A COMPARISON OF THE BOTSWANA AND SOUTH AFRICAN LABOUR DISPUTE RESOLUTION SYSTEMS

By

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Submitted in partial fulfillment of the requirements for the degree of Master of Arts (Labour Relations and Human Resources) at the

Nelson Mandela Metropolitan University

December 2011

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DECLARATION NOTE

I, Michael Sean Koorapetse, student number 210030399, hereby declare that the treatise for Master of Arts (Labour relations and Hr) is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

Michael Sean Koorapetse
ACKNOWLEDGEMENTS

My sincere appreciation and thanks go firstly to my friends and classmates in MA (Labour Relations and Human Resources), Monwabisi Gantsho, Annet Kigozi, Klaas Titus, Anjuli Hesse and Johannes Taglieber for always encouraging me with my treatise. Secondly, to Mrs Jennifer Bowler for the direction, supervision, support, encouragement and wisdom which has carried me throughout this research, without her I would not have managed to finish this treatise. Thirdly, to my dear colleagues, fellow mediators at the Department of Labour and Social Security (DLSS) in Botswana.

Last but not least I would like to thank my family for putting up with my absence for such a long time, my dear wife Thapelo Ponnah Koorapetse and my unborn baby girl Ivana Yaana Koorapetse, thank you for the love and support you have shown.
# TABLE OF CONTENTS

DECLARATION NOTE .................................................................................................................................................. i

ACKNOWLEDGEMENTS ........................................................................................................................................... ii

TABLE OF CONTENTS .............................................................................................................................................. iii

LIST OF APPENDICES ............................................................................................................................................... ix

LIST OF TABLES ...................................................................................................................................................... x

LIST OF FIGURES ................................................................................................................................................... xi

LIST OF ACRONYMS AND ABBREVIATIONS ............................................................................................................ xii

DEFINITION OF TERMS ........................................................................................................................................... xiii

ABSTRACT ................................................................................................................................................................. xiv

INTRODUCTION

1. THE THEORY OF LABOUR DISPUTE RESOLUTION ......................................................................................... 1

2. LABOUR DISPUTE RESOLUTION IN SOUTH AFRICA AND BOTSWANA .................................................... 2

3. RESEARCH OBJECTIVE ...................................................................................................................................... 2

4. SCHEME OF PAPER .......................................................................................................................................... 3

CHAPTER ONE

THE THEORY OF LABOUR DISPUTE RESOLUTION

1. INTRODUCTION .............................................................................................................................................. 5

2. CONFLICT AT WORK ..................................................................................................................................... 6

   2.1 Complaints, grievances and disputes ......................................................................................................... 6

   2.2 Collective and Individual disputes ......................................................................................................... 8

   2.3 Disputes of Interest and disputes of right .............................................................................................. 8

3. THE GOALS OF A DISPUTE RESOLUTION SYSTEM ....................................................................................... 9

   3.1 Efficiency .................................................................................................................................................. 10

   3.2 Accessibility ............................................................................................................................................ 10

   3.3 Informality ............................................................................................................................................... 10

   3.4 Affordability .......................................................................................................................................... 10
3.5 Expertise ........................................................................................................................................11

4. NORMATIVE INTERNATIONAL FRAME WORKS ...........................................................................11

4.1 ILO Conventions and Recommendations .............................................................................11

4.2 ILO supervisory machinery ..................................................................................................11

5. THE DISPUTE RESOLUTION PROCESS ..................................................................................12

5.1 Consensus-based processes ..................................................................................................12

5.1.1 Fact-finding .......................................................................................................................12

5.1.2 Facilitation ........................................................................................................................12

5.1.3 Conciliation and Mediation ..............................................................................................13

5.2 Referral-based Processes ....................................................................................................14

5.2.1 Arbitration ........................................................................................................................14

5.2.2 Adjudication ....................................................................................................................16

5.3 Mixed Processes ..................................................................................................................16

5.3.1 Mediation-arbitration/Conciliation-arbitration ................................................................16

5.3.2 Arbitration-Mediation/conciliation ....................................................................................17

6. AVENUES OF A DISPUTE RESOLUTION SYSTEM ................................................................17

6.1 Legislation ................................................................................................................................17

6.2 Dispute Resolution Agencies ...............................................................................................17

6.2.1 Public dispute resolution agencies ....................................................................................17

6.2.2 Private dispute resolution agencies ..................................................................................18

7. FRAMEWORK FOR COMPARISON .........................................................................................18

8. CONCLUSION ............................................................................................................................19

CHAPTER TWO

THE BOTSWANA LABOUR DISPUTE RESOLUTION SYSTEM

1. INTRODUCTION ........................................................................................................................20

2. BACKGROUND AND HISTORY ..............................................................................................21

2.1 The pre-independence era 1885-1966 ..................................................................................21

2.2 The Post-independence era (1966-1992) .............................................................................21

2.2.1 Employment Act of 1982 (No.29) .................................................................................22
2.2.2 The Trade Disputes Act of 1982 (No.19) ........................................................................23
2.2.3 Trade Unions and Employers Organisations Act 1983 (No.23) ..........................23
2.3 The 1992 reforms .................................................................................................................23
  2.3.1 Employment (Amendment) Act of 1992 .................................................................24
  2.3.2 Trade Disputes (Amendment) Act of 1992 .............................................................24
  2.3.3 Trade Unions and Employers Organisations (Amendment) Act of 1992 .........24
  2.3.4 Establishment of the Industrial Court ........................................................................24
3. THE PRESENT STATUTORY SYSTEM FOR DISPUTE RESOLUTION........................25
  3.1 Amendments of 2003/2004 .............................................................................................25
  3.2 Establishment of a panel of mediators and arbitrators ..................................................26
  3.3 Referral of disputes to the Commissioner ......................................................................26
  3.4 The Mediation Process ......................................................................................................26
  3.5 The Process of Arbitration ...............................................................................................28
  3.5 The Industrial Court ..........................................................................................................28
  3.6 Physical distribution of offices ........................................................................................29
4. REVIEW OF THE PERFORMANCE OF THE SYSTEM ...........................................30
  4.1 Presentation of findings from interviews (Interview guide attached as Appendix 1) ....30
    4.1.1 The current performance of the system .................................................................30
    4.1.2 Delays in the system ...............................................................................................30
    4.1.3 The Role of Government, Trade Unions and Employers ......................................31
    4.1.4 Ways to improve the internal dispute resolution system .......................................31
    4.1.5 Independence of the dispute resolution system .....................................................31
    4.1.6 The role and qualifications of a mediator ...............................................................31
    4.1.7 Legal representation during mediation .................................................................32
    4.1.8 Routing of disputes after mediation .....................................................................32
    4.1.9 Lessons which can be learnt from other dispute resolution systems ................32
    4.1.10 Additional words .................................................................................................33
  4.2 Some information from the statistics ...............................................................................33
    4.2.1 The Frequency and incidence of dispute referral ..................................................33
4.2.4 Outcome of disputes ........................................................................................................35

5. CONCLUSION .........................................................................................................................36

CHAPTER THREE
THE SOUTH AFRICAN DISPUTE RESOLUTION SYSTEM

1. INTRODUCTION ..................................................................................................................37

2. EVOLUTION OF THE SOUTH AFRICAN LABOUR DISPUTE RESOLUTION SYSTEM .........37

2.1 Dispute Settlement between 1920 and 1948 .................................................................37

2.1.1 Private Sector (White workers) ..................................................................................38

2.1.2 Private Sector (Black workers) ..................................................................................38

2.1.3 Public Sector workers ...............................................................................................39

2.2 Dispute Settlement between 1948 and 1979 .................................................................39

2.2.1 Private Sector (White, Coloureds and Indians) .........................................................39

2.2.2 Private Sector (African workers) ...............................................................................39

2.2.3 Public Sector Workers ...............................................................................................40

2.3 Dispute settlement in South Africa between 1979 and 1994 ........................................40

2.3.1 Private Sector employees .........................................................................................41

2.3.2 Public Sector Workers ...............................................................................................42

3. DISPUTE RESOLUTION UNDER THE LABOUR RELATIONS ACT 66 OF 1995 ...............42

3.1 Commission for Conciliation, Mediation and Arbitration (CCMA) ............................43

3.1.1 Conciliation ...............................................................................................................43

3.1.2 Conciliation-Arbitration (Con-Arb) ........................................................................44

3.1.3 Arbitration ..................................................................................................................44

3.2 Bargaining Councils .......................................................................................................46

3.3 The Labour Court and Labour Appeals Court ...............................................................47

4. PRIVATE DISPUTE RESOLUTION ......................................................................................48

5. REVIEW OF THE PERFORMANCE OF THE SYSTEM .....................................................49

5.1 The frequency and incidence of dispute referral ..........................................................49

5.2 The course of referred cases and processes .................................................................50

5.2.1 Public Information and Awareness .......................................................................50
5.2.2 Condonation ........................................................................................................... 51
5.2.3 Scheduling of Cases .............................................................................................. 51
5.2.4 The Con-Arb Process ............................................................................................ 52
5.2.5 Attendance at Arbitration and Default Awards .................................................... 52
5.2.6 Representation and Assistance ............................................................................. 52
5.3 Categories of referral ................................................................................................. 53
5.4 Outcome of disputes ................................................................................................. 54
  5.4.1 Settlement rate ..................................................................................................... 54
  5.4.2 The outcome of awards ........................................................................................ 55
  5.4.3 Breakdown for the reason for unfairness .............................................................. 56
  5.4.4 Remedies for unfair dismissal ............................................................................... 57
5.5 Strike Action .............................................................................................................. 58
  5.5.1 Number of workdays lost ..................................................................................... 58
  5.5.2 Strike Triggers ...................................................................................................... 58
6. CONCLUSION ............................................................................................................... 59

CHAPTER FOUR
COMPARISON BETWEEN BOTSWANA AND SOUTH AFRICAN DISPUTE RESOLUTION SYSTEMS

1. INTRODUCTION ............................................................................................................. 60
2. COMPARISON OF THE SYSTEMS ............................................................................. 60
  2.1 Elements of the systems .......................................................................................... 60
    2.1.1 Nature of disputes ............................................................................................. 60
    2.1.2 Coverage .......................................................................................................... 61
    2.1.3 Avenues of dispute resolution ............................................................................ 61
    2.1.4 Human resources .............................................................................................. 62
    2.1.5 Processes ............................................................................................................ 62
  2.2 Performance of the system ..................................................................................... 64
    2.2.1 Efficiency .......................................................................................................... 64
    2.2.2 Accessibility ...................................................................................................... 65
    2.2.3 Informality ........................................................................................................ 65
2.2.4 Costs ........................................................................................................66
2.2.5 Legitimacy ................................................................................................66

3. CONCLUSION .....................................................................................................67

CHAPTER FIVE
RECOMMENDATIONS AND CONCLUSION

1. INTRODUCTION ..................................................................................................68

2. RECOMMENDATIONS .........................................................................................68

2.1 Botswana ...........................................................................................................68

  2.1.1 Hiring full-time arbitrators .........................................................................68
  2.1.2 Making arbitration a public hearing .............................................................68
  2.1.3 Establishment of a legislated mixed process of mediation-arbitration ...........69
  2.1.4 Making the dispute resolution system independent from government ..........69
  2.1.5 Recruitment of high qualified and experienced staff for mediation and arbitration ..................................................................................................69
  2.1.6 Accreditation to Private agencies .................................................................69
  2.1.7 Effective Case management system .............................................................70
  2.1.8 Proper routing of disputes ..........................................................................70

3. CONCLUSION ......................................................................................................70

LIST OF STATUTES ..................................................................................................71

  South Africa ..........................................................................................................71
  Botswana ..............................................................................................................71

REFERENCES ..........................................................................................................72

APPENDIX A- Interview Guide Line .......................................................................75

APPENDIX B- Introduction Letter and Informed Consent Forms ..............................77
LIST OF APPENDICES

APPENDIX A - Interview Guideline ............................................................................. 76

APPENDIX B - Consent Form ................................................................................... 78
LIST OF TABLES

Table 1: List of Respondents.................................................................9
Table 2: Framework for comparison.........................................................24
Table 3: Breakdown of Calls by Province 2008/2009 and 2009/2010..........................53
Table 4: CCMA’s breakdown of settlement’s figure 2009/2010..............................54
LIST OF FIGURES

Figure 1: Typology of employee dissatisfaction.................................................................13

Figure 2: Referrals to Department of Labour and Social Security........................................38

Figure 3: Referrals by month..........................................................................................38

Figure 5: Outcome of mediation.......................................................................................40

Figure 6: Referrals to CCMA and Bargaining Councils.....................................................53

Figure 7: Referrals by Sector.........................................................................................54

Figure 8: Non-attendance at CCMA and Bargaining Council Arbitration and Con-Arb in 2008........56

Figure 9: Referrals by Issue.........................................................................................57

Figure 10: Types of Dismissal Arbitrated........................................................................57

Figure 11: Outcome of CCMA and Bargaining Council Cases includn and excludn Default Awards.59

Figure 12: Outcomes of cases.......................................................................................59

Figure 13: Remedies for Unfair dismissal........................................................................60

Figure 14: Workdays (in millions) lost to strike action-1995 to 2010.................................60

Figure 15: Distribution by trigger-1995 to 2010................................................................61
### LIST OF ACRONYMS AND ABBREVIATIONS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CCMA</td>
<td>Commission for Conciliation, Mediation and Arbitration</td>
</tr>
<tr>
<td>DLO</td>
<td>District Labour Office</td>
</tr>
<tr>
<td>DLSS</td>
<td>Department of Labour and Social Security</td>
</tr>
<tr>
<td>ELRA</td>
<td>Education Labour Relations Act</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Office</td>
</tr>
<tr>
<td>LAC</td>
<td>Labour Appeals Court</td>
</tr>
<tr>
<td>LRA</td>
<td>Labour Relations Act</td>
</tr>
<tr>
<td>MLHA</td>
<td>Ministry of Labour and Home Affairs</td>
</tr>
<tr>
<td>NEDLAC</td>
<td>National Economic Development and Labour Council</td>
</tr>
<tr>
<td>PIRO</td>
<td>Principal Industrial Relations Officer</td>
</tr>
<tr>
<td>PSA</td>
<td>Public Service Act</td>
</tr>
<tr>
<td>PSLRA</td>
<td>Public Service Labour Relations Act</td>
</tr>
<tr>
<td>PSBC</td>
<td>Public Service Bargaining Council</td>
</tr>
</tbody>
</table>
DEFINITION OF TERMS

Batswana: people who are citizens of Botswana (Allen-Ile, 2007).

Conciliation: according to the International Labour Organization (ILO) this refers to means of assisting the parties the dispute, through neutral third party intervention, to reach a mutually agreed settlement (ILO, 2011).

Conciliation: In South Africa conciliation means to reconcile or bring together especially opposing sides in an industrial dispute. Conciliation is private, confidential and without prejudice (Du Toit, et al., 2006).

Essential services: A service which its interruption will endanger the life, personal safety or health of the entire population or part thereof (Bendix, 2010).

Maintenance services: In South Africa a service is a maintenance service if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery (Labour Relations Act, 1995).

Mediation: according to ILO although conciliation and mediation are sometimes used interchangeably, mediation is often distinguished from conciliation as a method of dispute settlement in which even though the dispute is settled by the agreement between parties to the dispute, the third party is more active than in conciliation and in some instance this third party can make proposals for settlement of the dispute (ILO, 2001).

Mediation: in Botswana mediation refers to a dispute resolution method which includes facilitation, conducting a fact finding exercise, and the making of an advisory award (Trade Dispute Act, 2004).

Trade disputes: this would include an alleged dispute, dispute between unions, a grievance, a dispute of interest, or any dispute over the application or the interpretation of any law relating to employment (Trade Dispute Act, 2004).
ABSTRACT

The purpose of this study was to compare the dispute resolution systems of Botswana and South Africa. As far as the South Africa dispute resolution system is concerned extensive literature on the system was carried out to describe its functioning. As for the Botswana dispute resolution system there was not much written about it in the literature, so in order to find out more about this system semi-structured interviews with labour relations experts which include mediators, arbitrators, lecturers, labour lawyers, trade unionists, employers and government officials held. The framework of comparison was developed to compare the elements of dispute resolution systems against each other and secondly to compare each system against the criteria of performance to the system.

The two labour relations systems were compared in terms of elements of the system and the performance of the two systems. In the comparisons of the elements of the systems it was found out that in both systems the nature of disputes was collective and individual disputes both of which can be referred to the initial process of mediation or conciliation. However, in Botswana collective disputes can only be referred to arbitration if they remain unresolved in mediation while in South Africa only collective disputes on essential services go to arbitration while others lead to a strike or lockout if unresolved at conciliation. As for coverage both systems have incorporated public service sector employees in the systems after being excluded from the system for a very long time. The only difference is that in Botswana the Police force is not included while in South Africa they are included in the system. Differences in the avenues of disputes in the two countries were noted, in Botswana the rights/individual disputes go to either arbitration or Industrial Court if unresolved at mediation, interest/collective disputes can only go to arbitration while in South Africa the route of disputes is specified in the legislation. As for the human resources of the two countries it was found that the South African system has more qualified, trained and sufficiently experienced staff than the Botswana system. As for the processes it was found that for South Africa the initial process is conciliation while in Botswana it is mediation but these two processes were similar in many ways, from mediation/conciliation the next step in both systems is arbitration and just like the conciliation/mediation, arbitration in both countries was found to be similar except that in South Africa it is a public hearing. The two systems were also compared in terms of their performances and the research has established that between the two systems the South African system proved to be more superior on three of the criteria; efficiency, accessibility and legitimacy than the Botswana system.

Therefore, the research proposes a number of recommendations for Botswana to implement namely; establishment of a legislated mixed process of mediation-arbitration, making the dispute resolution system independent from government, recruitment of high qualified and experienced staff for mediation and arbitration, accreditation to private agencies, effective case management system and proper routing of disputes.
INTRODUCTION

1. THE THEORY OF LABOUR DISPUTE RESOLUTION

A labour dispute resolution system is part of the labour relation systems practiced in a certain area or country. The dispute resolution system of a country is important because it helps to regulate the labour relations system of a country and promotes labour peace. This promotes economic prosperity and assists in terms of attracting foreign investment. At the centre of dispute resolution is the term 'dispute' which is differentiated from complaints and grievances. Disputes usually occur when negotiations in the collective bargaining process reach a deadlock and if not resolved this can lead to strikes. Therefore, the establishment of an efficient labour dispute resolution system is the foundation of sound labour relations policy.

In most countries there are distinctions drawn amongst several different types of disputes and there are separate procedures for dealing with them. The two commonly applied distinctions are between disputes of right and disputes of interest and individual and collective disputes. Generally rights disputes are disputes which are concerned with the violation of an existing right while interest disputes are those which arise because of differences over the determination of future rights and obligations emanating from the failure of collective bargaining. Individual disputes involve a single employee while collective disputes involve a number of workers collectively. Parties to a dispute ought to first of all exhaust the dispute resolution procedures provided for by the collective agreement if it is a collective dispute and if it is an individual dispute there are dispute resolution procedures in many organisations which may assist parties before they go for external dispute resolution. When all internal processes have failed a dispute can be referred to alternative dispute resolution processes which include conciliation, mediation and arbitration amongst others.

The International Labour Organisation (ILO) has several conventions and recommendations which deal with dispute resolution. The principal among them are the Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92) and the Collective Bargaining Recommendation, 1981 (No.163) both of which have been ratified by both Botswana and South Africa. It is important to note that ILO conventions and recommendations leave enough room for member states to design the dispute resolution systems suitable for their circumstances but in accordance with the principles that dispute resolution should be informal, efficient, accessible and affordable. In order to see if a certain dispute resolution system is performing well there are several measures which are taken.
2. LABOUR DISPUTE RESOLUTION IN SOUTH AFRICA AND BOTSWANA

The earliest attempt to introduce statutory labour dispute resolution in South Africa can be traced to 1909 when the Transvaal Dispute Prevention Act of 1909 which applied only in the Transvaal was promulgated. It was only in 1924 when the first comprehensive piece of labour legislation was passed, the Industrial Conciliation Act which by excluding African male workers from the definition of employee created the racially-dual labour relations system. It also introduced Industrial Councils and ad hoc conciliation boards. This was only dismantled in 1979 after the Wiehahn commission recommendations. The present statutory system in South Africa which is governed by the Labour Relations Act of 1995 covers both interest and rights disputes as well covering both private and public sector employees. Dispute Resolution is provided by institutions such as the Commission for Conciliation, Mediation and Arbitration (CCMA), a government funded but independent body which provides conciliation and arbitration. Certain disputes must be referred to the Labour Court for adjudication if attempts at conciliation fail. Decisions from the Labour Court can be appealed at the Labour Appeals Court (LAC).

In Botswana, before independence, most Batswana were employed in the South African mines and there was no labour dispute resolution system which was in place until the early 1980s after phenomenal growth of the economy which resulted in significant increases in both informal and formal sector employment. As for Botswana the present statutory system is provided under the Ministry of Labour and Home Affairs (MLHA). The first process is mediation and if it fails parties can either go to arbitration or the Industrial Court. The system also covers both interest and rights disputes and cover public and private sector employees.

3. RESEARCH OBJECTIVE

The South Africa dispute resolution system was established in 1995 after the fall of apartheid and the designers of the system had the opportunity to benchmark in countries where the labour dispute resolution systems were effective and used what they deemed to be important in the drafting of the system. The system was also drafted in accordance to the International Labour Organisation (ILO) conventions. The Botswana dispute resolution system on the other hand is not as developed as the South African one despite Botswana attaining independence as far back as 1966. It is important for Botswana to develop a dispute resolution system that is aligned with current trends in labour dispute resolution. Hence this comparison between the dispute resolution systems of Botswana and South Africa is aimed at identifying what is good about the South Africa system and recommending it to Botswana and likewise if there is anything in the Botswana system which can be beneficial to South Africa it will be recommended to the South Africans. In this way this study would be adding value to both the Botswana and South African labour dispute resolution systems and contributing positively to their development.
4. SCHEME OF PAPER

The paper is divided into five chapters with each chapter focusing on a specific theme. The first chapter will focus on the theory of labour dispute resolution and offer a framework for the comparison of the two systems. The second chapter will look into the Botswana dispute resolution system, its history, present statutory system and the performance of the system. Chapter three will focus on the South African labour dispute resolution system, its evolution, current system under the Labour Relations Act 66 of 1995, private dispute resolution and the review of performance of the system. Chapter four will be a comparison of the two systems and the last chapter will present conclusions and recommendations.

Chapters two and three primarily utilise secondary data from the existing literature. However, unlike the South African dispute resolution system where the CCMA and Tokiso have undertaken extensive reviews of the system, there has been relatively little critical evaluation and review of the Botswana system. Therefore, this researcher undertook a series of semi-structured interviews of key informants to gather perceptions regarding the current Botswana dispute resolution system. The respondents were purposively selected by the researcher from people employed in government, academia, the trade union movement, labour law as well as employers.

The interviews were conducted in September 2011 using the interview guide attached as Appendix 1. The list of respondents is shown in Table 1 below. Four of the respondents did not want their names and job titles to be mentioned. Most of the interviews were recorded and then later transcribed and summarised. The findings from the interviews are incorporated in Chapter 2 in the section on the performance review of the Botswana labour dispute resolution system.
Table 1: List of Respondents

<table>
<thead>
<tr>
<th>Number</th>
<th>Name</th>
<th>Job Title</th>
<th>Date Interviewed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Ms Tamapo Salani</td>
<td>Mediator</td>
<td>14/09/2011</td>
</tr>
<tr>
<td>2</td>
<td>Mr Thusego Ohentse</td>
<td>Mediator</td>
<td>14/09/2011</td>
</tr>
<tr>
<td>3</td>
<td>Dr N.Tshabang</td>
<td>Lecturer/Unionist</td>
<td>23/09/2011</td>
</tr>
<tr>
<td>4</td>
<td>Mr B.K Kwadipane</td>
<td>Arbitrator(part-time)</td>
<td>22/09/2011</td>
</tr>
<tr>
<td>5</td>
<td>Mr S.K Leero</td>
<td>Arbitrator(part-time)</td>
<td>22/09/2011</td>
</tr>
<tr>
<td>6</td>
<td>Respondent F</td>
<td></td>
<td>22/09/2011</td>
</tr>
<tr>
<td>7</td>
<td>Dr B.Mothusi</td>
<td>Lecturer</td>
<td>20/09/2011</td>
</tr>
<tr>
<td>8</td>
<td>Dr B.Motshegwa</td>
<td>Lecturer</td>
<td>19/09/2011</td>
</tr>
<tr>
<td>9</td>
<td>Respondent I</td>
<td></td>
<td>19/09/2011</td>
</tr>
<tr>
<td>10</td>
<td>Mr Mataboge Motsele</td>
<td>Mediator</td>
<td>15/09/2011</td>
</tr>
<tr>
<td>11</td>
<td>Dr T. Tshukudu</td>
<td>Lecturer</td>
<td>19/09/2011</td>
</tr>
<tr>
<td>12</td>
<td>Ms Khumo Dira</td>
<td>Mediator</td>
<td>15/09/2011</td>
</tr>
<tr>
<td>13</td>
<td>Respondent M</td>
<td></td>
<td>16/09/2011</td>
</tr>
<tr>
<td>14</td>
<td>Respondent N</td>
<td></td>
<td>22/09/2011</td>
</tr>
<tr>
<td>15</td>
<td>Mr Moitshepi Tshipayagae</td>
<td>Mediator</td>
<td>23/09/2011</td>
</tr>
</tbody>
</table>
CHAPTER ONE

THE THEORY OF LABOUR DISPUTE RESOLUTION

1. INTRODUCTION

The labour dispute resolution system in any given country seeks to assist parties in an employment relationship to resolve their grievances or disputes in a peaceful and orderly manner through agreed machinery with minimum disruption of work (ILO, 2011).

This chapter will concern itself with discussing conflict in the workplace by differentiating complaints, grievances and disputes as well as identifying types of disputes which can be either conflicts of interests or of rights or individual or collective conflicts. This chapter will also look into the purpose of labour dispute resolution, the different dispute resolution processes which can either be extra-judicial namely; conciliation, mediation and arbitration or judicial namely; litigation and adjudication and the institutions dealing with dispute resolution. Lastly it will also propose a framework for comparing the elements of a dispute resolution system and criteria to evaluate the performance of the system that will be used to structure chapters two, three and four.

Conflict can be defined as a process that begins when one party perceives that another party has negatively affected or is about to negatively affect something that the first party cares about. Conflict may be destructive but may be potentially healthy and even beneficial as, conflict is often a catalyst for change, growth and development and without it, the employment relationship system or society, as a whole may tend to stagnate. It is therefore believed that conflict is the force underlying transformation. The challenge is how to approach conflict, manage it and handle it appropriately (Nel, Swanepoel, Kistern, Erasmus & Tsabadi, 2005).

A grievance is a partly formalised expression of individual or collective conflict, usually involving dissatisfaction in respect of workplace related matters. A dispute is a highly formalised manifestation of conflict in relation to workplace related matters which may include the failure to address a grievance (Brand, Lotter, Mischke & Steadman 1997). Employment disputes are divided into the two main categories of individual and collective disputes. Individual disputes are disputes which involve a single employee while collective disputes involve a group of employees who are usually represented by a trade union. Disputes can further be broken into two sub-categories of rights disputes and interests disputes. Right disputes relate to a situation whereby there is a disagreement over the implementation or interpretation of an existing right and interest disputes usually arise when negotiations in collective bargaining fails to yield an agreement. This is basically where there is no collective agreement or it is being renegotiated (ILO, 2007).
The processes of labour dispute resolution include the extra-judicial processes of conciliation, mediation and arbitration. These three methods have one thing in common in that they all involve the intervention of a neutral third party. According to the ILO (2007) the difference between conciliation and mediation is that in conciliation the third party just facilitates communication between parties while in mediation the third party goes on to propose terms of settlement which can be accepted or rejected by the parties. Arbitration on the other hand requires a proposed settlement that may either be compulsory or voluntary, binding or advisory depending on the choice of the parties. In the event that a dispute is not resolved by the extra-judicial processes it would be referred to the judicial process and be adjudicated by a court. Adjudication is a procedural process whereby a judge or a panel of judges decides the case between two parties (Bosch, Molahlehi & Everett, 2004).

2. CONFLICT AT WORK

According to Bosch et al (2004) conflict is a way of life in the labour relations arena. Therefore the labour legislation’s objective should be to create an environment where conflict is managed so that the interests of the parties are advanced and a positive relationship is promoted between them. Similarly Brand et al. (1997) state that conflict is a part of our working lives so it cannot be avoided or eliminated no matter how effective our dispute resolution processes and techniques are. The best that can be done is to try and manage it and that is where dispute resolution will play a very important role in the management of conflict.

2.1 Complaints, grievances and disputes

A complaint is whereby dissatisfaction is expressed but not in a procedural way. Complaints, grievances and disputes are parts of a single process and should not be isolated from one another instead they should be interlinked and related. The main distinction between the three is that a dispute can only be resolved by the means of formal dispute resolution procedures and processes while handling complaints and grievances need a totally different consideration (Brand et al., 1997).

A complaint is where dissatisfaction is being expressed but not in a procedural way while a grievance is whereby the complainant is presented formally and triggers the procedural machinery.

The essential difference between a grievance and dispute is usually determined by the way they are initiated and in the degree of proposed change in the status quo. By presenting a grievance this shows that the dissatisfaction is serious because this is a formal, drastic step which involves questioning the superior’s judgement. Most people fear it because it often puts one on a collision course with the superior.

The term dispute usually describes a grievance as soon as a union official is involved. However, it is still applicable in a non-unionised environment which differentiates between rights disputes and interests disputes because issues like unfair dismissal are individual rights disputes. If a union is involved and the dispute is a dispute of interest it implies that the issue should be handled by
management and union (inter-organisation), and if it is necessary the union may invoke the use of industrial action in the event of a continuing failure to agree (Salamon, 2000).

A grievance is a partly formalised expression of individual or collective conflict which usually emanates from dissatisfaction about work-related matters (Salamon, 1992). There are many kinds of employee grievances, they range from dissatisfactions with conditions of work and wages, promotions, training or unfair treatment in the workplace. This has led to many organisations having their own grievance procedures in the workplace. A grievance procedure is a tool which is charged with creating communication between employees and employers and making sure that complaints are dealt with by management (Bendix, 2001).

According to Du Toit et al. (2000) a dispute is more than a statement of opposing views about an employment issue, it is also more than a claim or demand. The term denotes a situation whereby the parties to a dispute have reached an impasse. However, it should be noted that not all labour disputes end in the resolution of the dispute. Sometimes one or more parties may simply decide to withdraw from the dispute because they lack the interest in pursuing the dispute further (Majinda, 2007).

![Diagram](image)

Figure 1: Typology of employee dissatisfaction (Adapted from Salamon, 2000 p 554)

It is often difficult to define the terms grievance and dispute precisely because of the various issues and their significance to both employees and management. Figure 1 attempts to show that this variety
emanates from a number of factors such as nature of issues, extent of satisfaction and the manner of representation (Salamon, 2000).

2.2 Collective and Individual disputes
An individual dispute is usually a dispute which involves a single worker or a number of workers as individuals in the application of their individual employment contacts. A collective dispute on the other hand is a dispute which involves a number of workers collectively. The distinction between collective and individual disputes is not easy to draw because individual disputes can develop into collective disputes at some point in time particularly when the trade union takes over or when a point of principle is involved. Both individual and collective disputes may concern rights because an employee may have a dispute about not being treated according to his contract and a union may be aggrieved because it members have not been treated in accordance with the term of the collective agreement. Interest disputes are usually collective in character (ILO, 2001).

2.3 Disputes of Interest and disputes of right
According to Basson, Christianson, Dekker, Garbers, Le Roux, Mischke & Strydom (2009) a dispute of rights is about the interpretation or application of a right that already exists. This is when employees and employers do not seek to create a new right, but rather they are seeking to enforce an already existing right that it is felt the other party in the employment relationship has breached. In terms of the ILO, the concept of disputes of rights are sometimes known as legal disputes, which usually involves individual workers or a group of workers who claim that they have not been treated in accordance with rules laid down in collective agreements, individual contracts of employment, or in laws or regulations or elsewhere (ILO, 2011).

A dispute of right is the kind of dispute which is usually heard in courts and arbitrations on a daily basis. It is usually easier to see who is right or wrong in a dispute of right as the arbitrator or judge at the court can always refer to the statute, individual contract or collective agreement. The processes of adjudication and arbitration are basically rights procedures where parties present their evidence and arguments to a neutral third party who has the power to hand down final and binding decisions (Majinda, 2007).

A dispute of interest is usually defined as a dispute which is about the creation of new rights. This dispute arises where employees or trade unions acting on behalf of employees seek to further their interest where there are no currently existing rights which they can enforce. One example would be when employees seek higher salaries or when they seek new and improved conditions of employment such as more leave or shorter working hours for the same pay (Basson et al., 2009).

Disputes of interest are traditionally and appropriately resolved by the means of interest-based, negotiation, conciliation or mediation and in the final resort by a strike or lockout. Resolving disputes of interest is not easy. It involves probing for deep-seated concerns, devising creative solutions and making trade-offs and concessions where interests are opposed. Arbitration, adjudication and even government action are not normally suited to resolve disputes of interest because the issues involved
are usually too wide-ranging and it is very difficult to see who is wrong or right because each particular case is dependent on whose interest is the cause of the dispute (Majinda, 2007). There are times when arbitration can be used to resolve disputes of interest however, this is difficult to do, since it involves deciding the case by making value judgments rather than relying on legal principles (Bosch et al., 2004).

The issues which lead to disputes of interest are those which emanate from problems in collective bargaining. Any matter causing conflict between an employer and employee and not regulated by law, agreement or custom can give rise to a dispute of interest. Disputes of interest constitute the more dynamic aspect of labour relations than disputes of rights, and their settlement requires the establishment of procedures outside the normal legal machinery (Bendix, 2001).

According to Du Toit et al. (2000) the main distinction between a disputes of interest and disputes of rights lies in the fact that disputes of rights involve claims of rights that can be determined by the application of mutually binding standards and are usually described as more amenable to third party decision-making (arbitration or adjudication) than disputes of interest, that are usually open-ended and rooted in the exercise of power rather than rights. But for Majinda (2007) the difference between disputes of interest and disputes of right is not always visible especially when it comes to classification of cases which have characteristics of both types. For example a dispute which happens to have a rights dimension does not mean that it cannot also form the subject of a protected strike or lockout. Where there is a provision that entitles a party to refer a dispute of interest to arbitration that party is free to choose between arbitration and or strike or lockout.

It is very important to note that when resolving a dispute the focus may shift from interests to rights to power (strikes) and back again. The resolution of disputes of interest takes place within the context of the parties ‘rights and power’. For example parties may not reach an agreement on the basis of interests simply because their perceptions of who is right or who is more powerful are different. Similarly, the resolution of disputes of right takes place within the context of the parties’ power. For example a party may win a judgment in court but unless the judgment can be enforced against the more powerful party that refuses to implement it, the rights disputes will inevitably continue (Majinda, 2007).

3. THE GOALS OF A DISPUTE RESOLUTION SYSTEM

According to Thompson (2010) the effectiveness of any dispute resolution system flows from its legitimacy and this legitimacy flows from the participation of the interested parties in its creation. It makes more sense for stakeholders to be involved collaboratively in the design process since in this way they become true partners and will have more vested responsibility for the successful operation of the system. In terms of a statutory dispute resolution system participation may be achieved through the political process but if this arrangement is not possible, it helps if the social partners are directly
involved in the making of the relevant governing decision. Countries like Holland with the Social and Economic Council and South Africa with the National Economic Development and Labour Council have created bodies which deal with this aspect of the involvement of social partners.

Besides legitimacy Brand, Lotter, Steadman & Ngcukaitobi (2008) identified the following as the five goals of a dispute resolution system:

**3.1 Efficiency**
The efficiency of a dispute resolution system refers to disputes being resolved as speedily as possible. A solution to a labour dispute has to be found as quickly as possible because if it takes too long it will negatively affect labour peace in the workplace. The efficiency of dispute resolution machinery is very important because when aggrieved parties choose to refer their dispute to the institution they expect it to be resolved so that they go on with their lives. However the pursuit of efficiency at all costs has been found to be problematic as this can lead to the dispute resolution institutions losing sight of their primary function that of attempting to solve disputes. Efficiency also demands that parties should have the confidence to come to the dispute resolution system at short notice and that the institutions of the systems should be able to respond promptly because if a dispute remains for too long it becomes harder to solve.

**3.2 Accessibility**
The accessibility of dispute resolution system means easy access to the dispute resolution centre (short travelling distance) and knowing who to approach after getting there. In other words there should be minimum fuss when a party needs to approach the dispute resolution system for help. It should be clear to the parties as to when it is the right time to involve the dispute resolution system. Accessibility also means that employees, employers and the public at large should be aware of and understand the system.

**3.3 Informality**
Informality means that parties should be able to come to the dispute resolution institution and be able to present their dispute themselves unaided. In alternative dispute resolution the stringent legal and procedural formalities which are usually associated with courts of law should not apply. The reason why legal representatives are not allowed in the initial process of conciliation or mediation is that by their very nature and training legal representatives prefer to stick formalities and are very technical.

**3.4 Affordability**
It is an accepted view that dispute resolution systems ought to be free or affordable. This is done so that everyone, even the poorest people in the society can use this service. However the provision of the system comes at a cost because infrastructure and personnel have to be paid for by someone. It is usually the state which provides this service to its people using the revenue from the citizens themselves. One way of reducing the money spent on the appointment of personnel is to use personnel on a non-permanent basis. This is beneficial because in this arrangement the state will only pay for the work done and the dispute resolvers do not to leave their jobs elsewhere to come and work for the dispute resolution institution.
3.5 Expertise
The quality of the staffing of people in any dispute resolution system usually determines how efficiently a system works. They also determine how employers, employer organisations and trade unions and individuals look at the dispute resolution system. Dispute-resolvers need to be well-qualified and be highly knowledgeable about the legal framework within which they are functioning. A dispute-resolver should always be sensitive to the nature, extent and consequences of the intervention in a dispute.

4. NORMATIVE INTERNATIONAL FRAME WORKS

4.1 ILO Conventions and Recommendations
As far as ILO conventions and recommendations are concerned there are several which deal with dispute resolution. The main ILO instrument dealing with dispute settlement and prevention is Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92). According to this recommendation voluntary conciliation should be made available to assist in the prevention and resolution of industrial disputes between employers and employees. This recommendation goes further to emphasize equal representation from both employers and employees and that these procedures should as free and quick as possible. It also prohibits parties from being involved in strikes and lockouts whilst conciliation or arbitration is still going on. Another instrument which deals with dispute settlement is the Collective Bargaining Convention of 1981 (No.154). It provides that bodies and procedures for the resolution of the labour disputes should be designed in such a way that it contributes to the promotion of collective bargaining. Although this convention focuses on collective bargaining it does not rule out the use of conciliation and arbitration as a part of the bargaining process where such processes are voluntary (ILO, 2007).

As far as public sector is concerned, the Labour Relations (Public Service) Convention, 1978 (No.151) provides that in order to have just and fair settlement of disputes over the terms and conditions of employment an independent and impartial machinery for mediation, conciliation and arbitration should be established to ensure the confidence of the parties involved (Thompson, 2010).

4.2 ILO supervisory machinery
The issue of collective dispute prevention and resolution in the context of the right to strike has been addressed by the ILO supervisory bodies. Having to pursue conciliation or arbitration before a strike is legitimate but only in so far as these processes are not too complex or slow. If they are, a lawful strike may be impossible to practice or may lose its effectiveness. Another concern has been raised regarding compulsory arbitration which results in a binding decision which may prohibit strikes or end them quickly. The ILO committee of experts has advised that arbitration ought to be freely chosen and parties should be bound by the final decisions. On top of the various ILO conventions and recommendations the ILO is involved in a number activities and interventions assisting member states to strengthen their labour courts, industrial tribunals and dispute resolution systems for efficient, effective and equitable labour dispute resolution (Thompson, 2010).
5. THE DISPUTE RESOLUTION PROCESS

Apart from litigation and other forms of judicial action there are three extra-judicial labour dispute settlement procedures which are usually used in most countries throughout the world; These are conciliation, mediation and arbitration. In some countries there is no difference between conciliation and mediation, the terms are just used interchangeably but in some there is a distinction between the two. According to the ILO (2007) in the descriptions of both processes there is an intervention of a neutral third party but in conciliation the conciliator helps to facilitate communication between the two parties, without making any specific proposal for resolving the dispute while a mediator in mediation does not only keep the lines of communication open he also makes proposals to the settlement of the dispute which can be rejected or accepted by the parties. As for arbitration it is a process which also includes the intervention of a neutral third party but here the third party is empowered to make a binding decision after hearing legal arguments and evidence from both parties.

5.1 Consensus-based processes

5.1.1 Fact-finding
One way of adding objectivity in a situation where parties are struggling to reach an agreement and where part of the problem can be traced to conflicts over data or perspectives of fairness and affordability is to undertake a fact finding exercise and then present recommendations (Thompson, 2010). According to Brand et al. (2008), in the South African context there is a non-binding fact finding process. This is when a conciliator collects information or hears the versions of the parties and then makes a non-binding finding on the facts without deciding on the solution to the overall dispute. In a situation whereby fact finding is part of conciliation, the power to decide on which procedure to follow is usually left to the fact finder and when the parties voluntarily agree to such fact finding, they will set the powers of the fact finder.

5.1.2 Facilitation
In Australia facilitation is a process in which the parties, with the assistance of a dispute resolution practitioner, identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may end there, or it may go on to help the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation (National Alternative Dispute Resolution Advisory Council, 2003). According to Brand et al. (2008) facilitation in South Africa involves the use of an independent third party. It seeks to help the parties reach an agreement without imposing a decision upon the parties. The difference between facilitation and conciliation is that conciliation focus on disputes and all the parties agree to go to conciliation or one party forces the other into the conciliation. Facilitations focus on
structural and relationship issues as the third party helps to identify parties to the facilitation and then persuades them to come to the table (Du Toit, 2006).

5.1.3 Conciliation and Mediation

These processes may either be voluntary or involuntary. It is voluntary when the parties have recourse to decide whether to make use of the processes or not and when the processes are undertaken by a private party who has been mutually agreed upon by the two parties outside the machinery provided for by the government. It is compulsory when the law requires the parties to consent to the use of conciliation or mediation. In most countries conciliation is undertaken by a government conciliation service and sometimes by labour inspectors. In order to inspire confidence in the parties that there is neutrality in the conciliation machinery and thus create legitimacy, some countries have established independent conciliation bodies by statute. These countries include South Africa (the Commission of Conciliation, Mediation and Arbitration), Ireland (the Labour Relations Commission), Denmark (the Conciliation Board), the United Kingdom (the Advisory, Conciliation and Arbitration Service), and the United States of America (the Federal Mediation and Conciliation Service) (ILO, 2001).

Taking the example of South Africa, conciliation is a process whereby a neutral third party not involved in the dispute tries to assist the parties to reach their own settlement of the dispute. The conciliator leads and tries to persuade the parties to settle the dispute themselves. It is usually the first step in the dispute resolution process with the hope that most disputes will be resolved here thereby leaving a small number of disputes to be resolved by arbitration, adjudication or strikes and lock-outs. Often enough the terms conciliation, mediation and non-binding fact finding are used interchangeably because in all three cases settlement of the dispute depends upon the agreement of the parties (Basson et al., 2009).

For Du Toit et al (2000) conciliation means to reconcile or bring together especially opposing sides in an industrial dispute. It is very private, confidential and without prejudice by its own nature. The primary role of a conciliator is to help parties resolve their disputes themselves by devising a process that the conciliator deems appropriate. According to Bosch et al (2004) a mediator or conciliator brings the parties to the table and facilitates discussion between them. The conciliator further plays a very active role in helping the parties to come up with options, consider alternatives and reach a settlement that will address both parties’ needs.

Steadman (2008) compared conciliation and mediation in three countries namely Canada, Indonesia and Trinidad and Tobago. In Canada conciliation and mediation are the primary labour disputes settlement processes available for collective bargaining disputes at federal level. Conciliation is performed by conciliation officers appointed by the Minister of Labour and must be conducted before an industrial action or lockout can be declared to be lawful. It may take up to 60 days and if there is a need to extend the period it is up to the parties to mutually agree to do that. The Minister of Labour can appoint a mediator at any time either at the request of the parties or at his own initiative. Mediation appointments are usually done after the completion of formal conciliation procedures. The ap-
pointment of mediators does not limit the right to strike or lockout. In Indonesia mediation is used to resolve disputes of interest, disputes of right, disputes of termination of contract and disputes involving trade unions in one company. The mediator is appointed by the Minister and his role is to investigate a dispute and conduct a hearing and in the event that he fails to resolve the dispute he has to write down recommendations to the parties as to how to settle the dispute, conciliation on the other hand does not resolve disputes of right. In Trinidad and Tobago Conciliation is the first step for resolving trade disputes. It is compulsory in the sense that all disputes must first be referred to the Ministry of Labour for conciliation before industrial action or adjudication in the industrial court can take place. The Ministry of Labour with its free provision of voluntary conciliation services is the principal third party in the settlement of both individual and collective disputes.

In Australia the legislation requires a number of agencies to employ mediation or conciliation either as a process preceding arbitration or adjudication or as the only process available. Mediation is said to be more suitable for disputes of interests than disputes of rights. It is also recommended for parties which are in a relationship. Mediation claims to be an efficient form of dispute resolution in at least three ways, the first being direct expenditure on preparation, lawyers and experts which is considerably lower than in litigation; secondly mediation is credited for saving time because of its likelihood to go ahead on the appointed day, being able to commence without delays and potentially short duration of the process and the third measure of efficiency relates to the parties’ abilities to take advantage of all the potential value which is at the bargaining table (Boulle & Rycroft, 1997).

Southern Africa benefited immensely from the post-apartheid establishment of the Commission of Conciliation, Mediation and Arbitration (CCMA) which was set up shortly after the new democratic government took over in the mid-1990s. The ILO working with representatives from government, labour and business in South Africa helped to establish the CCMA as an independent institution of settlement. The core feature of this institution is the compulsory conciliation of all disputes whether they are collective or individual or interest or right disputes. The CCMA model has inspired six countries in Southern Africa to build labour dispute settlement institutions of their own. These countries include Botswana, Swaziland, Lesotho, Namibia, Mozambique and Zimbabwe. In each of these countries dispute resolution systems have been designed in such a way that consensus-building processes like negotiation, conciliation and mediation take precedence over more adjudicative ones like arbitration and judicial courts (Steadman, 2008).

5.2 Referral-based Processes

5.2.1 Arbitration

There are two types of arbitration namely compulsory and voluntary arbitration. Voluntary arbitration is the most widely used form of arbitration. It occurs when a dispute settlement system which has been established by legislation makes a provision for the voluntary submission of disputes to a legally binding arbitration. There are several ways of encouraging and promoting this type of arbitration. These include making arbitration awards legally binding to parties, giving it statutory basis and providing ma-
chinery and facilities for arbitration. Compulsory arbitration on the other hand is when the dispute is referred to arbitration for settlement by a way of a binding award, without the consent of all the parties involved. This type of arbitration undermines collective bargaining and reduces the willingness of parties to accept compromises which are vital for effective collective bargaining (ILO, 2001).

Boulle & Rycroft (1997) state that in Australia arbitration involves the submission of a dispute to an arbitrator who resolves it by making a binding decision called an award which can be enforceable through the courts and it is not subject to appeal or review unless the arbitrator has committed a misconduct. Although arbitration shares with mediation greater potential flexibility and greater party control than the formal court system, arbitration has a close association with the court system in terms of the parties’ ability to obtain court orders in order to assist the arbitration and to secure direct court enforcement of arbitral awards.

In South Africa arbitration refers to the appointment of a third party to act as an adjudicator in a dispute and to decide on the terms of settlement. The difference between arbitration and conciliation or mediation is that arbitration does not promote the continuation of collective bargaining. The third party in arbitration actively intervenes and takes up the role of decision-maker. The arbitrator listens carefully and investigates the demands and counter-demands on both sides, and decides on a final settlement. Parties may submit their individual proposals for a settlement to the arbitrator but the final decision lies with the arbitrator and whatever decision is made, it is binding on the parties concerned (Bendix, 2001).

In Canada arbitration takes place in the Ministry of Labour. The minister appoints an adjudicator who is charged with determining individual disputes of right for federal employees including allegations of wrongful dismissal. The decisions of these adjudicators are final and binding and there is no right to appeal or review (Steadman, 2008). In the United States of America arbitration is credited for minimizing pre-hearing processes like discovery, motion practices and the other preliminary issues that extend the time, expense and anxiety of litigation costs. On top of that it provides a lower cost, less complex and more expeditious alternative to traditional litigation for adjudicating employer/employee disputes to a binding result (Hayford, 2000).

a) Voluntary arbitration

This is the step which comes directly after mediation has failed in the dispute resolution chain. It is when the parties after realising that they cannot resolve their dispute on their own, decide that the only way to reach an agreement in their particular dispute is to employ the services of an independent third party. The arbitrator gets his powers from either a written contact (the deed of submission to arbitration) or a statute to consider evidence and arguments of both parties and then make a final binding decision on the matter in dispute (Thompson, 2010).

b) Compulsory arbitration
The costs associated with strikes can be very high to bear, so legislators may decide to restrict such action in critical areas of the public service by introducing compulsory arbitration. This process should be handled with caution because it can take away collective bargaining’s vitality and equity (Thompson, 2010).

According to Venter, Levy, Conradie & Holtzhausen (2009) in the South African context compulsory arbitration may take place either in terms of a collective agreement that mandates arbitration as part of the collective bargaining process, or in terms of section 136 of the Labour Relations Act. The act clearly stipulates that arbitration is compulsory in that if mediation fails parties are compelled to go for arbitration.

5.2.2 Adjudication

This is a procedure whereby the courts are used to resolve any dispute of right channeled through to them. In this process then stringent procedures are highly structured and institutionalised with detailed rules and numerous compliance mechanisms. The parties to the dispute incur the costs and delays normally associated with the judicial procedure. Court adjudications yield final and binding decisions or judgments which are appealable (Majinda, 2007). In reaching his or her decision, the adjudicator is expected to make a principled and reasoned decision based on legal norms. The trial judge’s decisions are binding on the parties and subject to appeal to a higher court. Adjudication is a public process since the judge is a public official and the proceedings are ordinarily open to the public and not confidential (Mnookin, 1998).

Adjudication is a dispute resolution system in which the official courts in a country impose a binding decision on the disputants. It is a formal system regulated by rules of evidence, procedure and directions from the courts. It is an adversarial system which signifies that parties themselves define the dispute and present the evidence and all the court has to do is to decide on the basis of the evidence and arguments presented. One major difference between adjudication and processes of conciliation and mediation relate to what information and evidence can be used and how it can be presented and tested. In adjudication it is regulated by evidential and procedural rules on relevance and reliability unlike what happens in mediation where there are no rules of evidence and there is no scope for cross-examination and procedural point-taking. The traditional model of litigation does not provide for extensive and direct participation of parties in the process instead it allows limited and structured participation by parties with legal interest in the outcome (Boulle & Rycroft, 1997).

5.3 Mixed Processes

5.3.1 Mediation-arbitration/Conciliation-arbitration

In many systems across the world a fused or directly connected two-stage process of mediation and arbitration has begun to emerge across the private and public sectors. This innovation has been backed by practitioners and users of the dispute resolution systems because it saves costs and time but there are those who express professional misgivings for this practice provides for the same per-
son to perform both mediation and arbitration. They contend that mediation needs enough time for the parties to really try to reach an agreement and using the med-arb model may rush this process. They also feel that if a dispute has failed in mediation it needs a fresh, independent third party in arbitration who was not involved in mediation. This model is used in South Africa, as well as in Australia in a number of employment settings both public and private sector. In the state of New South Wales, disputes regarding worker compensation first proceed to conciliation usually in a telephone conference environment but if the matters remain unresolved it goes to arbitration (Thompson, 2010).

5.3.2 Arbitration-Mediation/Conciliation
This is when an arbitrator reaches a decision in arbitration then does not disclose it to the parties but goes to mediation or conciliation in an attempt to persuade them into a voluntary settlement of the own (Bendix, 2001).

6. AVENUES OF A DISPUTE RESOLUTION SYSTEM

6.1 Legislation
Every country has legislative rules for dispute resolution covering individual and collective disputes. In some countries this framework is part of the country’s general labour law while in other countries labour regulation rules are just scattered all over different statutes or regulations which govern labour relations. Still, there are other countries which adopt singular pieces of legislation that specifically deal with dispute resolution. Whichever form they take, dispute resolution laws address common issues which include the status of the parties in a dispute and their corresponding rights and obligations in the duration of the dispute. The rules that apply to public dispute resolution often differ from those which apply to the private sector. This is because governments feel that public employees provide essential services that require more rigorous dispute resolution arrangements so that the health and safety of the whole society is not compromised. However industrial action among public employees in the police, military and emergency services is restricted if not outlawed altogether (ILO, 2007).

6.2 Dispute Resolution Agencies
In almost all the countries in the world labour disputes may be dealt with under the formal court system. However, many countries have developed dedicated agencies for labour dispute resolution. Labour disputes can be handled in public dispute resolution agencies or private agencies.

6.2.1 Public dispute resolution agencies
According to Thompson (2010) if state labour agencies are to operate effective, it is vital that they display certain key procedural and substantive qualities which include:

a) Legitimacy
It is important to have the system within which the agency operates to be the product of the consent of the parties whose interests are at stake, as well as having the substantive standards which are to be applied satisfying public interest norms and standards.
b) **Powers**

Ideally the system must be capable of bringing the full alternative dispute resolution (ADR) processes (mediation, arbitration and others) to the resolution of the issue at hand if it is appropriate.

c) **Scope**

The system need to be able to cover the full range of interests of rightful concern to the parties together with the attendant issues that give rise to conflict in the workplace.

d) **Independence**

It is very important for any organisation which houses facilitators, mediators and arbitrators of any conflict resolution arrangement to be seen to be clearly independent and without any conflicts of interest in relation to the parties or subject-matter. The appointment of the neutrals must be the product of either general or specific consent.

e) **Professionalism**

The users of a dispute resolution system must be confident that the service thrives under an ethically sound governance structure and that the providers of this service are sufficiently experienced and competent people.

f) **Coordination and integration**

A private or sectoral dispute resolution process needs to be compatible with the wider workplace regulation system. The statutory and the private dispute resolution systems should complement each other, and should not in any event undermine one another.

**6.2.2 Private dispute resolution agencies**

These play an important supplementary role in dispute resolution. They have benefits which include privacy, informality, speed and focus on substance rather than form. These agencies are usually cost-effective even if they are not publicly subsidized. Good examples can be found in South Africa, Canada and United States of America (Thompson, 2010). In South Africa there is Tokiso Dispute Settlement (Pty) Ltd which is South Africa's largest and most active private dispute resolution service in the labour field.

7. **FRAMEWORK FOR COMPARISON**

The framework for comparison outlines the elements of a dispute resolution system which include the nature of the dispute, coverage, processes, avenues, and human resources. It also presents efficien-
cy, legitimacy, accessibility, informality and costs as five criteria to evaluate performance of the system. The framework will be used to structure chapters two, three and four.

Table 2: Framework for comparison, elements and performance criteria

<table>
<thead>
<tr>
<th>Elements of the system</th>
<th>Performance of the system</th>
</tr>
</thead>
<tbody>
<tr>
<td>The nature of the dispute</td>
<td>Key Criteria</td>
</tr>
<tr>
<td>Individual and collective; rights and interests</td>
<td>Possible indicators</td>
</tr>
<tr>
<td>Coverage</td>
<td></td>
</tr>
<tr>
<td>Public; private; workers excluded</td>
<td>Stakeholders to the design of the system</td>
</tr>
<tr>
<td>Processes</td>
<td>Independence of the institutions</td>
</tr>
<tr>
<td>Extra-judicial; judicial</td>
<td>Professionalism of the providers</td>
</tr>
<tr>
<td>Avenues of dispute resolution</td>
<td>Clear and consistent standards and decision</td>
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8. CONCLUSION

Labour conflict expressed as complaints grievances, and disputes are inherent in a labour relations system. It must be noted that in any employment relationship there are always going to be conflicts which if not managed well will lead to unrest and possibly strikes and lock-outs which will in turn affect the economy of a country negatively. In the interest of maintaining a good industrial climate in a country there should be promotion of collective bargaining and the establishment of a sound system of prevention and settlement of labour disputes. Knowing the difference between disputes of interest and disputes of rights will enable the parties to know which channels they should follow if they have a dispute.
CHAPTER TWO

THE BOTSWANA LABOUR DISPUTE RESOLUTION SYSTEM

1. INTRODUCTION

Botswana is a landlocked country bordered by South Africa to the south, Namibia to west and the north, Zimbabwe to the east and Zambia to the north. The territory where Botswana is today was colonised by Britain in 1885 and was then called The Bechuanaland Protectorate until the attainment of independence in 1966. It was not a united nation at the time rather it was a collection of tribes living alongside each other under the rule of their respective chiefs. The territory was under the authority of the High Commissioner (HC) of the Colony of the Cape (Ntumy, 1999).

Throughout the colonial period the Batswana were known to be avid farmers who were involved in cattle rearing and subsistence farming. After sometime their involvement in agriculture began to dwindle as more and more healthy, strong young men migrated to work in South African mines as the mining trade was booming at the turn of the century (Ntumy, 1999). According to Mogalakwe (2008) in 1966 when Botswana attained independence Botswana was ranked as one of the poorest countries in the world. The British imperialists never really developed the country because they saw it as a labour reserve for the mining industry in South Africa. There was no physical, social or economic infrastructure except for the single line railway track built by the British South Africa Company in their quest to link the Cape Colony with Southern Rhodesia in 1890.

It was only after the discovery of diamonds in Botswana in the 1970s that the economy began to grow and as a result employment also grew and the need to regulate employment became inevitable. Prior to the discovery of diamonds, employment had been regulated by the Employment Act of 1963 and in 1969 two further pieces of labour legislation had been passed; The Trade Unions Act (24 of 1969) and the Trade Disputes Act (28 of 1969). After the rapid economic growth of the 1970s, the 1982/83 amendments followed which included; the new Employment Act (no.29 of 1982), the Trade Disputes Act (no.19 of 1982) and the new Trade Unions and Employers Organisation Act(1983). The Employment Act of 1982 in section 27 addressed the issue of the settlement of labour disputes by stating that the Department of Labour and Social Security (D.L.S.S) through Labour Officers (LO) had the responsibility to handle all grievances and trade disputes including cases of unfair dismissal (Kupe-Kalonda,2001). According to Takirambudde and Molokomme (1994) ten years later in 1992 new reforms were introduced with the aim of lessening the intervention of the state in the resolution of labour disputes. Through these changes the role of labour officers was reduced to a more mediatory one and the Industrial Court was established as the arbiter of all trade disputes in the country. Further
reforms in 2003/2004 brought changes to the dispute resolution machinery, when a panel of mediators and arbitrators was created and as a result a clear structure for resolution of trade disputes in Botswana was created with the initial step being mediation and if the dispute remains unresolved the parties to the dispute can refer it to arbitration or to the industrial court.

2. BACKGROUND AND HISTORY

2.1 The pre-independence era 1885-1966
The Bechuanaland Protectorate as Botswana was known before independence did not have much regulation in the labour field mainly because the colonial masters did not introduce innovations in the economy and in industrialisation in particular. In fact Botswana was just a labour reserve for the gold mines in the Witwatersrand (Takirambudde & Molokomme, 1994).

According Ntumy (1999) during the period between 1930 and 1966 there were several laws regulating labour to which the Bechuanaland protectorate was party. These included *The African Labour Proclamation (56 of 1941)* which was intended to regulate and control the recruitment of African labour. Wage advances for Africans were restricted to four pounds and desertion from work was penalised by two months imprisonment or ten pounds fine. *The Works and Machinery Proclamation (40 of 1934)* dealt with processes associated with production, manufacturing, mining and issues of safety, health and inspection. *The Women and Boys Underground Work Proclamation (74 of 1936)* prohibited employment of females and boys below 16 years in underground mines. *The Workmen’s Compensation Proclamation (28 of 1936)* was introduced to protect employees in case they died or were injured in the line of duty (a workman was defined as a worker under contract of service or an apprentice). *The Wages Act (20 of 1936)* called for the formation of a Wages Board (Cap 161) and minimum wages were prescribed for some sectors; *The Shop Hours Proclamation (72 of 1941)* prescribed strict business hours for shops. The *Trade Unions and Trade Disputes Proclamation (of 1942)* legalised trade unions and provide limited protection for workers but it neglected to set out an adequate provision for the settlement of trade disputes. Finally, to consolidate and regulate conditions of work the then Legislative Council of Bechuanaland Protectorate came up with *The Employment Law (15 of 1963)* prior to independence. It repealed all the proclamations before it.

2.2 The Post-independence era (1966-1992)
After independence Botswana’s economic difficulties were labeled as chronic, the country was ranked amongst the poorest nations in the world and in some quarters it was even referred to as “a hopeless basket case” (Mogalakwe, 2008). Although most Batswana were involved in agriculture, the cattle in the country were of a very poor grade and agricultural land only yielded a crop every three years due to persistent drought and low, unreliable rainfall (Du Toit, 2006). The political economy at the time was still very much that of a labour reserve country, social services were under-developed and the population was young and rural with very few opportunities of work in the country. It was estimated that at the time the country had only four-fifths of the Gross Domestic Product (GDP) of Lesotho,
three quarters of that of Swaziland, a quarter of that of Malawi and South Africa as the regional power had a GDP 234 times bigger than that of Botswana (Parsons, 1993).

The new post-colonial government of Sir Seretse Khama embarked on a policy of economic development in order to undo the total neglect by the colonial masters as far as development was concerned, be it physical, social or economic. The industrial development policy was firmly based on a highly regulatory and central role for the state. In the sphere of labour relations the government had the overall responsibility to regulate the labour market and to intervene in the resolution of both individual and collective grievances and disputes (Kalula, 1993).

The attainment of independence did not bring about an immediate change in the labour legislation framework of the country. The Trade Unions and Trade Disputes Proclamation of 1942 and the Employment Law (15 of 1963) which were passed in the colonial era were still in place and since there was not much happening in terms of industry it made sense not to change the laws immediately after independence. In time the need to update the labour laws grew and two new pieces of legislation were passed in 1969, the Trade Unions Act (24 of 1969) and the Trade Disputes Act (28 of 1969) were passed (Takirambudde & Molokomme, 1994).

In the 1970’s diamonds were discovered in Botswana and the economy grew in leaps and bounds. Roads, education, health and water provision improved dramatically as did formal employment. By 1980 the World Bank called Botswana the best economic performer in Africa (Du Toit, 2006). The 1980s saw further dramatic growth in the Botswana economy as rapid developments inspired by the diamond mining industry and changes in social and political behaviour began to show. This signaled that Botswana could no longer be referred to as a rural economy based on subsistence agriculture especially since about a third of the labour force was now in formal sector employment (Kalula, 1993). This meant that the Acts passed in 1969 were overtaken by developments in the economy. The government introduced amendments to the existing labour laws in 1982/83. In came the total overhaul of the Employment Act, a comprehensive Trade Dispute Act and Trade Unions and Employers Organisations Act which now included employer organisations (Takirambudde & Molokomme, 1994).

2.2.1 Employment Act of 1982 (No.29)
This Act came into force on 14 December 1984 and it aimed to provide a link between the state and the employee in the form of minimum floor of rights which adhered to a set of labour standards (Kupe-kalonda, 2001). In this Act an employee was defined as a person who has either before or after its commencement entered into a contract of employment for the hire of his labour. This definition excluded public servants unless they belonged to a category of those public officers who were declared by the minister to be employees through a government gazette for the purposes of the Act (Kalula, 1993).

Section 27 of the Act addressed the issue of dispute resolution in that it directed that employees could file a protest with the Department of Labour at the District Labour Office (DLO) nearest to where they
lived. Labour officers were given the power to fine employers if after their investigations they concluded that the dismissal of an employee was unfair (Kupe-Kalonda, 2001). According to Kalula (1993) the Employment Act of 1982 created a Labour Officer’s Court because Labour Officers were granted the powers of a Magistrate grade 1 by being given the responsibility to determine whether the dismissal was fair or unfair. The problem was that this put labour officers who were without any legal training in a position where they were prosecutors, judges and the jury. Labour officers became the only officers outside the judiciary to have such powers. This was problematic because their qualifications did not match the responsibilities they had been given. For one to be employed as a labour officer tertiary education was not a prerequisite.

2.2.2 The Trade Disputes Act of 1982 (No.19)
This Act came into effect in 1983 and it introduced elaborate rules relating to the control of trade disputes. The Act established a quasi-judicial mechanism in the form of the Permanent Arbitrator’s office which was established to resolve all collective trade disputes, but it was never functional as it grappled with the lack of adequate resources, supporting mechanism and legitimacy (Kupe-Kalonda, 2001). According to the Act industrial action was legal but its legality was dependant on the proper application of the elaborate rules prescribed by the Act. Strikes, in the form of secondary strikes not strictly related to the employee–employer relationship of the parties involved were outlawed. Also outlawed were the solidarity and general strikes and some restrictions were imposed on some forms of picketing (Kalula, 1993).

2.2.3 Trade Unions and Employers Organisations Act 1983 (No.23)
This Act provided the means by which government could regulate trade unions activity as well as setting specific rules by which trade unions and employer organisations should abide. These rules mostly related to the formation and registration of trade unions. The Act also placed some restrictions on union membership, office-holding, external affiliation and receiving donations from beyond Botswana’s borders (Kupe-Kalonda, 2001). According to Takirambudde and Molokomme (1994) this Act brought a tight legal structure which allowed intrusive government control. For example section 30 empowered the Minister to attend every meeting of the body in which the ultimate authority of a registered trade union or federation was based and of the federation’s executive committee. The other example is in section 51 which empowered the Minister to appoint the Minister’s commissioner to assume the management of a registered trade union or federation of trade unions if he was of the opinion that the affairs of the union were being conducted without any regard to sound financial management.

2.3 The 1992 reforms
In 1992 parliament adopted legislation which radically changed the industrial relations framework in Botswana. The most significant changes were in the dispute resolution mechanism. These reforms introduced an independent Industrial Court system which replaced the Department of Labour and Social Security as the arbiter of both individual disputes and grievances (as per Employment Act) and also dealt with collective trade disputes (in the Trade Disputes Act) which were previously referred to the government appointed arbitrators (Kalula, 1993).
In the Employment Act of 1982 individual disputes and grievances, most of which were dismissal cases, were decided by labour officers who were given judicial powers to determine these cases. Now after the amendments made to the Employment Act the officers retained their power to hear cases but the role of labour officers was reduced to a mediatory one. If the dispute was not resolved at mediation either party could refer the dispute to the Industrial Court (Kalula, 1993).

### 2.3.1 Employment (Amendment) Act of 1992

Apart from the establishment of the Industrial Court and the reduction of powers of labour officers, the Act addressed several unsatisfactory features of the 1982 Employment Act such as inequality which placed restrictions on women when it came to certain types of jobs and the fact that the Act had failed to provide for the enforcement of the obligations of the employer (Kupe-Kalonda, 2001). The amendments primarily affected five aspects of the Act namely; the right to work and job security, sexist provisions, aspects of work obligations, remedies and jurisdiction of labour department and lastly changes at work with reference to severance benefits (Takirambudde & Molokomme, 1994).

### 2.3.2 Trade Disputes (Amendment) Act of 1992

The amendment of the Trade Disputes Act provided for the consolidation of all procedures leading to a situation whereby all disputes arising from employment were subject to the governance of the Trade Disputes Act. Section 5 of the Act directed that the initial reporting of a grievance or an unfair dismissal should be made at the nearest labour office within the prescribed 14 days and if the settlement of the dispute was not achieved the matter would be referred to the Commissioner of Labour who had 21 days to settle the matter. If the dispute was still unresolved the Commissioner was required to issue a section 7 certificate which allowed either party or both parties to refer the matter to the Industrial Court (Kupe-Kalonda, 2001).

### 2.3.3 Trade Unions and Employers Organisations (Amendment) Act of 1992

The 1992 amendments to this Act sought to relax the intrusive and restrictive provisions in the principal legislation. These relaxations related to limitations on membership of trade unions, restrictions on office-holding and the provision for a minister’s representatives on the relevant committees of a trade union or federation. A new provision was inserted which called on the minister to appoint an investigator who could investigate the membership of a trade union or maybe even carry out that investigation himself (Takirambudde & Molokomme, 1994).

### 2.3.4 Establishment of the Industrial Court

The 1992 labour reforms called for the establishment of an Industrial Court. This represented a landmark moment in the country’s labour relations history since no specialised body designed to enforce the settlement of labour disputes had existed before (Kupe-Kalonda, 2001). Kalula (1993) stated that the court was to be headed by a judge who enjoyed the same power and privileges as a judge in the high court of Botswana. The court had two assessors, selected from the panels nominated by trade union movements and employers’ organisations. The court’s jurisdiction was to;
• Hear and determine all labour disputes properly referred to it.

• Refer any matter to an expert, and at its discretion, accept the report of an expert as evidence.

• Enjoin any employer or employee or any trade union or employer organisation from taking or continuing industrial action.

• Do whatever was necessary for the expeditious and just hearing and determination of any trade dispute before it.

3. THE PRESENT STATUTORY SYSTEM FOR DISPUTE RESOLUTION

3.1 Amendments of 2003/2004

Further changes were made to the major Acts in 2003/04.

In the Employement Act (1992) section 92(A) was inserted after section 92 and it addresses the situation whereby when the employer is insolvent, an employee’s claims arising from his employment should be paid out of the assets of the insolvent employer before non-privileged creditors are paid their shares. This protection extends to: a) employee claiming up to three months in wages prior to the insolvency)severance benefits and c) other terminal benefits which the employee is entitled to, c) the employee's claim of work performed on holidays within a period of 24 months before insolvency (Employment Act, 2004).

The Trade Disputes Act of 1992 was amended to provide for the general resolution of trade disputes including the resolution of disputes in essential services. The other duty is to control and regulate industrial action and related matters. In section 3 of the Act the minister appoints a panel of mediators and arbitrators with the Commissioner of Labour as their chairman. Section 7 sets out the procedure of reporting a trade dispute; section 8 outlines the process of mediation while section 9 outlines that of arbitration (Trade Dispute Act, 2004).

The Trade Unions and Employers Organisation Act received many amendments with one of the most important being that the definition of an ‘employee’ was extended to include public officers. This meant that for the first time all public officers were allowed to join trade unions except for the disciplined forces (the police and the army). Other changes included providing recognition of the union in the workplaces where the union represents a third of the employer’s employees, providing recognition at the industry if the members of the trade union are at least a third of all employees in an industry and the provision of relevant information by an employer to a recognised trade union in order to help collective bargaining between the two parties (Trade Unions and Employer’s Act, 2003).
3.2 Establishment of a panel of mediators and arbitrators
Apart from providing resolution of disputes in essential services Section 3 of the amended Trade Disputes Act of 2004 calls for the establishment of a panel of mediators and arbitrators with the Commissioner of Labour as the chairman of this panel. The minister may appoint mediators and arbitrators with expertise in law or labour relations or other specialist areas of expertise to the panel. The panel of mediators and arbitrators shall be subject only to the control and direction of the Commissioner and anyone who obstructs them in the performance of their duties commits an offence and is liable to a fine of 1000.00 (pulas) or to imprisonment for six months or both.

This panel includes part-time mediators, full-time mediators, part-time arbitrators and full-time arbitrators. Full-time mediators are mostly university graduates with qualifications in human resources management, labour relations or social sciences. Part-time mediators are people with qualifications and experience in labour relations. Most of them have their own labour relations consultancy companies while some hold key labour relations positions in the private sector. There are only six full-time arbitrators but they rarely do arbitrate because they already have other duties which they do full-time. They include the Commissioner and senior management staff in the Department of Labour and Social Security. They hold arbitration qualifications from the University of Namibia. Like part-mediators, part-time arbitrators are people with expertise in the labour relations field, these include; labour lawyers, human resource managers from companies in the private sector and labour consultants (DLSS Annual Report, 2006).

3.3 Referral of disputes to the Commissioner
Section 7 of Trade Disputes Act (2004) states that a party to a dispute may refer the dispute to the Commissioner or a labour officer designated by the Commissioner and if the dispute concerns termination of employment it should be referred within 30 days of the date of such termination. A party referring the dispute shall satisfy the commissioner, in writing, that a copy of the referral has been served on the other party to the dispute unless the commissioner is satisfied that it was not possible to serve the referral on the other party. An employee who cannot read or write may refer the dispute orally and the Commissioner of Labour or the Labour officer designated by the commissioner shall complete the prescribed form on the employee’s behalf. Sub-section 5 continues to state that upon receiving the matter the Commissioner or the designated labour officer shall assign a mediator from the panel to attempt to resolve this dispute through mediation, secondly determine the venue, date and time of the first mediation meeting and lastly inform the parties to the dispute in writing about the details mentioned above.

3.4 The Mediation Process
A mediator shall attempt to mediate a dispute referred to him or her within the 30 days of the dispute being received by the Commissioner or a Labour Officer designated in terms of section 7. This period may be extended by an agreement between the parties to the dispute or a collective agreement. If the mediator fails to resolve the dispute in the stipulated time frame, the parties to the dispute may refer it
to arbitration or the Industrial Court. Sub-section 5 of Section 8 of the Trade Disputes Act (2004) directs that a mediator in dealing with a dispute assigned to him may:

a) Determine any question concerning-
   - whether a dispute has been referred in terms of Section 7;
   - the date on which the dispute was referred; or
   - the jurisdiction of the mediator to mediate

b) Allow for any application for condonation of late referral, if the applicant shows good cause for such late referral

c) Dismiss a referral if the referring party fails to come to the mediation meeting

d) If satisfied that a referral has been served but the party who has been served does not appear for mediation the mediator gives a default award

e) Reverse on good cause-
   - any dismissal of a referral, or
   - default award

f) Recommend a settlement

g) Make an advisory award if –
   - the parties request it
   - it is in the interest of settlements to do so

A decision made by the mediator in terms of the Trade Disputes Act (2004) section (5) (a) (i) and (ii) shall be final. A party to the dispute may appeal to the Industrial Court in respect of decisions made pursuant to sub-sections (5) (a) (iii), (b) and (e). Any information divulged during the mediation process shall be confidential unless the party divulging the information states otherwise. A mediator shall not be a compellable witness in any legal proceedings in respect of anything said or information divulged during the mediation process relating to the dispute being mediated. A mediator shall issue a certificate of failure to settle if the dispute is not settled within the time period contemplated in sub-section (1) and (2) but if there are no prospects of settlement at a certain stage of the dispute a mediator may issue a failure to settle certificate before the expiry of 30 days as contemplated by subsections (1) and (2).
3.5 The Process of Arbitration

The Commissioner shall refer a trade dispute referred in terms of section 7 to arbitration if the parties to the dispute agree to have the dispute settled by arbitration. If the parties to the dispute are engaged in essential services and the dispute concerns a dispute of interest or if the Industrial Court has instructed the Commissioner to refer the dispute to arbitration. The Commissioner after discussion with the parties to the dispute assigns an arbitrator from the panel of arbitrators to arbitrate the dispute, determine the venue, date and the time of the arbitration hearing. Regardless of whether the dispute has been mediated, if the arbitrator is of the view that there are prospects for settlement, mediation of the dispute may commence before the arbitration hearing. An arbitrator may deal with the dispute in whichever manner he considers appropriate but must make sure that the substantial merits of the dispute are dealt with the minimum of legal formalities (Trade Disputes Act, 2004).

The arbitrator is also given 30 days in which to attempt to settle the dispute. Subject to the discretion of the arbitrator as to the appropriate form of proceedings, a party to the dispute may give evidence, call a witness, question the evidence of any other party and address concluding arguments. Sections 9 (8) states that the arbitrator shall have the power to:

a) give such directions or do such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before him

b) make an award for a specific period of time, or such other award he considers appropriate; or

c) vary or rescind the award if –

- it was erroneously made in the absence of any party affected by the award

- it is ambitious or contains an error or omission, but only to the extent of that ambiguity or error or omission, or

- it was made as a result of a mistake common to the parties to the proceedings

Upon conclusion of an arbitration hearing, the arbitrator shall make an award and shall within 30 days of the hearing, give reasons for the award (Trade Disputes Act, 2004).

3.5 The Industrial Court

The Industrial court was established as a court of law and equity, with all the powers and rights set out in the Trade Disputes Act or any other written law. The functions of this court include settling trade disputes and further, securing and maintaining good industrial relations in Botswana. The court may consist of one or more divisions each headed by an Industrial Court judge. When it comes to the appointment of judges the President of Botswana in accordance with the Section 96(3) of the Constitution shall appoint Industrial Court judges from among persons who are in possession of qualifications to be judges of the High Court. In appointing the judges the President shall, designate one of them as President of the Industrial Court with other judges ranking according to their dates of appointment (Trade Disputes Act, 2004).
An Industrial Court judge shall vacate office after attaining the age of 70 years but the President of Botswana has the power to let a judge perform their duties beyond the retirement age of 70 for such a period as may be necessary to enable the judge to deliver judgment. Judges can only be removed from office for inability to perform the functions of their office, whether arising from infirmity of body or mind or from any other cause or if the judge has committed a serious misconduct. Other than judges there are two nominated court assessors who sit with the judges during court hearings. One of the two nominated members shall be selected by the Judge from among persons nominated by the organisation representing employees or trade unions in Botswana while the other one shall be selected from among persons nominated from the organisation representing employers in Botswana (Trade Disputes Act, 2004).

Section 18(1) of Trade Disputes Act (2004) states that the Industrial Court or any other division of the court shall have exclusive jurisdiction in every matter properly before it under this Act and such jurisdiction shall include the power to:

a) To hear and determine all trade disputes except disputes of interest

b) To interdict any unlawful industrial action

c) To hear appeals and reviews from decisions of mediators and arbitrators

d) To direct the Commissioner of Labour to assign a mediator to mediate a dispute, where in the opinion of the court, the matter has not been properly mediated or requires further mediation

e) To direct the commissioner to refer a dispute that is before the Court, to arbitration

f) To refer any matter to an expert, and at the court's discretion, to accept the expert's report as evidence in the proceedings; and

g) Generally to give such directions and do such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before it.

The presiding judge shall decide any matter of law arising for decision at a sitting of the court and any question as to whether a matter for decision is a matter of law or a matter of fact but despite this the decision of the majority of persons representing the court shall be the decision of the court but if there is no majority the decision of the judge shall prevail. There shall be an appeal to the Court of Appeal against decisions of the industrial court (Trade Disputes Act, 2004).

3.6 Physical distribution of offices
The Dispute Resolution Unit which is responsible for both mediation and arbitration is located at the headquarters of the Ministry of Labour and Home Affairs. The unit is headed by a Principal Industrial
Relations Officer (PIRO 1). Mediation is conducted in District Labour Offices around the country. These offices which are about 25 in total are located in cities, towns and big villages in every district in the country. Part-time mediation which is more common in Gaborone is also done in the District Labour Offices. Full-time arbitration is conducted by the Commissioner of Labour and other members of senior management in the Department of Labour and Social Security. Part-time arbitration takes place in Regional District Offices throughout the country except in Gaborone where it takes place at Gaborone District Labour office situated in Block 8, Gaborone. It is important to note that this office is the only one which is concerned only with dispute resolution, other district labour offices and regional labour offices deal with other labour issues like inspection, permits and compensation. The Industrial Court of Botswana is located in Gaborone and from time to time the judges of the court go to Maun in the Northern part of the country and Francistown in the north-east of the country to hold mobile courts there (DLSS, 2006).

4. REVIEW OF THE PERFORMANCE OF THE SYSTEM

4.1 Presentation of findings from interviews (Interview guide attached as Appendix 1)

4.1.1 The current performance of the system
Most respondents seem to agree that the system is not doing too well; it is average according to most of the respondents. The system that is in place is working but it could be improved to work more effectively. To improve the current system most respondents believe that more mediators and arbitrators should be employed, public awareness of the system and labour legislation should be improved and that there should be thorough training of mediators and arbitrators. Respondents who are mediators believe that if they could be given powers to take punitive actions when parties employers appear not to take them seriously (as often happens especially with employers) and this would make the system to work better.

4.1.2 Delays in the system
According to the respondents there are several reasons which contribute to the delays in the effective and efficient resolution of disputes. The most common is lack of manpower in the system as mediators and arbitrators are overwhelmed by the number of disputes. The other reasons which were raised by mediators who responded to the questions in the interview were that employers extend the time it takes for the mediation hearing because they usually come unprepared, without relevant documents which may assist in the case and sometimes the employer representatives do not have the mandate to make decisions for example whether or not to pay an employee during mediation. This forces the mediators to reschedule a case so that the employer can bring the relevant documentation or given powers to make decision in mediation. Other employers refuse to come for mediation: then when the mediator proceeds with a default award, they appeal and another hearing has to be scheduled. In order to solve these problems that cause delays most respondents agreed that the best move forward would be to employ more arbitrators and mediators. Further, the mediators believe that, they should be given powers to penalise employers who deliberately delay the mediation process.
4.1.3 The Role of Government, Trade Unions and Employers
All the respondents agreed that for the dispute resolution system to be effective government, trade unions and employers should work together. The government has the role of providing the institutions, resources for the system as well as carrying out public education to sensitise people about the system. Employers on the other hand are charged with the responsibility of helping government by educating their employees about the system. Trade unions are also expected to educate their members so that they understand how the system works.

4.1.4 Ways to improve the internal dispute resolution system
A number of cases which could have been resolved at company level (internal dispute resolution) have been allowed to go to the external dispute resolution (mediation, arbitration and Industrial Court). When asked about factors which may improve the effectiveness of the dispute resolution system most respondents believed that the management of labour relations should be improved in most companies in Botswana. Labour relations are still a new field in Botswana so most of the companies have Human Resource practitioners who may not have any or little appreciation for labour relations. Another factor which is important is that employers should open communication channels with their employees because usually disputes arise because employers do not speak with their employees. Employers should also educate their employees during orientation on general information about their employment. For example, how many leave days they are entitled, how to claim severance benefits, which public holidays are paid and which are unpaid. Ideally there should be a staff handbook which clarifies all this and every employee should own a copy or at the minimum have access to a copy.

4.1.5 Independence of the dispute resolution system
Almost all respondents agreed that the labour, resolution system in Botswana should be independent or have some form of autonomy from government. A number reasons were put forward for this suggestion. Firstly, ever since the law was changed to include public sector workers in the definition of an employee they are entitled to use the system. This may pose a hierarchy challenge when for example a permanent secretary of a ministry represents that particular ministry (as the employer) in a mediation hearing which is chaired by a mediator who in the government hierarchy is a junior. The permanent secretary may apply undue pressure on the mediator and this may erode impartiality (and thus legitimacy) which is one of the pillars of the mediation process. The second reason suggested by respondents is that Ministry of Labour and Home affairs is too big and has so many departments that when it comes to the allocation of funds all these departments compete for whatever funds the ministry has been given and there is not always enough for the Department of Labour and Social Security.

4.1.6 The role and qualifications of a mediator
All the respondents agreed that the role of a mediator included bringing the parties together and mediating their dispute and further educating and advising them on the way forward regarding the dispute they have reported. As far as qualifications of a mediator were concerned almost all except for two respondents agreed that a person who has a degree preferably in Labour Relations or Human
Resource Management is qualified to become a mediator. Others added that a legal background or specific training in mediation can help. There were two respondents who believed that having a degree is not really important, a diploma or even somebody who has not had tertiary education can be a good mediator. Other respondents were of the view that personal qualities like good people management skills, good negotiation skills, objectivity and being a good listener can be very helpful when one is a mediator.

4.1.7 Legal representation during mediation
Most respondents were in favour of the current system where legal representation is only allowed in arbitration and the Industrial Court. The reason why lawyers should not be allowed in mediation according to most respondents is that they are too technical and this can lead to many ordinary workers not using the system as they would fear that they would come up against lawyers. Even in other countries legal representation is not allowed in mediation as it should be as informal as possible.

4.1.8 Routing of disputes after mediation
Many respondents felt that there is nothing wrong with the current system whereby when a dispute does not get resolved in mediation; parties can either choose to take it to arbitration or the Industrial Court. However two respondents suggested that maybe the system should be changed to ensure that when a dispute is registered the route it should go if it is not resolved at mediation, is prescribed.

Secondly, there was an issue of the Industrial Court having a high volume of cases and in order to improve the speed of resolution most respondents called for the employment of more judges. Others proposed that the Industrial Court have another branch in the northern part of the country, while some were more in favour of a comprehensive case management system in the Industrial Court. Those respondents who are mediators proposed that if mediators were given more powers minor disputes like those which involve wages, leave, severance benefits and overtime could be resolved in mediation. There were those respondents who felt that by giving more powers to mediators they would no longer be performing the mediation function, but rather they would be taking binding decision akin to arbitration.

Thirdly, there was a question asked that if more cases were routed to arbitration (rather than adjudication) what changes would need to be made? Most interviewees responded by suggesting that more full-time arbitrators should be employed because currently there are a few part-time arbitrators employed and this has led to a backlog of cases in arbitration. Mr Leero who is currently a part-time arbitrator suggested that the pay rates for arbitration could be raised in order to make arbitration more attractive to experienced labour relations practitioners.

4.1.9 Lessons which can be learnt from other dispute resolution systems
There was a general agreement among respondents that in order to improve the Botswana dispute resolution systems benchmarking exercises should be carried out against countries with better dispute resolution systems. Countries that were suggested were South Africa, Zimbabwe, Lesotho, Swaziland, United Kingdom and Australia. Lessons which could be learnt included: the independence of
the system by benchmarking against South Africa’s CCMA model, introduction of mixed processes like med-arbitration found in South Africa and Lesotho, how mediators and arbitrators could be ranked and remunerated fairly and even the case management which is practiced in Swaziland and South Africa.

4.1.10 Additional words
After the interview the researcher gave the respondents a chance just to comment generally about the study and labour dispute resolution in the country. While some declined to comment others were thankful that they were given an opportunity to take part in the study. There were others who were happy that the researcher has decided to research in this field because if more research and training could be done it could help to shape policy.

4.2 Some information from the statistics

4.2.1 The Frequency and incidence of dispute referral
The statistics kept at the Department of Labour and Social Security (DLSS) show an increase of disputes which are referred to District Labour Offices around the country. In 2009 there were 12241 cases referred and a year later they increased by 1728 to 13969 (DLSS, 2011).

![Figure 2: The number of referrals to DLSS 2009 and 2010 (DLSS, 2011)](image)

Referrals to the DLSS vary from month to month, there are months in a year which receive less referrals than others. Figure 2 below show variation of referral by month for 2009 and 2010.
4.2.2 The route of referred cases and processes

a) Public information and Awareness

The DLSS through its Inspection unit visits malls to disseminate public information about what the department does and how to register a trade dispute with the department. This practice has been popular in major urban areas like Gaborone, Francistown and Selibe-Phikwe. In 2009 a national call centre was launched in the Ministry of Labour and Home Affairs, although the questions being asked in the call centre were not specifically about labour issues, it still helped a lot of people who had enquiries about dispute resolution. In all the District Labour Offices there are landline phones and people can phone the offices and ask about how the dispute resolution system works (DLSS office information, 2011).

b) Condonation

In cases of unfair dismissal when a dismissed employee lodges a case outside the statutory 30-day period for date of dismissal, the employee concerned should apply for condonation of late referral. Condonation is only granted if the party asking for it provides valid reasons why they should be given it. There are no records for the number of condonations in the DLSS.

c) Attendance at Mediation and Default Awards

There have been a number of non-attendances at processes and this is a concern that has been noted for a number of years now. A default award is reversible if the responding party presents valid reasons why they did not attend the hearing in the first place. There are several reasons attributed to non-attendance of cases, one of the main reasons is poor notification of the respondent which can be blamed on the applicant because contact details are taken from the application form which has
been completed by the applicant. Another reason may be by the respondents’ regard and a tendency to take advantage of the system.

d) Categories of referral
The number of unfair dismissal cases rose in 2010 while those of failure to pay wages, notice, leave and others were constant in the years 2009 and 2010.

Figure 4: Categories of Referrals for 2009 and 2010 (DLSS, 2011)

4.2.4 Outcome of disputes
After mediation a case is either settled or referred to the Industrial Court or to arbitration. In the year 2010 6518 cases were settled, 186 went to arbitration while 3724 went to the Industrial Court and 2849 were withdrawn compared to 2009 when 6542 were settled, 2235 went to Industrial court, 585 went to arbitration and 322 were withdrawn.
5. CONCLUSION

It was in the early 1980s when comprehensive labour legislation was promulgated in Botswana and the dispute resolution system put in place. Labour officers had the powers to charge employers if after their investigations they concluded that the indeed the employer had unfairly dismissed an employee. These powers were however curtailed after the 1992 reforms which saw the major Acts being amended. In line with labour trends at that time the Industrial Court was established to assist government in the settlement of labour disputes. After the ratification of several ILO conventions in 1997 and the subsequent amendment of the major Acts in 2003/2004 the dispute resolution system was further improved when the Minister of Labour and Home Affairs was empowered to appoint a panel of mediators and arbitrators who possessed degree qualifications (unlike labour officers who did not need a tertiary qualification) to become mediators. In terms of the coverage of types of employee prior to the 2003/2004 amendments only private sector workers were covered, public sector employees were only covered after the 2003/2004 amendments when they were now included in the definition of an ‘employee’. Individual and collective disputes were covered by Botswana labour dispute resolution since the promulgation of the 1982/1983 Acts. Disputes of interest and rights dispute are routed to mediation and arbitration. However, only disputes of rights are entertained by the Industrial Court. A dispute is only referred to Industrial Court if it is a rights dispute and it remains unresolved after mediation.
CHAPTER THREE

THE SOUTH AFRICAN DISPUTE RESOLUTION SYSTEM

1. INTRODUCTION

The purpose of this chapter is to narrate the evolution of the South African labour dispute resolution system, describe the current labour dispute resolution framework and lastly to review the performance of the system.

2. EVOLUTION OF THE SOUTH AFRICA LABOUR DISPUTE RESOLUTION SYSTEM

The evolution of the South Africa labour dispute resolution can be divided into three eras. The first era is between 1920 and 1948 and covers the 1920 formation of Public Service Association (PSA) for white workers in the public sector and the Public Sector Act and the passing of Industrial Conciliation Act No. 11 of 1924 for the private sector. The second era covers the 1948 change brought by the National Party government which included the Public Service Joint Advisory Council in the Public sector and in the Private sector there was the Industrial Conciliation Act No.28 of 1956 for white workers as well as the Black Labour Relations Regulation Act No. 48 of 1953 for Africans. The third era came in the late 1970s after the Wiehahn Commission recommendations which resulted in the collapse of the racially dual labour system so that all Private sector employees were covered by the same labour legislation. As for the Public sector the changes that happened in 1979 did not affect them and it was only in 1993 that the Public Service Labour Relations Act was introduced.

2.1 Dispute Settlement between 1920 and 1948

After years of an inadequate statutory labour legislative framework, the 1922 Rand Revolt was the deciding factor that indicated to the South African government that it was time that a comprehensive piece of labour legislation was urgently needed. The revolt by white mineworkers was sparked by white workers protesting against a move by the mine owners to lay-off ten percent of the white workforce. The white workers protested because they feared that African workers were going to replace them. When the strike ended after 70 days, over 200 people were dead and around 534 were seriously injured (Venter, Levy, Conradie & Holtzhausen, 2009).

This proved to be a critical point in the South Africa's pattern of labour relations because as a result of this the government of South Africa promulgated the Industrial Conciliation Act No.11 of 1924 which introduced dispute settlement system for the first time in the South African labour history. From the very beginning this machinery was based on the notion of voluntarism. That is the state
should only provide the framework for the settlement of disputes and the parties to the labour relationship would not be forced but encouraged to use the officially established machinery (Bendix, 2010).

2.1.1 Private Sector (White workers)
This category of employees benefited immensely from the Industrial Conciliation Act 1924 because it called for the establishment of Industrial Councils for collective bargaining and to settle disputes between parties. These councils were envisioned to be self-governing within the framework provided by the government. They were registered when the Minister of Labour consider parties to sufficiently representative of the employers and employees in a certain industry. Non-compliance to Industrial Council agreements which had been made binding constituted a criminal offence. In the case where there was no Industrial Council the Act provided for the creation of an ad hoc conciliation board for both bargaining and dispute settlement between trade unions (employees) or employers’ organisations (employers). Conciliation board agreements were also legally binding and carried the same penalties for non-compliance as Industrial Council agreements. In this Act the emphasis was more on collective-interest disputes and individual-right disputes were not dealt with by this Act which meant that they were covered in the normal civil courts. This Act further limited the right to strike as strikes and lock-outs were illegal during the currency of any agreement between the two parties (employees and employers) that forbade such action. (Du Toit, Woolfrey, Murphy, Godfrey, Bosch, Christie, 2006).

Although Industrial Councils and Conciliation Boards primarily performed conciliation, they could also perform arbitration to a limited extent. According to the Industrial Conciliation Act 1924 section 7 provided for a majority of employer representatives and majority of employee representatives in an Industrial Council or Conciliation Board to agree to the appointment of an arbitrator to arbitrate a dispute of right. Compulsory arbitration of both disputes of right and interest was only used in essential services where strikes were prohibited. Arbitration in non-essential services remained voluntary hence many disputes of right were referred to the civil courts for adjudication on the basis of law of contract (Majinda, 2007).

2.1.2 Private Sector (Black workers)
The Industrial Conciliation Act provided freedom of association rights in the form of registration of employers’ organisation and trade unions to all employees except pass-bearing African workers. This basically meant that African males were excluded because African women, Indians and Coloureds were not required to carry passes (Du Toit, et al., 2006). The Industrial Conciliation Amendment Act No.36 of 1937 provided for the extension of Industrial Council agreements to cover African employees even though they were still not allowed to be represented in Industrial Councils and Conciliation Boards. This Act also allowed indirect representation of African employees’ interests in the Industrial Councils by officials of the Department of Labour (Majinda, 2007).


2.1.3 Public Sector workers
The Public Service Commission (PSC) administered all aspects of the employment relationship in the Public sector from 1912. In 1920 the Public Servants Association was established for white public servants after the Public Service Act of 1920 provided for the recognition of staff associations. Recognition was dependant on majority representation of the permanent employees in the various divisions of the public service (Adler, 2000).

2.2 Dispute Settlement between 1948 and 1979
In 1948 the National Party came to power largely because conservative white farmers, workers and employers feared the perceived growth in the power of African labour and the emergence of socialism. The new government crafted labour legislations to support the ideology of apartheid and appointed the Botha Commission to investigate the existing labour legislation. A result of Botha's investigations the Native Labour Settlement of Disputes Act No. 48 1953 was promulgated to prevent and settle disputes affecting native employees. Subsequently, came the Industrial Conciliation Act No.28 of 1956 which repealed the Industrial Conciliation Act No.36 of 1937 for white workers. As for public workers the Public Service Joint Advisory Council was established in the 1960s (Nel, Swanepoel, Kirsten, Erasmus &Tsabadi, 2005).

2.2.1 Private Sector (White, Coloureds and Indians)
Recommendations by the Botha Commission to establish a coordinating body were ignored and the framework of the 1924 legislation remain largely intact. Some of the changes brought by the Industrial Conciliation Act No.28 of 1956 Act were to further entrench racial divisions by bringing in tighter controls on the registration of mixed trade unions and the introduction of statutory job reservation. As far as dispute resolution was concerned the Minister could appoint a permanent Industrial Tribunal with the powers to hear appeals against decisions of the registrar, undertake arbitration voluntarily requested by the parties to Industrial Councils or Conciliation Boards as well as compulsory arbitrations for essential services (Du Toit, et al., 2006).

2.2.2 Private (African workers)
In their bid to bring labour legislation in line with their apartheid policy the National Party government passed the Native Laws Amendment Act 54 of 1952 to control African women, who had “escaped” exclusion from the definition of employee in the Industrial Conciliation Act. The loophole which had allowed African women the status of employees was thereby closed (Du Toit, et al., 2006).The Black Labour Relations Regulation Act No.48 of 1953 applied to all blacks (also known as Bantu) who were employed in every trade except those domestic workers in private households, those employed in farming operations and those who were working for government (Nel, et al., 2005). According to this statute if a Native labour officer believe that a dispute in the area in which he was appointed existed, he had to report that particular dispute to the regional committee concerned and to the inspector defined by the regulation. The Native labour officer with the assistance of the regional committee and in collaboration with the said inspector, had to attempt to effect a settlement of the labour dispute failing which the matter could then be referred to the Central Native Labour Board which in collaboration with
such officer and such inspector had to endeavour to effect a settlement to the dispute (Schaeffer, 1957).

The government reacted speedily to the 1973 strike wave. In the same year it passed the Black Labour Relations Regulation Amendment Act No.70 of 1973 which provided for the creation of liaison committees at plant level as alternatives to the already existing workers’ committees. These liaison committees were supposed to be representative of both employers and employees. The idea behind these committees was to improve communications between black employees and employers. This Act gave the black employees limited freedom to strike because under this Act a dispute resolution system similar to the one in the Industrial Conciliation Act of 1956 existed. The process was that disputes arising from employers and black employees were first channelled to the Black Labour officer responsible for that area, after that it went to the regional Labour Committee, from there to the Divisional Inspector and then the Black Labour Board. Only after all these channels were exhausted could workers engage in legal industrial action (Bendix, 2010).

In 1977, the government made a last attempt to promote the committee system as alternative to unionism by promulgating the Black Labour Relations Regulation Amendment Act No.84 of 1977. This Act made it possible for more blacks to occupy jobs which were previously filled only by whites. Contrary to the desires of this Act, black trade unionism continued to grow and it appeared as if this Act did not achieve its intended purpose (Nel, et al., 2005).

### 2.2.3 Public Sector Workers
The Nationalist government established a Joint Public Service Advisory Council for white public sector workers the in the late 1960s. This structure was representative of all categories of white public servants and its primary role was to advise the Minister of Public Service on human resource matters. The Associations were allowed to make written submissions to this council.

### 2.3 Dispute settlement in South Africa between 1979 and 1994
The early 1970s was a period of many strikes carried out by black workers especially in the Durban area. This together with Soweto uprisings of 1976 and the flight of capital prompted the apartheid regime in South Africa to appoint the Wiehahn Commission which was tasked to investigate labour legislation as it pertained to African black workers (Nel, et al., 2005).

It must be noted that before 1979 the dispute resolution in South Africa was marred by problems. The statutory procedures were considered to be ineffective, lengthy and full of technicalities and instead of reducing disputes they created additional disputes leading to an increase in industrial action. According to a research carried out at that time the South African system of the adjudication of unfair dismissals was among one of the lengthiest and most expensive in the world and did not deliver meaningful results (Smith, 2008).
2.3.1 Private Sector employees

Following the recommendations of the Wiehahn commission important changes were made, chief among these recommendation was that African workers should be included in the definition of what constituted an employee. This meant that now for the first time in the South African labour history black workers were extended freedom of association rights (Venter, et al., 2009).

The introduction of the Industrial Court provided a viable option to industrial action because before 1979 if a dispute was not resolved the parties either engaged in industrial action or let the matter rest. It is true that they may have elected to go the arbitration route but although the arbitrator might have imposed settlement, his findings or even the findings of an Industrial Tribunal (which was replaced by Industrial Court) had little impact on the general behaviour of the parties concerned. Now after 1979, the wide definition of unfair labour practice provided a channel in which parties could refer all disputes which might otherwise have ended up in a strike to the Industrial Court using the unfair labour practice provision (Bendix, 2010). The Industrial Court can be described as having been more primarily suited to resolve interest disputes which were referred to Industrial Councils or Conciliation Boards for conciliation and in the event they were not resolved employees could strike and employers could lock-out employees. As for right disputes they were referred to ordinary courts to be decided on the basis of the law of contract (Smith, 2008).

After the statutory collective bargaining and dispute resolution were opened to them in 1979 black unions did not jump into seeking to join Industrial Councils or Conciliation Boards as anticipated, but they continued to organise, seek recognition and bargain at non-statutory plant level which they used under the committee system. By doing this black trade unions managed to establish plant level collective bargaining and dispute resolution to supplement the Industrial Council system of collective bargaining and dispute resolution (Majinda, 2007). By accepting most of the Wiehahn Commission recommendations the government was hoping for a repeat of the success they had of the 1924 Act by co-opting and controlling the militant new unions but the new black trade unions were aware of the danger of co-option and initially avoided registration. As pressure mounted they eventually registered, but they made a clever decision to reject Industrial Council participation in favour of bargaining at enterprise or plant level. This allowed them to maximise their power when bargaining and facilitated control of the unions by their members (Du Toit, et al., 2006).

It must be noted that in the period after the Wiehahn Commission, the Industrial Conciliation Act was amended but the changes were minimal because workers still remained categorised and segregated. In 1981 the Act was changed and it was given a new name. The Labour Relations Amendment Act No.57 of 1981 and that is when it incorporated several important developments in South African labour relations. Firstly it repealed all the exclusions which were left in 1979, then secondly it repealed the Black Labour Regulation Act and by so doing it meant that the Labour Relations Act was for all private sector employees regardless of race (Venter, et al., 2009).
2.3.2 Public Sector Workers

Calls for a formal bargaining mechanism by the PSA started in 1979 during the Wiehahn reforms but they were flatly rejected (Huluman, 2006). The historic 1979 reforms did not affect public servants. The Wiehahn Commission proposed that public servants be extended freedom of association rights but this was rejected by the government. In the beginning of the 1980s associations were formed along racial lines. The Institute for Public Servants (IPS) for African employees, Public Service Union (PSU) for Indian workers, and Public Service League (PSL) for coloured workers. These associations were allowed to make written submissions which were only recommendations to the Joint Advisory Council just like the PSA. These recommendations were not helpful because the state (employer) was not obliged to respond or even consider them when making decisions around conditions of service. After years of consultations and pressure from employee organisations such as Congress of South African Trade Unions (COSATU) through the International Labour Organisation (ILO) the government committed itself to collective bargaining in the public sector in 1988 (Huluman, 2006).

The beginning of the 1990s saw bitter struggles in the labour movement for the recognition of union organisations in the public service. There was a split in the public service during this period of industrial action and labour unrest especially in health and education sectors. This resulted in the passing of two pieces of labour legislation in 1993 both dealing with public service labour relations, the Public Service Labour Relations Act (PSLRA) and the Education Labour Relations Act (ELRA). The PSLRA extended rights such as the right to strike and the right to organise to trade unions. It also established the Public Service Bargaining Chamber (PSBC) while the ELRA established a sector specific bargaining council for educators; these bargaining councils were tasked with the prevention and resolution of disputes and the regulation of settlement of matters of mutual interest through negotiations (Smith, 2008).

3. DISPUTE RESOLUTION UNDER THE LABOUR RELATIONS ACT 66 OF 1995

In 1994 a new non-racial, non-sexist and democratic South African regime under President Nelson Mandela was formed. In 1995 a new labour dispensation was introduced with the promulgation of the Labour Relations Act of 1995. This Act brought all employees in South Africa under a single piece of labour legislation whereas previously public sector employees were under administrative law. The Industrial Councils were replaced with Bargaining Councils that were responsible for collective bargaining and, when accredited, for dispute resolution. The new LRA allowed for the formation of a new dispute resolution institution the Commission for Conciliation, Mediation and Arbitration (CCMA) tasked with resolving the majority of disputes that previously had been referred to the Industrial Court. The Labour Court which replaced the Industrial Court was thus relieved of much of the previous burden placed on the court system (Bendix, 2010).
3.1 Commission for Conciliation, Mediation and Arbitration (CCMA)

According to Nel et al (2005) the CCMA is a creation of Labour Relations Act 1995 in chapter 7. It is an independent body which has jurisdiction in all provinces of South Africa. The location of the commission’s head office is determined by the Minister of Labour in consultation with the governing body. Presently, the head office is in Johannesburg and the commission must have an office in each province and maintain as many local offices as deemed necessary. The main functions of the CCMA are:

- Using conciliation to attempt to resolve any dispute properly referred to it in terms of the LRA
- If the dispute is unresolved after conciliation, arbitrate it if the Act requires arbitration and any party requested that the dispute be resolved through arbitration.
- Assisting in the establishment of workplace forums
- Compiling and publication of information and statistics about its activities

3.1.1 Conciliation

This is an alternative dispute resolution method in which parties to the dispute agree to the use of a conciliator. The conciliator will meet with the parties separately in order to resolve their differences. This role is to chair the meeting with the parties and help them to define their positions as well as summing up arguments. The conciliation process has no legal standing and the conciliator has no authority to make an award or to call witnesses. Conciliation is often confused with mediation yet these two terms although usually used interchangeably do differ slightly. Mediation is defined as the active intervention of a neutral third party who assists the parties to reach a mutually agreeable outcome through the facilitation of open and constructive dialogue (Venter, et al., 2009).

According Nel et al (2000) section 135 of the LRA dictates that when a dispute is referred to the CCMA a commissioner should be appointed to attempt to resolve the dispute through conciliation. The commissioner shall do so within 30 days of the date the referral was received at the CCMA. The 30-day period can be however be extended through the consent of the parties. In the proceedings of conciliation a party to the dispute may appear in person or be represented by a co-employee or a member, office bearer or official of that party’s trade union or employer organisation. It is up to the commissioner to see how to proceed with the dispute. This may include mediating the dispute, conducting a fact-finding exercise and making recommendations to the parties but at the end of the 30-day period what is required from the commissioner is:

- A certificate must be issued indicating whether or not a dispute has been resolved
- A copy of the certificate should be served to each party to the dispute or his representative
- The original of the certificate should be filed with the CCMA

The issuing of a certificate of resolution brings the matter to an end 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. A settlement agreement made at conciliation can be made into an order of court (Majinda, 2007).

The CCMA must not disclose to anyone even to the court any information, knowledge or document which is acquired confidentially except only if it is an order of the court. The reasoning behind this confidentiality is that disclosure by the conciliator would seriously undermine the efficacy of the process as well as the credibility of the CCMA (Du Toit, et al., 2006).

The advantage of conciliation is that it extends the process of negotiation thus allowing the settlement of the dispute between parties without with interference of external agents. In the event that the procedure dictates that conciliation be attempted before industrial action can be undertaken, there is plenty of time allowed for parties to “cool off” so that they approach other in a friendlier manner and that they can seriously attempt to settle the matter before they could engage in an action that can seriously destroy their relationship (Bendix, 2010).

3.1.2 Conciliation-Arbitration (Con-Arb)

This process is the mixture of conciliation and arbitration. It usually starts with conciliation by a neutral third party and if this fails the person who was conciliating proceeds on to conduct arbitration, therefore the same person conducts both conciliation and arbitration. The process of Con-arb was introduced in the 2002 amendments of LRA. Section 191(5A) dictates that an arbitration hearing should immediately follow conciliation proceedings once a certificate of non-resolution has been issued in disputes concerning dismissals or unfair labour practice relating to promotion. The Con-arb process may be used in other dismissal and unfair labour practice disputes that the CCMA is allowed to arbitrate but only if one of the parties does not object (Bosch, Molahlehi & Everett, 2004). Con-arb takes place as a continuous process in one day. Usually the same party acts as a conciliator then arbitrator, alternatively the roles of conciliator and arbitrator may be assumed by different third parties. The purpose of this process is to save costs, reduce workload and the delays which occur when the two processes of conciliation and arbitration are separated. The con-arb process is governed by rules of conciliation in its conciliation aspect and rules of arbitration in the arbitration part (Majinda, 2007).

3.1.3 Arbitration

According to Finnewore (2009) arbitration is when there is direct intervention by a third person who plays a decisive role in resolving a dispute between two parties by conducting a fair hearing, where arguments and evidence can be presented, and after the hearing the arbitrator makes a final, binding decision. Venter et al (2009) make a distinction between two types of arbitration; Compulsory arbitration which can take place either in terms of a collective agreement which stipulates arbitration as part of the collective bargaining process or in terms of section 136 of the LRA which says that arbitration is compulsory where conciliation has failed and parties are compelled to go for arbitration. Voluntary arbitration on the other hand is when parties are not compelled to go for arbitration after conciliation has failed, but if they agree amongst themselves the parties can still go for arbitration. So unless one of the parties objects such arbitration may be conducted by the same commissioner who was conducting conciliation (con-arb).
The two bodies which engage in the arbitration of disputes are the CCMA and Bargaining Councils. Bargaining councils and the CCMA (where there is no bargaining council) are allowed to arbitrate on disputes related to unfair dismissals and unfair labour practices as well as interest disputes in essential services. The Labour Court adjudicate on certain rights. Disputes which are referred to the Labour Court include those which arise from automatically unfair dismissals, victimisations, interpretation of agreements, and interference with the freedom of association, strike action and disagreements about organisational rights. The routing of disputes to the CCMA, Bargaining Councils or the Labour Court is clearly prescribed in the legislation (Bendix, 2010).

The procedure of arbitration as provided by section 136 of the LRA stipulates that where a dispute remains unresolved after conciliation, and a certificate has been issued, any party to the dispute may within 90 days from the date when the certificate was issued request that the dispute be resolved through arbitration. After this a commissioner should be appointed, which may be the same commissioner who attempted to resolve the dispute in conciliation.

Venter (2003) identified several steps which are followed in the process of arbitration in South Africa, these include:

- Preparation: when preparing for arbitration parties need to identify the issues in contention and collect evidence which will help them in the arbitration. As for witnesses they have to be additionally identified and prepared especially for examinations and re-examination purposes but this should not be confused with coaching the witness which should be avoided at all costs. Coaching a witness will include instructing a witness which evidence to lead and which response to give or not to give.

- Introduction and House-keeping: each party to the proceedings should be introduced and the role of an arbitrator explained. It is this stage that the language requirements are established and if there is a need for an interpreter that the service must be provided. The layout of the room is also important; it is more adversarial and formal than mediation. The sitting arrangement is that the arbitrator sits on one end of the table with parties flanking him or her on either side. Witnesses give testimony at the other end of the table.

- Opening Addresses: parties should be allowed to state their respective positions, first of all by introducing themselves, summarizing the dispute and the position taken together with outlining the case and the evidence to be led. It is important that during the opening address parties should refrain from creating expectations which they cannot fulfill nor they should they give evidence or admit to anything.

- Confirmation of Jurisdiction and narrowing of issues: it is in this stage that the arbitrator should establish authority to preside on the proceedings. The other thing the arbitrator ought to do is to determine which facts and disputes are not in dispute by going through
them, familiarising himself with nature of the dispute, referring to any law or legislation which might be applicable.

- **Examining Witnesses:** when it comes to the process of examination, parties should make their witnesses feel comfortable by initially asking questions which allow the witness to establish their background. The examining party should make sure that the questions are clear enough so that it does not confuse and at the same time the examining party should not ask leading questions which suggest or prompt a response.

- **Cross-examination:** the objective of cross-examination is to discredit the evidence presented by the other party. The opposing party should always be afforded the opportunity to cross-examine. Cross-examination should not be used to bully the witness into submission but to win the witness over and gain his cooperation, while at the same time asking clever, probing question in order to test a witness's evidence against the facts.

- **Re-examination:** during re-examination a party who first called the witness is allowed to re-examine issues and clarify matters raised during cross-examination. What is worth noting in this stage is that new issues cannot be raised unless the arbitrator permits it.

- **Closing arguments:** In closing the arguments parties should be clear, concise and logical and they should avoid being overly emotive.

- **Making the award:** arbitration awards are final and binding. In South Africa, awards can be taken on review to the Labour Court.

### 3.2 Bargaining Councils

Under the new Act Industrial Councils have been renamed Bargaining Councils. The renaming of the councils showed that legislation applied beyond industry and private sector to include the public sector. Bargaining Councils may be established under the LRA. They are empowered to resolve disputes between its parties in terms of its constitution. A registered trade union and a registered employer organisation may establish a Bargaining Council for a sector and area by adopting a constitution which fulfils the requirements of Section 30 of the Act and registering the Bargaining Council in terms of Section 29 of the Act (Du Toit et al., 2006; Nel et al., 2005; Venter et al., 2009).

Du Toit et al (2006) identified the functions of Bargaining Councils to be:

- **Prevention of disputes by collective bargaining:** a Bargaining Council provides a pre-emptive measure to promote industrial peace because one of its powers is to conclude and enforce collective agreements and to prevent and resolve labour disputes.

- **Settlement of disputes:** another major function of bargaining councils which is provided by its constitution and by Section 51 is to resolve disputes. The council is empowered to create and administer funds that are to be used in the resolution of disputes, in this way a council is
expected to use the funds and operate as an accredited agency or to appoint an accredited agency to perform the dispute settlement function

- **Residual function**: these are functions which include the power to promote and establish training and education schemes as well as to administer and pension, provident, medical aid or similar schemes and funds.

Section 36 establishes an overarching bargaining structure for the public sector called the Public Service Co-ordinating Bargaining Council (PSCBC) which acts as a Bargaining Council where coordination is required across sectors in the public sector or if a sectoral public bargaining council is non-existent. This body can also designate a sector of the public service for the establishment of a Bargaining Council which will deal with matters particular to that sector (Du Toit et al., 2006). According to Smith (2008) these sectoral councils include Public Health and Social Development Sectoral Bargaining Council (PHSDSBC), Education Labour Relations Council (ELRC), Safety and Security Sectoral Bargaining Council (SSSBC) and General Public Service Sectoral Bargaining Council (GPSSBC). The PSCBC has been given accreditation by the CCMA to perform both conciliation and arbitration. Arbitration awards issued here are also final and binding and cannot be subjected to appeal although they can be reviewed. A fully fledged panel of conciliators and arbitrators has been appointed by the PSCBC to carry out dispute resolution functions. The PSCBC deals mostly with collective disputes while the sectoral councils deal with individual disputes.

**3.3 The Labour Court and Labour Appeals Court**

The Labour Court was established by Section 51 as a superior court of law with the powers and status in relation to matters under its jurisdiction, equal to those of a provincial division of the Supreme Court. This court is composed of the Judge President, his assistant and as many judges as the President, advised by National Economic Development and Labour Council (NEDLAC), and also in consultation with the Minister of Justice and the Judge President may deem necessary (Venter et al., 2009).

The Labour Court has the power to refuse a dispute if it is not satisfied that a prior attempt has been made to resolve it by conciliation, the only exception is those disputes which do not have to be first referred to conciliation such as applications for interdicts. The Labour Court according to section 145 of the Labour Relations Act has the jurisdiction to review and set aside defective arbitration awards referred to it by any party to the dispute within six months and issued by commissioners of the CCMA. It also supervises arbitration proceedings of private arbitrators of other labour dispute resolution bodies such as bargaining councils, statutory councils and accredited private agencies in terms of the Arbitration Act 42 of 1965 (Majinda, 2007).

According to LRA (1995) the grounds on which an award may be reviewed include:

- The commissioner committed misconduct in relation to his/her duties
- Commissioner committed a gross irregularity in the conduct of proceedings
The commissioner exceeds his powers

The award was improperly obtained

There have often been jurisdictional clashes between the Labour Court and the High Court over the years but it must be noted that the Labour Court has exclusive jurisdiction in all matters that the Labour Relations Act or any another law that prescribes that it should be determined by the Labour Court. The High Court retains its jurisdiction of common law (Du Toit, et al., 2006) According Majinda (2007) the High Court does not have concurrent jurisdiction to handle disputes which has been expressly assigned to the Labour Court but the Labour Court has concurrent jurisdiction with the High Court in those matters which have not been particularly assigned to the Labour Court such as any alleged breach of any fundamental rights conferred by chapter 2 of the Constitution to which the Labour Relations Act does not give effect.

According to Section 167 of the LRA the final court of appeal in respects of judgments made and orders made at the Labour Court is the Labour Appeal Court (LAC) and just like the Supreme Court of Appeal it is a superior court and it enjoys the same status. The LAC consists of the judge president of the Labour Court who is also the president of the LAC, deputy judge president and three other judges from the High Court (Nel et al., 2005).

Judgments issued at Labour Appeal Court are binding on the Labour Court and arbitrators even if the Labour Court or the arbitrator in question is of the view that the decision of the Labour Appeal Court is plainly wrong, except of course where the higher court had not referred to the rules that would necessarily have led to a different conclusion. According to the Constitution an appeal against such decision, judgment or order of the Labour Appeal Court to the Supreme Court of Appeal exists. If a dispute concerns a constitutional matter the final appeal destination is the Constitutional Court. In the Labour Appeal Court if two of the three judges constituting the LAC agree, the decision is final (Majinda, 2007).

4. PRIVATE DISPUTE RESOLUTION

The South African labour law provides for parties to resolve their dispute through private processes otherwise commonly known as private dispute resolution. Private arbitration that is part of private dispute resolution is conducted by an agreement between the parties in which they choose an arbitrator and this agreement also determines the terms of reference and powers. The Labour Relations Act expects private dispute resolutions agencies to play a major role in dispute resolution system. They may do this as agencies accredited by the CCMA or as private bodies (Smith, 2008).

The Labour Relations Act of 1995 vests the powers to licensed private agencies to attempt to resolve disputes through conciliation and arbitration. As long as it is accredited by CCMA any organisation can perform dispute resolution functions under the Act. The CCMA may accredit any applicant to per-
form any function for which it seeks accreditation for as long as the services provided meet the CCMA standards. Provided the applicant is able to conduct its activities effectively, the dispute resolvers are competent and independent, the applicant has a clear code of conduct to govern its dispute resolvers, reasonable disciplinary procedures are kept in place to make sure that dispute resolvers adhere to the code of conduct and lastly the applicant's service should be seen to be broadly representative of South Africa (Kwakwala, 2009).

Tokiso Dispute Settlement (Pty) Ltd is South Africa's largest and most active private dispute resolution service in the labour field. Tokiso was established 10 years ago in a direct response to the closure of Independent Services of South Africa (IMMSSA). Ever since its inception Tokiso has grown to be the largest private dispute resolution provider in country with 255 panelists (mediators, facilitators and arbitrators) across all provinces and also in other countries who resolve over 10 000 disputes per annum (Tokiso Profile, 2011).

5. REVIEW OF THE PERFORMANCE OF THE SYSTEM

5.1 The frequency and incidence of dispute referral
The incidences of cases in all dispute resolution institutions in South Africa has increased for the period 2006 to 2011 as shown in the figure below, the recent economic recession seems to have increased the number of disputes in the labour relations field and thereby increased the number of cases being referred to dispute resolution institutions. The CCMA caseload increased by an additional 13 291 (9.5%) cases when compared to the 2008/2009 financial year while Bargaining Councils also saw the same significant increase in the case overload of both statutory disputes and compliance cases (Tokiso, 2011).
According to CCMA (2009/2010) a total number of 153 657 cases were referred to the CCMA. Twenty-two percent of the cases referred were deemed to be non-jurisdictional and they were screened out. There was an 11% increase of jurisdictional cases over the previous year. Unfair dismissals represented the largest number of disputes accounting for 81% of the total case received. On the other hand the breakdown of referrals by sector has remained consistent. The retail sector has always accounted for the highest number of referrals ever since the inception of the CCMA and in the 2008/2009 it accounted for 15% of all referrals in this financial year.

5.2 The course of referred cases and processes

5.2.1 Public Information and Awareness
In June 2002 the CCMA national call centre was launched and it has had a huge impact on the CCMA. In 2009/2010 the call centre dealt with 172 481call and this was a 1% increase from the previous year. The call centre provided information’s on case related queries and labour legislation which accounted for 48% and 42% respectively of all cases.
Table 3: Breakdown of Calls by Province 2008/2009 and 2009/2010

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Gauteng</td>
<td>62%</td>
<td>59%</td>
</tr>
<tr>
<td>Western Province</td>
<td>16%</td>
<td>17%</td>
</tr>
<tr>
<td>KwaZulu Natal</td>
<td>14%</td>
<td>15%</td>
</tr>
<tr>
<td>Other</td>
<td>8%</td>
<td>9%</td>
</tr>
</tbody>
</table>

The percentage breakdown of calls received by province was fairly consistent with the percentage breakdown of referrals by province. Gauteng accounted for 62%, Western Cape accounted for 16% and KwaZulu Natal accounted for 14%. The other provinces together accounted for 8% (CCMA, 2010).

5.2.2 Condonation

In cases of unfair dismissal when a dismissed employee lodges a case outside the statutory 30-day period for date of dismissal or in the cases of unfair labour practice when an employee lodges a case after 90 days, in both cases the employee concerned should apply for condonation of late referral.

Under the CCMA Rules the party applying for condonation must set out grounds for seeking condonation and must include details of the following:

- The degree of lateness
- The reasons for lateness
- The referring party’s prospects of succeeding with the referral and obtaining the relief sought against the other party
- Any prejudice to the other party; and
- Any other relevant factors

About 70% of the condonation applications are successful. The Tokiso Digest (2010) raises for discussion the issues that it appears that commissioners just grant condonation even if the reasons for lateness are not reasonable. According to them figure should be lower considering the fact that the onus falls on the applicant to show good cause (Tokiso, 2010).

5.2.3 Scheduling of Cases

When a case comes to the CCMA it is usually screened first so that it is checked if it is under the CCMA’s jurisdiction. If it is within the CCMA’s jurisdiction it is scheduled for con-arb, unless there is
an objection. In the event there is an objection the case has to be scheduled for conciliation and if it still remains unresolved the applicant is free to refer it to arbitration (Tokiso, 2010).

5.2.4 The Con-Arb Process
In this process the commissioner attempts to conciliate the dispute and if it does not get resolved the same commissioner issues a non-resolution certificate and continues to arbitrate the case. In 2009/10 CCMA of the total number of conciliations heard 67% were originally scheduled for the con-arb process but only 45% were heard at con-arb process due to objections party has the right to object (Tokiso, 2010).

5.2.5 Attendance at Arbitration and Default Awards
The high-level of non-attendance at processes is a concern that has been noted for a number of years. According to the CCMA statistics 32% of awards issued are default awards while Tokiso records a total of non-attendance at 21%. There are several reasons attributed to non-attendance of cases, one of the main reasons is the poor notification of the employer which is hardly CCMA’s fault because contact details are taken from the application form which has been completed by the applicant (Tokiso, 2010)

![Figure 8: Non attendance at CCMA and Bargaining Council Arbitration and Con-Arb in 2008](image)

5.2.6 Representation and Assistance
According to Tokiso (2010) over the past five years there have been patterns of representation in arbitration where parties have been represented by an attorney, union or employer organisation. For about a third of arbitrations there has been representation by a third party for either one of the parties and those figures have consistent over this period.
5.3 Categories of referral

According to the CCMA (2010) there is almost an identical pattern of the types of cases referred year to year. Dismissals remain the largest category of disputes and in the year 2009/2010 they accounted for 82% of all referrals to the CCMA.

Figure 9: Referrals by Issue 2008/2009 and 2009/2010
5.4 Outcome of disputes

5.4.1 Settlement rate
The CCMA statistics and Tokiso statistics differ sharply when it comes to the issue of settlement rate. For some time now Tokiso has queried the CCMA’s claim that they post over 60% settlements each year. In 2009/10 the CCMA annual report reported a 67% settlement rate in all processes and 62% in conciliation. This is because there are differences in the way the CCMA and Tokiso define settlement. The CCMA does not publish its definitions, categorisation or the basis for which they calculate it figures. Below is the breakdown of the CCMA’s settlement figure for 2009/10:

Figure 10: Types of Dismissal Arbitrated 2008, 2009 and 2010
Table 4: CCMA’s breakdown of settlement’s figures 2009/2010

<table>
<thead>
<tr>
<th>Case withdrawn</th>
<th>10 827</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled by parties</td>
<td>1 558</td>
</tr>
<tr>
<td>Settled in arbitration</td>
<td>9 602</td>
</tr>
<tr>
<td>Settled in con-arb</td>
<td>18 926</td>
</tr>
<tr>
<td>Settled in conciliation</td>
<td>9 890</td>
</tr>
<tr>
<td>Settled in in-limine hearings</td>
<td>1 730</td>
</tr>
<tr>
<td>Settled in pre-conciliation contact</td>
<td>4 488</td>
</tr>
<tr>
<td>Settled in pre-dismissal arbitration</td>
<td>11</td>
</tr>
<tr>
<td>Settled in rescission hearings</td>
<td>76</td>
</tr>
<tr>
<td>TOTAL SETTLEMENT</td>
<td>57 108</td>
</tr>
</tbody>
</table>

The above table shows that 57 108 cases are settled and if the CCMA had 108 000 jurisdictional cases then this means that 53% of these jurisdictional cases were settled across all processes. As for the settlement rate of conciliation it was 9 890 cases, translating to 31% (Tokiso, 2010).

5.4.2 The outcome of awards
According the CCMA annual report 62% of awards were in favour of the employee party and 38% were in favour of the employer party, but the Tokiso records remain different from the CCMA’s records. Due to the high number of default awards issued by the CCMA figures are always going to be skewed because the majority of them favour the employee party (Tokiso 2009/10).
5.4.3 Breakdown for the reason for unfairness
The reason for unfairness remained very consistent over the past three years. It is interesting to note that procedural unfairness has been consistent at around 4% for the last 2 years. When there is procedural unfairness in a dismissal case the reason is usually because there was no hearing at all (Tokiso 2010).
5.4.4 Remedies for unfair dismissal

Over the past three years compensation has consistently been the remedy of choice for unfairness in the dismissal disputes. When comparing the preferred remedy for unfair dismissal from one year to another, it is interesting to note that a trend of an increase in compensation rather than reinstatement emerges (Tokiso, 2010).

Figure 13: Remedies for Unfair dismissal

Figure 12: Outcomes of cases
5.5 Strike Action
2010 was the year with the greatest incidence of strike action in South Africa’s labour history.

Figure 14: Workdays (in millions) lost to strike action-1995 to 2010

5.5.1 Number of workdays lost
From the data above the number of days lost to strike rose to 14.6 million in the period 1 January to December 2010, compared with 2.9 million in the corresponding period in 2009. This remains the highest number of strike incidences recorded in the post-democracy South Africa. The public sector strike in September which accounted for the loss of 12 million work days was the major contributor to this massive loss of work days. Other high profile strikes included municipal strike in April, Transnet strike in May, automobile and tyre sectors in August and the retail motor industry strike in September.

5.5.2 Strike Triggers
The major strike trigger was wages. Wages accounted for 77% of the number of strikes and 99.6% of working days lost. It was followed by recognition/bargaining levels which accounted for 0.3% of workdays lost and 11.4% of strikes. Grievances came third with less than 1% of working days and 11.4% of the number:
Figure 15: Distribution by trigger-1995 to 2010

6. CONCLUSION

The first comprehensive labour legislation was the Industrial Conciliation Act of 1924 which introduced Industrial Councils and Conciliation Boards as dispute resolution instruments albeit for white workers in the private sector only since black (male) workers were excluded from the definition of an employee. As for public sector workers they were not included in the labour legislation as well. The nature of disputes covered was collective/interest disputes only while individual/rights disputes went to the ordinary courts. The turning point for the South African dispute resolution was in 1979 with the Wiehahn commission recommendations which brought changes to the 1956 Industrial Conciliation Act. These changes included; the establishment of the Industrial Court (with full powers of equivalent that of a branch of the Supreme Court) which now covered unfair labour practice disputes and black workers were now included in the definition of an employee which means that they were now covered under the system. Public sector employees were still not covered in the system. It was only in the new labour dispensation of the Labour Relations Act 66 of 1995 brought about by the fall of apartheid that all employees whether public or private sector employees were covered under the same piece of labour law. Institutions of dispute resolution included the CCMA, Bargaining Councils and Labour Court. All disputes are covered under this current system, individual/rights dispute and interests/collective disputes. The CCMA employs people with labour related tertiary qualifications and experience as commissioners. Private dispute resolution is being provided by Tokiso which is accredited by the CCMA.
CHAPTER FOUR

COMPARISON BETWEEN BOTSWANA AND SOUTH AFRICAN DISPUTE RESOLUTION SYSTEMS

1. INTRODUCTION

This chapter is responsible for finding differences and similarities between the two systems. This will be undertaken using the framework developed in Chapter 1. Firstly by looking at the elements which includes nature of disputes, coverage, processes, avenues of dispute resolution, human resources, and secondly, the two systems will be compared using the goals of the system legitimacy, efficiency, affordability, accessibility, informality and costs.

2. COMPARISON OF THE SYSTEMS

2.1 Elements of the systems

2.1.1 Nature of disputes

In the Botswana dispute resolution system both disputes of rights and dispute of interest can be referred to mediation but then if the dispute remains unresolved disputes of interest cannot go to Industrial Court they only go to arbitration while disputes of right can go to either arbitration or Industrial Court. Individual and collective disputes can be referred to mediation and if the dispute remains unresolved, a collective dispute it can only be referred to arbitration since the Industrial court does not have the jurisdiction to hear disputes of interest.

In the South African dispute resolution system disputes of right are referred to either a Bargaining Council or CCMA for conciliation and when the dispute remains unresolved it can either go to arbitration or adjudication in the Labour court. Disputes which go to the labour court include; unfair labour practices entailing discrimination, automatically unfair dismissals, dismissal relating to retrenchment. Dismissals relating to incapacity, incompetence or misconduct are the ones which go to arbitration. As for disputes of interest they are also referred to conciliation in either a bargaining council or CCMA. Only disputes of interest in essential services are referred to arbitration if they remain unresolved after conciliation. Other disputes of interest if they are not resolved at conciliation the next step is strike action or lockout (Bendix, 2010).
2.1.2 Coverage
In Botswana both private and public employees are covered by the dispute resolution system. Previously public sector employees were not covered in the dispute resolution system but ever since the Trade Disputes Act was amended in 2003 the new definition of an ‘employee’ includes civil servants. The only cadres not covered in the definition of an employee are the Botswana Defence Force, the Botswana Police Force and Directorate of Intelligence Services as is standard practice in most countries.

In South Africa the promulgation of the Labour Relations Act 66 of 1995 united the South Africa workforce which was divided by the apartheid regime. For a very long time only private sector workers were covered by the dispute resolution mechanism. The Industrial Conciliation Act of 1924 excluded male Africa workers. It was only after amendments of the 1956 Industrial Council Act in the wake of Wiehahn Commission recommendations that African workers were included in the dispute resolution system. Public sector employees took longer to have their own dispute resolution mechanism. It was only in 1993 that the Public Service Labour relations Act (PSLRA) was promulgated together with Education Labour Relations Act (ELRA). These two pieces of labour legislation established Bargaining Councils which together with the Police’s National Negotiation Forum (NNF), were responsible for the prevention and resolution of disputes and the regulation settlement of matters of mutual interests through negotiations. The new Labour Relations Act of 1995 covered all workers in South Africa under a single piece of legislation. Those who are not covered are members of the South Africa Defence Force, National Intelligence Agency and the South African Secret Services (Smith, 2008). The difference here is that in Botswana the Police are excluded from the definition of the word ‘employee’ while in South Africa they are included in the Labour Relations Act just like any other public sector employees.

2.1.3 Avenues of dispute resolution
In the Botswana system all types of labour disputes are referred to mediation provided by the Dispute Resolution Unit in the Department of Labour and Social Security. This includes disputes of right, disputes of interest, collective and individual disputes. Collective disputes of interest are only referred to arbitration, the Industrial Court does not have jurisdiction in these matters. As for individual disputes of rights they either go to arbitration or Industrial Court depending on the choice of the parties. For a dispute to go to arbitration both parties should consent to that action by signing the arbitration referral form. If one of the parties does not agree with the other party’s decision to refer the dispute to arbitration the party may reject and the dispute would be referred to Industrial Court.

In South Africa all types of disputes come for conciliation to the CCMA or Bargaining Councils. If after conciliation these disputes remain unresolved the legislation prescribes the route. For example, freedom of association (freedom from victimisation) goes to Labour Court; disputes of interest in essential services goes to arbitration; dismissals due to incapacity, incompetence or misconduct goes to arbitration; automatically unfair dismissals go to Labour Court, dismissals relating to participating in strike for reasons linked to closed shop go to Labour Court, dismissals relating to reason for re-
trenchment go to Labour Court, unfair labour practices (excluding discrimination) go to arbitration; unfair labour practices entailing discrimination go to Labour Court and interest disputes go to strike action unless if it is a dispute about refusal to bargain (Bendix, 2010).

2.1.4 Human resources
The people who are employed in the system as mediators and arbitrators should well be qualified people with an in-depth knowledge of the legal framework of the country.

In Botswana the Trade Disputes Act of 2004 empowers the Minister to establish a panel of mediators and arbitrators with the Commissioner of Labour as the chair of this panel. The Minister may appoint to the panel, mediators and arbitrators with expertise in labour law or labour relations or other specialist areas of expertise. Mediators are either full-time or part-time (Trade Dispute Act, 2003). Full-time mediators are government officials who are employed through the Directorate of Public Service Management, most of them hold degrees in human resource management, social sciences and labour relations. Part-time mediators are people with qualifications and experience in labour relations, most of them have their own labour relations consultancy companies while some hold key labour relations positions in the private sector. There are only six full-time arbitrators but they rarely arbitrate because of their workload which involves working as heads of other units in the department. They include the Commissioner and senior management staff in the Department of Labour and Social Security. They hold arbitration certificates from University of Namibia. Like part-mediators, part-time arbitrators are people with expertise in the labour relations field, these include; labour lawyers, human resource managers from companies in the private sector and labour consultants.

In South Africa the governing body of CCMA is tasked by Section 117 of the Labour Relations Act with the appointment of Commissioners who are appointed on the strength of their experience and expertise in labour matters particularly in labour dispute resolution. Complete impartiality is expected from commissioners. Commissioners are employed on either full time basis or part-time basis. There are several categories of commissioners. Senior commissioners are those who manage other commissioners and monitor the conciliation and arbitration hearings and they should have an equivalent of NQF 7 tertiary qualification preferably in labour law; Level A commissioners are employed to conduct conciliation, arbitrations and con-ars and they should have at least 6 years in labour relations field and have an equivalent of NQF 6 qualification. Level B commissioners are also expected to conduct the processes of arbitration, conciliation and con-arb at the CCMA and they should have at least 4 years in the field of labour relations and possess an NQF 5 qualification (CCMA, 2011).

2.1.5 Processes
a) Conciliation/Mediation

In Botswana the first process which aggrieved parties go to is mediation which includes facilitation, fact-finding and the making of an advisory award. Mediation in Botswana is similar to conciliation in
South Africa in the sense that in both processes a dispute has to mediated or conciliated within 30 days from the day it was referred and the period can only be extended by agreement between the two parties to postpone. Mediation and conciliation are both private and confidential processes, any information divulged in the hearings shall be confidential and without prejudice and a mediator or commissioner cannot be a compellable witness in a court of law in respect of the information divulged in a hearing. The other point is that in both Botswana and South Africa legal representation is not allowed at this stage. The main difference between the Botswana and South Africa dispute resolution systems as far as conciliation/mediation is concerned is in South Africa there is a provision for conciliation-arbitration as a single process in regard to dismissal and unfair labour practice disputes. This provision was introduced by the August 2002 Labour Relations Act amendments in an attempt to expedite the dispute resolution process by making conciliation and arbitration to take place in one continuous process in the same day (Majinda, 2007).

b) Arbitration

In Botswana arbitration is a private and confidential process and arbitrators cannot disclose to any person or in any court information acquired in the course of performing the function as arbitrators (Trade Disputes Act, 2003).

In South Africa arbitration hearings are open public hearings. This is according to section 34 of the Constitution of the Republic of South Africa which provides that arbitration by the CCMA is a public hearing because the Commission itself is a public body that is subject to the Constitution which provides that everyone has the constitutional right to have their disputes resolved by application of the law decided in a fair public hearing either before a court or an impartial tribunal. Despite this it is not practical to have arbitration as a public hearing unless there is consent on both parties to the dispute. The arbitrator has the power to order out those who attend the arbitration hearing (Majinda, 2007). According to the LRA (1995) circumstances where legal practitioner may be allowed in arbitration proceedings are:

- Consent of the commissioner and the other parties
- Where the commissioner concludes that it is unreasonable to expect a party to deal with dispute without legal representation after –
  - The nature of the questions of law raised by the dispute
  - The complexity of the dispute
  - The public interest; and
  - The comparative ability of opposing parties to deal with the dispute

In Botswana an arbitrator is allowed to start with mediation or conciliation if he thinks that the dispute can be resolved by mediation, this happens if the parties consent to this action. In Botswana a legal
A practitioner may be allowed in arbitration only a) if both parties agree to it b) at the request of a party to the dispute if the arbitrator is satisfied that the dispute is of such complexity that warrants the party to have a legal representative and that will not prejudice the other party.

c) Labour Court/Industrial Court

In Botswana the Industrial Court was established in 1992 after labour legislation reforms which were introduced in that year. The court enjoys powers which are equal to those of the High Court and the judges are appointed by the President of the country. The functions of this court include settling trade disputes and further, securing and maintaining good industrial relations in Botswana. The industrial court judge when presiding on a dispute sits with two court assessors one nominated by labour and the other one nominated by business. In South Africa there is no provision for court assessors but there are three judges who preside over a case in the Labour Courts. Furthermore in Botswana parties appeal to High Court of Appeal there is no labour-specific appeals court like in South Africa where there is Labour Appeals Court (LAC).

2.2 Performance of the system

2.2.1 Efficiency

The efficiency of the system is the most important goal. Disputes should be resolved as speedily as possible and there must be prompt response to all disputes. An effective dispute resolution system is the one which expeditiously resolves a high number of disputes in minimum of time. Systems which are slow and take a long time to produce a resolution are inefficient (Budd & Colvin, 2008).

In Botswana there are several concerns about the efficiency of the dispute resolution system. Of the 15 people interviewed in Botswana only one person thought the system was effective. Many respondents pointed out factors such as shortage of manpower in the dispute resolution unit; lack of resources like transport and office space; mediators and arbitrators lacking training; backlog of cases in the Industrial Court as some of those factors which impede the efficiency of the Botswana dispute resolution system.

In South Africa at the CCMA efficiency relates to the time taken in conciliation, con-arb or arbitration proceedings. The Labour Relations Act directs that conciliations should be concluded in 30 days of the referral of disputes, arbitrations should be done within 90 days. In order to enhance efficiency the CCMA has set an internal efficiency target of 60 days for arbitrations meaning that the CCMA has committed to conclude arbitrations in 60 days instead of the statutory 90 days set out for arbitration (Bhorat, Pauw & Mncube, 2007). Efficiency also relates to the settlement rate of dispute resolution, this means total disputes referred versus total disputes resolved. According to CCMA reports over the years there is an increase of the settlement rate from one year to another, this shows that the CCMA’s efficiency has been increasing over the years (Kwakwala, 2009).

Looking at the two dispute resolution systems one can conclude that the South Africa system is more efficient than the Botswana system.
2.2.2 Accessibility

Accessibility of a labour dispute resolution system means the awareness and understanding of the system by employers, employees and the general public. This also relates to the dispute resolution office being within a reasonable travelling distance. The ability to access the system means that personal characteristics which include education levels, situational characteristics, such as the availability of service centres or the cost of legal services, do not prevent a party from using the dispute resolution system (Kwakwala, 2007).

In Botswana there is a problem of the general public not understanding the system and not knowing where to find the services provided by the system. On many occasions people go to a member of parliament in a certain area to report a labour matter. This often delays the dispute and in terms of dismissal disputes the 30 days in which a dispute may be registered may expire. Others go to the Commissioner of Labour’s office to report there thinking that since it is a higher office than District Labour offices this will work in their favour. Most people have shown a lack of understanding of how the labour office operates. They think that mediators and arbitrators are government officials who are there to make sure that they are not ill-treated by employers. The travelling distance to a labour office in most rural areas is far and this discourages most people employed in rural areas. There are only 24 District Labour offices in Botswana and most of them are in urban and peri-urban areas. On the positive side in the Botswana dispute resolution system when a person approaches correct office the system, there is a friendly officer at the reception who will direct the aggrieved party to the registration office where they will be asked to present their dispute orally. Then if the registering officer is satisfied that the labour office has jurisdiction in the matter then the aggrieved party will be given a form called ‘referral’ form to formally lodge a complaint. If the aggrieved party cannot write the officer will write for them. This shows that anyone is able to refer a dispute to a trade dispute resolution centre.

In South Africa the CCMA ensures accessibility of the commission to users by not having a complicated referral procedure. This way illiteracy and lack of skill are not barriers to the system. When a complainant approaches the CCMA to register a dispute the only procedural requirements are to submit a form of conciliation and if the dispute goes to arbitration submit a form of arbitration. The CCMA can be said to be highly effective taking into consideration the high number of out-of-jurisdiction cases. This can be presumed to mean that this excessive number of cases referred to CCMA is due to its ease of access (Kwakwala, 2009). Evaluating the two systems in respect to accessibility the South Africa system is much more accessible than the Botswana system.

2.2.3 Informality

A dispute resolution system should be as informal as possible in order to attract many users. This means minimum emphasis on procedural formalities, minimum emphasis on legal formalities and that there should be an opportunity for party to represent themselves. Informality of the dispute resolution should emphasize that disputes are handled in an informal, non-legalistic way.
In Botswana the move to out-law legal representation at mediation was a deliberate move to make the system as informal as possible level. However for legal representation to be allowed in arbitration it is up to the arbitrator to allow it and in Industrial Court it is allowed. A person who is not educated can approach the District Labour office where a receptionist will direct them to a registration office. In the registration office the complainant will make their presentation orally and after the registering officer is satisfied that the labour office has jurisdiction on the dispute the complainant will be given a referral form to fill and if they are cannot write the officer will write for them. Then after that they will be given the other party’s referral form so that they can notify them of the date of mediation. In a series of interviews conducted among labour relations experts in Botswana, most of the respondents indicated that legal representation in mediation is not necessary as legal representatives do not care about the settlement all they want to do is to win the case for their clients. They point out that mediation should be free of legalistic procedures so that more people can use the system.

In South Africa the CCMA is committed to informality. This is shown by the absence of complicated referral procedures when a complainant wants to report their dispute to mediation. This is to ensure that literacy and lack of skill are not barriers to the system. The only procedural requirements that an applicant has to fulfill are the two referral forms for conciliation and arbitration. Given the excessive number of cases referred to the CCMA and a high number of out-of-jurisdiction cases, this can be concluded that this excessive number of disputes referred to arbitration is largely due to the ease of access to the CCMA (Kwakwala, 2009). Both system seem to be informal.

2.2.4 Costs
The cost of the dispute resolution system is very important. Costs of dispute resolution involve the legal fees, order of costs and dispute resolution fees. Most dispute resolution systems are provided by governments as a service for their people. It is very important that a system should be free or affordable so that many people can be able to access it (Brand et al, 2008).

In Botswana the dispute resolution system is provided by the government under the Ministry of Labour and Home Affairs and users are not expected to pay any fees. Section 29 of the Trade Disputes Act is very clear when it comes to the issue of cost at the Industrial Court, it provides no costs should be awarded unless a party has been identified by the court to have acted in a vexatious or frivolous manner.

According to Levy and Venter (2009) although the CCMA may make awards regarding to costs, generally commissioners are hesitant to make cost awards. Cost awards are only awarded in exceptional cases. These costs have the potential to scare away employees who cannot afford them. Both the Botswana and South Africa systems are free.

2.2.5 Legitimacy
The legitimacy of a dispute resolution system entails such factors as; independence of institutions, professionalism of the providers, participation of stakeholders in the design of the system, delivery of just and fair decisions as well as clear and consistent decisions.
In Botswana the dispute resolution system is not independent as it is still operates within government. This is unlike most countries, for example South Africa, where the system has been separated from government and functions like an autonomous body.

In the interviews carried out on labour relations experts in Botswana all the respondents pointed out that in order for the Botswana system to have legitimacy it has to be outside of government. The respondents are of the view that when the system functions under government impartiality which is one of the pinnacles of any dispute resolution systems is going to be eroded. This is especially important since the Trade Disputes Act amendments of 2003 added public sector employees in the definition of an employee. This means that civil servants including mediators are free to report their disputes with the Trade Dispute Resolution Unit just like any other employee.

In South Africa the CCMA is an independent statutory body with a governing body which is fully-funded by the state. This means that although it receives money from government it is an autonomous body so it free from government influence. The CCMA has the power to license private agencies and bargaining councils to perform any of its functions. This allows parties in dispute the choice of which institutions to use when they have a dispute (Bhorrat et al., 2007). In terms of legitimacy the South African dispute resolution has more legitimacy because it is independent and the providers of the system are seen to be more professional and better qualified.

3. CONCLUSION

The comparison of the two systems have revealed a lot of similarities as well as differences which can be help to identify where one system is better than the other. In terms of the elements of the system although coverage and processes are similar there is a big difference in qualifications of the dispute resolution personnel and that the routing of disputes. As far as goals of a dispute resolution system are concerned the both system have been found to be affordable and informal but as for legitimacy, accessibility and efficiency the South Africa system is better that that of Botswana.
CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

1. INTRODUCTION

The dispute resolution systems of Botswana and South Africa depict noticeable similarities and differences. The South African labour dispute system is of a higher standard and complexity than the Botswana system, so there are a lot of lessons that the Botswana system can learn from the South African system.

2. RECOMMENDATIONS

2.1 Botswana

2.1.1 Hiring full-time arbitrators

Having a fully-staffed arbitration service can relieve the Industrial Court of the backlog it has been experiencing over the years. The department should employ full-time arbitrators because the current full-time arbitrators have other jobs. My suggestion is that instead of hiring completely new people it is better to train the existing mediators who have more than five years’ experience. This move is advantageous because the Department can be sure that with experience gained from mediation and the fact that they have been in the Department for a while will make it easier to adapt to arbitration rather than having completely new people. As for part-time arbitrators they are still needed since the value and experience they bring from the various labour relations areas they come from is vital for the development of the dispute resolution in the country.

2.1.2 Making arbitration a public hearing

Although in South Africa the Labour Relations Act is silent on the issue of making arbitration a public hearing, by the virtue of the constitution being the principal law in the country it is a public hearing in line with section 34 of the Constitution of South Africa. Botswana must consider making arbitration hearing public like court adjudication because currently being private and confidential as it is, it undermines the quality of arbitration awards as there is no public monitoring or control mechanism. However it may not be practical for public hearings so Botswana can rather concentrate on publishing arbitration awards so that they contribute to the development of law in the country. By making arbitration a public hearing, it does not simply mean that the general public would be free to physically attend arbitration hearings, it also means that arbitration awards can be made public and thus develop the case law. This will help to improve the quality and consistency of arbitration awards.
2.1.3 Establishment of a legislated mixed process of mediation-arbitration

The Botswana authorities should look into creating a mixed process of mediation-arbitration as a measure of improving efficiency and reducing time taken in the dispute resolution system. This means that mediation and arbitration should be a continuous process, whereby arbitration follows immediately when mediation fails. This can ensure the expeditious resolution of trade disputes. This can only happen if full-time arbitrators are employed and the arbitration service is developed from its current form.

In South Africa the provision for conciliation-arbitration was introduced by the August 2002 Labour Relations Act amendments in an attempt to expedite the dispute resolution process. The other party may object to con-arb but the process is compulsory on all dismissal and unfair labour practice disputes involving probationary employees (Majinda, 2007).

2.1.4 Making the dispute resolution system independent from government

Botswana is probably the only country in southern Africa with a dispute resolution system which is still under government. According to interviewees who responded to interviews carried out by the researcher this poses a number of problems including financial constraints since the department which houses dispute resolution will have to share the budget with other departments in the Ministry of Labour and Home Affairs and the dilemma of public sector who have to report to the system which their employers, government owns, this brings questions of impartiality. In the light of the above statements I strongly suggest that the time has come for Botswana to have an independent dispute resolution system. To add legitimacy to the process this can be done with the full participation of the tripartite partners. Government, business and trade unions will have to decide how the independent labour dispute resolution system should be. The governing council of this new independent body should be nominated by the tripartite partners.

2.1.5 Recruitment of high qualified and experienced staff for mediation and arbitration

Currently in Botswana people who are employed as mediators do not always have the appropriate qualifications. Most of them have degrees in Social Sciences and Human Resources Management. In order to improve the quality of mediation and arbitration prospective mediators and arbitrators should go through a rigorous recruitment-selection and training programmes like in South Africa where an individual starts work as a commissioner once they have demonstrated competence on all the core training modules which include Conciliation Module I, Conciliation Module II, Arbitration I and Arbitration II, managing dismissal disputes and substantive law. This training goes on for six months and after completion the new commissioner will work under the guidance of an experienced commissioner for a while.

2.1.6 Accreditation to Private agencies

Currently the law in Botswana is silent on the issue of accreditation of private agencies, although there are no institutions which are involved in private mediation and arbitration, there are individual private mediators and arbitrators who are not required by law to be accredited by the government but
it is important to have accreditation because the Department of Labour and Social Security can only credit those individuals or institutions that meet the standard acceptable standards of competence and if they fail to live up to the required standards of competence and behaviour the Department of Labour can discredit them.

2.1.7 Effective Case management system
In Botswana mediators are overwhelmed with other duties such as registering disputes, administrative duties and following the up of the settlement certificate. In order to improve quality mediation there should be an effective case management system in which an officer who is not necessarily a mediator can do these administrative duties linked to mediation so that mediators only focus on mediating disputes. These case managers should be in each District Labour office throughout the country and in bigger offices like Gaborone and Francistown they should be two so that they can be able to cope with the workload.

2.1.8 Proper routing of disputes
In South Africa upon registration of a dispute its resolution path is prescribed by the statute. Several types of disputes come for conciliation at CCMA or bargaining councils, then after conciliation if these dispute remain unresolved they take slightly different routes. It is recommended that Botswana should have a system like that one of South Africa because it brings clarity on which disputes are supposed to be going where if mediation fails. The current practice is that if a dispute fails at the parties have to choose if they want it to go for arbitration or to the Industrial Court and if party objects to arbitration it must go to the Industrial Court.

3. CONCLUSION

In this research the Botswana dispute resolution system was compared with the South Africa system and the findings suggest that the Botswana system has much more to learn from the South Africa system. Although there marked similarities were identified, it was the differences identified that explained why the Botswana dispute resolution system is not as effective as the South African one. Chief among these differences is the independence of the dispute resolution system, in Botswana the system is still under government and this is problematic because it raises issues of impartiality especially as far as public sector employees are concerned. Botswana as a member of Southern African development Community (SADC) is a signatory to the charter of fundamental social rights in SADC signed in Tanzania on 26 August 2003. Among other things the Article 4,section (d) of the charter calls for member states to have a dispute settlement machinery that is autonomous, accessible, efficient and subject to tripartite consultation. Compared to South Africa on these noble objectives the Botswana dispute resolution systems were found to be far behind in achieving them.
LIST OF STATUTES

**South Africa**
Industrial Conciliation Act No.11 of 1924

Industrial Conciliation Amendment Act No.36 of 1937

Native Labour settlement of Disputes Act No. 48 1953 or Black Labour Relations Regulation Act No.48 of 1953

Industrial Conciliation Act No.28 of 1956

Black Labour Relations Regulation Amendment Act No.70 of 1973

Black Labour Relations Regulation Amendment Act No.84 of 1977

The Labour Relations Amendment Act No.57 of 1981

Education Labour Relations Act No.146 of 1993

Public Service Labour Relations Act No.102 of 1993

Labour Relations Act No. 66 of 1995

**Botswana**
Constitution of Botswana 1966

Employment Act of 1982

Employment Act of 1992

Employment Act of 2004

The Employment Law (15 of 1963)

The Trade Unions Act (24 of 1969)

Trade Disputes act (28 of 1969)

Trade Disputes Act of 1982

Trade Disputes Act of 1992

Trade Disputes Act of 2004

Trade Unions and Employers Organisation Act (1983)
REFERENCES


Parsons, N. (1993). Botswana: An End to Exceptionality, 325 The Round Table, 73-78


APPENDIX A-Interview Guide Line

Date:__________________________

Time:__________________________

Place:__________________________

Thank you for affording me the time to interview you.

Name of the Interviewee: ____________________________________________________________

1. What are your thoughts on the effectiveness of the Botswana labour dispute resolution system? (Probe here what they think is good and what needs to be strengthened)

2. Where would you like changes to be made?

3. In your opinion what factors contribute to delays in the effective and efficient resolution of disputes?

4. How do you think these problems should be resolved?

5. What do you think are the roles that Government, employers and trade unions (employees) should play in Labour Dispute Resolution?

6. In an attempt to reduce the number of cases which go to the external dispute resolution, what factors could be important in improving the effectiveness of the internal dispute resolution system?

7. The Labour Dispute Resolution Unit is located in the Ministry of Labour and Home Affairs, what are your thoughts about this arrangement?

8a. In your opinion what is the role of a mediator?

8b. What qualifications do you think mediators should possess?

9. In your opinion where in the dispute resolution process does legal representation become important?

10a. Where do you think cases should be routed after mediation?

10b. Currently there seems to be a high volume of cases routed to Industrial Court which is a lengthy and costly process. How do you think the speed of resolution of cases could be improved?
10c. If more cases were to be routed to arbitration what changes would be made?

(Probe regarding clear demarcation of jurisdiction, existing capacity and extending the role of a mediator to incorporate arbitration.)

(Probe further as to whether they believe this will impact quality of the judgments made)

11. What kind of lessons can be drawn from other labour relations dispute resolution systems throughout the world?

12. In your opinion, which systems are best for us to learn from?

13. As neighbours to South Africa, which is considered to have one of the best dispute resolution systems in the world, what lessons do you think can be drawn from them?

14. Anything else you would like to add?
APPENDIX B- Introduction Letter and Informed Consent Forms

THE LABOUR RELATIONS AND HUMAN RESOURCES UNIT
DEPARTMENT OF INDUSTRIAL AND ORGANISATIONAL PSYCHOLOGY
NELSON MANDELA METROPOLITAN UNIVERSITY
PORT ELIZABETH 6031

September 2011

INFORMED CONSENT FORM

As a Masters student in Labour Relations and Human Resources in the Labour Relations and Human Resources Unit at the Nelson Mandela Metropolitan University I am required to conduct an independent research project.

The research project is an examination of the Botswana Dispute Resolution System and a comparison with the current South African system. The proposed title of the treatise is “A comparison of the Botswana and South African Labour Dispute Resolution Systems”

You are requested to participate in an interview. Your participation in terms of responding to any or all of the questions is VOLUNTARY.

Could you please complete the section below which clearly indicates what level of confidentiality and anonymity you would be comfortable with regarding the interview.

Thank you for your time,

Michael Koorapetse
Master’s student of Labour Relations and Human Resources

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<td>I voluntary consent to participation in this study</td>
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<td>I have a signed copy of this letter to keep</td>
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<tr>
<td>I consent to the interview being recorded</td>
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<td>I consent to my name being used in the final treatise</td>
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| Name: (please print) ________________________________________________________ |
| Designation (please print) ________________________________________________ |
| Contact details: ____________________________________________________________ |

Signed:

Date: _______________________

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INTRODUCTION LETTER AND INFORMED CONSENT FORM

As a Masters student in Labour Relations and Human Resources in the Labour Relations and Human Resources Unit at the Nelson Mandela Metropolitan University I am required to conduct an independent research project. The research project is an examination of the Botswana Dispute Resolution System and a comparison with the current South African system. The proposed title of the treatise is "A comparison of the Botswana and South African Labour Dispute Resolution Systems". You are requested to participate in an interview. Your participation in terms of responding to any or all of the questions is VOLUNTARY. Could you please complete the section below which clearly indicates what level of confidentially and anonymity you would be comfortable with during the interview.

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Name: (please print) _______________________________________________________
Designation (please print) ___________________________________________________

Signed: ____________________________________________

Date: ______________________
LETTER OF INTRODUCTION

8 September 2011

Michael Koorapetse is a mediator with the Botswana Labour Dispute Resolution Unit situated in the Ministry of Labour and Home Affairs. Michael Koorapetse is currently a coursework Masters student in the Labour Relations and Human Resources Unit at the Nelson Mandela Metropolitan University in Port Elizabeth, South Africa.

As part fulfillment of the master’s programme he is required to produce a research treatise. The research area that he has chosen compares the Labour Dispute Resolution systems in Botswana and South Africa and explores means of strengthening these systems. The proposed title of the treatise is “A comparison of the Botswana and South African Labour Dispute Resolution systems”

The research requires that Michael conduct a number of interviews with individuals who are knowledgeable regarding the Botswana Dispute Resolution system. The results are published as a master’s treatise and will become part of the international library system. However, the names of the persons need not be mentioned. You are asked to indicate on the attached consent form your preferred level of anonymity.

As the UNIT we can give reassurances of confidentiality and as a student of the Unit, Michael Koorapetse is bound by these rules of confidentiality when dealing with any information. Before embarking on a project, students are required to sign a confidentiality agreement.

If you have any queries or concerns regarding the above please contact the undersigned.

Yours faithfully

Jennifer Bowler
Co-ordinator Masters programme
Labour Relations and Human Resources Unit,
Department of Industrial and Organizational Psychology
Nelson Mandela Metropolitan University

Email address Jennifer.Bowler@nmmu.ac.za

Telephone: 027 41 504262

Cell: 0834635285

Co-signed:

Michael Koorapetse