THE ENFORCEMENT OF SETTLEMENT AGREEMENTS AND ARBITRATION AWARDS

By

Portia Chwayita Thathoba

Student number: 218203748

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Supervisor: Dr. Johana Kambo Gathongo

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student number, 218203748 a candidate for the Master of Laws (LLM (Labour Law)) Coursework

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SUMMARY

The Labour Relations Act (LRA) recognises settlement agreements and arbitration awards as mechanisms by which the rights of parties in troubled employment relationships can be asserted. Commission for Conciliation Mediation and Arbitration (CCMA) is a statutory body empowered to make and pronounce on such rights through settlement agreements and arbitration awards. The CCMA caters for those earning within the stipulated ministerial threshold falling outside the existing bargaining forums. However, not much empirical evidence is available to indicate the challenges experienced by parties when attempting to enforce those CCMA rulings to get defaulters to comply.

South African law accepts settlement agreements as part of dispute resolution mechanism, but the experience of some who hold settlement agreements is such that they are exposed to prejudice when they are required to have the settlement agreement converted to arbitration awards which essentially requires alteration of the very settlement agreed upon. The broad objective of taking matters to the CCMA for resolution with the possibility of having them resolved at conciliation phase cannot be achieved if a settlement agreement is not worth the paper written on and must be made an arbitration award for enforceability. The two are not the same, nor should they be made to be and trying to give them a similar status for enforceability purposes brings about a myriad of unintended challenges.

While it could be argued that there also exists section 158 (1) (c) of the LRA if the requirements of section 142A are challenging, it could also be said that such a provision is inaccessible to indigent individuals who may only be able to invoke that provision at the mercy of legal practitioners willing to take cases pro bono for those parties to even stand a chance at enforcing compliance with a settlement agreement that was entered into voluntarily. Such a system allows for employers to bail out on settlement agreements without consequence make a mockery of the CCMA. To a serious degree, this suggest lack of certainty on the part of CCMA and its ability to bring matters to finality which is an important element to realisation of justice.

This study sought to examine the way settlement agreements and arbitration awards are enforced, with dedicated focus on the requirement that must be satisfied in order to have force and effect. With the above in mind, chapter one dealt with how settlement agreements and arbitration awards are given force and effect through the LRA as envisaged in section 142A. The chapter explored challenges brought by the enforcement process and what that may mean to the objectives intended by the legislation. Chapter two encapsulates the framework under which the CCMA operates and enforces its decisions, a framework envisaged to be less formal and non-legalistic for the expedient resolution of labour disputes.

Chapter three touches on the challenges met with section 143 implementation and highlights some case law prior and after the LRA amendments. Lastly chapter four looked into the enforcement of international or foreign arbitration awards within the South African context given the affiliation with international organisations such as International Labour Organisation (ILO). While it may be good for South Africa to align herself with international practices, it is worth noting that South Africa is still developing in international arbitration as a mode of alternative dispute resolution, but its prevalence as a preferred dispute resolution mechanism is without a doubt increasing.

CHAPTER 1: INTRODUCTION

1 1 Introduction and background to the study

Grievances and conflicts are inevitable parts of the employment relationship[1] and it is for this reason that effective dispute resolution mechanism should be in place to deal with these as they occur in the workplace in a just, expedient, efficient and manner. The establishment of regulatory frameworks such as the Labour Relations Act 66 of 1995 sought to achieve this, whose purpose amongst others is to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration for which purpose the Commission for Conciliation, Mediation and Arbitration was established.

The Labour Relations Act[2] (LRA) is built on the spirit of conciliation and resolving labour disputes in a cost-effective manner. It has also one of its primary objects the promotion of effective resolution of labour disputes.[3] This is a sentiment highlighted in *Mackay v Absa Group and Another*[4], in which the Labour Court held that, in keeping with the LRA's main objects, all disputes arising from the employer-employee relationship must be effectively resolved. The LRA, not only does it embrace effective dispute resolution, but also that speedy dispute resolution is core to the LRA's primary objectives.

As one of dispute resolutions arms, disputes are resolved through Conciliation, Mediation and Arbitration (CCMA)[5] and it caters for those industries which do not have their own bargaining structures. In the light of the aforegoing, it is clear that Conciliation is an integral part of dispute resolution and that the LRA sought to strength that in the enactment of section 142A of the LRA[6], by ensuring that conciliation outcomes in the form of settlement agreements are afforded a legitimate status.

As noted above, majority of disputes resolved through conciliation end with a settlement agreement and or through arbitration awards for matters not amicable resolvable. The CCMA as

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[1] International Labour Organisation (ILO) article on Labour dispute prevention and resolution available at https://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm (accessed 28-03-2022).
[2] The Labour Relations Act, 66 of 1995 (hereafter referred to as the "LRA").
[3] S (1)(d)(iv)) of the LRA.
[4] [1999] 12 BLLR 1317 (LC) para 15.
[5] [1999] 12 *BLLR* 1317 (LC) para 20.
[6] The section provides for a Commission to make a settlement agreement in respect of any dispute an arbitration award.

a body caters mainly for those earning within the stipulated threshold[7] and whose workplaces do not fall within the current existing bargaining councils.

Since its inception, this body has enjoyed a national settlement rate of 70% and greater, a clear signal that the CCMA is committed to restoring sound labour and industrial relations within the South African economy.[8] Accordingly, it has always been the inclination of the CCMA through the Commissioners to encourage the parties to a dispute to rather conciliate and conclude a settlement agreement[9] upon a matter being amicable concluded.

In *Molaba v Emfuleni Local Municipality*, the court held that to constitute a settlement agreement for purposes of section 142A of the LRA, the settlement agreement must be in writing and be in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7) of the LRA.[10]

By both parties entering into a settlement agreement, the agreement becomes the full and final settlement of the disputes between the parties. In fact, by emphasising the use of consensus-seeking processes, the LRA places the ultimate power in the hands of the parties to resolve disputes on their own terms. But with the power literally in their hands, the parties must ensure that they use the power correctly, efficiently, effectively and for their mutual benefit. Consequently, the settlement agreements entered amicably are for the benefit of both the employers and employees.

Nevertheless, that does not imply that employers will always comply with their end of the bargain as pledged in those settlement agreements. The settlement agreements usually stipulate the date to honour the obligations that a party to the settlement must comply with. The big question as will be noted below is, what happens when the employer does not comply with the settlement agreement as they fail to at most times?

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[7] The earnings threshold, which is determined by the Minster of Employment and Labour from time to time in terms of the Basic Conditions of Employment Act of 1997 (the BCEA), has been increased to R224080,30 per annum with effect from 1 March 2022.

[8] https://www.ccma.org.za/About-Us (accessed 29-03-2022).

[9] S 142A (2) provides that the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7).

[10] [2009] 7 *BLLR* 679 (LC) para 6.

1 2 Making a settlement agreement an arbitration award

The CCMA is empowered in terms of the LRA to make a settlement agreement an arbitration award for it to have any force and effect. The LRA stipulates that, a Commissioner by agreement or on application by a party may make any settlement agreement regarding any dispute that has been referred to the Commission, an arbitration award[11]. In respect of cases where the applicant seeks to enforce the settlement agreement as a result of the employer's non-compliance or partial compliance with the settlement agreement, the applicant must make an application in terms of section 142A of the LRA.

This usually happens as a result of failure or refusal by the respondent to comply with obligations as per the settlement agreement which they entered into at their own free will. Parties enter into such an agreement consciously and knowing there is an underlying principle that settlement agreements are meant to be complied with. However, this is not the knowledge that parties always demonstrate and this necessitates the party at the receiving end to invoke section 142A of the LRA, details of which will be discussed in chapter two below.

1 3 Enforcement of an Arbitration Award

After receipt of the arbitration award, the party may seek to have the same certified[12]. The certification results in the arbitration award being made a warrant that the Sheriff of the Court can enforce. In terms of section 143 of the LRA, an applicant may apply for the arbitration award to be certified by the CCMA. However, an applicant is required to complete the relevant form[13] and commission the application to certify CCMA award and serve it on the CCMA. The aggrieved party is required to serve the 7.18 form accompanied by the arbitration award and the proof of email from the CCMA as proof of issuing the arbitration award to both parties.

After fourteen (14) days, the CCMA is mandated to issue an enforcement of award instructing the Sheriff to execute the respondent's movable goods at the respondent's premises and, thereafter realise the movable goods by public auction for the sum stipulated on the settlement agreement plus interest. This is the only way in which the CCMA may enforce payment of amounts awarded as per arbitration awards or settlement agreements in favour of applicants. However, as it will be shown, in certain instances, the employer normally fails or refuses to comply with an obligation in terms of the settlement agreement or arbitration award. This situation creates a burden financially

[11] S 142A (1)
[12] S 143(3) of the LRA.
[13] This form is available on the CCMA website and is called the LRA Form 7.18.

to the applicant who would then be left with no option but to seek compliance by way of contempt proceeding in the Labour Court.[14]

From the foregoing discussion, it appears that settlement agreements and arbitration awards can be given effect in two ways, either by approaching the Labour Court or the CCMA. However, the difference to approach is too vast when this is closely examined. Approaching the Labour Court could have a settlement agreement made an order of the court for it to have force and effect, while seeking the same with CCMA has the effect to make the settlement agreement an arbitration award. While there is also a process to follow as outlined above, an arbitration award does not have to be altered to anything else when it has to be certified in terms of section 143.

The Labour Court process as well as that of the CCMA to give legal effect to a settlement agreement do not necessarily have the same effect and could have adverse effects to those whose reliance is only on the CCMA and this will be elaborated at length below in the chapters to follow.

1 4 Problem statement

As noted above, the LRA is built on the spirit of conciliation and resolving labour disputes in a cost-effective and efficient manner. And so, effective resolution of disputes in terms of the LRA presupposes expeditious, speedy, simple, quick, non-legalistic and inexpensive resolution of disputes.[15] The CCMA was established to accommodate and provide protection to a particular group of the members of society, specifically targeting those indigent members of society who would be economically strung to challenge what would be perceived as unfair decisions of employers. The Minister of Employment and Labour accordingly lays out a particular category of employees whose matters should fall within the jurisdiction of the CCMA[16].

It is indeed a rational consideration if one considers that courts are arguably not easily accessible, in that there are serious costs involved in most litigation processes, wherein lawyers and advocates services have to be employed. And so, those who ordinarily refer the dispute to the CCMA do so because they are presumed to have less means[17] and unable to afford litigation costs.

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[14] S 143(4) of the LRA.

[15] *CWIU v Darmag Industries (Pty) Ltd* [1999] *8 BLLR* 754 (LC). See also *Kolobe v Proxenos* (Sophia's Restaurant) [2000] 11 *BLLR* 1291 (LC), *CWIU v Johnson & Johnson* (Pty) Ltd [1997] 9 *BLLR* 1186 (LC) and *Gibb v Nedcor Limited* [1997] 12 *BLLR* 1317 (LC))

[16] S 6(3) of the Basic Conditions of Employment Act 75 of 1997

[17] S 73A of the Basic Conditions of Employment Act of 1997 (the BCEA). This provision confers jurisdiction on the CCMA to conciliate and arbitrate disputes in which employees earning below the prescribed threshold of R224080,30

The examination of enforceability of settlement agreements and arbitration awards will give focus to the requirements that must be satisfied in order to make them binding and legally enforceable. The study will demonstrate that such requirements do not to consider or rather create enormous problems for the party who requires fulfilment by the defaulting party. This becomes particularly prejudicial where for an example, an ex-employee has already parted ways with the ex-employer as part of the terms of the settlement agreement. Imagine someone being unemployed, likely to find themselves in an indigent position, and without the financial means to approach the relevant tribunals such as the Labour Court for a remedy. Consequently, these individuals may well have no option but to give up on the possibility of forcing the defaulters to comply with the settlement agreements.

Arguably, it defeats the very purpose of the LRA in this case and indeed that of the CCMA's existence which essentially is to accord protection to the most vulnerable. Our law accepts settlement agreements as part of dispute resolution mechanism, but those who hold settlement agreements are exposed to serious prejudice by section 142A if they are to have settlement agreements converted to arbitration awards which in itself requires alteration of the very settlement agreed upon. How so, for instance, an arbitration award must conform to section 194 of the LRA[18] and yet this provision is not a consideration when the CCMA facilitates conclusion of a settlement agreement.

The broad objective of taking matters to the CCMA for resolution with the possibility of having them resolved at conciliation phase cannot be achieved if sections 142A and section 158 (1) (c) creates a hurdle in terms of accessibility for destitute individuals who must find themselves at the mercy of legal practitioners who may be hopefully keen to take cases pro bono to have a chance at enforcing compliance through section 158(1) of the LRA. This provision appears to be the only hope of compelling scrupulous parties (mainly employers) who may suddenly want to resile out of settlement agreement entered into voluntarily, willingly and supposedly in good faith.

1 5 Aims and Objectives of the study

The CCMA was established for the purpose of providing protection to the vulnerable, by enhancing their rights, saving jobs and promoting social justice and the economy. This means it was designed to cater for those with less means to afford protracted litigation processes to fight

per annum to claim monies owing to them in terms of the National Minimum Wage Act, the BCEA, a collective agreement, a sectoral determination or contract of employment. Employees or workers earning above the threshold may instead institute a claim concerning failure to pay any amount in section 73A(1) in either the Labour Court, High Court, Magistrates Court or Small Claims Court if they meet the necessary jurisdictional requirements for either court.

[18] S 194 of the LRA clearly defines the limits of compensation which can be awarded in terms of an arbitration award.

for their rights through costly processes such as those of approaching courts and relying on unaffordable services of legal practitioners.

The study will therefore aim to assess effectiveness of section 142A to achieve its intended purpose as it seems to fall short of the intention to provide adequate protection to vulnerable members of society whose only recourse to enforcement of their settlement agreements is through the CCMA due to lack of financial means to invoke section 158 of the LRA which requires access to courts. Importantly the study will examine the overall effectiveness of the implementation of CCMA rulings.

1 6 Research questions

This study seeks to investigate the following questions:

i. With all the benefits of resolving disputes through consensus-seeking mechanisms, can a settlement agreement be made an arbitration award as envisaged by section 142A without violating other equally important provisions of the LRA relating to cost effective and speedy dispute resolution?
ii. Also, can section 158(1)(c) be read to mean that the Labour Court equates the status of a settlement agreement to that of an arbitration award? And if so, the extent to which section 142A of the LRA accords a settlement agreement conversion to an arbitration award and whether doing so retains the intended instead of the requirements of an arbitration award.

1 7 Research methodology

This treatise conducts a detailed examination of the available qualitative literature in order to address the research problem. Primary and secondary sources will also be reviewed. Relevant legislation in South Africa and international laws, ILO conventions, case law, peer reviewed journal articles, policies, the internet, task-team reports, and presentations pertinent to the issue may also be referred to. The data obtained for the study will be evaluated to inform the study findings. Throughout the study, analysis, data collecting, and processing will occur concurrently to enable the researcher to approach the data analytically. Similarly, the study, the outcomes, recommendations, and proposals for improvement will be highlighted in the end. Where required, a comparative assessment with other selected countries will be conducted.

1 8 Significance of the study

The study seeks to bring clarity to the issue relating to enforcement of settlement agreements and arbitration awards effectively and in line with section 142A. The provision as it stands appears to

provide inadequately the protection essential to those who rely solely to the CCMA for effective dispute resolution.

1 9 Outline of the research

This study consists of five chapters:

Chapter 1

The objective of this chapter is to establish a framework for the context of the study. This chapter discusses the context and rationale for the study, the issue statement that inspired the study, the study objectives, highlights the research questions and the significance of the study.

Chapter 2

This chapter focuses on the existing legislative frameworks on the enforcement of settlement agreements and arbitration awards in South Africa.

Chapter 3

The pertinent case law in South Africa pertaining to the enforcement of settlement agreements and arbitration awards in South Africa is discussed.

Chapter 4

This chapter discusses International Laws as well as the regulations regarding enforcement of settlement agreements and arbitration awards in selected international jurisdictions. The scope of enforcement of international arbitration awards will also be explored.

Chapter 5

This chapter ends with a discussion on how to adequately address the enforcement of settlement agreements and arbitration awards in South Africa within the scope of the LRA and CCMA jurisdiction.

CHAPTER 2:

LABOUR DISPUTE RESOLUTION FRAMEWORK AND ENFORCEMENT OF SETTLEMENT AGREEMENTS AND ARBITRATION AWARDS UNDER THE LRA

2 1 Introduction

In Chapter one, a general introduction and framework for this study was discussed. The problem leading up to this study was also identified. Further, the aims and objectives of the study as well as the research questions were highlighted. This chapter will discuss the existing labour dispute resolution framework and enforcement of settlement agreements and arbitration awards.

The advent of the new political dispensation in 1994 heralded the coming of a new labour dispensation. Labour relations and labour policies changed significantly from that which prevailed under the previous government. At the time, the new government made the overhauling of the labour legislative framework a top priority.[19]

Ferreira argues that at the heart of democracy is an individual with a voice and the right to use it when a dispute arises. Similarly, at the core of economic development and recovery is an individual who works and has a right to a work environment conducive to wellbeing and productivity.[20] The old dispensation of labour dispute resolution system fell short of this. Above all, it failed to establish a workable framework system of labour dispute resolution that could provide speedy and effective relief to parties involved in labour disputes.

According to the Explanatory Memorandum to the Labour Relations Bill of 1995 which motivated the promulgation of the 1995 LRA, the old system achieved very low settlement rates on average 20% of conciliation board disputes and 30% of industrial council disputes.[21] These various structures and mechanisms for labour dispute resolution institutions established under the old labour legislation such as industrial councils, conciliation boards, the Industrial Court and the Labour Appeal Court simply did not work. They were too formal, flawed by long delays in the appeal process and eroded with unnecessary technicalities.[22]

The failure of the statutory structure to resolve those disputes effectively resulted in an excessively high workload for the Industrial Court and the unnecessarily high incidences of strikes

[19] Kruger and Tshoose "The Impact of the Labour Relations Act on Minority trade Unions: A South African perspective" 16 (20130 PER/PELJ1.
[20] Ferreira "The Commission for Conciliation, Mediation and Arbitration: its effectiveness in dispute resolution in labour relations" 2004 Review Article 73.
[21] Republic of South Africa (1995a) "Explanatory Memorandum to the Labour Relations Bill (Bill No. 66 of 1995)."
[22] Basson *et al Essential Labour Law* 358.

and lockouts. Moreover, the old legislature attempted to provide a basis for relations among its citizens, however, in most circumstances, the laws themselves impeded the promotion of such good relations. It was therefore through these inadequacies that the new government envisioned a comprehensive statutory framework to give effect to the constitutionally entrenched labour rights.[23]

2 2 Dispute resolution framework under the LRA

The LRA came into full operation on 11 November 1995. One of the founding principles of the LRA was that it must create a mechanism that will enable speedy and effective resolution of disputes.[24] To achieve this, the LRA enhanced powers of the forums designed to deal with these disputes, and through the CCMA, an independent dispute resolution body was created to address the shift in labour relations from the previously highly adversarial model to one promoting greater cooperation, industrial harmony, and social justice.[25] Accordingly, the CCMA replaced the Industrial Court and conciliation boards ran by the Department of Labour.[26]

In other words, the drafters of this legislation envisaged efficient and easily accessible (simplified, non-legalistic, informal) dispute resolution based on statutory Alternative Dispute Resolution (ADR) techniques of conciliation, mediation and arbitration.[27] As a result, the LRA create independent institutions that attempt to resolve labour disputes through consensus seeking techniques such as conciliation and arbitration in addition to specialised Labour Courts and Labour Appeal Court that provide adjudication processes.[28] These institutions include:

i. the Commission for Conciliation, Mediation and Arbitration (CCMA);

ii. the Labour Courts;

iii. that Labour Appeal Courts; and

iv. Accredited Bargaining Councils that exist in various sectors and industries. Private labour dispute institutions also exist.

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[23] Du Toit, Cohen, Everett, Fouché, Giles, Godfrey, Steenkamp, Taylor and Van Staden (2015) *Labour Relations Law: A Comprehensive Guide* p6-22.

[24] S 1(d)(iv) of the LRA 66 of 1995.

[25] See also Bendeman An Analysis of the Problems of the Labour Dispute Resolution System in South Africa82. Similarly, the ILO also played a pivotal role in the formation of this institution. See ILO/Swiss Project on Regional Conflict Management and Enterprise Competitiveness Development in Southern Africa was implemented in the six Southern African countries under the aegis of tripartite task forces. The project, which ended in 2006, was implemented in two phases: from 2000 – 2002 and from 2003 – 2006, with funding from the Swiss Government.

[26] Grogan *Workplace Law* (2013) 6.

[27] *Ibid*

[28] Venter, Levy, Bendeman, Dworzanowski-Venter *Labour Relations in South Africa* (2014) 423.

2 3 Statutory Functions of the CCMA

The CCMA was created as a creature of statute to enhance speedy and easy access to labour fairness and resolution of disputes. As a creature of statute, therefore, it may only exercise those functions and powers assigned to it by the LRA. Sections 113 and 114 of the LRA declare that the CCMA to be an independent statutory body with legal personality or is established as a juristic person.[29] Although independent, the court has held that the CCMA still remains an administrative tribunal and an organ of state created under section 239 of the Constitution.[30] Therefore, it is directly bound by the Bill of Rights and subject to the basic values and principles governing public administration such as acting impartial, equitable and unbiased manner.[31]

Besides the discretionary functions performed by the CCMA in terms of section 115 (2), (2A) and (3) of the LRA, section 115 (1) of the same LRA lists some obligatory functions of the CCMA. This section provides *inter alia* that the CCMA must:

- attempt to conciliate any dispute referred to it in terms of the LRA;
- arbitrate a dispute that remains unresolved after conciliation, if it has the powers to do so;
- perform any other duties imposed on it by or in terms of the LRA; and
- compile and publish information and statistics about its activities.

Section 213 of the LRA which deals with definitions does not provide a detailed description of the term 'labour dispute' other than a general statement that 'dispute include an alleged dispute.' No further detail is provided, leaving it to interpretation of the Commission in accordance with its rules and classification of dispute. In *Edgars Stores (Pty) Ltd v SACCAWU*[32] the Court held that "an alleged dispute" defined in section 213 of the LRA means that an actual impasse was not necessary for there to be a dispute. The Court concluded that it was sufficient that there was a demand made by a party that, given an opportunity to comply with it, did not comply.

In addition, seeing that the LRA failed to provide a distinction between disputes of rights and disputes of interest, the Court have suggested that in our labour law dispensation such a

[29] A juristic person is translated to mean as body treated by law as a person and, as a result, it can acquire its own rights and duties. See Brassey *Employment and Labour Law* A7-2. See also in *SACCAWU v Specialty Stores Ltd* (1998) 18 *ILJ* 557 (LAC) par 560B in which case juristic person was determined.
[30] *Cerephone (Pty) Ltd v Marcus NO & Others* (1998) 19 *ILJ* 1425 LAC par 1430 F-G.
[31] S 195(2) (b) of the South African Constitution. See also Brassey *Employment and Labour law* A7-2.
[32] The concept of a labour dispute was canvassed in the matter of *Edgars Stores Ltd v SACCAWU* (1998) 19 ILJ (LAC).

distinction was necessary.[33] In the case of a dispute of right, the basis of an employee's claim is vested in a legal or contractual right. Such a right can be enforced through the civil courts, the Labour Court or the CCMA in certain instances.

A dispute of interest, on the other hand, is not based on an existing right. The Labour Court held in *Trans-Caledon Tunnel Authority v CCMA & others*[34] that for such dispute, employees or their unions ought to approach the employer to establish/negotiate the new right. If the employer does not want to give employees what they want and the matter remains unresolved, then the employees may exercise their right to strike after following the appropriate procedures. They cannot have their wishes enforced through arbitration at the CCMA or adjudication at the Labour Court.[35] However, a single employee would have no recourse whatsoever, because only two or more employees can strike.[36]

The relevance of this distinction flows from the application of section 64 (1) (c) of the LRA which provides that employees may not strike if the issue in dispute is one that either party has a right to refer to arbitration or Labour Court. However, the distinction is not absolute. In *Maritime Industries Trade Union of SA & others*[37], the Labour Appeal Court stated that in certain circumstances involving an alleged unfair labour practice dispute, employees might elect whether to refer the matter to arbitration or go on strike.

2 4 Statutory dispute settlement machinery

What remains a core feature of the statutory dispute settlement machinery in the South African system is the compulsory conciliation of almost all disputes, whether they are disputes over rights or interests. Currently, the LRA incorporates useful structural pathways or procedures through which each category of labour disputes must follow.[38] These statutory procedures are designed to deal only with labour and employment disputes. In other words, only those arising from and, for the most part, during the existence of an employment or collective bargaining relationship between the parties in dispute.[39]

Unless a dispute has not been settled in conciliation, it may, depending on its nature, proceed to arbitration for resolution. Industrial action is reserved for interest disputes only, conciliation and

[33] *Department of Justice & Constitutional Development v Van de Merwe NO & others* (2010) 31 ILJ 1184 (LC) par [23].
[34] As outlined in the case of *Trans-Caledon Tunnel Authority v CCMA & others* (2013) 34 ILJ 2643 (LC).
[35] Unless the parties render an essential service or agree to arbitration. See also Grogan Labour Litigation and Dispute Resolution 9.
[36] See the definition of strike in S213 of the LRA.
[37] (2002) 23 ILJ 2213 (LAC).
[38] See Schedule 4 of the 1995 LRA (as amended in 2015) *Dispute Resolution: Flow Diagrams* 261.
[39] Grogan *Labour Litigation and Dispute Resolution* 4.

arbitration may take place through the CCMA; as well as through industry based bargaining councils or private dispute resolution agencies.

2 5 Referral of disputes to the CCMA

Ordinarily, the LRA encourages parties who are in dispute to first attempt to reach an amicable solution to the dispute by exploring internal mechanisms available prior to making referral to the CCMA. However, if the internal mechanism proves unsuccessful, the CCMA emphasises that parties should take the necessary steps immediately by approaching the CCMA.[40] The referral must be timeous in terms of the statutory time limits. In the case of an unfair dismissal dispute, a party or parties have only 30 days from the date on which the dispute arose to open a case.[41]

If the case relates to an unfair labour practice, parties would normally have only 90 days and, with discrimination cases, they are given six months to refer the dispute.[42] In terms of section 191 (2) of the LRA, if the above time periods have lapsed, the referring party must apply for condonation otherwise the CCMA would not have jurisdiction to conciliate the dispute. The party is required to make application to the CCMA to condone the reason that he/she failed to refer the case timeously.

The applicant may make use of the CCMA's pro forma affidavits when applying for condonation. Rule 31 of the CCMA Rules regulates the manner in which condonation must be applied for.[43] However, since the LRA places primacy on the speedy resolution of labour disputes, condonation for late referral of disputes for conciliation is not automatically or lightly granted.[44] CCMA Rule 9 (3) requires that an application for condonation must set out the grounds for seeking condonation and must include the following factors which the Commissioner may consider when deciding whether or not to grant condonation:

- the degree of lateness of the referral[45];
- the reason for the lateness[46];

[40] https://joubertscholtzinc.co.za/2018/04/09/what-is-the-ccma/
[41] S 191(1)(b)(i) of the LRA 66 of 1995. Should an employee appeal against the employer's decision, the date for the referral would be the date of the decision of the appeal. See *SACCAWU & another v Shakoane & others* (2000) 10 *BLLR* 1123 (LAC) and *Halgang Properties CC v Western Cape Workers Association* (2002) 10 *BLLR* 919 (LAC).
[42] Van Niekerk *et al Law@work 449*–450. See also Grogan *Workplace Law* 444. Brad *et al Labour Dispute Resolution* 114–115.
[43] The Bargaining Councils have adopted similar Rules.
[44] Grogan *Labour Litigation and Dispute Resolution* 107.
[45] See *NUM v West Holdings Gold Mining* (1994) 15 ILJ 610 (LAC).
[46] See *Motloi v SA Local Government Association* (2006) 3 *BLLR* (LAC) and *Mghobozi v Naidoo NO & Others* (2006) 3 *BLLR* (LAC).

- the referring party's prospects of success on the merits[47];
- any prejudice to both parties which includes the importance of the matter to each party; and
- any other relevant factors[48].

In *Dial Tech CC v Hudson & another*,[49] the Labour Court set forth the following additional factors:

- the respondent's interest in the finality of the judgement or decision;
- the convenience of the Court and of the CCMA; and
- avoidance of unnecessary delays in the administration of justice.

Rule 31 of the Rules of the CCMA presupposes that all applications for condonation will be determined generally by means of an oral hearing of evidence given under an oath.[50] This entails a generally adversarial approach, permitting parties to present opening statements, lead evidence-in-chief, to cross-examine witnesses of the opposing party and argue on the merit of the application. Govindjee[51] opines that there is no requirement that the application be heard orally, and therefore, the application can be considered through written submissions which is currently the requirement with CCMA condonation applications.

In *Fidelity Guard Holdings (Pty) Ltd v Epstein*,[52] the Labour Appeal Court held that the time to challenge a late referral is prior to or during the conciliation phase. The court held further that, if a certificate was issued without condonation having been raised and considered, the issuing of the certificate cures the fact that condonation was not granted, and the matter can proceed to arbitration unless the certificate is set aside for review.

Once the party has decided to refer the dispute to the CCMA for conciliation[53], he or she needs to complete and sign a CCMA case referral form (also known as LRA Form 7.11). These forms are available from the CCMA offices, Department of Labour and the CCMA website.[54]

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[47] See *Total Facilities Management v CCMA & Others* (2008) 1 *BLLR* 73 (LC) and *NUM v Council for Mineral Technology* (2002) 23 *ILJ* 1229 (LAC) 1231.
[48] *Coates Brothers (SA) Ltd v Shanker & others* (2003) 12 *BLLR* 1189 (LAC).
[49] (2012) 28 *ILJ* 1237 (LC) 1245. See also the discussions in *Forster v Stewart Scott Inc* (1997) 18 *ILJ* 367 (LAC) where the court amongst others held that the list is not exhaustive.
[50] CCMA Labour Law in Practice: Commissioners Training Manual for Labour Dispute Resolution (Module 5 - Rulings) 300.
[51] Govindjee "*Labour Dispute Resolution*" 224.
[52] (2000) 12 *BLLR* 1389 (LAC).
[53] S 134(1) of the LRA 66 of 1995.
[54] https://www.ccma.org.za/categories/case-referral-forms/ (accessed on 2022-04-02).

2 6 Setting down a dispute for conciliation process

On receipt of the referral documents from the employee, the CCMA will process the application and set the matter down to be heard. The CCMA will then notify the parties of the scheduled conciliation meeting. With respect to conciliation and con-arb, the parties must be given 14 (calendar) days' notice[55] and in respect to arbitration at least 21 (calendar) days' notice. This is in line with the spirit of the LRA that labour disputes be resolved without delays.[56] Statutory conciliation is governed by the LRA and the procedural rules of the Commission.[57]

The dispute resolution work of the CCMA is performed by commissioners appointed by the governing body. Once the CCMA has established that it has jurisdiction to conciliate the dispute and the matter is set down, it must appoint a commissioner to attempt to resolve the dispute through conciliation. The commissioner may do this by mediating the dispute, by conducting a fact-finding exercise and make recommendations to the parties within 30 days of the date the Commission received the referral or within such extended period agreed upon by the parties.[58] The role performed by an appointed commissioner is limited to assisting the parties to reach their own settlement. He or she plays an active role in attempting to help the parties develop options, consider alternatives and reach a settlement agreement that will address the parties' needs.[59] The Conciliator makes no binding determination on them.[60]

Such Conciliation is a compulsory process unless all the parties to a dispute agree differently. According to Van Niekerk, the overall value of conciliation process is twofold. First, it is beneficial to the employer and employee involved in an employment relationship to settle their disputes through agreement rather than resolving it by means of a final decision with a winner-loser outcome.[61] Second, the filtering out of disputes has the advantage of lessening the burden on the CCMA and other dispute resolution mechanisms.[62]

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[55] Rule 11 of the CCMA Rules. In terms of Rule 3 (1) and (2) of the CCMA Rules, for the purpose of calculating any period of time in terms of these Rules – (a) day means a calendar day; and (b) the first day is excluded and the last day is included, subject to sub-rule (2). (2) The last day of any period must be excluded if it falls on a Saturday, Sunday, public holiday or on a day during the period between 16 December to 7 January.

[56] Bosch, Molahleni and Everett *The Conciliation and Arbitration handbook: A comprehensive guide to labour dispute resolution procedure (2004)* 76.

[57] S135 of the 1995 LRA and Rules of the proceedings before the CCMA.

[58] Ss 133(1) and 135(1)-(2) of the LRA 66 of 1995. See also *SANAWU v Maluti Crushers* (1997) 7 *BLLR* 955 (CCMA).

[59] Bosch *et al* (2004) *The Conciliation Handbook: A comprehensive guide to labour Disputes resolution procedures* 47.

[60] Govindjee "Labour Dispute Resolution" in Van der Walt, Le Roux and Govindjee (eds) *Labour Law in Context* (2012) 223. See also Van Niekerk *et al Law@work* 449.

[61] Van Niekerk *et al Law@work* 449–450. See also Grogan *Workplace Law* 444.

[62] Van Niekerk *et al Law@work* 449–450. See also Grogan *Workplace Law* 444.

2 7 Agreement and settlement of disputes after conciliation

Notably, if parties agree to settle their dispute at the end of conciliation hearing on some or all of the disputed issues, the conciliating commissioner must assist the parties in drafting a written settlement agreement.[63] This agreement must be signed by all the parties to the dispute with the commissioner in attendance. The commissioner must then issue a certificate of outcome using Form LRA 7.13 to indicate that the matter has been resolved[64] even if the 30-day or any extension thereof has not expired. The commissioner must file the original certificate with the Commission and serve a copy thereof on all parties.[65]

The issue of a certificate of resolution ends the matter and neither party can pursue the settled dispute further unless the conciliating commissioner acted irregularly, and the certificate is set aside on review by the Labour Court.[66] Once the agreement has been signed, it becomes binding on both parties and it may also be made an order of the court.[67] However, it is the compliance and enforcement of such orders that, as will be noted below, presents more challenges than the sought resolution for those intended to benefit from such outcomes.

2 8 When a Settlement Agreement does not settle the matter

It has been widely accepted by South African Courts that once a settlement agreement has been reached, by consent, then it may be made an order of court and this would result in the finalisation of a matter. Be that as it may, this mechanical approach to settlement agreements although established with good intention, may have brought up inadequacies which the drafters of the LRA may have missed to address. Accordingly, the process has arguably been abused by employers to the detriment of poor employees who resort to resolve their dispute through the CCMA to avoid legal fees involved in other dispute resolution forums such as courts.[68]

However, if the dispute remains unresolved after a conciliation attempt or at the end of the 30-day conciliation period or any agreed extension thereof, the conciliating commissioner must issue a certificate of outcome recording that conciliation has failed or the conciliation period has expired without any settlement agreement reached.[69]

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[63] Ss 64(1) (a) (i), 135(5) (a), 136(1) (a) of the LRA 66 of 1995. Also see Govindjee "Labour Dispute Resolution" 225 where the author notes that a settlement agreement is a written agreement in settlement of a dispute that a party had the right to refer to arbitration or the Labour Court.

[64] Grogan *Workplace Law* 428.

[65] S 135(5) (a)-(c) of the LRA 66 of 1995. See also Du Toit *et al Labour Relations Law* 114.

[66] Grogan *Workplace Law* 428.

[67] s158 (1) (c) of the 1995 LRA.

[68] *Buffalo City Metropolitan Municipality v Asla Construction (PTY) LTD* [2019] ZACC 15.

[69] Van Niekerk *Law @ Work* 451.

It is this certificate that triggers the next processes. At this instant, either party may give notice of a strike or lockout if it is a dispute of interest in non-essential or non-maintenance services or may choose to refer the matter to the CCMA for conciliation, failing which arbitration, or to the Labour Court for adjudication as the case may be.[70]

2 9 Setting down the dispute for Arbitration

Arbitration refers to a process whereby the parties make presentations to a mutually agreed neutral third party, known as an arbitrator, and commit themselves to abide by that arbitrator's decision as final and binding.[71] Without a detailed discussion, an arbitration hearing under the LRA, typically involves six stages. The stages normally follow the sequence set out below but may occur differently in a particular case. The stages are:

i. preparation and introduction;
ii. the preliminary issues;
iii. narrowing the issues;
iv. the hearing of evidence;
v. the concluding arguments; and
vi. the award.

It is submitted that arbitration is an expedited process to resolve factual labour disputes once and for all. As such, an application for arbitration must be brought within 90 days of the date on which the certificate was issued. In fact, although the LRA requires that the CCMA should arbitrate disputes in 90 days, as a means of improving efficiency in its function, in practice, the CCMA sets a higher internal efficiency target of 60 days from the date of the request for arbitration to finalise the matter.[72] In terms of section 136 (1) (b) of the LRA, non-compliance with the time limit may be condoned on 'good cause shown.'

Important to remember is that the LRA makes it clear that the Arbitration Act does not apply to any arbitration under the auspices of the CCMA.[73] For this reason, arbitration proceedings before the CCMA are regulated by sections 136 to 144 of the LRA, read with the CCMA Rules.[74] Arbitration under the LRA is compulsory, in that once an employee or, in some instances, an

[70] Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie, Steenkamp *Labour Relations Law: A Comprehensive Guide (*2015) 140.
[71] *Ibid* 117.
[72] Bhorat *et al* "Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa" An Analysis of CCMA Data in Development Policy Research Unit: (2007) University of Cape Town 23.
[73] S146 of the 1995 LRA.
[74] Basson *et al Essential Labour Law* 361.

employer has referred a dispute to the CCMA or a bargaining council with jurisdiction, the other party must attend if it wishes to defend the matter.[75]

Arbitrators have the discretion to determine the form in which arbitration process is conducted but with least possible legal formality so that the dispute may be resolved fairly and expeditiously.[76] In other words, the LRA does not require arbitrators to act in the same manner as a court.[77] For this reason, it is important for an appointed arbitrator to ensure from the onset that the parties are aware of the arbitrator's powers and the procedure to be followed. This is particularly important if the parties or their representatives have little or no experience of CCMA proceedings.

In terms of section 138 (2) of the LRA, subject to the arbitrator's discretion as to the appropriate form of proceedings, each party to a dispute may:

- give evidence;
- call witnesses;
- question witnesses; and
- address concluding arguments.

Brand opines that these rights are important for the effective presentation of a case and the parties should as a general rule make use thereof in spite of the procedure adopted by the commissioner.[78] In *Country Fair Foods (Pty) Ltd v CCMA*,[79] the Court held that arbitration is a hearing *de novo* on the merits of the dispute. In other words, arbitration is a new hearing, which means that the evidence concerning the dispute is heard afresh before the arbitrator.[80] Therefore, the arbitrator must determine the dispute in the light of the evidence admitted at the arbitration. The arbitration process is much admired due to its simplicity and informality. Formalistic legalities bring about a possibility of dragging the process of dispute resolution, and as such allowing lawyers at such proceedings may prejudice an ordinary employee who may not afford legal representation.[81]

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[75] Grogan *Workplace Law* 125.

[76] S 138 (1) of the LRA 66 of 1995. See also *Le Monde Luggage t/a Pakwells Peije v Dunn NO & other* (LAC), where the Labour Appeal Court (par 17 to 19) held that an arbitrator may ascertain any relevant fact in any manner that it deems fit provided that it is fair to the parties.

[77] *Naraindath v CCMA & Others* (LC) par 26-27.

[78] Brand *Labour Dispute Resolution (2008)* 149.

[79] (1999) 11 *BLLR* 1117 (LAC) 11. See also Van Niekerk *Law @ Work* (2015) 453.

[80] Van Niekerk *Law @ Work* 453.

[81] Bamu and Mudarakiwa "*Social Regionalism in the Southern Africa Development Community: Transnational, Regional and National Interplay of Labour Alternative Dispute Resolution Mechanisms*" in Blakette *Research Handbook on Transnational Labour Law* 469.

2 10 Certification and enforcement of an arbitration award

Once the arbitrator has heard the parties and their arguments, he or she will consider the evidence and submission of both parties and decide within 14 days the outcome of the matter. The arbitrator's decision is published in what is commonly referred to as arbitration award, setting out the reasons for the decision made.[82] On good cause shown by the arbitrating commissioner, the CCMA Director may extend this period.[83] Normally, the award must be signed because an unsigned award is not binding.[84] The LRA requires that the award must then be served on each party to the dispute while the original must be filed with the Registrar of the Labour Court.[85]

Notably, however, advisory arbitrations are not enforceable. Once the commissioner has issued the award, his or her mandate terminates. Consequently, the commissioner cannot later change his or her mind and alter the award unless there are grounds for variation or rescission.[86] The arbitrator's award must be reasonable in that it must be a decision, which a reasonable decision maker could reach based on the materials available otherwise it could be subjected to a review by the Labour Court.[87]

The LRA provides that an arbitration award issued by a commissioner is final and binding.[88] This was also confirmed in the *CCMA v Bheka Management Services (Pty) Ltd and Others*.[89] In fact, as will be seen below, section 143 (1) of the LRA now elevates the status of an arbitration award to become an order of the Labour Court after certification of the award by the Director of the CCMA.[90] Notably, before the amendment to the 1995 LRA, employees seeking to enforce an award were required to apply to the Labour Court to have the award made an order of the court. While it was envisaged that the certification procedure would simplify the enforcement process, its practical effect is that it required employees to attend at the CCMA in order to seek certification, which in itself introduced a further procedural step in the enforcement process.

This method received a lot of criticism from some practitioners as it made the enforcement process unduly burdensome in circumstances in which parties should be able to rely on a CCMA

[82] S 138(7) (b) of the LRA 66 of 1995.
[83] An example of a 'good cause' could be the complexity of the matter.
[84] S 138(7) (a) of the LRA 66 of 1995. see also In *Meyer v CCMA & Others* (2002) 23 *ILJ* par154, the Court held that, where the award was not signed and there was no prospect of it ever being signed, it would be declared a nullity. See also Grogan *Labour Litigation and Dispute Resolution* 154.
[85] S 138(7)(b) of the LRA 66 of 1995.
[86] Grogan *Labour Litigation and Dispute Resolution (2014)* 155.
[87] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) *BLLR* 1097. See par 8.2 'Review of arbitration awards'.
[88] S 143 (1) of the 1995 LRA.
[89] (2016) *ZALAC* 34
[90] See also Rule 40 of the CCMA Rules. The Director may delegate this function to senior commissioners.

award being what it purports to be. Given these criticisms and some of the difficulties encountered with enforcement process, amendments to section 143 of the LRA were proposed which sought to address those difficulties. Critics noted that employees would already have endured a lengthy and often protracted journey to reach the remedy of a CCMA award in their favour, only to have to begin the tiresome journey of receiving such award after succeeding with their claim. This plight was recognised in the Labour Courts and resulted in the amendment of the LRA to extend the CCMA's authority to the compliance process of awards.[91]

As noted above, prior to this, the CCMA only had the authority to grant awards and not to further follow through with ensuring compliance by the employer. This meant that victories were often for the most part pointless for successful employees as they had to expend themselves further if the employer chose to simply not comply with instructions to pay over the compensation awarded by the CCMA.

2 11 Process before the amendments

Previously, if the employer chose not to pay any amounts awarded after being liable for same as determined by the CCMA, employees would then have to approach the Labour Court to execute a writ for enforcement once the employer is deemed to be in default. This process, although self-explanatory and easy to navigate for the layman with the help of the Clerk of the Court, carried the burden of additional costs for the employee and further dragged out the process of being compensated timeously. The application for the writ would have had to be considered by a Registrar and if approved, be sent to the relevant Sheriff for execution. The Sheriff would proceed in opening an account in the name of the employee and then charge to that account for any work done in attaching and realizing property of the employer in satisfaction of an amount equal to the award.[92]

The further difficulty here is that the Sheriff would often request security equal to the amount to be claimed in respect of the award prior to executing his or her duties as a Sheriff in respect of attachment. Quite clearly, employees with CCMA awards in their favour would obviously be prejudiced and therefore less likely to be able to claim awards rightfully due to them.

But the Labour Appeal Court heard the matter of *CCMA v MBS Transport CC and Five Others*[93] which would set precedence for how section 143 of the LRA would be interpreted and

[91] GN 1112 in GG 33873 of 2010-12-17.
[92] Poole "*Enforcing CCMA Awards without further referrals*" 2020 Employment Law, Publications 2.
[93] [J1807/2015].

executed. In terms of the LRA, the Labour Court enjoys status similar to that of a High Court in the province of its operation. Therefore, its decisions would be equivalent to that of a High Court judgment in its jurisdiction of operation.

For this discussion, section 143 (1) and section 143(5) of the LRA are relevant, in that it states that;

> "An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued. 'Furthermore, that 'Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court."

In this matter, the CCMA argued that, essentially, employers were ignoring CCMA awards and not making payment as they were fully aware of the laborious process involved with holding them accountable. The status and weight of a CCMA ruling was, therefore, heavily undermined.

2 12 The Interpretation of section143 of the LRA

The Labour Court in the above matter ruled in accordance with the sections above and gave authority to its intention. The Court stated that[94]

> "the practical effect of sections 143(1) and 143(3) is that a certified arbitration award may be enforced without the need for a writ to be issued by any court or the CCMA."

Following the amendments now, once certified by the director of the CCMA or his/her designate, the award can be presented to a deputy sheriff for execution with no writ required from the Labour Court. A certified award will serve as a writ to avoid an employee having to go to the Labour Court for a writ to be issued. Accordingly, this has made it possible now for employees to circumvent the practice explained above of obtaining a writ from Court. The effects of this ruling mean that, as it stands, once employers do not make payment to employees as awarded, the employee can approach the CCMA and apply to have the award certified. If all is in order, the CCMA will then submit the certified award to the Sheriff or his/her Deputy for execution.

Be that as it may, in further support of employees claiming awards, the CCMA now also provides financial assistance to those seeking to institute the collection process. To qualify, individuals

[94] *Moqhaka Local Municipality v Motloung and Others* (JS1505/16) [2016] ZALCJHB 401; (2017) 38 ILJ 649 (LC) para 36. These development in as far as labour disputes are concerned are encouraging as they no longer put employees at a disadvantage once an award is granted in their favour. This allows for a less incoherent process in dealing with CCMA matters, hopefully providing encouragement to individuals who feel they might never be compensated even if successful with their disputes.

need to earn below R224,080.48 per annum.[95] In the appropriate circumstance the CCMA may recover such costs from an employee who has successfully enforced their order. This study argues that recovery of such costs from employee is absurd and defeats the very purpose as to why the CCMA was established. It would arguably place significant prejudice on the employee and places an employee at a disadvantage once an award is granted in their favour. It further may discourage individuals who feel they might never be compensated even if successful with their disputes.

2 13 Conclusion

Following the dawn of democracy in 1994, a democratic Constitution was passed. Remarkably, this signaled the end of a dispensation full of tyranny and marred with racial segregation. To date, the Constitution remains the supreme law of the country and entrenches various labour rights and regulates labour relations. In particular, section 23 of the Constitution is dedicated to labour relations. The LRA was enacted to give effect to this constitutional commitment, which guarantees labour rights and the right to fair labour practices. The LRA is a pivotal piece of legislation, as it recognises the need for fast and easy access to justice in labour disputes. In doing so, the LRA adopts an approach that encourages a negotiated rule making and conciliation and voluntary arbitration in order to achieve effective workplace labour disputes resolution with the parties retaining significant influence over outcomes.

To achieve this, the LRA introduced the CCMA as an independent dispute resolution body that does not belong to and is not controlled by any political party, trade union or business. The Commission endeavours first and foremost to conciliate between the parties and if conciliation attempt proves unsuccessful, the matter moves on to arbitration. The entire process is to a large extent informal, expeditious and at no charge, and is therefore meant to be accessible to parties in dispute. Notably, each year, more than 160,000 labour disputes are referred to the CCMA.[96] Of this total, the CCMA enjoys over 75% national settlement rate and greater.[97]

Be that as it may, the problem remains at the enforcement of the awards by the party who requires to compliance from the defaulting party, particularly in instances where an employee has parted ways with their employer as part of the terms of the settlement agreement. If an individual remains

[95] Section 73A of the Basic Conditions of Employment Act 75 of 1997, the Act was amended to expand the jurisdiction of the CCMA to include disputes relating to employers' failures to pay employees certain amounts to which they are entitled.
[96] Van Niekerk and Smit *Law @work* (2014) 449.
[97] The CCMA Annual Report 2020/2021. Report available at://www.ccma.org.za/categories/annual-reports/. Accessed on 2 April 2022.

unemployed, they are likely disadvantaged and unable to seek redress from relevant institutions such as the Labour Court because of costs associated with such action. As a result, these individuals may have little choice but to abandon their attempts to compel their employers to comply with the settlement terms.

The next chapter explores the pertinent case law pertaining to the enforcement of settlement agreements and arbitration awards in South Africa.

CHAPTER 3: ENFORCEMENT OF CCMA DEFAULT AWARDS AND PRESCRIPTION OF ARBITRATION AWARDS

3 1 Introduction

In the preceding chapter, the current framework for the resolution of labour disputes and the enforcement of settlement agreements and arbitration awards was explored. It was shown that the CCMA, which is tasked with mediation and arbitration duties, is among the institutions created to hear and adjudicate over labour matters.[98] However, the Commission is not necessarily responsible for the enforcement of its awards. As previously observed in the last chapter, over 160,000 labour issues are submitted to the CCMA annually, and that the CCMA boats a national settlement rate of more than or equal to 75% of this total.[99]

Nevertheless, enforcement of CCMA awards by the party that may need to challenge the defaulting employer remains problematic, especially when the applicant is no longer in the employ, such as in a case when an employee parts way in accordance with the terms of a settlement agreement. Such person may well be jobless and in a penniless position to challenge such disingenuous acts, ultimately unable to seek remedy from the courts to seek enforcement. Consequently, those in possession of settlement agreements and arbitration awards in their favour may have little alternative but to give up the hope that their ex-employers may comply. Notably, at this point, the applicant would have already experienced a long and frequently stretched process to reach the oasis of a CCMA award in their favour, only to have to face a similarly grueling road to enforce compliance.

In effect, these settlement agreements and arbitration awards have proven to be legally ineffectual documents, and the method to get them is so loaded with legal and practical complexities that it is unworkable. Considering the above, this chapter covers the enforcement of settlement agreements and arbitration awards, as well as how courts have dealt with the resulting issues. In addition, a review of current developments surrounding the prescription of arbitration awards is included.

3 2 Prior to the revision of the LRA

Previously, enforcing a CCMA award was a lengthy and complicated procedure.[100] If the employer elected not to pay any payments awarded after being found liable for same by the CCMA, the employees would have to petition the Labour Court to execute a writ for enforcement after the

[98] Par [23] above
[99] The CCMA Annual Report 2020/2021. Report available at: https://www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports/Token/ViewInfo/ItemId/59 (Accessed on 2 April 2022).
[100] Ludwig *The Politics of Solidarity: Privatisation, Precarious Work and Labour in South Africa* (2020) 143.

employer is adjudged in default. This method, although being self-explanatory and simple for a layperson to traverse with the assistance of the court clerk, imposed extra fees on the employee and prolonged the process of receiving timely compensation. However, this position has since changed, case law has played an integral part into the current dispensation and the cases which influenced the amendments are discussed briefly below. [101]

3 3 Case law leading to the revision of the LRA

MBS Transport CC V CCMA and Others[102] *and Bheka Management Services (Pty) Ltd v Jonathan Kekana and Others*[103]

In 2015 the Labour Court had to decide on the matter for *MBS Transport CC v CCMA and Others and Bheka Management Services (Pty) Ltd v Jonathan Kekana and Others* and shed light on the amendments to the LRA and, in particular, the application and interpretation of section 143. The court a quo consolidated the two cases because the issues to be decided were comparable.[104] In *MBS Transport CC v. CCMA and Others,* the applicant (employer) sought a rule nisi requiring the respondents to show cause why an enforcement award issued by the CCMA should not be stayed pending the outcome of a review application to set aside the arbitration award granted to the employee. The arbitrator ruled that the employee was terminated unfairly and ordered the employer to compensate.

In the case of *Bheka Management Services (Pty) Ltd v. Jonathan Kekana and Others,* Mr. Kekana was dismissed. The arbitrator determined that his termination was substantively unfair and ordered his reinstatement retrospectively. After the arbitrator determined the wage arrears, he directed the employer to pay the specified sum to the employee by June 30, 2015.[105] The Director of the CCMA certified both awards, and enforcement awards were issued. Upon learning of the respective enforcement awards, the respective employers lodged an urgent application to the court *a quo* to stay the respective enforcement awards.

Briefly, both cases were filed before the Labour Court on an urgent basis in order to stay the writs of execution that had been issued in accordance with compensation awards, which the CCMA had already approved for this reason. In both instances, the employers requested a stay of execution on the grounds that they were reviewing the arbitration awards. As a result, they argued that the writs should be stayed pending the outcome of their individual reviews and since the Sheriff had already attached the employer's property but had not yet removed it. The Labour Court

[101] Section 143 of the Labour Relations Act, 66 of 1995
[102] *MBS Transport CC V CCMA and Others* (Case no J1807/15)
[103] Case no J1706/15
[104] Para 3.
[105] Para 4.

reviewed the relevant portions of the LRA amendments included in section 143,[106] which read as follows:

i. "An Arbitration Award issued by a Commissioner is final and enforceable and may be enforced as if it were a Labour Court ruling in respect of which a writ has been issued, unless it is an advisory Arbitration Award"[107]

ii. "An Arbitration Award may only be enforced according to paragraph (1) if the director certifies that the Arbitration Award is an Award referred to in subsection 1"[108]; and

iii. "Despite paragraph (1), for the purposes of enforcing or executing an Arbitration Award requiring a party to pay a sum of money, the Award must be considered as if it were an Order of the Magistrates Court."[109]

In determining the case, the court observed that, over the years, writs of execution were issued by the Registrar of the Labour Court before they could be executed by the Sheriff, and that, pursuant to section 145(3) of the LRA[110], the Labour Court had exercised its discretion to stay these writs where a review was pending. In addition, it was opined that the LRA amendments to section 143 had altered the situation such that the CCMA could now issue writs for the enforcement of its own arbitration awards, but that the certification of an award by the CCMA did not transform the award into a Labour Court order, despite the legislative language.[111] Accordingly, the court determined that section 143(5) generated uncertainty since an arbitration award that mandates the payment of money must be considered for purposes of enforcing or executing such judgment as if it were a Magistrates Court order.[112]

In this regard, the Labour Court determined that the CCMA has not been statutorily granted the ability to issue writs, and that the certification of an award followed by its implementation via the Sheriff is in reality outside the scope of its authority. The Labour Court ruled that section 143 does not provide the CCMA the necessary authority to issue writs of execution, and they must continue to be granted by the Labour Court. This meant that there was no need to stay the CCMA's writs, as they were invalid and could be dismissed. This ruling sparked controversy about the need and likelihood of additional legislative intervention, and it was appealed.

[106] Para 9.
[107] s 143(1)
[108] S 143(3)
[109] S 143(5)
[110] Para 20.
[111] Para 40.
[112] Para 36.

3 4 The context of section 143

Prior to the challenges of this section of the LRA as illustrated in case law[113], section 143 specified that an arbitration award may only be enforced by an application to the Labour Court in accordance with section 158(1)(c) of the LRA. The reality of those in the receiving end, this provision was generally ineffectual, since the time and expense involved with all petitions presented in the ordinary procedure discouraged many workers from seeking such remedy. Essentially, an employee whose employer failed to comply with the award received an empty award as a result as it were.

The changes to the Act, which brought about the 2002 amendments provide an alternative.[114] According to the revised section 143, any employee whose employer refused to comply with an arbitration decision might petition the CCMA Director to certify the award. Once validated, the award was accorded the same standing as a court order. The Registrar of the Labour Court would issue a writ based on the certified award, which the employee would then send to the Sheriff for execution.

While this method solved some of the shortcomings of the original section 143, it was inadequate since it still needed an employee to petition the Labour Court for the injunction to be granted. The amendments to the Act addressed this specific issue by introducing a further amendment to section 143 of the LRA, which gives the CCMA Director the authority to certify a CCMA award as a court order, do not justify the practice of the Labour Court Registrar issuing a writ of execution for certified CCMA awards. As from 2015, the effects of the amendment were such that after an award was certified, it may be handed to a Sheriff for execution without an applicant required to visit the Labour Court to get a writ.

In both decisions, the Labour Appeal Court considered the CCMA's contention that employers paid little regard to CCMA awards because they were aware of the burdensome enforcement requirements of the LRA.[115] The LAC determined that this method was burdensome, time-consuming, and costly. It established a two-step process for situations in which an employer failed to comply with an arbitration award.[116] In order to give effect to the provisions of section 143 of the LRA and given that the CCMA does not issue writs in the conventional manner, the LAC concluded that there is no legal or practical problem with a CCMA-certified award having the same

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[113] *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others* (2016) 37 ILJ 2793 (LAC).
[114] Government Gazette "Labour Relations Amendment Act, 2002 http://www.saflii.org/za/legis/num_act/lraa2002268.pdf (accessed 20-05-2022) 13.
[115] Para 17.
[116] Para 18.

status as a Labour Court order in respect of which a writ has been issued. The court decided that the practical impact of sections 143(1) and 143(3) is that a certified arbitration award may be enforced without any court or the CCMA issuing a writ.[117]

Notable is that this decision gives effect to the explanatory note accompanying the 2015 revisions to section 143, in which it was claimed that section 143 needed to be amended so that:

> "…an award which has been certified by the Commission can be presented to the Deputy-Sheriff for execution if payment is not made. This removes the need for the current practice in terms of which parties have a writ issued by the Labour Court."[118]

As a consequence of the amendments to section 143 and the LAC's decision in *CCMA v. MBS Transport*, the procedure for enforcing an award in the CCMA is now as follows:

i. referring a disagreement to the CCMA (within 30 days of an unjust termination or 90 days of an unfair labor practice);

ii. the receipt of an arbitration decision from the CCMA directing one party to pay the other an amount of money (often an order for the employer to pay the former employee compensation for the unjust dismissal or unfair labour practice);

iii. a request to the CCMA to certify the award under section 143 of the LRA (using form LRA 7.18);

iv. receipt of the award certificate;

v. communication of the award to the Sheriff of the appropriate judicial district with authority to execute the award; and

vi. enforcement by the Sheriff (usually by taking into inventory, or possession of goods to the value of the monetary amount of the award).

The certification procedure affords a party who holds an arbitration award in their favour to rely on the CCMA to complete the process and importantly achieve enforcement. A party that is dissatisfied with the CCMA's award and desires to contest it is not precluded from doing so by this decision or the method permitted by section 143. The unsuccessful party is always entitled to initiate a review proceeding in the Labour Court in accordance with section 145 of the LRA and can either provide security in accordance with sections 145(7) and (8) or apply for a stay of

[117] Para 31.
[118] Para 22.

execution of the award pending the review on the grounds that the award is under review if doing so is in the interest of justice.

It should be emphasized that the preceding procedure only applies to CCMA awards that order the payment of a monetary sum to a party. If the certified award to be enforced is for the performance of an act rather than for the payment of money (such as the reinstatement of an employee), then failure to do so is an invitation of contempt of court proceedings. This unfortunately could not be cured by the amendments to the LRA.

3 5 *Mlaudzi v Metro South Towing CC*

In this case[119], a worker filed a dual application with the Labour Court. The first portion of the application was filed according to section 158(1) (c) of the LRA, while the second portion was filed pursuant to section 77(3) of the BCEA.

3 5 1 Facts

This application was filed after the Motor Industry Bargaining Council's Dispute Resolution Centre concluded an arbitration hearing between the employee and the employer, during which the Commissioner decided that the employee's discharge was procedurally and substantively unjust. The Commissioner ruled that the employee must be restored and that the firm must pay the employee. The employee filed the aforementioned dual application with the Labour Court after the employer refused to comply with the arbitration award's provisions. The Labour Court handled the two components of the application independently.

3 5 2 Application of section 158(1)c of the LRA

If an arbitration award is certified by a director of the CCMA in accordance with section 143 of the LRA, then it is unnecessary to approach the Labour Court in accordance with section 158(1)(c) of the LRA, as determined by the Labour Court. In lieu of this, the aggrieved party may immediately enforce the certified arbitration award in accordance with section 143(4) of the LRA via contempt actions in the Labour Court. This is also consistent with the Labour Court's ruling in *SATAWU obo Phakathi v Ghekko Services SA (Pty) Ltd and Others*[120], in which it was determined that section 158(1)(c) of the LRA petitions are not a requirement for contempt proceedings. Nonetheless, the Labour Court held that an application under section 158(1)(c) of the LRA cannot be denied on the basis that the arbitration award was certified. In this particular instance, the

[119] *Mlaudzi v Metro South Towing CC* [2017] ZALCJHB 37.
[120] *SATAWU obo Phakathi v Ghekko Services SA (Pty) Ltd and Others* (2011) 32 ILJ 1728 (LC).

Labour Court determined that the employee had a valid claim, and as a result, the arbitration award became an order of the Labour Court.

3 5 3 Application of section 77 of the BCEA

In the second section of the application, the employee requested that the Labour Court compel his employer to pay him his unpaid income. The Labour Court cited *CocaCola Sabco (Pty) Ltd v Van Wyk*[121], in which it was determined that a reinstatement order revives the employment contract. In addition, the Labour Court ruled in the Coca-Cola Sabco case that if an employee offered his services between the date of the order and the date of execution, he is entitled to compensation for that time period. As a result, the Labour Court determined in the Mlaudzi case that the employee did report for duty (as required by the arbitration ruling) and that he was not reinstated when he reported for duty. Thus, the Labour Court ruled that the respondent must pay the applicant the compensation sought by the applicant.

This is an important decision because, it paves way for regard of reinstatement awards and stamps the authority of the CCMA and accordingly contributes to the expeditious settlement of employment disputes as envisioned by the LRA.

3 6 Enforcement of prescribed arbitration awards

In *South African Tourism v Monare*[122], a former employee filed a claim for compensation for lost wages. The employee was hired on a three-year fixed-term contract but was terminated before to the contract's expiration. The employee referred a claim of unfair termination to the CCMA. The dismissal was deemed substantively unfair, and reinstatement with backpay was ordered. The employer told the employee not to report for work when he desired to provide his services since the arbitration ruling was to be reviewed.

Upon review, the Labour Court set aside the arbitration award because the CCMA lacked the authority to decide the dispute. The case was then appealed to the Labour Appeal Court, which reversed the Labour Court's decision, resulting in the reinstatement order being reinstated. The fixed-term contract had already expired at this point, so the employee could not be reinstated to his position. Subsequently, the employee filed a claim with the Labour Court for the recovery of his lost salary.

The employer argued that the claim had prescribed, but the Labour Court determined that this was not the case. In the circumstances the employer was then ordered to pay the applicant

[121] *CocaCola Sabco (Pty) Ltd v Van Wyk* [2015] 8 BLLR 774 (LAC).
[122] *South African Tourism v Monare* [2021] 4 BLLR 386 (LAC).

damages as a result of the loss of salary. The amount due to the employee was calculated with reference to the exchange rate as at the expiry of the contract. The employer took the decision on appeal and the employee cross-appealed alleging that the exchange rate to be applied should be that at the time when payment should be made. The employee also alleged that the employer should have been ordered to pay costs and that the Labour Court erred in not dealing with interest on the outstanding amount.

The Labour Appeal Court was obliged to evaluate whether the Labour Court erred in ruling that the claim for arrear salary had not prescribed and in not imposing an order in respect of interest due. In addition, the Labour Appeal Court had to assess if the applicable exchange rate was accurate and whether a costs order should have been issued. In determining whether the claim had lapsed, the Labour Appeal Court had to determine when the cause of action arose and whether the reinstatement order was suspended during the time between the Labour Court's decision and that of the Labour Appeal Court's decision, and if so, whether such suspension also applied to the contractual claim the court is called to determine.

According to the employer, the claim had prescribed as the cause of action to claim arrear salaries arose more than three years prior to the date the employee was terminated, and the applicant could at time have filed a contractual claim and sued the respondent for damages or specific performance immediately thereafter. This argument by the employer was based on the assertion that they had repudiated the contract, at which time the employee was not required to wait any longer before filing a claim. The Labour Appeal Court determined that this argument would be valid only if the employee accepted the repudiation of his contract. This was not the case, since the employee promptly contested the termination when he submitted a dismissal to the CCMA and, as a result, took measures to resuscitate and enforce the contract rather than annul it.

The claim before the court arose as a result of the employer's failure to comply with the reinstatement order. If the employer had cooperated with the reinstatement order, the employee would have been paid a wage in accordance with the provisions of the employment contract. Due to the employer's conduct, the employee was not reinstated as per the order, and this claim could have arisen only after the Labour Appeal Court revived the reinstatement order.

The Labour Appeal Court held that this was a contractual claim and concluded that there was no complete cause of action prior to the November 2015 decision.[123] It was determined that the statute of limitations begins when an obligation becomes due and payable. Therefore, the statute

[123] *South African Tourism v Monare* [2021] 4 BLLR 386 (LAC) para 20.

of limitations did not begin to run until the employer failed to comply with the reinstatement order, which was a different claim from that of the time of termination.

Regarding the cross-appeal, the Labour Appeal Court stated that the Labour Court erred when it did not address interest on the sought pay. It was found that interest would accrue from the moment the fixed-term contract expired.[124] In relation to costs, the Labour Appeal Court determined that it was reasonable to award costs given that this was a civil claim, the parties had agreed that fees would follow the outcome, and the employee was required to file a second application to enforce payment. It was determined that the rule of practice that costs should not generally follow the outcome in Labour Court disputes applied to employment and labor disputes but not to civil claims for back wages.[125] The appeal was rejected, while the cross-appeal was sustained. Therefore, the claim had not prescribed, and the employer was obligated to pay, including the costs.

In *NUM obo Majebe v Civil and General Contractors*[126], the employee attempted to enforce a reinstatement order eight years after the award was given. In this instance, the employee was dismissed for dereliction of duty in 2006. The CCMA declared the dismissal to be unfair by the employer, and retrospective reinstatement was granted in favour of the employee. Despite that decision, the employer did not comply with the arbitration award and instead indicated intention to take the CCMA decision on review.

This meant the employee remained out of employment, and only in 2014 did he seek to have the CCMA award enforced as a court order. The employer then asserted that the award had prescribed, and the Labour Court agreed with that assertion and found that the arbitration award had prescribed on the grounds that the filing of a request for review did not suspend the statute of limitations or prescription. The employee challenged the ruling of the Labour Court two years after it made the ruling. The employee requested leniency on the grounds that a subsequent ruling in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others*[127], had strengthened his chances of success.

The Constitutional Court in this Myathaza matter found that prescription is affected by the LRA to the extent that impending matters suspend subscription, and this was the basis for which the sought condonation was granted amongst other pertinent factors considered by the court.

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[124] Ibid para 37.
[125] Ibid para 43.
[126] *NUM obo Majebe v Civil and General Contractors* [2021] 4 BLLR 374 (LAC).
[127] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* [2017] 3 BLLR 213 (CC).

In *re: Mazibuko v Concor Plant; Cellucity (Pty) Ltd v Communication Workers Union obo Peters*[128], it was determined that an arbitration award constitutes a "debt" under the Prescription Act[129] and, as such, it expires after three years. This ruling was later reversed by the Constitutional Court, with four justices finding that the Prescription Act is incompatible with the LRA and four judges finding that it does not conflict with the LRA, but that sending a disagreement to the CCMA disrupts prescription. In light of the fact that there was no genuine detriment to the opposing party, hearing the issue was in the interest of justice, and the appeal would provide clarity about the prescription of awards in accordance with the LRA, leniency was thus granted.

Subsequently, in *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[130], the Constitutional Court ruled that the Prescription Act is not in conflict with the LRA and that LRA claims do indeed prescribe. This reiterated the position that the Prescription Act applies to orders for reinstatement or compensation, and such claims expire three years after filing. However, the court asserted the position in Myathaza above, that the referral of an unjust dismissal issue to the CCMA suspends prescription until the conclusion of any pending reviews. Accordingly, the court upheld the appeal, and the case was referred back to the Labour Court to determine the intention of the parties on this application. And so, it can be said that it is now trite law in South Africa that pending reviews affecting reinstatement and or compensation are exempted from operation of the prescription provisions.

3 7 Conclusion

This chapter has discussed enforcement of CCMA default awards and prescription of arbitration awards. Notably, despite the revisions to the LRA, a well-resourced and obstinate employer now has the resources to delay and even block the enforcement or execution of arbitration awards, therefore weakening the constitutional right of workers to fair labour practices. An important obstacle for individual workers is exerting pressure on their employers to uphold arbitration awards.

The practical effect of the LAC's decision in *CCMA v MBS Transport CC* will be that a party who is successful in the CCMA and who receives a monetary arbitration award in their favour (typically an employee whose employment has been terminated) will have easier and more affordable access to justice than under the old system. Unfortunately, this cannot be said about those who

[128] In *re: Mazibuko v Concor Plant; Cellucity (Pty) Ltd v Communication Workers Union obo Peters* [2016] 1 BLLR 24 (LAC).
[129] Prescription Act 68 of 1969.
[130] *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [2018] 6 BLLR 531 (CC).

seek reinstatement for the mere reason that a writ of execution cannot provide the same protection reinstatement would afford.

This is consistent with the LRA's overarching approach of justice and equality and supports the notion of a speedy settlement of labor disputes. The Labour Appeal Court's interpretation of section 143 of the LRA in the *CCMA v MBS Transport CC* case has settled the long-standing dispute about the validity of certified CCMA arbitration awards. The Labour Appeal Court detailed the correct reading of section 143 of the LRA and determined that section 143(1) of the LRA read in conjunction with section 143(3) of the LRA implies that when an arbitration award is certified by the Director, it may be enforced as if it were a Labour Court order for which a writ has been issued. We must thus presume not only that it is a Labour Court order, but also that a writ has been issued in relation to that order.

Based on this interpretation, the Labour Appeal Court decided that the Labour Court's conclusion that the CCMA issued writs of execution when it certifies an award was correct. The right reading of the 2014 revisions of the LRA had the effect that a certified award is equal to a Labour Court order for which a writ has been issued. In other words, the essence of the Labour Appeal Court's determination was that the CCMA does not issue writs in the traditional fashion. The certified award is analogous to a Labour Court order for which a writ has been issued. Not only must it be accepted that the certified award is an order of the Labour Court, but also that a writ was issued in relation to that order. Therefore, the certified award enjoys the same status as the writ. The Labour Appeal Court stated that the Labour Court's decision that there is no reason why writs issued by the CCMA should be delayed for review in situations where they are void for lack of jurisdiction is however wrong.

The revised sections 143(1) and 143(3) of the LRA have the practical effect of allowing a certified arbitration award to be enforced without the necessity for a writ to be issued by a court or the CCMA. This facilitates the victorious applicant's ability to enforce the CCMA award. In light of this, the Labour Appeal Court concluded that the legislature changed section 143 of the LRA to make it "easier, less costly, more effective, and more accessible"[131] to enforce a certified arbitration ruling. For these reasons, the Labour Appeal Court reversed the decisions of the Labour Court and returned both cases to the Labour Court for a new hearing.

[131] *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others* (J1807/15, J1706/15, JA94/2015) [2016] ZALAC 34; [2016] 10 BLLR 999 (LAC); (2016) 37 ILJ 2793 (LAC) (28 June 2016) 25.

The next chapter discusses the international standards as well as the regulations regarding to enforcement of settlement agreements and arbitration awards at international level. Some selected jurisdictions such as the United Kingdom may be considered. The scope of enforcement of international arbitration awards will also be explored.

CHAPTER 4: RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS

4 1 Introduction

In the previous chapter, the scope for the execution of settlement agreements and arbitration awards in South Africa, as well as how courts have dealt with the resulting issues was discussed. In addition, a review of current developments surrounding the prescription of arbitration awards was explored.

This chapter discusses the scope of enforcement of international arbitration awards. Arbitration employed by the CCMA derives its origin from the LRA. (Nonetheless, it is important to indicate that this chapter considers a discussion of the enforcement of international or foreign arbitration award in South African workplace/ business, given the commitment under section 1 of the LRA). The chapter highlights some of the pertinent legislation dealing with enforcement of international arbitration awards as well as the relevant International Labour Organisation's (ILO) Conventions or standards relevant to settlement of disputes through arbitration. It is worth noting that South Africa is still developing in international arbitration as a mode of alternative dispute resolution, but its prevalence as a preferred dispute resolution mechanism is without a doubt increasing.

4 2 ILO and Standards

As a member State of the ILO, South Africa is required to adhere with its requirements.[132] Typically, for a state to be bound by the provision of a particular convention, that state must ratify that convention. South Africa may be considered unique in this respect since the LRA compels it to conform to certain international norms and standards.[133] And so, if South Africa is to create an efficient labour dispute resolution system, South Africa should endeavour to comply with set ILO guidelines and standards. Worth noting is that the ILO is a specialized organization of the United Nations with a unique role in developing international labour laws. Notably, South Africa joined the ILO in 1919 but left in 1966 as a result of the apartheid policy and practice that was widespread at the time.[134]

Later, with the restoration of democracy in 1994, South Africa re-joined and revived its membership and since then has ratified all of the ILO's fundamental conventions.[135] Since South Africa is a signatory of the ILO, it is essential to compare the relevant provisions of the LRA to the

[132] Smit and BPS Van Eck "International perspective on South Africa's unfair dismissal law" 2010 *XLIIISA* 48.
[133] S 1(b) of the LRA.
[134] Van Niekerk *et al Law @ work* 1st ed (2008) 20.
[135] Budeli *Freedom of association and trade unionism in South Africa: from Apartheid to the democratic constitutional order* (LLD Thesis, University of Cape Town 2007) 256. See also Van Niekerk *et al Law @ work* 1st ed (2008) 20.

principles defined by the ILO's agencies. To this end, one of the main motives for the promulgation of the LRA was to implement the commitments undertaken by South Africa as a signatory to the ILO standards. Likewise, section 39 of the Constitution demands that courts consider international laws and the manner in which court system in other jurisdictions have resolved analogous matters.[136] Equally, section 233 provides:

> "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any international law that is inconsistent with international law.*"

Accordingly, this is a clear illustration that the Constitution of South Africa demands that international law be considered in the Republic as this may prove vital at any point where limitation of a right in terms of section 36 of the Constitution is to be considered.[137] From its very inception in 1919, the ILO's core objective has always been the formulation, advancement, and supervision and enforcement of international labour standards. To promote internationally accepted norms and standards, the ILO employs instruments such as conventions that member state must adhere to.[138] These norms and standards cover a wide range of topics, including the settlement of labour disputes.[139] In addition, international labour standards strive to promote decent work, fairness, safety, and dignity in the workplace.[140] These international legal frameworks do this by setting minimum social standards endorsed by ILO members.[141] Notable is the fact that international labour standards are necessary for two main purposes.

First, the standards represent an international consensus on minimal best practices for human rights and fundamental freedoms and labour and employment issues in particular.[142] Secondly, in so many instances, when a member state ratifies the conventions, such conventions become legally binding under national and international law and should be integrated into domestic legislation.[143] Typically, international Labour Standards often take the form of Conventions or

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[136] S1(b) of the LRA.
[137] Currie and De Waal *The Bill of Rights handbook* 6th ed (2013) 1476.
[138] The Preamble of the ILO Constitution.
[139]Lohani and Swepston Core Labor Standards Handbook (2006) 10. Available at: http://www.adb.org/sites/default/files/institutional-document/33480/files/cls-handbook.pdf (accessed on 2022-06-11).
[140] Ban Ki-moon "ILO Introduction to International Labour Standards: UN Secretary-General" 2014-02-20 http://ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm. (Accessed on 2022-06-13).
[141] Simmons and Beth Mobilizing for Human Rights: International Law in Domestic Politics (2009). See also Baccini and Koenig-Archibugi Why do states commit to international labour standards? The importance of "rivalry" and "friendship" (2011) 12. See also ILO Labour Standards: Available http://www.ilo.org/global/standards/lang--en/index.htm (accessed on 2022-06-20).
[142] Musukubili Towards an efficient Namibian Labour Dispute Resolution System: Compliance with International Labour Standards and a comparison with the South African System 37.
[143] *Ibid*

Recommendations drafted by ILO members.[144] ILO Member states are all expected to submit any Convention or Recommendation agreed at the annual Conference to their respective national legislative body or the appropriate competent authority within 18 months. This is done for the obvious purpose of allowing national discussion and dialog on the new set of standards and for the governing authority at the national level to deliberate on the adoption of applicable legislation or other necessary action, such as ratification (in the case of conventions).[145]

A further important issue is that the Conventions and Recommendations must be approved by a majority of at least two-thirds of the delegates attending the conference.[146] Through ratifying these conventions, member states commit to applying them in domestic legislation and best practices.[147] Upon ratification by a member state, the convention typically enters into effect for that nation one year from the date of ratification.[148] Notably, a nation may be in conformity with a fundamental norm even though it has not ratified the agreements.[149] Even if a nation has not ratified a specific convention, it continues to serve as a source of inspiration for its domestic legislation. Recommendations, unlike Conventions, are not legally binding to member state as they are not international treaties.[150]

They create voluntary national policy and practice guiding principles. Although they are non-binding in nature, they provide specific ideas on how the Conventions should be implemented. States that have ratified conventions must periodically report on their legal and practical implementation. They are also required under the ILO constitution to submit a report on the steps they have undertaken to implement these conventions. The reports are assessed by an independent organization, the Committee of Experts on the Application of Conventions and Recommendations, whose report is subsequently considered annually by a tripartite committee of the International Labour Conference.[151] A member state that has violated a particular

[144] Art (1) and (2) of the ILO Constitution.
[145] Rules of the Game: a brief introduction to International Labour Standards http://www.ilo.org/global/What_we_do/Publications/lang--en/docName--WCMS_084165/index.htm (accessed on 2022-06-25).
[146] Art 19 (2) of the of the ILO Constitution.
[147] Ratification is a formal procedure whereby a state accepts the convention as a legally binding instrument. Once it has ratified a convention, a country is subject to the ILO's supervisory system which is responsible for ensuring that the convention is applied. https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm (accessed on 2022-06-28).
[148] Art 19(5)(c) of the ILO Constitution. See also Hepple Labour Laws and Global Trade Oxford / Portland (2005) 63.
[149] Lohani and Swepston Core Labour Standards Handbook 15 http://www.adb.org/sites/default/files/institutional-document/33480/files/cls-handbook.pdf (accessed on 2022-06-11).
[150] Art 19 (2) of the ILO Constitution. See also Smit et al "International Perspective on South Africa's dismissal law" University of Pretoria, research output 48.
[151] Van Niekerk and Smit Law@Work (2015) 23-24.

convention that it has ratified may be subject to representation and any applicable grievance process.

Because ILS are approved minimum standards by governments and social partners, it is in everyone's best interest for these norms to be enforced uniformly, so that those who do not implement them do not undercut the efforts of those who do.[152] Employers' and workers' groups may submit comments to the Organization about the application of Conventions adopted by their respective countries.

The ILO has been instrumental in helping member States, as well as workers' and employers' organizations in developing, or strengthening, dispute prevention and settlement systems. In order to effectively achieve this, a number of Conventions and Recommendations play a key part.

4 3 Voluntary Conciliation and Arbitration Recommendation No 92 Of 1951

The main purpose of this Convention is the prevention and settlement of industrial disputes. It recommends that voluntary conciliation "should be made available to assist in the prevention and settlement of industrial disputes between employers and workers." The Convention in particular puts emphasis that voluntary conciliation and arbitration processes should be expeditious, voluntary and provided free of charge to the disputing parties albeit minor costs may be incurred. Such costs may include costs for calling a witness, legal representation at arbitration if necessary.[153]

From the aforementioned Convention, it shows that the ILO advocates for reliance on Alternative Dispute Resolution bodies and procedures to significantly contribute to the success of dispute resolution. Nevertheless, such success would call for the establishment of an efficient labour dispute resolution system that is meaningful and dedicated to the collective bargaining process and settlement of disputes amicably.[154] The Convention encourages member States of the ILO, South Africa included to develop and incorporate into their labour legislation, dispute settlement systems in accordance with certain general principles of the ILO. These include:

[152] Simmons and Beth Mobilizing for Human Rights: International Law in Domestic Politics. See also Baccini and Koenig-Archibugi Why do states commit to international labour standards? The importance of "rivalry" and "friendship" 12.

[153] R092 - Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92). See also Servais *International Labour Law* 185. See also International Training Centre of the ILO, *Labour dispute system: Guidelines for improved performance* 31.

[154] Khabo *Collective Bargaining and Labour Dispute Resolution – Is SADC Meeting the Challenge*? 5.

- Government making available voluntary conciliation machinery, which is cost free and expeditious to assist in the prevention and settlement of industrial disputes. [155]

- Encouraging parties in disputes to abstain from strikes and lockouts while conciliation or arbitration is in progress and;[156]

- Drawing up written settlement agreements reached during or as a result of conciliation and accorded the same status as agreements concluded in the usual manner.[157]

4 4 Promotion of Collective Bargaining Convention No 154 Of 1981

Dispute resolution is further addressed under the Collective Bargaining Convention, 1981 (No. 154). This Convention was adopted by the International Labour Conference in 1981 as an instrument for the promotion of collective bargaining. The Convention advocates for designing labour dispute settlement institutions and procedures for the prevention and settlement of labour disputes in order to promote collective bargaining.[158] According to this Convention, for such institutions to bring any meaningful contribution to the promotion of collective bargaining, they must be effective and efficient. In other words, they should be designed in a manner that encourages the aggrieved parties to reach agreement between them. Importantly, there methods of operation must be independent, accessible, informal and expeditious in order to increase the confidence of the parties to the dispute.[159]

While this Convention focuses on collective bargaining, it does not rule out the use of conciliation and/or arbitration as part of the bargaining process where such processes are voluntary.[160] In fact, one of the primary objectives of dispute resolution is to promote the mutual resolution of differences between employees and employers and, consequently, to promote collective bargaining and the practice of mutual negotiation. Because it is promotional in nature, Convention No. 154 is very flexible. There are many ways of implementing it, respecting every national context

[155] Par 1 and 3 of the Recommendation No. 92 concerning voluntary conciliation and arbitration (1951).
[156] Par 4 and 6 of the Recommendation No. 92 concerning voluntary conciliation and arbitration (1951).
[157] Par 5 of the Recommendation No. 92 concerning voluntary conciliation and arbitration (1951).
[158] Art 5 par 2(e).
[159] Khabo "Collective Bargaining and Labour Dispute Resolution – Is SADC meeting the challenge?" 11. See also Recommendation No. 130 of 1997.
[160] Art 6. See also ILO *Promoting collective bargaining Convention No. 154*: Industrial and Employment Relations Department (Dialogue) International Labour Standards Department (Normes) (2011) 8. Following the dawn of democracy in South Africa in 1994, the 1995 LRA of South Africa was enacted. Amongst its objectives, the 1995 LRA seek to promote collective bargaining and the effective resolution of labour disputes. To this end, the 1995 LRA established the CCMA, specialised Labour Courts and the Labour Appeals Court. Further, the 1995 LRA makes provisions for the establishment private agencies and sectoral bargaining councils to be accredited by the CCMA to resolve disputes through conciliation and arbitration.

and local preference. It can be implemented in countries with different economic and social situations, in different legislative frameworks, and in a variety of industrial relations systems.[161]

4 5 Framework for the execution of international arbitral awards

The execution of foreign arbitral awards in South Africa was until 2017 enforced through the provisions of the Recognition of International Arbitral Awards Act.[162] Under this legislation, the rights to enforce the arbitral awards were subject to a number of limitations. These comprise:

- "where the matter at hand is not a subject matter that a party is able to arbitrate on in South Africa";
- "if enforcement runs contrary to public policy; or
- where technical grounds for refusing enforcement apply – such as where insufficient notice has been provided to the other party; the arbitration clause at issue is invalid, or; the tribunal overstepped its jurisdiction in making the award."

4 6 The International Arbitration Act

After much anticipation, the Recognition of Foreign Arbitral Awards Act (REFAA) was eventually repealed in its entirety. This was followed by the adoption of the South African International Arbitration Act[163] which came into effect in December 2017. This statute included the spirit of contained in the UNCITRAL Model Law on International Commercial Arbitration as the foundation of South Africa's international arbitration framework. Likewise, it encourages and recognizes arbitration as a credible means of settling foreign trade disputes. Even though it was repealed, one of the most important improvements to the previous South African International Arbitration Act was the adoption of the REFAA Act, which was enacted to implement the New York Convention that South Africa ratified in 1976. The REFAA Act acknowledged that a foreign arbitral award is enforceable between the parties and may be executed by applying to the court to have the same be declared an order of court.

Notably, the Arbitration Act[164] remains applicable to domestic arbitrations. In South Africa, claimants that want to execute an international arbitration awards within the country have a stronger case courtesy of the International Arbitration Act, which stipulates that arbitration agreements and international arbitral awards must be recognized and enforceable in the country.

[161] ILO *Promoting collective bargaining Convention No. 154*: Industrial and Employment Relations Department (Dialogue) International Labour Standards Department (Normes) (2011) 2.
[162] Recognition of International Arbitral Awards Act of 1977.
[163] South African International Arbitration Act 15 of 2017.
[164] South African Arbitration Act 42 of 1965.

However, there are still certain restrictions placed on the powers to execute arbitral rulings in the country. A claimant is required to produce the following in order for a foreign arbitral award to be enforceable in South Africa:

- "the original award and arbitration agreement, in addition to a certified copy that has been authenticated in the foreign jurisdiction from which the award was made;"
- "a sworn translation of the award and arbitration agreement that has been authenticated in the foreign jurisdiction from which the award was made."

According to the International Arbitration Act, the enforcement of or refusal to recognise an international arbitration award may be for very same reasons as those stipulated under the Recognition of Foreign Arbitral Awards Act. The International Arbitration Act makes public institutions in South Africa legally obligated to comply. However, they are still subject to section 13 of the Protection of Investment Act,[165] which demands that before pursuing alternative form of dispute resolution, they must first attempt to settle issues through the process of mediation.

4 7 Procedure for enforcement of foreign arbitration awards in South Africa

It is a somewhat time-consuming procedure to bring a court application in order to get an international arbitration award converted into an order of a court. The claimant that is seeking to have the foreign arbitration award enforced is required to file a Founding Affidavit together with a Notice of Motion to a High Court in South Africa which has competence to determine the dispute. The location of the respondent's primary place of business or the geographical location of their assets is often used in determining which court has jurisdiction over a case. In accordance with section 17 of the new Act[166], the applicant must also submit the original award and the original arbitration agreement pursuant to which the award was rendered, both recognized for use in the High Court, as well as certified copies of the award and the agreement.

In addition, the application must be accompanied by certified copies of the award and the agreement. The High Court Registrar issues and the Sheriff serves the respondent's application. The respondent may then decide whether or not to reject. Should the respondent contest the application, it must submit a Notice of Intention to Oppose within the prescribed time frame which is ordinarily between 5 to 10 days. In such case, the respondent would then be expected to submit a replying affidavit within the time stipulated in the statute following the filing Notice of Intention to

[165] Protection of Investment Act of 2015.
[166] South African International Arbitration Act 15 of 2017

Oppose. The applicant may submit a Replying Affidavit within a period of 10 days of receiving the respondent replying affidavit.

The High Court Rules also allows an opportunity for an applicant to bring an urgent application under Rule 6(12) of the Uniform Rules of Court. Under such circumstances, the application timelines and procedures are condensed. Be that as it may, the applicant must demonstrate why the case is urgent, such as the respondent selling all of its properties in South Africa. In case the court finds no urgency, the case will go on the standard motion court roll.

4 8 Timelines for enforcement of arbitration awards

Concerning the enforcement of arbitration awards, timelines is of the highest significance. In practice, whenever an issue is put on the regular court register and the application is contested, the trial often occurs between four to six months subsequent to the matter being put on the court roll, which is a problem in South African in as far as enforcement procedure is concerned. Such a significant delay in enforcing an arbitration award might be prejudicial to the successful party. It is well knowledge that a party who is successful in arbitration would desire to have the award executed as swiftly as possible so that he or she can obtain the remedy sought. If the application is unopposed, it can be heard about one to two months subsequent to the deadline for the respondent to file its notice of opposition has lapsed.

Whenever the respondent considers contesting the enforcement of an international award, section 18 of the Act[167] becomes crucial since it outlines the numerous circumstances on which execution would be rejected. If a court determines that the subject matter of the dispute cannot be referred to arbitration under South African law or that the decision is detrimental to public policy, it has the discretion to simply reject or enforce the award. This happens in instances where the party against whom the award is being sought to be enforced is able to demonstrate:

i. "a party to the arbitration agreement lacked the legal capacity to contract,"

ii. "the arbitration agreement is invalid under the law to which the parties are subjected,"

iii. "that he or she did not receive notice of the appointment of the arbitrator or the arbitration proceedings or was unable to present his or her case," and;

[167] *Ibid*

iv. "the award deals with disputes not contemplated by or falling within the terms of the arbitration agreement, the award shall not be enforceable."

Unfortunately, there is no legal precedent currently addressing section 18 of the Act[168]. Nevertheless, since the language in section 18 is similar to that of section 4 of the REFAA Act, the following judgments are pertinent when considering a case of rejection of recognition and execution of international arbitral awards. In any event, the law of South African legal jurisprudence recognizes the notion of legal precedence. It is quite probable that case law determined with respect to the REFAA Act will continue to promote the importance of judicial precedence under the Act.

4 9 Seton Company v Silveroak Industries Ltd

In *Seton Co v Silveroak Industries Ltd*[169], the Defendant opposed the Claimant's plea for the High Court to accept a French arbitral tribunal's award of damages, arguing that the Claimant had misled the tribunal. The Defense argued that the South African High Court should decline to enforce the award under section 4(1) (a)(ii) of the REFAA Act because it is against public policy to recognize an award obtained via fraudulent methods.

The Defendant admitted that although the affidavit failed to highlight any proof to substantiate the fraud allegation, there were witnesses who, if compelled to testify orally, would supply the necessary proof.

The court held that section 4(1)(a)(ii) of the REFAA Act provided that a court may only refuse to recognize an international arbitral decision where it was clear from the face of the award and the provisions of the arbitration agreement contradicted public policy. For an accusation that the arbitration award was obtained by unethical and fraudulent manner, there need be no more proof to persuade the court that the agreement in question was unconstitutional. The Defendant was then required to file a motion with a court having jurisdiction in France to set aside the arbitral award based on an allegation of fraud and, simultaneously, to request a stay of the Claimant's application to have the arbitral award enforced awaiting the outcome of the Defendant's application to have the award set aside in France. The High Court in South African found no reason not to recognize the arbitration award, and hence granted the Claimant's application for recognition and enforcement was granted.

[168] *Ibid*

[169] *Seton Co v Silveroak Industries Ltd* (2000 (2) A 215 (T).

4 10 Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another

In this case, Phoenix and DHL[170] filed an application in the Western Cape High Court to seek for an order to recognize and enforce a London arbitral ruling. Subsequently, Bateman Ltd, another party in the proceedings opposed the move arguing that it was never included as a signatory in the arbitration request. Bateman Ltd further contended that the arbitrator lacked jurisdiction and that executing the award would violate public policy. DHL Global relied on the booking notice, which indicated that any disagreement between the parties would be arbitrated in London.

DHL Global maintained that the arbitrator had ruled against Bateman Ltd and that Bateman Ltd had failed to comply with the arbitral award, which the court was required to enforce. The court ruled that, under South African law, the booking notice provided by Phoenix did not form an enforceable contract of carriage for the transportation of Bateman Ltd's equipment, as stipulated by the parties' agreement to submit any dispute to arbitration. Arbitration is distinguished by its involuntariness, and there was no evidence that Bateman Ltd and DHL Global or Bateman Ltd and Phoenix ever entered into a contract in which they agreed to submit to arbitration.

Common law and the REFAA Act both recognize the need of an arbitration clause as a prerequisite for the implementation of an arbitral decision. In this instance, DHL Global and Bateman Ltd had not entered into a legitimate arbitration agreement under either English or South African law. DHL Global had thus failed to assert and show the existence of a legitimate arbitration agreement. In the absence of an arbitration agreement, no arbitrator could assert jurisdiction over a dispute, and an order recognizing and enforcing an ostensibly illegitimate foreign arbitral decision would violate the principles of public policy.

4 11 Industrius D.O.O v IDS Industry Service and Plant Construction South Africa (Pty) Ltd

This recent decision[171] emanated from the High Court demonstrating the scope of the applicability of the UNCITRAL Model Law on International Commercial Arbitration to the enforcement of an arbitration award against an unsuccessful party. The party against whom the award was given had filed a supplementary lawsuit in an attempt to prolong the execution of the arbitration award to have the court make a determination of its counterclaim, which had failed at arbitration. The court ruled that filing a rejected counterclaim before a court through action proceedings is

[170] *Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another* (2012 (3) SA 381 (WCC).
[171] *Industrius D.O.O v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* [2021] ZAGPJHC 350.

“proverbial flogging of a dead horse” and may not be relied upon to prolong the execution of the arbitral award.

4 11 1 History of the dispute

In 2017, a dispute emerged between Industrius, a company based in Croatian company, and IDS Industry Service and Plant Construction South Africa. Both parties had agreed that in case of a dispute, they will submit the same to arbitration. They also both agreed in the arbitration clause that the dispute would be handled by a single arbitrator and that the procedures would be carried out in accordance with the Association of Arbitrators' rules. Article 7 of the Model Law[172], as incorporated into the International Arbitration Act of South Africa, defines "arbitration agreement" as the topic of the present agreement.

Prior to the commencement of the arbitration hearing on 25 May 2020, the parties filed multiple interlocutory motions with the arbitrator. IDS suspended participation in the proceedings in January 2020 apparently owing to a disagreement with its prior lawyers. The arbitrator urged IDS to submit a request to reschedule the arbitration hearing, but IDS declined and also neglected to hire new counsel for the hearing. Accordingly, the arbitration hearing was scheduled and conducted on 25 May 2020 in the absence of IDS. A decision was handed down against IDS and the same was published on 9 June 2020, affirming Industrius' claim and rejecting IDS' counterclaim.

4 11 2 The case before the High Court

The applicant approached the High Court seeking to make the award issued by the arbitrator made a court order. Then IDS opposed the move, despite the fact that it had failed to protest in its pleadings that it was bound by the award or demand that it be reviewed and dismissed, which is the only alternative a court has under the Model Law against an arbitral award. The IDS was premised on a separate action it had brought before the High Court in which it demanded for the same remedy as in its arbitration dispute. IDS sought that the arbitral ruling's enforcement be stayed until the resolution of the legal actions it had initiated.

In support of its argument, IDS asserted that the counterclaim was rejected by default and that the arbitrator's alleged assessment of the facts of its case in their absence rendered the award null and void. Therefore, it asserted that its complaints were never adjudicated and that it was permitted to pursue its lawsuit in South African courts. IDS argued further that the arbitrator's

[172] UNCITRAL Model Law on International Commercial Arbitration

award was not binding because the counterclaim was denied by operation of law, in other words by default. The court noted that the arbitrator would have been unable to decide on the merits of the case due to the dismissal for non-appearance, since this constituted an irregularity.

Lastly, the IDS argued that the other court proceedings had been stayed, citing Model Law, in particular article 36(1) (a)(ii) in support of its argument that the court reserved the right to stay the arbitral award.

4 11 3 Utilization of Statute and Model Law

The International Arbitration Act has incorporated the Model Law into South African law. Parties in dispute regarding an international transaction have an opportunity to submit the dispute to arbitration under an arbitration clause established by the Model Law. In this case, the arbitration was declared international since the parties' respective places of business were located in different countries when the arbitration clause was entered into. Except if specific requirements outlined in the Act are met, an arbitration award issued in accordance with the Model Law is legally enforceable and binding.

The court concluded that IDS failed to demonstrate or show any one or more of the grounds required in section 18 of the Act in order to persuade the court to dismiss the application to convert the arbitration award into a court order. The court concluded that defence put by IDS should therefore fail.

4 11 4 The issue of the counterclaim

On the issue regarding the separate court proceedings surrounding the counterclaim, it was decided that the evaluation and analysis of the arbitrator of the counterclaim in determining the arbitration award were proper. The court added that IDS's allegation that the counterclaim was not adjudicated on its merits lacked factual foundation and that if IDS was so upset by the award, it may have challenged it in accordance with the Act.

Citing the decision in *United Enterprises Corporation and Another v STX Pan Ocean Company Ltd*[173], the court stated that under South African law, the determination on the merits is more important than the form of the obtained order. The court concluded that IDS's contention that the arbitrator made an error when addressing the merits of the counterclaim in their absence was not a sufficient reason to withhold execution of the arbitration award. *Palabora Copper (Pty) Ltd v*

[173] *United Enterprises Corporation and Another v STX Pan Ocean Company Ltd* [2008] ZASCA 21.

Motlokwa Transport and Construction (Pty) Ltd[174], a similar case, reinforced the court's position that a party claiming serious irregularity committed by an arbitrator is required to prove the same. This judgment also found that if an arbitrator conducts a proper investigation but comes up short on the facts or the law, this will not constitute an anomaly nor a cause for putting aside an arbitral award. For that reason, the court found that the allegations by IDS that the arbitrator misunderstood the facts while evaluating the counterclaim owing to the fact that it was not in attendance was not a justifiable cause to stay execution of the arbitration ruling.

4 11 5 The South African spirit of the Model Law

While applying the spirit contained in the Model Law, the court adopted a strict position on its strategy to enforcing an international arbitral award, contrasting the attitude in South Africa to that of jurisdictions such as Australia. The court held that both the Model Law and the Act do not allow a court to reject nor prolong the execution of an arbitral award based on the argument that one of the parties in dispute instituted additional proceedings unrelated to the arbitral award which would otherwise have no bearing on its finality or execution.

The court found that a party's attempt to balance a proven debt with an unproven claim in unrelated actions is similarly irrelevant under the legislation and Model Law. In either of the aforementioned instances, the court held that delaying the execution of a foreign arbitration award in South Africa would be inconsistent to the purpose of the Model Law.

Reiterating a prior judgement in *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd & others; SPX Technologies (Pty) Ltd v Termico (Pty) Ltd*[175], in the *IDS case*, the court found that all issues presented before the arbitrator must be resolved in a manner that gives consistency and finality. It said that the rejection of IDS' counterclaim was conclusive, and that the arbitrator's decision cannot and must not be utilised to oppose the execution of the arbitration award. Accordingly, the judgement illustrates the South African courts' stance on stalling tactics used by disputants in arbitration proceedings and their inadmissibility owing to their impact on global trade.

What is evident is that courts in South Africa continue to uphold the spirit as well as intent of the International Arbitration Act thereby promoting South Africa as a competent platform for resolving international disputes, with no fear of losing parties succeeding in court and prolonging the settlement and enforcement process. The judgment likewise highlights the importance of an arbitration agreement and the independence that it provides to parties in dispute. Contrary to the

[174] *Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd* 2018 (5) SA 462 (SCA).
[175] *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd & others*; *SPX Technologies (Pty) Ltd v Termico (Pty) Ltd* (2020) 2 SA 295 (SCA).

intent of an arbitration agreement, seeking remedy from a court in the first instance would be contrary to the spirit of the agreement.

Certainly, if a losing party in an international arbitral tribunal wishes to challenge or get the award issued by the arbitrator reviewed, he or she is obligated to use the relevant legislation with precision if it hopes to be successful. The unsuccessful party is also required to take a precise position on whether they are dissatisfied with the outcome of the arbitral award, as well as the grounds upon which it relies must also be explained within the pleadings.

4 12 Conclusion

Remarkably, South Africa remains among one of the highly sophisticated countries for financing of arbitration across the continent. It is also fast becoming one of the most dependable judicial systems in Africa for claimants seeking to execute arbitral awards both domestically as well as internationally. The International Arbitration Act and AFSA's International Arbitration Rules further align South Africa's judicial system with that of the UNCITRAL Model Law on International Commercial Arbitration, LCIA and the ICC Rules.

Despite the fact that it may take some time for an international arbitration award to be made and enforced as a court order in South Africa, the parties in dispute can rest assured that the courts remain committed to upholding the importance of public policy and remain practical and unbiased when determining whether or not to recognize and enforce an international arbitration award.

Clearly there is an increasing focus on international arbitration in South Africa and by the look of things the continent as a whole, considering that a number of jurisdictions have taken steps to increase their attractiveness as arbitration centres and safe seats for arbitration. South Africa must be counted among the jurisdictions which have taken some serious strides to establish its position in the international arbitration community through the promulgation of the International Arbitration Act, as a progressive tool to employ in support of international arbitration. Having looked at the framework for recognition and enforcement of international arbitration awards in South Africa, the next chapter provides the findings and possible recommendations to the problem statement and the research questions as highlighted in chapter one.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5 1 Conclusion

Labour and employment related disputes in South Africa are primarily governed under the framework provided for in the LRA. This legislation which strives to establish an orderly workplace environment seeks to encourage the spirit of collective bargaining and amicable resolution of labour disputes. The CCMA, which is entrusted with conciliation as well as arbitral powers, is one of the institutions meant to consider and adjudicate employment and labour related matters. Unfortunately, the powers of the CCMA are limited to the extent of enforcing its settlement agreements and arbitration awards.

Chapter one of this study began by highlighting the background, introduction, the methodology used, the research questions as well as the aims and objectives of the study. Importantly, the problem statement leading up to this study was illuminated. The chapter highlighted that the LRA is founded not only on the principles of reconciliation but also on cost-effective ways of settling labour disputes. Consequently, the settlement of labour and employment disputes under the LRA presupposes a prompt, simplified, non-legalistic, and affordable process of dispute resolution. Those who often take a matter to the CCMA do so on the understanding that the processes are believed to have less financial means for defending and enforcing their claim in any other institution.

Nonetheless, it was pointed out in chapter one that section 142A of the LRA may have fallen short of the intention to provide adequate protection and cost-effective enforcement of arbitration award to the vulnerable employees whose only next course of action to the enforcement of the award is through the jurisdiction of the Labour Court. To address this and other problems raised in chapter one, the treatise conducted a wide-ranging review of the relevant available literature.

Following that, the second chapter of this research evaluated legislative structures and systems currently in place in South Africa to ensure that arbitration awards are enforced as agreed upon. It was observed that with the formation of the new constitutional era in South Africa, came the beginning of a new labour dispensation. When compared to what had been the practice during the apartheid administration, there were major changes made in both labour law as well as labour policy. At that period in history, the revision of labour and other relevant employment laws was a primary consideration for the incoming administration.

In addition, this chapter observed that in terms of CCMA procedures, once the parties and their arguments have been heard by the CCMA in arbitration proceedings, the arbitrator is required to evaluate and assess the parties' submissions based on the credibility of the evidence presented by both parties and make a decision regarding the outcome of the dispute within 14 days. The LRA stipulates that the decision of an arbitration hearing, delivered by the Commissioner in the form of an award, is considered definitive and binds both parties unless it has been subjected to review or is issued as a sort of an advisory award.

The status of an arbitration award is now elevated to that of an order of the Labour Court following certification and validation of the award by the Director of the CCMA in accordance with subsection (1) of section 143 of the LRA. Importantly, this chapter established that until the amendments to the LRA, workers who wanted to enforce their arbitration award were obliged to take another step by approaching the Labour Court in order to get the arbitration award made an order of the court.

The certification method was intended to be more simplistic and streamline the enforcement process, but in practice, it had the effect of requiring the workers to personally visit the CCMA to obtain certification, which in and of itself added a new procedural step to the process of enforcing the arbitration award. This approach undoubtedly makes the enforcement procedure unnecessarily complicated when parties should be able to depend on a CCMA arbitration award being exactly what it intends to be. This and other similar challenges led to the amendments to section 143 of the LRA with the view to address such challenges. The chapter noted that employees would already have, at the enforcement stage, endured a lengthy and often protracted journey to reach the remedy of a CCMA award in their favour, only to have to begin the tiresome journey of receiving such an award after succeeding with their claim.

Additionally, the chapter also noted that another the problem remains at the stage of enforcement of the settlement agreement, specifically in instances where the parties have parted ways as part of the terms of the settlement agreement. Here, consideration must be given towards an individual who is unemployed, despite holding a settlement agreement in their hands, they are at a disadvantage and unable to seek redress from relevant institutions such as the Labour Court due to the costs of litigation. As a result, these individuals may have little choice but to abandon their hopes of ever compelling compliance by the defaulting former employers.

Later in chapter three, the pertinent case laws pertaining to the enforcement of settlement agreements and arbitration awards in South Africa were discussed. The chapter unpacked the enforcement procedures of settlement agreements and arbitration awards, as well as how courts

have dealt with the resulting issues. In addition, a review of current developments surrounding the prescription of arbitration awards was discussed. The chapter found that despite the revisions to the LRA, well-resourced and stubborn employers continue to play delaying tactics and even in other circumstances block the enforcement of arbitration awards, therefore weakening the constitutional right of workers to fair labour practices. An important obstacle for individual workers is exerting pressure on their employers to comply with CCMA arbitration awards.

Despite this finding, the chapter acknowledged that one of the beneficial effects of case law in matters such as that of CCMA v MBS Transport CC will be that a party who is successful in the CCMA and who receives a monetary arbitration award in their favour (usually an employee whose employment has been terminated) will have more affordable access to justice than they would have had under the previous system. This is in line with the LRA's main objective of access to justice and equality, and it lends credence to the idea that labour disputes may be quickly and effectively resolved. In the same manner, the interpretation of section 143 by the LAC in the instance of CCMA v MBS Transport CC also provided a settled position in the long-standing dispute about the effect of arbitration awards.

The LAC provided a comprehensive explanation of how section 143 of the LRA should be interpreted and reached the conclusion that when section 143(1) of the LRA is read in tandem with the provisions of section 143(3) of the LRA, it presupposes that a certified arbitration award may be enforced in the same manner as if it were a Labour Court order for which a writ has been issued. As a consequence of this, it must be assumed, with respect to the certified award, not only that it is an order from the Labour Court but also that a writ has been issued in connection to that order. In other words, the certified award is comparable to an order that has been handed down by the Labour Court under which a writ has been given. Consequently, the writ is the certified arbitration award that was given.

Considering this interpretation, a better way to understand the amendments that were made in 2014 would then be that a certified award is equivalent in status to an order from the Labour Court for which a writ has been issued. As such, and because of the amendments made to sections 143(1) and 143(3) of the LRA, it is now possible for a certified arbitration award to be enforced without the need for a writ to be issued by either a court or the CCMA. This appears to be the practical effect of the amendments to these sections of the LRA. Subsequently, the capacity of the successful applicant to enforce a CCMA arbitration award is improved and gives credence to the intentions of the legislature when it amended section 143 of the LRA, which was to make it simpler, less costly, more effective, and thereby giving meaning to accessibility of justice.

And lastly, chapter four explored the scope of enforcement of international arbitration awards. The chapter highlights some of the pertinent international labour standards dealing with the enforcement of arbitration awards as well as the relevant ILO Conventions and or standards relevant to the settlement of disputes through arbitration.

5 2 Recommendations

In light of the foregoing, this chapter summarizes the findings of the study and highlights additional policy recommendations. It is necessary to keep in mind that the design of our regulatory regime, as embodied in the LRA, is dependent on existence of effective mechanisms for enforcement and implementation of this legislation. The constitutional guarantee of the right to fair labour practices and the protection of the law runs the danger of being rendered worthless in the absence of this. For this legislation to be meaningfully enforced, the enforcement mechanisms must function properly, in addition to being both accessible and efficient. In spite of this, there are still a lot of obstacles to overcome in the enforcement process of arbitration awards and more still needs to be done. In the same way though, a lot of progress continues being made towards giving meaning to the objectives of the LRA through continuous case law development and legislative amendments.

This study recommends that the CCMA should play an active role in sensitizing parties in dispute and bring them to the realization of the fact that the CCMA dispute resolution system is based on the acceptance of dispute and the utilisation of mechanisms and processes to deal with the dispute as soon as possible and importantly by giving meaning to those resolutions. The situation currently is that the parties, mainly employers abuse the gaps in the system such as their prevalent behaviour of not honouring settlement agreements thereby frustrating the employee party whose only recourse will be to go back to the CCMA.

When viewed from this point of view, the implementation of the current regulatory dispute resolution processes becomes exceedingly frustrating. The refinement of these gaps would assist in reducing the likelihood of many employers disregarding compliance to settlement agreements and arbitration award issued against them by the CCMA. These employers, as past experience has already shown, frustrate the successful employee by waiting until they receive a writ of execution against their movable property before considering compliance with the terms of the arbitration award.

Equally as important, such sensitization could help in the process of dispelling the public impression that the CCMA is a lesser arbiter in that it helps workers at no cost and as a result, the arbitration awards issued by them are not generally viewed as being of legal effect, valid nor

binding such as, for instance, an order of the court. This is a significant problem, and employers need to have a solid understanding of the power of the CCMA and the severe impact that an arbitration award might have on their business, but it is the law that must give backing to the CCMA thereby ensuring that it doesn't just have teeth, but it bites as well.

Practically, one of the indicators that there is a lack of trust in the system is the significant number of reviews that have been lodged by employers, in some circumstances with no basis and almost as a matter of routine in situations where they have not been successful at arbitration. Consequently, the overall findings of this study suggest that immediate action should be taken that will create acceptability and authoritative effect of CCMA decisions.

The CCMA could also play a major role in accomplishing this goal. It is now known that under the LRA, an arbitration award that has been issued by the CCMA Commissioner is considered compelling and binding, and it may be enforced in the same manner as if it were an order of the Labour Court in respect of which a writ has been issued unless it is an advisory arbitration award or has been reviewed. It may be argued from this that not only does section 143 of the LRA affirm the authority of the CCMA, but it also reinforces the enforceability of the decisions handed down by the CCMA. The CCMA could through its rules compel employers to act with speed in giving effect to their decisions or provide for harsh and serious consequences on failure to do so.

Furthermore, the amendments to section 143 were aimed at making it easier for workers to have arbitration outcomes enforced against their employers by removing the extra necessity of getting a writ. This was also intended to relieve the Labour Court of an unnecessary burden in this respect. As a direct result of this, parties who hold arbitration awards in their favour no longer required the intervention of the Labour Court unless they are trying to do so against their employers via contempt actions.

The effort made by the proposed changes to section 143 to facilitate the procedure of enforcement by requiring merely the act of certification in advance of contacting the Sheriff was a good step in the right direction. As a result of the elimination of the need for a writ, the party responsible for executing the law would be forced to first seek certification from the CCMA before going to the Sheriff. It is possible that the goal was to reduce the amount of time and effort it takes to give effect to an award, who had previously been required to go to the CCMA, then the Labour Court, and finally the Sheriff.

Having considered all the above, this study observed that there remains no good reason as to why all CCMA arbitration awards cannot be certified at the date of issue and the additional step of certification could be removed from the enforcement treadmill. Even though the move is

commendable, this study recommends that certification should be done at the date of issue. This would aid to reduce the strain, even more, that is placed on workers who are attempting to enforce arbitration awards against disingenuous employers who ride on gaps of the system to dodge compliance. Equally, this will be congruent with the reasoning as to why the LRA was promulgated, which assumes an efficient, quick, and cheap settlement of labour disputes.

In addition to the challenges of enforceability, parties who have been successful in obtaining arbitration awards have increasingly confronted the issue of whether or not the CCMA arbitration awards prescribe three years after they are issued in conformity with the Prescription Act. In both the Myathaza case and Mogaila case, referred to in Chapter two above, the Constitutional Court sought to give guidance on the matter without reaching a majority decision; hence the court's ruling could be said to lack a binding effect and enforceable foundation. Courts have maintained for a long time that the scope and the provisions of the Prescription Act does not apply to the LRA for two key reasons. First, they have determined that the provisions of the Prescription Act are inconsistent with the requirements of the LRA, as defined by section 16 (1) of the Prescription Act. Second, they have underlined that, even if the Prescription Act did apply to the LRA, an awarding of reinstatement was not a debt within the meaning of the Prescription Act since it did not include a duty to pay money, supply products, or give services, and so could not prescribe as a debt. In the sense of inconsistency, it establishes and specifies a timeframe within which a claim must be brought, or for action to be commenced.

As a result, this study observes that this Constitutional Court ruling may do very little to alleviate the frustrations experienced in the process of the enforcing compliance by a defaulting party. This observation is made on the basis that a close reading of the provisions of both the LRA as well as Prescription Act seems to reveal no inconsistency but in fact the two legislation complement each other. Even though both sections 191 of the LRA and 16(1) of the Prescription Act deal with time limits, they do so for different reasons and to achieve distinct goals. The time limitations in the LRA indicate when a litigant is expected to take the appropriate actions in the dispute-resolution process to properly litigate a claim, but the Prescription Act specifies when such procedures are no longer accessible to a litigant because the claim has prescribed. On the basis of this approach, it is difficult to assert that the provisions of the LRA and that of the Prescription Act are inconsistent with regard to time limits.

To this end, this study concludes and suggests that the Prescription Act and the LRA are capable of complementing one other in a manner that not only protects the basic right to access justice but also preserves the prompt settlement of LRA issues. Without legislative change, it would be difficult to apply the Prescription Act to the LRA without doing substantial injury to the terms of

any or both of these Acts, and doing so, as the second ruling did, casts doubt as to whether this what was intention as it provided little direction on this aspect if any at all.

Considering there is also focus on international arbitration in South Africa and by the look of things the continent as a whole, it is evidently clear that a number of jurisdictions have taken steps to increase their attractiveness as arbitration centres and safe seats for arbitration. What is left then is for persuasion of courts to instruct those would lawmakers to afford arbitration awards the same status of a court ruling, and thereby afford protection to those holding an award in their favour without the protracted process of approaching a court to give it a legally protected status.

The application of the Prescription Act to the LRA would expedite the settlement of employment disputes by, in the first instance, keeping intact section 191's statutory time limitations for referrals. The administration of the Prescription Act cannot result in an unexpected extension of those time periods to coincide with the prescription period. Secondly, imposing an outside time restriction on claims under the LRA would significantly improve the efficiency of the dispute settlement procedure. In light of section 210 of the LRA, this study finds and suggests that the LRA's provisions do not contradict those of the Prescription Act. If there is no contradiction, then if follows that there must also be no conflict.

Lastly, whilst the LRA provide workers with an accessible, inexpensive, swift, non-legalistic dispute resolution framework in order to enforce labour laws including the outcomes of the arbitration process. Given the ongoing issues of enforcement and noncompliance with arbitration rulings by employers, the question to be explored is; would it not change perceptions if the CCMA could establish and adopt formal, conventional, and punitive administrative sanctions? This study recommends that new slightly stricter approaches to enforcing compliance with arbitration awards through the use of fines, the referral of small monetary awards to the Small Claims Court, and the linking of compliance to tax clearance (or compulsory labour) certificates may provide an effective and appropriate approach to enforcement issues in the future. Accordingly, to urge parties and their legal agents to commit to cultivating a culture of genuine participation to dispute resolution processes and compliance with its outcomes, punitive measures may well be necessary.

BIBLIOGRAPHY

Books

1. A Van Niekerk, M Christianson, M McGregor, Nicola Smit, Bruno Paul Stefan Van EckV an Niekerk et al *Law@work* (2015) LexisNexis South Africa 449–450.

2. Bamu and Mudarakiwa "Social Regionalism in the Southern Africa Development Community: Transnational, Regional and National Interplay of Labour Alternative Dispute Resolution Mechanisms" in Blakette *Research Handbook on Transnational Labour Law* 469.

3. Basson, AC; Christianson, MA; Dekker, A; Mishke, C and Strydom, EML *Essential Labour Law* 5th ed (2009) Labour Law Publications, Centurion

4. Bhorat et al Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa "An Analysis of CCMA Data in Development Policy Research Unit (2007) University of Cape Town. 23.

5. Bosch, Molahleni and Everett the Conciliation and Arbitration handbook: A comprehensive guide to labour dispute resolution procedure (2004) 76.

6. Brand J *Labour Dispute Resolution* (2008) Juta & Company 149.

7. Brassey, M; Cameron, E; Cheadle, H and Olivier, M *The New Labour Law* (1987) Juta & Co Ltd.

8. Dawie Bosch, Edwin Molahlehi, Winnie EverettBosch et al (2004) The Conciliation Handbook: A comprehensive guide to labour Disputes resolution procedures LexisNexis Butterworths, Durban, South Africa 47.

9. Du Toit, Cohen, Everett, Fouché, Giles, Godfrey, Steenkamp, Taylor and Van Staden (2015) Labour Relations Law: A Comprehensive Guide LexisNexis Butterworths: Durban.

10. Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie, Steenkamo Labour Relations Law: A Comprehensive Guide (2015) 140.

11. Govindjee A "Labour Dispute Resolution" in Van der Walt AJ, Le Roux and Govindjee J (eds) Labour Law in Context (2012) 223.

12. Grogan J *Workplace Law* (2013) Juta Publication, Cape Town

13. Grogan *Labour Litigation and Dispute resolution* (2010) Juta, Grahamstown

14. Grogan, J Workplace Law 10th ed (2009) Juta Publication, Cape Town.

15. Ludwig The Politics of Solidarity: Privatisation, Precarious Work and Labour in South Africa (2020) 143.

16. Van Der Walt, Le Roux and Govindjee Labour Law in Context (2012) Cape Town, South Africa: Pearson Education Limited.

17. Venter, R; Levy, R and Holtzhausen, MME *Labour Relations in South Africa* 4th ed (2014) Oxford University Press Southern Africa, Cape Town

Legislation

1. Basic Conditions of Employment Act 75 of 1997.

2. Constitution of the Republic of South Africa.

3. Employment Equity Act 5 of 1957.

4. Labour Relations Act, 66 of 1995.

5. Prescription Act 68 of 1969.

6. Protection of Investment Act of 2015.

7. Recognition of International Arbitral Awards Act of 1977.

8. South African International Arbitration Act 15 of 2017.

9. The International Arbitration Act of 2017.

Journal Articles

1. Baccini and Koenig-Archibugi Why do states commit to international labour standards? The importance of “rivalry” and “friendship” (2011) 12.

2. Baccini and Koenig-Archibugi *Why do states commit to international labour standards? The importance of “rivalry” and “friendship”* 12.

3. Bendeman H “An Analysis of the Problems of the Labour Dispute Resolution System in South Africa” *African Journal on Conflict Resolution* Vol. 6 (1) 2006 p 81-112.

4. Currie and De Waal *the Bill of Rights handbook* 6th ed (2013) 1476.

5. Ferreira "The Commission for Conciliation, Mediation and Arbitration: its effectiveness in dispute resolution in labour relations" 2004 *Review Article* 73.

6. Gernigon, B; Odero, A and Guido, H "ILO Principles concerning Collective Bargaining" (2000) 139 *International Labour Review* ILO, Geneva.

7. ILO *Promoting collective bargaining Convention No. 154*: Industrial and Employment Relations Department (Dialogue) International Labour Standards Department (Normes) (2011) 8.

8. Khabo *Collective Bargaining and Labour Dispute Resolution – Is SADC Meeting the Challenge*? 5.

9. Kruger and Tshoose "The Impact of the Labour Relations Act on Minority Trade Unions: A South African perspective" 16 (20130 *PER/PELJ*1.

10. Simmons and Beth Mobilizing for Human Rights: International Law in Domestic Politics (2009).

11. Simmons and Beth *Mobilizing for Human Rights: International Law in Domestic Politics*.

12. Smit and BPS Van Eck "International perspective on South Africa's unfair dismissal law" 2010 *XLIIISA* 48.

Case law

1. *Buffalo City Metropolitan Municipality v Asia Construction* (Pty) Ltd [2019] ZACC 15.

2. *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others* (2016) 37 ILJ 2793 (LAC).

3. *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others* (J1807/15, J1706/15, JA94/2015) [2016] ZALAC 34; [2016] 10 BLLR 999 (LAC); (2016) 37 ILJ 2793 (LAC) (28 June 2016) 25.

4. *Cerephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 LAC par 1430 F-G.

5. *Coates Brothers (SA) Ltd v Shanker & others* (2003) 12 BLLR 1189 (LAC).

6. *CocaCola Sabco (Pty) Ltd v Van Wyk* [2015] 8 BLLR 774 (LAC).

7. *CWIU v Darmag Industries (Pty) Ltd* [1999] 8 BLLR 754 (LC).

8. *CWIU v Johnson & Johnson (Pty) Ltd* [1997] 9 BLLR 1186 (LC)

9. *Department of Justice & Constitutional Development v Van de Merwe NO & others* (2010) 31 ILJ 1184 (LC) para [23].

10. *Edgars Stores Ltd v SACCAWU* (1998) 19 ILJ (LAC).

11. F*ood and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Lt*d [2018] 6 BLLR 531 (CC).

12. *Forster v Stewart Scott Inc.* (1997) 18 ILJ 367 (LAC).

13. *Gibb v Nedcor Limited* [1997] 12 BLLR 1317 (LC))

14. *Halgang Properties CC v Western Cape Workers Association* (2002) 10 BLLR 919 (LAC).

15. *In re: Mazibuko v Concor Plant; Cellucity (Pty) Ltd v Communication Workers Union obo Peters* [2016] 1 BLLR 24 (LAC).

16. *Industrius D.O.O v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* [2021] ZAGPJHC 350.

17. *Kolobe v Proxenos (Sophia's Restaurant)* [2000] 11 BLLR 1291 (LC).

18. *Mackay v Absa Group and Another* [1999] 12 BLLR 1317 (LC) para 15.

19. *Maritime Industries Trade Union of SA & others* (2002) 23 ILJ 2213 (LAC).

20. *Meyer v CCMA & Others* (2002) 23 ILJ para 154.

21. *Mghobozi v Naidoo NO & Others* (2006) 3 BLLR (LAC).

22. *Mlaudzi v Metro South Towing CC* [2017] ZALCJHB 37.

23. *Molaba v Emfuleni Local Municipality* [2009] 7 BLLR 679 (LC) para 6.

24. *Moqhaka Local Municipality v Motloung and Others* (JS1505/16) [2016] ZALCJHB 401; (2017) 38 ILJ 649 (LC) para 36.

25. *Motloi v SA Local Government Association* (2006) 3 BLLR (LAC).

26. *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others [2017] 3 BLLR 213 (CC).*

27. *National Union of Metalworkers and Others v Baderbop* [2003] *2 BLLR* 103 (CC).

28. *NUM obo Majebe v Civil and General Contractors* [2021] 4 BLLR 374 (LAC).

29. *NUM v Council for Mineral Technology* (2002) 23 ILJ 1229 (LAC) 1231.

30. *NUM v West Holdings Gold Mining* (1994) 15 ILJ 610 (LAC).

31. *Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd* 2018 (5) SA 462 (SCA).

32. *Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another* (2012 (3) SA 381 (WCC).

33. *S v Makwenyane* (1995) 3 *SA* 39 para 36-37.

34. *SACCAWU & another v Shakoane & others* (2000) 10 BLLR 1123 (LAC)

35. *SACCAWU v Specialty Stores Ltd* (1998) 18 ILJ 557 (LAC) par 560B.

36. *SANAWU v Maluti Crushers* (1997) 7 BLLR 955 (CCMA).

37. *SATAWU obo Phakathi v Ghekko Services SA (Pty) Ltd and Others* (2011) 32 ILJ 1728 (LC).

38. *Seton Co v Silveroak Industries Ltd* (2000 (2) A 215 (T).

39. *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) BLLR 1097.

40. *South African Tourism v Monare* [2021] 4 BLLR 386 (LAC) para 20.

41. *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd & others*; *SPX Technologies (Pty) Ltd v Termico (Pty) Ltd* (2020) 2 SA 295 (SCA).

42. *Total Facilities Management v CCMA and Others* (2008) 1 BLLR 73 (LC)

43. *Trans-Caledon Tunnel Authority v CCMA others* (2013) 34 ILJ 2643 (LC).

44. *United Enterprises Corporation and Another v STX Pan Ocean Company Ltd* [2008] ZASCA 21.

Thesis

1. Budeli "Freedom of association and trade unionism in South Africa: from Apartheid to the democratic constitutional order" (LLD Thesis, University of Cape Town 2007) 256.

2. Gathongo JK "Labour Dispute Resolution in Kenya: Compliance with International Standards and A Comparison with South Africa" (LLD Thesis, Nelson Mandela University 2017) 458-488.

3. Musukubili F "Towards an efficient Namibian Labour Dispute Resolution System: Compliance with International Labour Standards and a comparison with the South African System" (LLM Treatise, Nelson Mandela University 2013) 37.

Internet sources

1. Ban Ki-moon "ILO Introduction to International Labour Standards: UN Secretary-General" http://ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm (accessed on 2022-06-13).

2. Lohani and Swepston Core Labor Standards Handbook (2006) 10. Available at: http://www.adb.org/sites/default/files/institutional-document/33480/files/cls-handbook.pdf (accessed on 2022-06-11)

3. Poole J "Enforcing CCMA Awards without further referrals" 2020 *Employment Law Publications* 2. Available at: https://www.schoemanlaw.co.za/enforcing-ccma-awards-without-further-referrals-explained/. (accessed on 29 July 2022).

4. Rules of the Game: a brief introduction to International Labour Standards https://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_318141/lang--en/index.htm (accessed on 2022-06-25).

Reports and ILO instruments

1. Freedom of Association and Protection of the Right to Organise Convention Convention No. 87 of 1948.

2. Government Gazette "Labour Relations Amendment Act, 2002 http://www.saflii.org/za/legis/num_act/lraa2002268.pdf (accessed 20-05-2022) 13.

3. ILO Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference Geneva (1998)

4. ILO Labour Standards: Available http://www.ilo.org/global/standards/lang--en/index.htm (accessed on 2022-06-20).

5. International Covenant on Civil and Political Rights No 16 of 1966

6. International Labour Organisation (ILO) article on Labour dispute prevention and resolution available at https://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm (accessed 28-03-2022).

7. Recommendation 092 - Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92).

8. Republic of South Africa (1995a) "Explanatory Memorandum to the Labour Relations Bill (Bill No. 66 of 1995)."

9. Right to Organise and Collective Bargaining Convention Convention No 98 of 1949.

10. Servais International Labour Law 185. See also International Training Centre of the ILO, Labour dispute system: Guidelines for improved performance 31.

11. Swepston, L Human Rights Law and Freedom of Association: Development through ILO Supervision (1998) International Labour Review.

12. The CCMA Annual Report 2020/2021. Report available at: https://www.ccma.org.za/About-Us/ReportsPlans/AnnualReports/Token/ViewInfo/ItemId/59 (accessed on 2 April 2022).

13. The CCMA Annual Report 2020/2021. Report available at https://www.ccma.org.za/categories/annual-reports/ (accessed on 2 April 2022).

14. The Constitution of International Labour Organisation.

15. Waldock "Human rights in contemporary international law and the significance of European convention" (1997) 11 Comparative and International Law Journal of Southern Africa 121.