily used to resolve factual disputes and is usually a hearing *de novo* of all disputed issues. It was stressed in *DB Thermal (Pty) Ltd v CCMA & others*\(^{114}\) that the arbitration process before the CCMA or Bargaining Councils does not amount to a review or appeal process against internal disciplinary enquiry, but requires a hearing *de novo* based upon evidence properly presented to arbitrating commissioner.

In *Du Toit*\(^{115}\) it is stated that while resembling adjudication, arbitration remains a *quasi-judicial* process rather than adjudication, and that arbitration under the Act\(^ {116}\) must be fair and equitable, the arbitrator must be impartial and unbiased, the proceedings must be fair and lawful (arbitrator must have jurisdiction and not exceed his/her powers), the decision must be consistent with the Act\(^ {117}\) and the Constitution,\(^ {118}\) and the award must be justifiable in relation to the reasons given.

Any party to the arbitration proceedings could be represented by a legal practitioner, director or employee of the party, or any member, office bearer or official of that party’s registered trade union or registered employers’ organization.\(^ {119}\) Despite section 138(4)(a) of the Act,\(^ {120}\) legal representation in alleged unfair dismissals (relating to employee conduct or incapacity) was precluded, unless all parties consented, and the commissioner deciding that it is unreasonable to expect a party


\(^{112}\) [1997] 2 BLLR 225 (CCMA).

\(^{113}\) 66 of 1995.

\(^{114}\) [2000] 10 BLLR 1163 (LC).

\(^{115}\) Du Toit *et al* *Labour Relations Law* 109.

\(^{116}\) 66 of 1995.


\(^{119}\) 66 of 1995.

\(^{120}\) *Ibid.*
to deal with the dispute without legal representation due to the questions of law raised and complexity of the matter. In essence, even though parties could agree (not object) to legal representation, the commissioner still has an obligation of ensuring that there is really a need for such legal representation. It was held in *Ndlovu v CCMA Commissioner Mullins & another* \(^{121}\) that a commissioner cannot infer from a party’s failure to object that he has tacitly consented to the other party being represented by a legal practitioner at arbitration of dismissal dispute, it was also emphasized that parties have a right to be heard in relation thereto.

There were also changes pertaining to legal representation brought about by the 2002 amendments. \(^{122}\) Prior to the 2002 amendments, \(^{123}\) legal representation at the CCMA was regulated by sections 135(4), 138(4) and 140(1), and the new amendments provided for the CCMA to develop a rule that will deal with the issue of legal representation, consequently, the CCMA came out with its Rule 25 in October 2003.

In terms of section 138(7) of the Act, \(^{124}\) a Commissioner must issue an award within 14 days of the conclusion of the arbitration proceedings, in *Meyer v CCMA & another* \(^{125}\) it was held that a long delay in issuing the award nullify the award. An arbitration award is final and binding, and may be made an order of court.

The arbitration award cannot be subject to an appeal process but to review. In terms of section 134 of the Act, \(^{126}\) an arbitration award can be enforced as if it was an order of the court if there is non-compliance to it.

There are various remedies provided by labour law where there is unfairness (procedurally and / or substantively) confirmed towards employees. These remedies vary from reinstatement, re-employment to compensation. Sometimes damages are awarded over and above a remedy offered.

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\(^{121}\) [1999] 3 BLLR 231 (LC).

\(^{122}\) Labour Relations Amendment Act 12 of 2002.

\(^{123}\) *Ibid*.

\(^{124}\) 66 of 1995.

\(^{125}\) [2002] 2 BLLR 186 (LC).

\(^{126}\) 66 of 1995.
The primary remedy in terms of the Act¹²⁷ is reinstatement and only when this is not possible¹²⁸ would other remedies, like compensation, be considered. In terms of compensation, employees can be compensated for up to a maximum of remuneration equal to 12 months for unfair dismissal or unfair labour practice, and up to a maximum of 24 months for automatic unfair dismissals.

There is guidance / limitation in terms of compensation that can be awarded as compensation. In *United National Breweries (SA) Ltd v Khanyeza & others*¹²⁹ the commissioner granted employee compensation in excess of statutory maximum of 12 months and the compensation was reduced by the Court. In fact in *South African Broadcasting Corporation v CCMA & others*¹³⁰ it was held that commissioner exceeded powers (in terms of section 145(2)(a)(iii) of the Act)¹³¹ by awarding compensation in excess of maximum prescribed by the Act.¹³² As much as commissioners are not allowed to exceed the legal maximum compensation, they are also equally not allowed to grant compensation less that what is prescribed by the Act.¹³³ This was confirmed in *Le Roux v CCMA & others*¹³⁴ where it was held that commissioner granting compensation less than prescribed by the Act¹³⁵ ignoring statutory and case law, committed an error that was reviewable, irrespective of commissioner’s motives. There were also some changes brought about by the 2002 amendments¹³⁶ with respect to compensation. The minimum compensation that was imposed in terms of sections 194(1) & (2) of Act¹³⁷ was repealed and this signaled the demise of the unsatisfactory (and often unintended) “all or nothing” principle enunciated in *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*.¹³⁸

The Courts and Arbitrators are now re-invested with a judicial discretion, last

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¹³² *Ibid*.
¹³⁵ 66 of 1995.
¹³⁶ Labour Relations Amendment Act 12 of 2002.
exercised by the Courts in terms of the LRA, to award compensation that is just and equitable.

It is acceptable that sometimes there would be a situation where there is impossibility of remedy (e.g. reinstatement), maybe because the organization has had structural changes or if one or more of the issues reflecting under section 193(2) of the Act prevail, and other reasons. In this regard, other remedies can be considered.

In terms of section 144 of the Act, any award may be varied or rescinded by the commissioner who issued the award or by any other commissioner appointed by the Director to do so. Initially, only the commissioner who issued the award could consider the rescission application, also see SACCAWU v CCMA & others. This later changed. It was held in Els Transport v Du Plesis & others that a decision on rescission needs not to be taken by commissioner who issued the arbitration award.

Rescission may be applied for if an award was erroneously sought or erroneously made in the absence of any party affected by the award, contains an ambiguity or an obvious error or omission or if it was granted as a result of a mistake common to both parties to the proceedings. In Day & Night Investigators CC v Ngoashesh & others it was emphasized that a Commissioner can only rescind awards on grounds set out in section 144 of the Act. And also an award cannot be replaced by an entirely new one. Furthermore, an award may be rescinded merely on the fact that it was issued in the absence of a party provided that the party was not in willful default and there are good prospects of success.

Last but not least, rescission is not a review. It was held in Health & Hygiene (Pty) Ltd v Yawa NO & others that an award cannot be rescinded on the basis of error

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139 28 of 1956.
140 Cohen “Compensation and Forum Shopping in South African Labour Law”.
141 66 of 1995.
142 Ibid.
143 [2000] 10 BLLR 1215 (LC).
144 [2001] 6 BLLR 599 (LC).
147 66 of 1995.
committed during arbitration proceedings, the proper recourse in such cases is for a party to apply for review at the Labour Court.

In terms of section 145 of the Act, a party is able to take an award for review for alleged defect in the arbitration proceedings to the Labour Court within six weeks of the date that the award was served on the applicant, and if the alleged defect pertains to corruption, within six weeks of the date that the applicant discovers the corruption. In terms of the section, a defect means that the commissioner committed misconduct in relation to the duties of a commissioner as an arbitrator, that he/she committed gross irregularity in the conduct of the proceedings or that he/she exceeded his/her powers as a commissioner. Defect also means that the award was improperly received. This approach to review is also referred to as the narrow test for the review of an arbitration award due to its limitation in terms of the grounds set out in section 145 of the Act. These grounds resemble those of section 33 of the Arbitration Act.

It was held in *Tao Ying Industry (Pty) Ltd v Pooe NO & others* that the review process is distinguished from the appeal process where the former was said to be focusing on how arbitrator arrived at a challenged conclusion while the latter focuses on whether the conclusion was right or wrong.

In terms of section 158(1)(g) of the Act, the Labour Court may also, subject to section 45 of the Act, review the performance or purported performance of any function provided for in the Act on any grounds that are permissible in law. This created confusion on whether CCMA awards could be reviewed under both sections 145 and 158 of the Act respectively. The confusion was clarified in *Carephone (Pty) Ltd v Marcus NO & others* by the Labour Appeal Court where it was held that review of CCMA arbitration awards is limited to the grounds set out in section 145 of

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149 66 of 1995.
150 Ibid.
151 42 of 1965.
152 [2007] 7 BLLR 583 (SCA).
154 Ibid.
155 Ibid.
156 Ibid.
the Act.\textsuperscript{158} What is of critical importance in this case is the emphasis on the justifiability, where determination is made on whether administrative action is justifiable in terms of the reasons given for it, and this is in line with our Constitution.\textsuperscript{159} Some experts have interpreted this as an importation or introduction of Carephone to section 145 of the Act.\textsuperscript{160} This test was approved and adopted in the subsequent Labour Appeal Court case of \textit{Shoprite Checkers (Pty) Ltd v Ramdaw NO \\& others}\textsuperscript{161} and continued to serve as a guideline in determining whether a CCMA award was reviewable. The test was whether there was rational objective basis justifying the connection a commissioner made between material before him/her and the conclusion he/she reached.

However, there were some changes brought about by the Promotion of Administrative Justice Act\textsuperscript{162} (hereafter referred to as “PAJA”), where the High Court was given powers to review some of the CCMA awards. The grounds for review in terms of PAJA are based on the decision of the arbitrator complying with the law, being rational and properly explained through the medium of giving reasons for it. The landmark ruling in this regard is the \textit{Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA \\& others}\textsuperscript{163} case where it was held that an arbitration award issued by commissioners of the CCMA constituted administrative action subject to review under PAJA. Such an award may be set aside on the grounds set out in PAJA, which grounds include the grounds of review in section 145(2) of the Act.\textsuperscript{164} The proper test being on whether conclusion was rationally connected to information before the commissioner and to reasons. Of significance was the observation that the CCMA awards were reviewable both in terms of sections 145 of the Act\textsuperscript{165} and 6 of PAJA,\textsuperscript{166} and that the latter superseded the former. This ruling by the Supreme Court of Appeal re-emphasized the test for review set out in the Carephone case and broadened the grounds for review as not only under the Act\textsuperscript{167} but also under the

\textsuperscript{158} 66 of 1995.
\textsuperscript{159} S 33 of the Constitution of the Republic of South Africa Act 108 of 1996.
\textsuperscript{160} 66 of 1995.
\textsuperscript{161} [2001] 9 BLLR 1011 (LAC).
\textsuperscript{162} 3 of 2000.
\textsuperscript{163} [2006] 11 BLLR 1021 (SCA).
\textsuperscript{164} 66 of 1995.
\textsuperscript{165} Ibid.
\textsuperscript{166} 3 of 2000.
\textsuperscript{167} 66 of 1995
PAJA, with the High Court also having concurrent jurisdiction to hear reviews from the CCMA.

The Labour Court may, according to section 145(3) of the Act, stay the enforcement of an arbitration award until a decision on review has been taken. If the award is set aside in terms of section 145(4) of the Act, the Labour Court may determine the dispute in a manner it sees as appropriate or it may make any order that it considers appropriate about the procedures to be followed in determining the dispute. In *Ndlovu v CCMA Commissioner Mullins & another,* the judge remitted the matter back to the CCMA for arbitration by another commissioner, whereas in *Morningside Farm v Van Staden NO & another,* the Court dealt with the matter and did not refer it back to the CCMA for correction of defects. Except if there are flagrant errors in the judgement, the court will not easily set aside an award on subjective issues.

### 2.4.5 Adjudication

Adjudication refers to a process whereby a judge reviews evidence and argumentation including legal reasoning set forth by opposing parties to come to a judgement which determines the rights between parties involved.

There are certain disputes that must be referred to the Labour Court for adjudication, and these disputes are set out in section 191(5)(b) of the Act. The EEA also confers jurisdiction to the Labour Court on disputes emanating from that statute.

Adjudication by a Court is a compulsory process, once appropriately referred by one of the parties to the dispute, a judge hears the parties’ cases and determines the dispute.

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170 [1999] 3 BLLR 231 (LC).
172 66 of 1995 as amended.
Parties to a dispute may also agree, in line with section 133(2)(b) of the Act,\textsuperscript{175} that instead of referring the matter for adjudication by the Labour Court, refer it for arbitration by the CCMA / relevant Bargaining Council (if there is any with jurisdiction).\textsuperscript{176} This is less formal, cheap and fast.

2.5 Dispute resolution in Essential Services

There is a slight deviation in terms of the manner in which disputes are resolved in the essential services area. According to section 213 of the Act,\textsuperscript{177} Essential Services refers to a service an interruption of which endangers life, personal safety or health of the whole or any part of the population, parliamentary service and the South African Police Service.

The Essential Services Committee (hereafter referred to as “ESC”) established in terms of section 70 of the Act\textsuperscript{178} and which operates under the auspices of the CCMA plays a crucial role in terms of designating services as being essential as per the definition. The ESC also resolves disputes about the demarcation of such services.

The ESC has declared 18 services to be essential; Air Traffic Control, Blood Transfusion Services, Court Services, Department of Correctional Services, Department Defense Civilian Services, Fire Fighting, Key-point Computer Services, Local Authority Services (municipal traffic services and policing, health and security), Power, Private Health Services funded by Public (emergency health services and health facilities for the community, nursing and paramedical services), Private health Services funded by the Public (boiler and water purification), Public Health Services, Public Health Support Services, Sanitation Services, Social Pensions Payments, Water, Welfare Registered Nursing Homes and Welfare Registered Nursing Homes Support Services.\textsuperscript{179}

\textsuperscript{175} 66 of 1995
\textsuperscript{176} Department of Labour \textit{Know your LRA: A Guide to the new Labour Relations Act 1995 2\textsuperscript{nd} ed} (2002) 82.
\textsuperscript{177} 66 of 1995 as amended.
\textsuperscript{178} 66 of 1995.
\textsuperscript{179} CCMA Info Sheet.
Section 65(1)(d) of the Act\(^{180}\) prohibits industrial action by persons engaged in essential or maintenance services. In terms of section 74(1) of the Act,\(^{181}\) disputes arising in essential services must be referred to CCMA or Bargaining Council for conciliation and arbitration.

If a dispute of mutual interest in essential service is referred to the CCMA in terms of section 135(6) of the Act,\(^{182}\) parties must agree on the terms of reference (section 135(6)(a)(ii) of the Act)\(^{183}\) but, if they do not, the CCMA must determine them in terms of section 135(6) (b)(ii) of the Act.\(^{184}\) The dispute is then conciliated and (if this does not succeed) arbitrated.

### 2.6 Private dispute resolution

There is provision by labour law in South Africa for parties to resolve their dispute through private processes, an arrangement commonly referred to as private dispute resolution.

Private arbitration that is part of the private dispute resolution system is conducted by agreement between the disputing parties in which they choose their arbitrator and by agreement also determine their own terms of reference and powers.\(^{185}\) This is also emphasized in Bosch,\(^{186}\) where it is mentioned that the powers of the arbitrator and the process to be followed are governed by the agreement between parties.

Du Toit\(^{187}\) states that although conciliation and arbitration are available under the Act\(^{188}\) at no cost, agreed procedures may override the relevant provisions of the Act.\(^{189}\) This was confirmed in *Mthimkhulu v CCMA*\(^{190}\) where the Labour Court held that dispute resolution procedures set by collective agreement enjoy precedence
over the provision of the Act\textsuperscript{191} and that parties therefore remained bound by collective agreements providing for private arbitration. Furthermore, the Act\textsuperscript{192} encourages private dispute resolution, and CCMA may not arbitrate a dispute that arises from a collective agreement if the agreement designates private arbitration.\textsuperscript{193}

The Act\textsuperscript{194} expect private dispute resolution agencies to play a major role in the dispute resolution system, and they may do this either as agencies accredited by the CCMA or as private bodies.\textsuperscript{195} Tokiso Dispute Settlement (Pty) Ltd (hereafter referred to as “TOKISO”) is South Africa’s largest and most active private dispute resolution service in the labour field.\textsuperscript{196}

Private arbitration is conducted in terms of the Arbitration Act\textsuperscript{197} and not in terms of the Act.\textsuperscript{198} In terms of this process, parties agree on a Commissioner and draw up the terms of reference for the Commissioner. The arbitration agreement may regulate issues such as privacy, legal representation and formalities, the timing, form and content of the award and arbitration costs.\textsuperscript{199} Furthermore, conciliation is not an absolute necessity (nor is it a legal requirement) before referring a dispute for arbitration under private dispute resolution. However, the principle of fairness which is central to the Act\textsuperscript{200} is also applicable to private dispute resolution.

Du Toit\textsuperscript{201} also states that as is with CCMA awards, the award of private arbitration is final and not subject to appeal. In terms of section 31 of the Arbitration Act,\textsuperscript{202} a private arbitration award may also be made an Order of the Court.\textsuperscript{203}

\begin{thebibliography}{99}
\bibitem{191} 66 of 1995.
\bibitem{192} Ibid.
\bibitem{193} Du Toit \textit{et al} \textit{Labour Relations Law} 139.
\bibitem{194} 66 of 1995.
\bibitem{195} Brand \textit{et al} \textit{Labour Dispute Resolution} 73.
\bibitem{196} Bosch \textit{et al} \textit{The Conciliation and Arbitration Handbook} 20.
\bibitem{197} 42 of 1965.
\bibitem{198} 66 of 1995.
\bibitem{199} Du Toit \textit{et al} \textit{Labour Relations Law} 140.
\bibitem{200} 66 of 1995.
\bibitem{201} Du Toit \textit{et al} \textit{Labour Relations Law} 140.
\bibitem{202} 42 of 1965.
\bibitem{203} See \textit{City of Tshwane Metropolitan Municipality v Campella NO \& others [2004] 1 BLLR 1 (LAC)}. 
\end{thebibliography}
As is with the arbitration awards in terms of the Act, private arbitration awards are also subject to review. In Bosch, it is stated that the test for review of private arbitrations has been a subject of debate, and that several decisions have held that the Labour Court must apply the same standards when reviewing private arbitration awards that are applicable to the review of CCMA awards. In *Transnet Ltd v HOSPERSA & another* and in *Cox v CCMA & others*, the Labour Court held that arbitration by CCMA and private arbitrators are subject to the same test, that of whether the award is justifiable in terms according to the evidence properly before the arbitrator.

However, in other cases, it was held that the “justifiability test”, in terms of section 158(1)(g) of the Act, does not apply to review of private arbitrations awards, simply for the reason that a private arbitrator is not an organ of state and that private arbitration is consensual, as opposed to statutory arbitration which is compulsory. This has just been re-emphasized by the Labour Court in *NUM obo 35 Employees v Grogan & another* where it was held that standard of justifiability is not applicable in review of private arbitration awards and that the proper test is whether arbitrator has committed error of law or fact.

In *Stocks Civil Engineering (Pty) Ltd v Rip NO & another* it was held that awards of private arbitrators to be reviewed only on grounds provided in the Arbitration Act, wide enough to include errors of fact and law that prevent arbitrator from properly discharging functions.

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204 66 of 1995.
205 Jordaan & Stelzner *Labour Arbitration* 120.
207 [1999] 7 BLLR 732 (LC).
208 [2001] 2 BLLR 141 (LC).
209 66 of 1995 as amended.
210 [2007] 4 BLLR 289 (LC).
212 42 of 1965.
2.7 Hierarchy Of Courts

The discussion of the hierarchy of courts begins with the Labour Court and not the CCMA due to the fact that the latter is an administrative tribunal and not a Court (just like its predecessor, the Industrial Court).\textsuperscript{213}

Sections 151 and 167 of the Act\textsuperscript{214} established new Courts, the Labour Court and Labour Appeal Court respectively, as the only Courts which could hear and decide on labour disputes.

If there is dissatisfaction with the outcome at the Labour Court in terms of any matter referred to it, the matter can be referred to the Labour Appeal Court in terms of section 173 of the Act.\textsuperscript{215} If there is still unhappiness with the outcome of the Labour Appeal Court, the matter can be referred to the Supreme Court of Appeal. There has been indecisiveness as to whether the Supreme Court of Appeal should entertain appeals from the Labour Appeal Court when that court has decided appeals from the Labour Court. This created some confusion because the Labour Appeal Court was viewed as being the highest in the labour hierarchy and which the Act\textsuperscript{216} proclaimed to be the final court of appeal on labour matters. In \textit{NUMSA & others v Fry’s Metal (Pty) Ltd & others},\textsuperscript{217} the indecisiveness was dealt with where the court indeed decided in the affirmative. In \textit{NUMSA and others v Fry’s Metal (Pty) Ltd and others supra}, it was held that the Supreme Court of Appeal can entertain appeals from the Labour Appeal Court when that court has decided on appeals from the Labour Court.\textsuperscript{218} Also in \textit{Chevron (Pty) Ltd v Nkambule and others},\textsuperscript{219} it was held that the Supreme Court of Appeals could entertain appeals on all questions of fact and law from the Labour Appeal Court. Nevertheless, it is stressed that there must be good reasons and good prospect for success for the second appeal (that is what this basically is). Furthermore, a leave of appeal must be granted for the matter to be referred to the Supreme Court of Appeal from the Labour Appeal Court.

\textsuperscript{213} See SA Technical Officials Association v President of the Industrial Court supra.

\textsuperscript{214} 66 of 1995.

\textsuperscript{215} Ibid.

\textsuperscript{216} Ibid.

\textsuperscript{217} [2005] 5 BLLR 430 (SCA).

The constitution also arranged the hierarchy of courts in the country in such a manner that the Supreme Court of Appeal is the court of highest instance in all matters (including labour matters), apart from constitutional matters.

### 2.8 Challenges and Way Forward

Although the Act\(^{220}\) has brought statutory dispute resolution mechanisms and processes within the reach of the ordinary worker, it may actually have compounded the problems relating to dispute resolution in the country.\(^{221}\) Dispute resolutions institutions like the CCMA have a very huge workload. This situation may largely be attributed to various factors and of significant impact being the fact that there is easy access to these institutions. Also the fact that these institutions do not charge play a major role in terms of contributing towards the cases overload for CCMA, this is confirmed by Bendeman.\(^{222}\)

Bendeman\(^{223}\) goes on further to mention that the Act\(^{224}\) created a sophisticated system of dispute resolution in which most of the role-players are not capacitated to operate, and this gave rise to an excessively high rate of individual unfair dismissal disputes to the CCMA. Consequently, labour lawyers and consultants are taking advantage of the situation. Surely, this was not the intention of the drafters of the relevant legislation, because consultants and lawyers will sometimes deliberately allow minor disagreement to snowball into big disputes thus creating more work for them and benefiting more in the process.

The Superior Courts Bill of 2003 provides for the incorporation of the Labour Court and Labour Appeal Court into the High Court system in not too distant future.\(^{225}\) The general feeling is that the (labour) courts have failed. The irony though is that the ordinary courts are not functioning optimally as well. In Van Jaarsveld,\(^{226}\) it is stated that the ordinary court of law generally function slowly, are expensive and lack

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224 66 of 1995 as amended.  
226 Van Jaarsveld & Van Eck *Principles of Labour Law* 414.
expertise in labour law. It is further stated that in many countries worldwide, special institutions have been put in place to resolve labour disputes, which function independently from the ordinary civil courts. If developed countries like Germany, France and Sweden still have the specialized institutions, this country could also retain these institutions to avoid the delays of the ordinary courts and, also employees and employers will have to depend heavily on lawyers and consultants. There is a feeling that should the Superior Court Bill be passed, this could signal a new era in the development of SA Labour Law. It will be an exciting but uncertain era where the principles regulating common law contract of employment, the notion of fairness as developed by the Industrial and Labour Courts, and administrative and constitutional law principles, will be stirred into one melting pot to be further develop by the Civil / High Court.\(^\text{227}\)

One of major challenges of the dispute resolution system is the “forum shopping” done as a result of the overlapping jurisdiction created by the various pieces of statutes within the employment relationship area. Zondo J\(^\text{228}\) also dealt with this issue in the recent Labour Law Conference\(^\text{229}\) where he vehemently voiced his unhappiness with the current state of affairs in this regard. He was strongly of the view that labour matters must be dealt with by a court specifically created for that purpose. Judge Zondo felt so strongly about the “forum shopping” problem caused by the overlapping jurisdiction that he even conveyed his frustrations to the authorities (government).\(^\text{230}\) A good example of forum shopping created by overlapping jurisdiction is in the Transnet v Chirwa.\(^\text{231}\) Chirwa was discharged and referred an alleged unfair dismissal dispute to the CCMA in terms of the Act,\(^\text{232}\) and upon realizing that this was fruitless, she shopped around for another forum and chose the High Court. It is interesting to note that she changed her cause of action from an unfair dismissal to a claim of unfair administrative action under the PAJA or alternatively, a violation of her constitutional right to fair administration action.


\(^{228}\) Judge President of the South African Supreme Court of Appeal.

\(^{229}\) Butterworth 20th Annual Labour Law Conference held in Sandton from 4 – 6 July 2007.

\(^{230}\) See Langeveldt v Vryburg Transitional Local Council [2001] 5 BLLR 501 (LAC) at 519 par 55.


\(^{232}\) 66 of 1995.
There is also an overall impression that the system was designed for big employers, and provided little flexibility for the small to the medium-sized employers.\(^{233}\) There has always been an outcry from small business with regards to the labour legislation not being flexible and understanding towards them. Also, the general feeling is that the labour legislation requires technical expertise that they do not have, and are always punished by the dispute resolution institutions due to mainly procedural flaws.

The dominant perception confirmed the views of Brand\(^{234}\) as mentioned by Bendeman\(^{235}\) that the impact of private dispute resolution bodies on the CCMA will be marginal. It is further stated that private dispute resolution will remain for long an elite phenomenon for minority because most employees cannot afford to pay the costs involved in private dispute resolution. There was also an indication that unions prefer the CCMA route.

The well known and institutionalized procedures for the management of individualized conflict are primarily the grievance and disciplinary procedures.\(^{236}\) According to Bendeman,\(^{237}\) if these mechanisms (grievance and disciplinary procedures) are utilized effectively, it could mean that very few disputes would escalate to a level where they need to be referred to a third party for resolution. Employers and employees are encouraged to take a very proactive role in terms of improving the grievance and disciplinary procedures to ensure that they deal effectively with issues at organization or company level.

According to Christie,\(^{238}\) cases must be screened at the point of entry because of the overload of cases. Experts should be appointed by institutions like the CCMA to do the preliminary screening of disputes referred and advise accordingly where there are no prospects of success.

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\(^{236}\) Brand et al Labour Dispute Resolution 7.


\(^{238}\) Christie “One-Stop Shopping: Has the CCMA made dispute resolution any easier?” CRR Vol.7 No.2.
It was suggested that conciliation-arbitration (con-arb) should be made compulsory for all misconduct cases.\textsuperscript{239} There is a belief that this will drastically reduce time it takes for a dispute to be resolved.

The overlapping of jurisdiction can be avoided by drafters of legislation. For example, in section 5(3) of Promotion of Equality and Prevention of Unfair Discrimination Act\textsuperscript{240} (hereinafter referred to as “PEPUDA”) it is stated that PEPUDA does not apply to the extent to which the EEA\textsuperscript{241} applies.

\begin{thebibliography}{99}
\bibitem{240} 4 of 2000.
\bibitem{241} 55 of 1998.
\end{thebibliography}
Refer for conciliation with CCMA or Bargaining Council (BC) within 30 days for unfair dismissals and 90 days for unfair labour practice.

If dispute is settled, agreement in writing and understood by both parties.

If agreement not implemented, apply to Labour Court for Order.

Arbitration with BC or CCMA
If the dispute involves;
- dismissal for misconduct or incapacity
- severance pay
- disclosure of information
- workplace forums
- essential services disputes of interest
- unfair labour practice (promotion, demotion, training, benefits, suspension, disciplinary action, failure to reinstate or re-employ)

Adjudication with the Labour Court
If the dispute involves:
- automatically unfair dismissal, for example pregnancy
- arbitrary and unfair discrimination
- unfair labour practice that involves arbitrary discrimination
- right to join a trade union, strike and picket
- Retrenchments

Industrial Action
However, industrial action cannot be taken:
- If there is an agreement between employees and employer that says that such dispute must be referred for arbitration or prohibits industrial action.
- If the Act says such disputes must be referred for arbitration.
- If workers are engaged in an essential service.

Before embarking on an Industrial Action:
- Dispute referred for conciliation
- Issue 48 hrs / 7 days

Appeal in the Labour Appeal Court
Supreme Court of Appeal
Constitutional Court
Industrial Action

Refer to the High Court i.e. PAJA (public sector)

Parties agree to refer for Private arbitration in terms of the Arbitration Act.

CCMA / BC arbitrator to chair the predismissal arbitration at the organisation

Refer for con-arb to the CCMA / BC w.r.t probation disputes or if both parties agree.

Review at the Labour Court

Review at the High Court in terms of PAJA.

Source: http://www.paralegaladvice.org.za downloaded on the 21 June 2006. The diagram initially contained the summary of the dispute resolution system of the Act before its amendments of 2002 and had to be updated accordingly to reflect the amendments as well.
CHAPTER 3
EVALUATION OF THE PUBLIC SERVICE DISPUTE RESOLUTION

3.1 Introduction
The field of labour relations in the public service is complex and very intriguing. This is mainly due to its unique setup and different guiding prescripts that are pertinent to the public service.

The public service is part of a broader public sector, and the latter refers to all institutions under public control which include public service, local government, parastatals, universities, technikons and marketing boards. In terms of section 213 of the Act, public service refers to the national departments, provincial administrations, provincial departments and organizational components contemplated in section 7(2) of the Public Service Act (hereinafter referred to as “the PSA”).

The public service constitutes about 75% of public sector employment, and there are about 1.1 million employees employed. This makes the public service the single largest employer in the country.

3.2 History of dispute resolution in the public service
Before 1993, there was no labour relations system in the public service, no right to join trade unions, no right to bargain or strike, in essence labour relations in

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244 There is explicit exclusion of the members of the South African Defense Force, National Intelligence Agency and the South African Secret Agency from the scope of the public service.
245 103 of 1994.
the public service was not regulated in any way.\textsuperscript{247} It must be emphasized that for a long time there was no effort to change the situation.

The National Party (NP) used the afrikaanisation of the civil service as a strategy of industrial discipline in the public service. Whites were given jobs by organisations like the Broederbond and had to be loyal in return.\textsuperscript{248} So most civil servants knew that they depended on their party for their jobs which could be revoked just as easily as they were supplied.\textsuperscript{249} Subsequently, disputes were rarely declared against the State as an employer.

Since 1912, the Public Service Commission (hereinafter referred to as “the PSC”) administered all aspects of the employer/employee relationship (including the determination of wages and conditions of service, discipline and grievance handling).\textsuperscript{250} The NP politicized the PSC to push its own agenda of apartheid.\textsuperscript{251}

In 1920, the Public Servants Association was established for white public servants.\textsuperscript{252} In the early 1980 other associations were formed along racial lines; the Public Service Union (PSU) for Indian public servants and the Public Service League (PSL) for Coloured employees.\textsuperscript{253} There was nothing established for African public servants though.

Whereas, in the past, the severely restricted “rights” contained in the LRA\textsuperscript{254} were conferred on other employees, the employees in the public service were

\begin{itemize}
\item \textsuperscript{247} Garson “Labour relations in education” in Adler Public Service Labour Relations in a Democratic South Africa (2000) 203.
\item \textsuperscript{248} Posel “Labour relations & the politics of patronage” in Adler Public Service Labour Relations in a Democratic South Africa (2000) 41.
\item \textsuperscript{249} \textit{Ibid.}
\item \textsuperscript{250} Adler “The neglected role of labour relations in the public service” in Adler Public Service Labour Relations in a Democratic South Africa (2000) 1.
\item \textsuperscript{251} \textit{Ibid.}
\item \textsuperscript{252} Huluman “The practice of social dialogue in the South African public service” [http://www.pscbc.org.za/Other/Conference Papers : 2006/10/30].
\item \textsuperscript{253} \textit{Ibid.}
\item \textsuperscript{254} 28 of 1956.
\end{itemize}
specifically excluded from the purview of the LRA.\textsuperscript{255} Section 2(2) of the LRA specifically excluded from the application of the LRA\textsuperscript{256} persons employed by the State and persons who taught, educated or trained other persons at universities, technikons, colleges, schools or other educational institutions maintained wholly or partly from public funds.\textsuperscript{257} This meant that employees in the public service could not complain using the mechanisms created by the LRA.\textsuperscript{258}

Since 1960’s, Joint Advisory Council (JAC) existed to advise the then Minister of Public Service on HR matters. The associations in the public service were allowed to make written inputs to JAC but the government was no obligated to respond and there were no negotiations.\textsuperscript{259}

The public service was even immune to the changes in the labour relations field brought about by the investigation and recommendations thereof made by the Wiehahn Commission. One of the recommendations by the Commission was extending labour rights to the public servants and the then government of the NP had no interest in pursuing this recommendation.\textsuperscript{260} This may have been perhaps due to the view that public service was “under control” and there was no anticipation of that situation changing later on (e.g. the eruption of strikes witnessed within the public service in the early 1990’s).

As mentioned before, the early 1990’s was an era of bitter struggles in the labour movement for the recognition of union organization in the public service, there was labour unrest and industrial action, more especially in the health and education sectors. This resulted into two pieces of legislation and their

\begin{itemize}
\item \textsuperscript{255} 28 of 1956.
\item \textsuperscript{256} \textit{Ibid}.
\item \textsuperscript{257} Ngcukaitobi “The right to collective bargaining: a constitutional rope of sand” Presentation at the Juta 17\textsuperscript{th} Annual Labour Law Conference (2005).
\item \textsuperscript{258} 28 of 1956.
\item \textsuperscript{259} Molahlehi “Structure of Social Dialogue in SA public service” Presentation at the PSCBC Conference (14 February 2005).
\item \textsuperscript{260} Adler “The neglected role of labour relations in the public service” in Adler \textit{Public Service Labour Relations in a Democratic South Africa} (2000) 1.
\end{itemize}
regulations in 1993 to deal with labour relations in the public service, the Public Service Labour Relations Act\textsuperscript{261} (hereinafter referred to as “the PSLRA) and the Education Labour Relations Act\textsuperscript{262} (hereinafter referred to as “the ELRA).

The PSLRA\textsuperscript{263} for the first time provided for labour rights in the public service.\textsuperscript{264} The public servants then had the right to organize into trade unions, right to collectively bargain and the right to strike. The PSLRA\textsuperscript{265} also established the Public Service Bargaining Chamber (PSBC), central chamber at national level, and departmental and provincial bargaining councils. On the other hand, the ELRA\textsuperscript{266} established a sector specific bargaining council for educators, the Education Labour Relations Council (hereinafter referred to as “ELRC”). The South African Police Regulations were passed in 1990’s, which established a National Negotiation Forum for the police in 1995. The summation of the functions of these bargaining councils is the prevention and resolution of disputes and the regulation of settlement of matters of mutual interest through negotiations.\textsuperscript{267} From its inception, the PSBC had to deal mostly with wage disputes.

In education, until 1993 white teacher organizations had a “hotline” with the Minister’s office, and Black teachers organizations had no way of airing their grievances.\textsuperscript{268} In the police service, any grievance, whether collective or individual, was dealt with on an individual basis by a higher ranking office. This

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\textsuperscript{261} & 102 of 1993. & \hline
\textsuperscript{262} & 146 of 1993. & \\
\textsuperscript{263} & 102 of 1993. & \\
\textsuperscript{265} & 102 of 1993. & \\
\textsuperscript{266} & 146 of 1993. & \\
\textsuperscript{268} & Garson “Labour relations in education” in Adler \textit{Public Service Labour Relations in a Democratic South Africa} (2000) 203. & \\
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\end{footnotesize}
was done initially at the police station but could go up even to the level of a National Commissioner.\textsuperscript{269}

Before 1994, there was no collective system of dispute resolution in the public service.\textsuperscript{270} Individual dispute resolution took place through administrative channels with the PSC as an ultimate arbiter. Internal grievance procedures were cumbersome and had lengthy timeframes. Public service legal relief was through the civil courts.

Subsequent to the introduction of the Interim Constitution,\textsuperscript{271} the PSA\textsuperscript{272} was introduced thus repealing the PSLRA.\textsuperscript{273} In 1995, the South African Police Services Act\textsuperscript{274} (hereinafter referred to as “the SAPSA”) came into effect. With it came the South African Police Services Labour Relations Regulations. These regulations set new procedures governing the discipline and dismissal of members of the police services.\textsuperscript{275}

### 3.3 Public service dispute resolution processes and their Institutions

With the advent of democratization in the 1990’s, the public service was brought within the ambit of the Act\textsuperscript{276} allowing for the first time the full development of trade unions and collective bargaining. When the Act\textsuperscript{277} was extended to the public service, its dispute resolution mechanisms were also extended. This meant that parties in the public service could go to the CCMA for the resolution of their disputes.

\begin{itemize}
\item \textsuperscript{269} Marks “Labour relations in the South African Police Service” in Adler Public Service Labour Relations in a Democratic South Africa (2000) 230.
\item \textsuperscript{270} Huluman “The Practice of Social Dialogue in the SA Public Service” [http://www.pscbc.org.za/Other/Conference Papers: 2006/10/30].
\item \textsuperscript{271} 200 of 1993.
\item \textsuperscript{272} 103 of 1994.
\item \textsuperscript{273} 102 of 1993.
\item \textsuperscript{274} 68 of 1995.
\item \textsuperscript{275} Ngcukaitobi “The right to collective bargaining: a constitutional rope of sand” Presentation at the Juta 17\textsuperscript{th} Annual Labour Law Conference (2004).
\item \textsuperscript{276} 66 of 1995.
\item \textsuperscript{277} \textit{Ibid.}
\end{itemize}
Unlike the private sector bargaining councils which were formed through a voluntary process, section 35 of the Act\textsuperscript{278} established the Public Service Coordinating Bargaining Council (hereinafter referred to as “the PSCBC”).\textsuperscript{279} The establishment of the PSCBC was aimed at addressing the fragmented system of collective bargaining created by the three separate statutes in the public service namely the ELRA,\textsuperscript{280} PSLRA\textsuperscript{281} and SA Police Regulations.\textsuperscript{282}

The PSCBC covers the whole public service (excluding the members of the National Defense Force, the National Intelligence Agency and the South Secret Service), and one of its main objectives is to provide mechanisms for the prevention and resolution of disputes in the public service. The PSCBC is also responsible for policy formulation together with sectoral councils (discussed hereunder) to ensure uniformity. In 1998, the PSCBC adopted own dispute resolution procedures by way of a collective agreement (PSCBC Resolution 3 of 1998).\textsuperscript{283} In June 2000, the PSCBC and the sectoral councils implemented own dispute resolution procedures and received accreditation from the CCMA. The disputes at the PSCBC are dealt with in terms of the PSCBC dispute resolution procedures which were initially adopted in 1998 and later amended in 2002. The procedures are in compliance with section 51 of the Act.\textsuperscript{284} The PSCBC has no jurisdiction where a sectoral council has jurisdiction, and if there is a dispute between the PSCBC and sectoral council as to whether these procedures or the sectoral council’s procedures apply, the dispute must be referred to the CCMA for conciliation and arbitration in terms of section 38 of the Act.\textsuperscript{285}

\textsuperscript{278} 66 of 1995.
\textsuperscript{280} 146 of 1993.
\textsuperscript{281} 102 of 1993.
\textsuperscript{284} 66 of 1995 as amended.
\textsuperscript{285} Ibid.
The PSCBC is the coordinating bargaining council and there are also sectoral councils in the public service established in terms of section 37 of the Act. These are the Public Health and Social Development Sectoral Bargaining Council (hereinafter referred to as “the PHSDSBC”) formerly known as the Public Health and Welfare Sectoral Bargaining Council - PHWSBC, the Education Labour Relations Council (hereinafter referred to as “the ELRC”), Safety and Security Sectoral Bargaining Council (hereinafter referred to as “the SSSBC”) and the General Public Service Sectoral Bargaining Council (hereinafter referred to as “the GPSSBC”).

The scope of the PHSDSBC is the whole of the health and social development sector, it covers all employees of both the Departments of Health and Social Development at both National and Provincial levels. It also covers all other health and social development professionals employed in all other National and Provincial Departments as reflecting under Section 1 of the PHSDSBC Constitution.

The scope of the SSSBC covers all employees employed in terms of the South African Police Service Act and their support staff employed in terms of the PSA.

The scope of the ELRC covers all the educators employed in terms of Employment of Educators Act (hereinafter referred to as “the eea”). Support staff of the Department of Education employed in terms of the PSA is not covered.

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286 66 of 1995 as amended.
287 The name change was effective from 2007.
288 Can be accessed from the PHSDCBC Website – http://www.phsdsbc.org.za.
290 103 of 1994.
291 76 of 1998.
The scope of the GPSSBC is all employees who do not fall under the sectors mentioned above (PHSDSBC, ELRC and SSSBC). It must be noted though that uniformed soldiers as well as employees of the National Intelligence Agencies and South African Secret Services are excluded.

The CCMA has accredited the PSCBC and all the sectoral councils for both conciliation and arbitration.\textsuperscript{293} The accreditation is in terms of section 127 of the Act.\textsuperscript{294} Arbitration awards issued in the public service are also final and binding, and cannot be subjected to an appeal but can be referred for review.

The PSCBC and sectoral councils have appointed a panel of conciliators and arbitrators who are contracted to the councils to carry out dispute resolution functions.\textsuperscript{295} The PSCBC deals mostly with collective disputes and sectoral councils deal mostly with individual disputes (e.g. dismissals or unfair labour practice).

However, in terms of section 127(2) of the Act,\textsuperscript{296} there are certain disputes that must be referred to the CCMA even in the public service. These are disputes in terms of disclosure of information (sections 16 & 189), organizational rights disputes (chapter III Part A), agency shop disputes (section 25), closed shop disputes (section 26), interpretation or application of collective bargaining provisions (section 63(1)), picketing disputes (section 69), workplace forum disputes (sections 86 & 94).

The processes followed in the public service in terms of dispute resolution (conciliation, arbitration and adjudication) are similar to the general processes of dispute resolution prevalent in the private sector. The amendments\textsuperscript{297} to the
Act\textsuperscript{298} in terms of the con-arb, pre-dismissal arbitrations are also applicable in the public service.

3.4 Dispute resolution in the Public Service Essential Services
The Act\textsuperscript{299} declared the South African Police Services as essential service, and furthermore, the ESC set up by the Act\textsuperscript{300} also declared the health and welfare sectors also as essential service.\textsuperscript{301} The Correctional Services was also declared as essential services. The procedures for the resolution of disputes in essential services are the same as other processes set out in the Act.\textsuperscript{302} The difference is that for matters of mutual interest, officials in these areas declared as essential service cannot embark on a strike action but their disputes must be settled by arbitration expeditiously.

3.5 Analysis of the Public Service dispute resolution system
One of the major challenges in the public service emanate from their legislative framework for dealing with labour disputes. Firstly, there are too many pieces of legislation applicable to dispute resolution in the public service. Some of these statutes are the Constitution,\textsuperscript{303} SAPSA,\textsuperscript{304} eea,\textsuperscript{305} PSA,\textsuperscript{306} Act,\textsuperscript{307} and their regulations. The problem is that there is sometimes an overlap of the statutes in certain sectors. For example, in the education sector, educators are employed in terms the eea\textsuperscript{308} and their support staff are employed in terms of the PSA.\textsuperscript{309} In the private sector the Act\textsuperscript{310} plays a very significant role.

\textsuperscript{298} 66 of 1995.
\textsuperscript{299} Ibid.
\textsuperscript{300} Ibid.
\textsuperscript{302} 66 of 1995 as amended.
\textsuperscript{303} 108 of 1996.
\textsuperscript{304} 68 of 1995.
\textsuperscript{305} 76 of 1998.
\textsuperscript{306} 103 of 1994.
\textsuperscript{307} 6 of 1995 as amended.
\textsuperscript{308} 76 of 1998.
\textsuperscript{309} 103 of 1994.
\textsuperscript{310} 66 of 1995 as amended.
These statutes also have different provisions in terms of dealing with same conducts (for example, abscondments). On one hand the PSA⁴¹ refers to abscondment if an official is absent for more than a calendar month and on the other hand section 14(1)(a) of the eea⁴² deem an official to have absconded if he/she is not at work for 14 consecutive days.

Furthermore, some of these statutes, like the eea⁴³ and PSA⁴⁴ are in certain areas not in line with the Act⁴⁵ in terms of approach and have been vigorously challenged by the Courts. Once again, there are two approaches that are adopted by departments in the public service with respect to dealing with abscondments. An employee is either subjected to a disciplinary process for being absent without leave or permission, alternatively, section 17(5)(a)(i) of the PSA⁴⁶ is invoked. It must be emphasized though that the departments in the public service have been very quick to jump for the latter option. The position of the Courts in this regard is that section 17(5)(a)(i) of the PSA⁴⁷ is draconian and must only be invoked if it is not possible to institute a disciplinary action as per the Act.⁴⁸ This was also confirmed in *Myburgh & others v SAPS⁴⁹* where it was held that public sector employees absent without permission for more than prescribed period by legislation deemed discharge only if employer is unable invoke normal disciplinary procedure. In terms of the relevant sections, the discharge is by operation of law and does not fit the dismissal definition as per section 186(1) of the Act.⁵⁰ The implications thereof are that if an official is discharged by operation of law, such official cannot utilize processes and institutions created by the Act⁵¹ to challenge the discharge. The recourse for an

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⁴¹ 103 of 1994.
⁴² 76 of 1998.
⁴³ *Ibid*.
⁴⁴ 103 of 1994.
⁴⁶ 103 of 1994.
⁴⁷ *Ibid*.
⁴⁸ 66 of 1995.
⁴⁹ [2006] 1 BALR 16 (SSSBC).
⁵⁰ 66 of 1995 as amended.
⁵¹ *Ibid*.
official discharged by operation of law is to make representation for reinstatement in terms of section 17(5)(b) of the PSA\textsuperscript{322} or section 14(2) of the eea,\textsuperscript{323} whichever is applicable.\textsuperscript{324}

Taking the argument further, there is no consistency and uniformity, and there is also an element of unfairness with regards to the manner in which the same abscondments are dealt with in the public service. To elucidate the point further by a possible scenario, an educator and a general worker in the same school are absent without leave or permission and cannot be found and efforts to locate them are fruitless. After 14 consecutive days, the educator is discharged (operation of law, section 14(1)(a) of the eea)\textsuperscript{325} and cannot even challenge the discharge by utilizing the provisions of the Act.\textsuperscript{326} Before the end of a calendar month, the general worker returns to work (and as such has not absconded as per section 17(5)(a)(i) of the PSA)\textsuperscript{327} and will be dealt with in terms of absence without leave or permission, this although he/she was absent for a period more than that of the educator. Surely, this is not a fair situation.

The public service has also been marred by delays in terms of dealing with grievances. The delay in terms of dealing with grievances within the prescribed period also contributes in terms of more disputes being declared unnecessarily in the public service. The departments have 30 days to deal with grievances, a period that may be extended in consultation with the aggrieved officials. It is interesting to note that departments fail to address grievances as per the stipulated time and consequently incur costs of attending to conciliations and arbitrations unnecessarily. Employers in the private sector have less time to deal with grievances but deal with their grievances in less time that their counterparts in the public service. This problem developed into alarming levels to an extent

\begin{footnotesize}
\begin{enumerate}
\item[322] 103 of 1994.
\item[323] 76 of 1998.
\item[325] 76 of 1998.
\item[326] 66 of 1995 as amended.
\item[327] 103 of 1994.
\end{enumerate}
\end{footnotesize}
that the Minister of Public Service and Administration, the Honourable Minister Geraldine Fraser-Moleketi had to intervene. In this regard, the Minister circulated a Memorandum\textsuperscript{328} to all other Ministers addressing the issue. The consequences of the delays are that disputes are declared on issues that could have been addressed at departmental level. This is very costly to departments and a waste of taxpayers money.

There is also confusion as to which court should resolve disputes between public sector employees and the State. The issue is whether public servants should rely on Promotion of Administrative Justice Act\textsuperscript{329} (hereinafter referred as “the PAJA”) or the Act?\textsuperscript{330} The right to fair administrative action, now partly codified in the PAJA\textsuperscript{331} creates a massive overlap where actions of the State are at issue. On one hand, the Act\textsuperscript{332} is designed to give effect to the fundamental right to fair labour practice enshrined in section 23 of the Constitution,\textsuperscript{333} on the other hand the PAJA\textsuperscript{334} is designed to give effect to just administrative action enshrined in section 33 of the Constitution.\textsuperscript{335} The Supreme Court of Appeal held in \textit{United Public Servant Association of SA v Digomo NO \\& others}\textsuperscript{336} that employees are entitled to choose between the PAJA\textsuperscript{337} and the Act\textsuperscript{338} to press their claims against employers, and, if they choose to litigate under the former act, the High Court is bound to deal with the matter. This judgment concurs with the Supreme Court Appeal’s earlier judgment in \textit{Fedlife Assurance Ltd v Wolfaardt}\textsuperscript{339} where it was held that employees may litigate in the High Court if they seek to contest the lawfulness, as opposed to the fairness, of the termination of their contracts of

\textsuperscript{328} Memorandum issued by the Honourable Minister Geraldine Fraser-Moleketi to Ministers dated 05/04/2006 with the subject Labour Relations: Problem Areas.
\textsuperscript{329} 3 of 2000.
\textsuperscript{330} 66 of 1995 as amended.
\textsuperscript{331} 3 of 2000.
\textsuperscript{332} 66 of 1995.
\textsuperscript{333} 108 of 1996.
\textsuperscript{334} 3 of 2000.
\textsuperscript{335} 108 of 1996.
\textsuperscript{336} (2005) 26 \textit{ILJ} 1957 (SCA).
\textsuperscript{337} 3 of 2000.
\textsuperscript{338} 66 of 1995.
\textsuperscript{339} [2001] 12 BLLR 1301 (SCA).
employment, thus preserving the High Court’s civil jurisdiction in labour matters, a jurisdiction which is in any event conferred by section 77(3) of the BCEA. This was also the case for suspensions and demotions.

There is also a challenge with the scope of the bargaining councils in the public service, to be more specific, with regards to their overlapping. This is similar to the challenge imposed by the relevant statutes in terms of dispute resolution. For example, educators (appointed in terms of the eea) belong to the ELRC and their support staff (appointed in terms of PSA) belongs to the GPSSBC. Once again, if an educator and a general worker in the same school, having transgressed together, are charged and subsequently dismissed, would have to refer their disputes to their relevant councils with a possibility of different outcomes. It must be kept in mind that the employer is one here, the State.

The long exclusion of the public service from the mainstream labour relations has resulted in lack of the necessary experience and expertise crucially needed to deal effectively and expeditiously with dispute resolution. This is in contrast with the situation in the private sector. This disparity is evident in the manner in which issues are dealt with by managers in the public service. Some of the issues escalate into being disputes unnecessarily.

The settlement rate of disputes in the public service at conciliation is far less than the private sector and this is mainly due to the fact that in the public service there is delegation of authority in terms of making the settlement. In the public service before any settlement with financial implications is made, permission would have to be sourced from the Head of Department, in a national departments the Head of Department may be in Pretoria and the dispute dealt with in Port Elizabeth or in another town. There is also protocol and bureaucracy that must be observed in

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341 See Mbayeka & another v MEC for Welfare, Eastern Cape [2001]1 All SA 567(Tk).
342 See Holgate v Minister of Justice (1995) 16 ILJ 1426 (E).
343 76 of 1998.
344 103 of 1994.
sourcing the relevant permission. In some Departments, the process of soliciting the necessary authority to settle takes a very long time.

There is constant monitoring and development of the performance by the contracted panel of conciliators and arbitrators in the PSCBC and Sectoral Councils. In this regard, a Quality Control Panel was established. There is quality control in terms of the proceedings, conduct of the commissioners and the awards. It is not insinuated in any way that there is no control over commissioners appointed by CCMA and Bargaining Councils utilized by the private sector, but having said that sometimes their performance can be questionable and this is also reflective on their awards that are referred to the Labour Court for review.

The public service, unlike the private sector allows disputes to be declared even when internal processes (like following the grievance procedures applicable in the public service) are not exhausted. This poses a huge problem in the sense that some of the issues could be addressed internally before disputes are declared.

In terms of the rate of disputes referred to different forums, the highest rate of referrals is with all the Bargaining Councils (excluding the Public Service Bargaining Councils). This is followed by the followed by the CCMA and then Public Service Bargaining Councils. With regards to the types of disputes referred, in the public service bargaining councils, the highest disputes pertain to unfair labour practice (more especially promotions), followed by unfair dismissal and then other disputes. In all Bargaining Councils, the highest is also the unfair labour practice and followed almost equally by unfair dismissals and other disputes. Interestingly, in the CCMA the highest disputes referred pertain to unfair dismissal, followed by other disputes. The unfair labour disputes are the

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345 Bosch "Dispute resolution in the Public Service – past achievements and future innovations" Presentation at the PSCBC Conference (14 February 2005).
least of the disputes referred. Furthermore, within the public service, the rate of disputes referred per sectoral council is highest at the GPSSBC. This is followed by SSSBC then ELRC. The sectoral council with the lowest rates of disputes referred is the PHSDSBC.

The overlapping jurisdiction of Bargaining Councils has also created a pandemonium within the public service with respect to dispute resolution. In most instances officials need information to pursue their unfair labour practice disputes. So firstly, information is sought and if not provided a dispute is declared and referred to the CCMA (only the CCMA has jurisdiction in this regard). Then afterwards, the unfair labour practice dispute is declared with the relevant bargaining council). Sometimes, an official lodges an unfair labour practice first and realize during the arbitration stage that he/she needs information, and now he/she must move between these institutions and the finalization of their disputes is delayed.

### 3.6 The jurisdictional debacle in the Public Service

Over the past couple of years, case law has highlighted the fact that a complex jurisdictional confusion has developed regarding public service labour dispute resolution.

Apart from the Constitution, there are three main sources of legal regulation that feeds into the public service employer/employee relationship. Firstly, common law contract of employment relationship which forms the basis of each relationship. Secondly, labour legislation such as the Act, which give effect to the constitutional fair labour practices and established specialist dispute resolution fora (including the bargaining councils, CCMA and labour courts)

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346 Bosch “Dispute resolution in the Public Service – past achievements and future innovations” Presentation at the PSCBC Conference (14 February 2005).
347 Bosch “Dispute resolution in the Public Service – past achievements and future innovations” Presentation at the PSCBC Conference (14 February 2005).
348 66 of 1995 as amended.
349 S 23 of the Constitution 108 of 1996.
which is responsible for the quick, cheap and informal resolution of labour disputes. And thirdly, the PAJA\textsuperscript{350} gives effect to the constitutional right to administrative action\textsuperscript{351} by codifying administrative law principles which steers due process and rationality regarding decision making in the public service. The High Court is the designated forum for the resolution of disputes under PAJA.\textsuperscript{352}

The different fora created by the different relevant statutes have contributed to the development of the jurisdictional quagmire that Conradie J refers to as “mystifying complexity”.\textsuperscript{353} This is a situation that is also referred to as “forum shopping” within the labour law and labour relations fields. According to Zondo J, there is a huge challenge of forum shopping that is created by the fact that jurisdiction is given to various tribunals to deal with labour disputes.\textsuperscript{354} This point is clearly observable in \textit{Transnet Ltd & others v Chirwa}.\textsuperscript{355} Upon her dismissal, Ms. Chirwa referred an unfair dismissal to the CCMA in terms of the Act,\textsuperscript{356} when she could not have her way at the CCMA she changed tack, shopped for another forum and altered her cause of action from an unfair dismissal dispute (as per the Act)\textsuperscript{357} to unfair administrative action (under PAJA),\textsuperscript{358} or in the alternative, to a breach of her constitutional right to just administrative action. The implications here are that public service employees can choose whether they want to make use of the Act\textsuperscript{359} or administrative law principle whenever an employee is dismissed or believe to have been subjected to an unfair labour practice.

Sometimes the choice for the forum can be influenced by certain factors, like time-frames for referrals of labour disputes. There are set timeframes for

\begin{itemize}
\item \textsuperscript{350} 3 of 2000.
\item \textsuperscript{351} S 33 of the Constitution 108 of 1996.
\item \textsuperscript{352} 3 of 2000.
\item \textsuperscript{353} This phrase was coined by Conradie J at para 33 of the Chirwa decision.
\item \textsuperscript{354} Welcoming speech by Judge Zondo at the Butterworth 20\textsuperscript{th} Annual Labour Law Conference held in Sandton Johannesburg on the 4 – 6 July 2007.
\item \textsuperscript{355} (2006) 27 ILJ 2294 (SCA).
\item \textsuperscript{356} 66 of 1995 as mended.
\item \textsuperscript{357} 66 of 1995.
\item \textsuperscript{358} 3 of 2000.
\item \textsuperscript{359} 66 of 1995 as amended.
\end{itemize}
referring disputes in terms of the Act\textsuperscript{360} (30 days for unfair dismissal, 90 days for unfair labour practice and six weeks for review at the labour court), with regards to PAJA\textsuperscript{361} there is no such strictness. If an official fails to meet the deadline in terms of the Act\textsuperscript{362} and there are very little prospects of succeeding with a condonation, such official may look around for another forum. Ms. Mbenya challenged her dismissal at the High Court after having been dismissed for seven (7) months, in this case the Supreme Court of Appeal confirmed that indeed the High Court did have jurisdiction.\textsuperscript{363} She must have known that it would have been very difficult to challenge her dismissal in terms of the Act\textsuperscript{364} because she was way out of the 30 days time-frame.

Different remedies offered by the different statutes relevant to dispute resolution in the public service have also contributed immensely in the current jurisdictional debacle that is prevalent in the public service. The Act\textsuperscript{365} contains better remedies than PAJA,\textsuperscript{366} the latter is limited to setting aside of the initial employer’s decision (see Chirwa).\textsuperscript{367} The normal remedy for administrative review is to set aside the decision and remit the matter back to the decision-maker to consider the dispute afresh (this is one of the reasons why Chirwa\textsuperscript{368} was overturned)

\subsection*{3.7 Way Forward}

The main problem with the dispute resolution system in the public service is due to fragmentation in terms of different statutes relevant to the dispute resolution. Sometimes approaches adopted in the public service with regards to dispute

\begin{flushleft}
\textsuperscript{360} 66 of 1995.
\textsuperscript{361} 3 of 2000.
\textsuperscript{362} 66 of 1995.
\textsuperscript{363} See Boxer Superstores Mthatha \& another v Mbenya [2007] 8 BLLR (SCA).
\textsuperscript{364} 66 of 1995.
\textsuperscript{365} 66 of 1995 as amended.
\textsuperscript{366} 3 of 2000.
\textsuperscript{367} Supra.
\textsuperscript{368} Supra.
\end{flushleft}
resolution are informed by these various and different statutes. This situation is amplified with how these statutes will offer guidance on certain issues, for an example, when an official in the public service has absconded. This is still a very thorny issue in the public service. There have been attempts by the Department of Public Service Administration (DPSA) to address the issue through legislative amendments. Initially, in terms of the Public Service Amendment Bill, the proposed amendments were that after being absent for a period exceeding 10 days an official would have been taken as having resigned (and not discharged as per the status quo). This proposal was changed later on and the situation reverted back to the status quo (if official absent for a period exceeding one calendar month he/she would be deemed as having discharged).

It is interesting though to note that in the proposed Draft Single Public Service Bill, once again, in terms of abscondments there is reference to 10 working days before an official would be deemed as having resigned. It is very disappointing though to note that educators are amongst the exclusions from this proposed piece of legislation because this means to there will not be a total elimination of this fragmentation (at least not any time soon).

369 31-2006.
370 See s17(5)(a)(i) of the Public Service Act 103 of 1994.
371 Public Service Amendment Bill (31B-2006).
372 There is an intention to have a single public service (that would combine all three spheres of Government; national, provincial and local). The Draft Bill was published in the DPSA Website - www.dpsa.gov.za).
### COMPARATIVE SUMMARY – PUBLIC SERVICE BARGAINING COUNCILS

<table>
<thead>
<tr>
<th>Council Name</th>
<th>PSCBC</th>
<th>PHWSBC</th>
<th>ELRC</th>
<th>SSSBC</th>
<th>GPSSBC</th>
<th>CCMA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Scope</strong></td>
<td>The PSCBC covers the whole public service but excluding the members of the National Defense Force, the National Intelligence Agency and the South Secret Service.</td>
<td>The PHWSBC covers the whole of the health and welfare sector i.e. the employers and employees employed in the department responsible for health nationally and in the nine provinces. In addition, its scope includes other health officials employed in other national and provincial departments.</td>
<td>The ELRC covers teachers employed in terms of the Educators Employment Act.</td>
<td>The SSSBC’s scope includes uniformed police officers and civilian employees employed in the South African Police Service in terms of the South African Police Service Act and Public Service Act.</td>
<td></td>
<td>Covers all employees/employees who are covered by the Act, excluding members of the National Defense Force, National Intelligence Agency, and the South African Secret Service. It must be noted that in terms of s147 of the Act, if a bargaining council has jurisdiction over a dispute and it has been wrongly referred to the CCMA, the CCMA may refer it to the relevant bargaining council or may continue to deal with the dispute.</td>
</tr>
</tbody>
</table>

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374 The name has changed to Public Health and Social Development Sectoral Bargaining Council – PHSDSBC.
<table>
<thead>
<tr>
<th><strong>Dispute Resolution Procedures</strong></th>
<th><strong>Annexure to Constitution</strong></th>
<th><strong>Annexure to Constitution</strong></th>
<th>In Constitution</th>
<th><strong>Annexure to Constitution</strong></th>
<th><strong>Annexure to Constitution</strong></th>
<th>As per the Act</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dispute Resolution Rules</strong></td>
<td>Resolution 4 of 2005</td>
<td>Resolution 1 of 2005</td>
<td>Resolution 4 of 2004</td>
<td>Annexure to the Act</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>To refer a dispute</strong></td>
<td>As per the Act, but internal procedures must have been exhausted first.</td>
<td>As per the Act</td>
<td>Must refer within 90 days of becoming aware of the dispute.</td>
<td>Must refer within 30 days after internal procedures have been exhausted.</td>
<td>As per the Act</td>
<td></td>
</tr>
<tr>
<td><strong>Timeframes for referrals</strong></td>
<td>As per the Act, but internal procedures must have been exhausted first.</td>
<td>As per the Act</td>
<td>Must refer within 90 days of becoming aware of the dispute.</td>
<td>Must refer within 30 days after internal procedures have been exhausted.</td>
<td>As per the Act</td>
<td></td>
</tr>
<tr>
<td>Notification Conciliation</td>
<td>14 days</td>
<td>14 days</td>
<td>14 days</td>
<td>14 days</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Notification Arbitration</td>
<td>21 days</td>
<td>14 days</td>
<td>21 days</td>
<td>21 days</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Mutual Interest Disputes Procedures</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parties to Council</td>
<td>Negotiate issue in council</td>
<td>Conciliation</td>
<td>Strike / Arbitration if essential service</td>
<td>OR</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Negotiate issue in chamber.</td>
<td>Refer to council or directly for Conciliation</td>
<td>Strike / Arbitration if essential services OR</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Same route as non parties i.e.</td>
<td>Conciliation</td>
<td>Strike / Arbitration if essential services OR</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**refer within 45 days of the employee being informed of the dismissal.**

**Notification - Conciliation**

14 days

**Notification - Arbitration**

21 days

**Mutual Interest Disputes Procedures**

- Parties to Council
  - Negotiate issue in council
  - Conciliation
  - Strike / Arbitration if essential service
    - OR
    - Negotiate issue in chamber.
    - Refer to council or directly for Conciliation
    - Strike / Arbitration if essential services
      - OR
      - Negotiate issue in chamber.
      - Refer to council or directly for Conciliation
      - Strike / Arbitration if essential services
        - OR
        - Negotiate issue in chamber.
        - Refer to council or directly for Conciliation
        - Strike / Arbitration if essential services
          - OR
          - Negotiate issue in chamber.
          - Refer to council or directly for Conciliation
          - Strike / Arbitration if essential services
            - OR
            - Negotiate issue in chamber.
            - Refer to council or directly for Conciliation
            - Strike / Arbitration if essential services
              - OR
              - Negotiate issue in chamber.
              - Refer to council or directly for Conciliation
              - Strike / Arbitration if essential services
                - OR

**Parties to Council**

- Negotiate issue in council
- Conciliation
- Strike / Arbitration if essential service
  - OR
  - Negotiate issue in chamber.
  - Conciliation
  - Strike / Arbitration if essential service

- Same route as non parties i.e.
  - Conciliation
  - Strike / Arbitration if essential service

56
<table>
<thead>
<tr>
<th>Pre-arbitration</th>
<th>Compulsory – in limine points</th>
<th>Not required</th>
<th>No requirement</th>
<th>Compulsory – in limine points</th>
<th>Not compulsory unless secretary / panelist to hold pre-arbitration</th>
<th>Rule 20</th>
</tr>
</thead>
<tbody>
<tr>
<td>Award</td>
<td>14 days</td>
<td>14 days</td>
<td>14 days</td>
<td>14 days</td>
<td>14 days</td>
<td>14 days</td>
</tr>
<tr>
<td><strong>Representation – Conciliation</strong></td>
<td>May appear in person or be represented by a member, an office bearer or official of a trade union or by any employee of any national or provincial administration.</td>
<td>May appear in person or be represented only by a co-employee or by a member, an office bearer or official of union or by any employee of any national or provincial admin.</td>
<td>May appear in person and/or be represented by a member, an office bearer or official of that party’s trade union in the case of an employee of the party in the case of an employer</td>
<td>In any conciliation/ arbitration/ joint conciliation and arbitration: May appear in person or be represented by: a legal practitioner, a co-employee from the same Unit/station/compartment within the same geographical area as the applicant, or a shop steward, office bearer or official of that party’s trade union recognized in the sector, and such shop steward shall be regarded to be on the duty, provided that the person must have been a member in</td>
<td>May appear in person or be represented only by a member, official of a trade union or by any employee of any national or provincial administration.</td>
<td>As per the Act</td>
</tr>
<tr>
<td><strong>Representation – Arbitration</strong></td>
<td>May appear in person or be represented by a legal practitioner, a member, an office bearer or official of a trade union or by any employee of any national or provincial</td>
<td>May appear in person or be represented by a legal practitioner, a co-employee, a member, an office bearer or official of that party’s trade union or by any employee of any</td>
<td>May appear in person and/or be represented by a legal practitioner, a member, an office bearer or official of that party’s trade union. In the case of the employer, the employer may be represented by</td>
<td>May appear in person or be represented only by a legal practitioner, a member, an office bearer or official of that party’s trade union recognized in the sector, and such shop steward shall be regarded to be on the duty, provided that the person must have been a member in</td>
<td>May appear in person or be represented only by a legal practitioner, a member, an office bearer or official of that party’s trade union or by an employee of a</td>
<td></td>
</tr>
</tbody>
</table>
administration. national or provincial admin. a delegated employee of the employer and/or by a legal practitioner. good standing of such trade union, at the time that the cause of action which had led to the dispute arose; or an office bearer or official of that party’s trade union recognized in the public service provided that the person must have been a member in good standing of such trade union at the time that the cause of action which led to the dispute arose; or.

An official or office bearer of that party’s registered trade union that:

Has registered with the council for the purposes of representation and has paid the registration fee which is to be renewed on 1 January of each year and has purchased copies of all collective agreements and resolutions applicable to the sector at cost thereof; and provided national or provincial administration.
<table>
<thead>
<tr>
<th>Costs</th>
<th>On application of a party, or of the panelist’s own accord.</th>
<th>If at the conclusion of an arbitration, the arbitrator is satisfied that the referral to arbitration was made vexatiously or without reasonable cause, the arbitrator may, on application by either party, make an appropriate order for costs against the referring party including the costs of the proceeding.</th>
<th>If an arbitrator finds that a dismissal is procedurally unfair the arbitrator may charge the employer an arbitration fee.</th>
<th>At an time during the proceedings costs may be awarded on application of a party or of the arbitrator’s own accord,</th>
<th>Grounds:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grounds:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Referral to arbitration was made or defended vexatiously, or without reasonable cause or where a party has caused unreasonable delays, or if the arbitrator is satisfied that a party, in the arbitration</td>
</tr>
<tr>
<td>• Referral was made or defended vexatiously or without reasonable cause; or</td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Any time during the proceedings, where a party has caused unreasonable delays: or</td>
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</tr>
</tbody>
</table>

| act in a manner seriously compromising the proceedings; is adjourned or dismissed because a party to the dispute failed to attend or to be represented at the proceedings; or any other grounds specific in the PSCBC Rules for the Conduct of Proceedings | arbitration. [Note: Thus only 1 ground = referral made vexatiously/without reasonable cause i.e. no cost order can be made against respondent] | council, make an appropriate order for costs, including the costs of the arbitration. | proceedings acted in a manner seriously compromising the proceedings.  
- If a matter is dismissed due to non-attendance of either party, the arbitrator may make a preliminary cost order. |

- Party who withdraws a referral less than 5 working days before the scheduled date of the hearing must bear the cost of the conciliator or arbitrator, unless the withdrawal is the result of a settlement agreement.
Initially, it was made clear that it is of critical importance that there should be labour peace at workplaces and that the effective, efficient and timeous resolution of disputes contributes immensely in terms of realizing this objective.

It is however interesting to note that the Act\textsuperscript{375} does not give a definition of neither a dispute nor dispute resolution under its section 213. The Act\textsuperscript{376} as a significant guiding statute in labour relations is supposed to offer clarity and guidance with such concepts. However, there are critical elements that have been discussed as constituting a dispute.

Some interesting developments pertaining to labour disputes resolution were discussed from the first legislation providing for mechanisms for dealing with labour disputes to the Industrial Conciliation Act\textsuperscript{377} with its Industrial Councils and Conciliation Boards, to the Industrial Conciliation Act\textsuperscript{378} which later became the LRA,\textsuperscript{379} and to changes brought about by the Wiehahn Commission which removed the exclusion of black employees thus ending the dual system of labour relations in the South Africa.

The major milestone in the dispute resolution field was the coming into effect of the Act\textsuperscript{380} which brought revolution in the dispute resolution system, with its amendments in 2002.\textsuperscript{381}

There was a move from the Industrial Tribunals, Industrial Councils, Conciliation Boards and Industrial Court to CCMA, Labour Court and Labour Appeal Court.

\textsuperscript{375} 66 of 1995. \\
\textsuperscript{376} \textit{Ibid.} \\
\textsuperscript{377} 11 of 1924. \\
\textsuperscript{378} 28 of 1956. \\
\textsuperscript{379} \textit{Ibid.} \\
\textsuperscript{380} 66 of 1995. \\
\textsuperscript{381} Labour Relations Amendment Act 12 of 2002.
There were also some significant developments in terms of the unfair labour practice concept from its introduction in 1979, when it covered virtually almost everything in terms of conduct of employees and employers that affected the employment relationship and employer’s business. Interesting enough was the fact that unfair labour practice included both disputes of right and interest. Under the Act, it was initially placed as Schedule 7 at the back. The amendments of 2002 placed unfair labour practice inside the body of the Act (sections 185 and 186).

It was also stressed that the Act itself promotes collective bargaining and for parties to agree on the dispute resolution procedures. Employers and employees have taken advantage of this gesture and concluded collective agreements with clauses on dispute resolution. Some have even opted for private dispute resolution even though there are costs involved unlike the dispute resolution provided for by the Act, which is free.

It was mentioned that there are two types of disputes; disputes of right and disputes of interest. Furthermore, it was not easy to distinguish between the two but there are some contributions made in terms of separating the two. In a nutshell, a right dispute was explained as emanating from an entitlement, whereas, interest disputes would be emanating from desire to change terms and conditions of service (e.g. increase in wages/salaries).

There have also been changes introduced to realize the main objective and spirit of the Act that of resolving labour dispute effectively and without delay. These changes involved introduction of con-arb, one stop disciplinary hearing conducted by the CCMA. Lowering the burden in terms of proving substantive
fairness in dismissal of probationary workers and flexibility in terms of formal disciplinary hearings.

There are some challenges within the system though. The CCMA is still inundated with frivolous and sometimes unnecessary referrals and as a result there is a huge case load. The decisions by some of the Commissioners have left much to be desired and this is clear from the high number of applications for reviews and outcomes thereof. Furthermore, the system has become too technical and complex and this is not in line with the intention Act\textsuperscript{388} in as far as resolution of disputes is concerned.

Dispute resolution in the public service is faced with serious challenges and centrally to the challenges is uniformity or rather lack thereof in terms of guiding statutes and approach. In the public service there are various statutes, prescripts, policies, regulations governing dispute resolution, as well as different bargaining councils. Some of the statutes will have different provisions on a single issue, for example abscondments. So there is still fragmentation in the public service in terms of dispute resolution, although the employer is one, the State.

The long time exclusion of the public service from the mainstream legal framework dealing with dispute resolution has also created some problems. The exclusion has now been removed and even after more than ten (10) years managers are not able to effectively deal with dispute resolution. There are disputes that are unnecessary declared because managers are not able to deal with grievances and appeals effectively.

The public service is also faced with the problem of dealing appropriately with desertion of its employees. There is however guidance being offered by case law in this regard. Departments jump for what seems as the easiest way of discharging an official, discharging an official based on the relevant statutes

\textsuperscript{388} 66 of 1995 as amended.
(section 17(5)(a) of the PSA\textsuperscript{389} or Section 14(1)(a) of the eea\textsuperscript{390} instead of invoking the procedures of the Act.\textsuperscript{391} These provisions are draconian and in conflict with the Act\textsuperscript{392} if they are applied, affected employees are excluded from the recourse provided for by the Act.\textsuperscript{393} The courts have adopted a stance to the effect that these provisions should only be invoked if it was impossible to apply the relevant provisions of the Act.\textsuperscript{394}

The scope of the Bargaining Councils will also have to be redefined. There is a need to redefine scopes of sectoral councils. There have been discussions in the relevant councils to make these councils truly sectoral in nature e.g. including Department of Justice and Correctional Services in the SSSBC scope, and including non-educators under the scope of the ELRC. This will reduce the scope of the GPSSBC. However there must still be an agreement amongst parties in these councils.

The move by the Department of Public Service and Administration to create a single public service is a major step towards the right direction. Subsequently, the legislation applicable to the public service, specifically regarding dispute resolution, will have to be aligned accordingly. This will address the problem of fragmentation in the public service. It will also bring uniformity in terms of processes and procedures of dispute resolution.

\textsuperscript{389} 103 of 1994.
\textsuperscript{390} 76 of 1998.
\textsuperscript{391} 66 of 1995.
\textsuperscript{392} Ibid.
\textsuperscript{393} Ibid.
\textsuperscript{394} Ibid.
ARTICLES
2. Bendeman, H “An analysis of the problems of labour dispute resolution system in South Africa”
5. Brand, J “Private labour arbitration complements CCMA” The Star 28 February 2001
6. Christie, S “One-Stop Shopping: Has the CCMA made dispute resolution any easier?” CRR Vol.7 No.2.


BOOKS


**INTERNET / WEBSITES**

7. http://www.labourguide.co.za

**LIST OF CASES**

3. Ceramic industries Ltd v CCMA & another [2005] 12 BLLR 1235 (LC)
24. National United
29. NUMSA & another v Voltex (Pty) Ltd t/a Electric Center & others 2001] 5 BLLR 619 (LC).
30. NUM obo 35 Employees v Grogan & another [2007] 4 BLLR 289 (LC).
33. SA Technical Officials Association v President of the Industrial Court (1985) 6 ILJ (A).
34. SACCAWU v CCMA & others 2000] 10 BLLR 1215 (LC).
41. Transnet Ltd v HOSPERSA & another [1999] 7 BLLR 732 (LC).

LEGISLATION
21. Public Service Amendment Bill (31-2006).
22. Public Service Amendment Bill (31B-2006).
23. Draft Single Public Service Bill.