LABOUR DISPUTE RESOLUTION BY BARGAINING COUNCILS AND THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION: A LEGAL ANALYSIS

By

NOMBULELO [redacted]BISI-NKOANE

University of Fort Hare
Together in Excellence

Submitted in fulfillment of the Requirements
for the Degree of Master of Laws
in the Faculty of Law,
University of Fort Hare,
ALICE

SUPERVISOR: **Professor Patrick Osode**

TABLE OF CONTENTS

CHAPTER 4

THE DISPUTE RESOLUTION FUNCTION OF BARGAINING COUNCILS

CHAPTER 5

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION(CCMA)

CHAPTER 6

THE REVIEW OF THE CCMA ARBITRATION AWARDS UNDER THE LRA

ACKNOWLEDGEMENTS

I would like to express my thanks to the following people, without whom the commencement/completion of this dissertation would not have been possible.

I wish to thank sincerely my supervisor, Professor P Osode for the valuable guidance and assistance. To my grandmother Nontethelelo Lillian Mashalaba, I am most grateful for all her love and support, which helped me to get through some difficult times in the course of the study. To my dearest husband, Enoch Nkoane Nkoane, thank you for being so patient with me. Your love and support helped me to see this study to the end. To my son, brothers, cousins and my friends, thank you for all your understanding and encouragement in many moments of cri

DECLARATION

I hereby declare that this dissertation submitted for the fulfillment of the requirements for the degree of Master of Laws at the University of Fort Hare, is my own work, and has not been formally submitted to another university for any other degree.

Nombulelo Lubisi-Nkoane

Alice, November 2005

ABSTRACT

Bargaining councils are, together with the Commission for Conciliation, Mediation and Arbitration (CCMA), charged by the new Labour Relations Act 66 of 1995 (LRA) with the speedy resolution of collective and individual labour disputes. Although they perform a very important role, the labour dispute resolution function is under-researched in South Africa. In this regard, Jeremy Dephne[1] has noted big gaps in information and understanding between the CCMA and its users.

To date, bargaining councils in most industries and areas in South Africa have not risen up to the responsibilities entrusted to them. The LRA requires that bargaining councils be accredited by the CCMA for this purpose, and a number of prerequisites are set out. In many cases, accreditation has not yet been achieved. As a result, funds have not been allocated as contemplated by [illegible] and the procedures and panels of conciliators and arbitrators envisaged to extend to resolution of disputes have not been established.

This study examines the law governing labour dispute resolution under the LRA and reviews the role and powers of the CCMA and bargaining councils in facilitating the resolution of labour disputes. The analysis includes a description of the present industrial relations system that bargaining councils form a part of. Special attention is given to the jurisdiction and review of arbitration awards. Literature pertinent to the research questions is reviewed. These includes publications and documents prepared by, or for the CCMA and bargaining councils, relevant research publications, law reports, CCMA awards, books and journal articles.

---

[1] Jeremy Daphne 'CCMA user forums: Objectives and Outcomes of the CCMA Dispute Prevention Unit' 17 May 2002 www.ccma.org.za. (accessed 02 February 2004)

ABBREVIATIONS

ACTWUSA	Amalgamated Clothing and Textile Worker's Union
ANC	African National Congress
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
COSATU	Congress of South African Trade Unions
HC	High Court
IC	Industrial Court
ICA	Industrial Conciliation Act
IMSSA	Independent Mediation Service of South Africa
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
NALEDI	National Labour & [illegible]c Development Institute
NEDLAC	National Economic Development and Labour Council
NMC	National Manpower Commission
NUMSA	National Union of Metalworkers of South Africa
RDP	Reconstruction and Development Programme

CHAPTER ONE

BACKGROUND TO THE STUDY

1. Introduction

The democratic elections of 1994 marked a significant change in the history of industrial relations in South Africa. The changed political circumstances necessitated a review of the existing South African labour dispensation.[1] The new democratic government transformed the whole legislative framework of labour relations so as to harmonise it with the Constitution[2] and uphold international labour standards.[3] The first major piece of legislation to be introduced after the said elections was the Labour Relations Act.[4]

Preceding the enactment of the LRA, the National Economic Development and Labour Council (NEDLAC) was established in 1994 pursuant to s 2 of the National Economic Development and Labour Council Act.[5] At about the same time, the government appointed a Ministerial Task Team to review the labour relations legislation, and to draft a Labour Relations Bill.[6] The draft Bill was accompanied by a detailed document in the form of an "Explanatory Memorandum," to inform and stimulate debate concerning the Bill.[7] Based on the recommendations of the task team, the LRA was promulgated.[8] The Act came into being after a series of negotiations between employers, labour and government. This legislation exhibits the true colours of a real democracy in

---

[1] Van Jaarsveld BP and van Eck BPS *Principles of Labour Law* (1998) at 258.
[2] Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as the Constitution).
[3] Finnemore & Van Rensburg, *Contemporary Labour Relations* (2002) at 36.
[4] Act No 66 of 1995 which came into operation on 11 November 1996. (Hereafter "theLRA").
[5] Act No 35 of 1994.
[6] Joubert WA 'Labour Law and Social Security' (2001) 13 *LAWSA* 1-6.
[7] Ibid.
[8] Op cit note 4.

South Africa, in that it reflects the wishes and interests of all relevant parties/stakeholders.

Although the LRA was strongly criticized by some, it was regarded by others as promising in its capacity to change the whole spectrum of industrial relations. Brand *et al,*[9] point out that the Act "has been hailed as a watershed in the development of labour law and labour relations in South Africa, a total change of paradigm in the conduct of industrial relations, and by those eternally optimistic, as a panacea for all our labour problems."

The goals of the LRA are to redress the injustices of the past, and develop a new system able to meet the challenges created by globalization.[10] What is expected from the LRA is clear from the wording of section 1, which describes the purpose of the Act,[11] as seeking to promote economic development, social justice, labour peace and, the democratization of the workplace. This was done in order:

- to give effect to and regulate the fundamental rights conferred by the fair labour practice provision in s 23 of the Constitution,[12] and s 1 of the Labour Relations Act;[13]
- to give effect to South Africa's obligation to the International Labour Organization (ILO); to provide a framework for collective bargaining and the formulation of industrial policy, and the promotion of orderly

[9] Brand *et al Labour dispute Resolution* (1997) at 16.
[10] Du Toit *et al Labour Relations Law: A comprehensive Guide* (1999) at 17.
[11] Section 1 of the LRA.
[12] The 1996 Constitution.
[13] Op cit note 4.

collective bargaining, sectoral level collective bargaining, employee participation in the workplace and effective labour dispute resolution.[14]

In order to ensure that the country complies with international standards, a number of international conventions have been ratified by South Africa. [15] The LRA has been extended in its scope to cover even those employees who were excluded from the previous labour relations legislation. The entrenchment of these rights indicates that the state is committed to social change and economic development.[16] The LRA has been amended[17] and its objectives are three-fold:

- to encourage and facilitate collective bargaining and employee participation in joint decision making;
- to regulate the organizati[illegible] of trade unions; and,
- to provide simple procedures for the settlement of labour disputes through conciliation, mediation and arbitration.[18]

The LRA provides for a new system of dispute resolution.[19] It establishes the Commission for Conciliation, Mediation, and Arbitration (CCMA); bargaining councils; statutory councils; the Labour Court and the Labour Appeal Court. Both the CCMA and the bargaining councils are empowered by the LRA to settle labour disputes.

---

[14] Ibid.
[15] For example, Unemployment convention 1919 (No 2); Equality of Treatment (Accident Compensation Convention 1925 (No 19); Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87); Right to Organise and Collective Bargaining Convention (No. 98); Tripartite Consultation (International Labour Standards (No. 144).
[16] Du Toit *et al The Labour Relations Act 66 of 1995* (1996) at 39.
[17] With effect from 1 August 2002.
[18] Finnemore and van Rensburg op cit note 3 at 214.
[19] Ibid.

Under this LRA, a bargaining council must endeavour to settle disputes through conciliation, and if the dispute cannot be settled, it has to be referred to arbitration either through a bargaining council with jurisdiction, or through the (CCMA)[20]. The LRA prescribes conciliation and arbitration or adjudication for the resolution of labour disputes, and at the same time encourages private dispute resolution.[21]

2. The aim of the study

Against this background, the aim of this study is three-fold. First, it will explore important aspects of the labour relations system which has emerged in South Africa since 1994, focusing on the legal mechanisms/processes by which labour disputes are resolved. Secondly, it examines the law governing the institutions and institutional processes for resolving labour disputes. Lastly, it attempts to assess and document the effectiveness of the present labour dispute resolution system in South Africa.

For this purpose the following objectives are pursued:

- to review literature and case law pertaining to the establishment, operation and jurisdiction of the bargaining councils and CCMA;
- to ascertain which structures and processes the bargaining councils have put in place to conciliate and arbitrate disputes within their jurisdiction; and,
- to examine the grounds for review of decisions rendered by bargaining councils or private arbitrators and the CCMA.

---

[20] Ibid.
[21] Du Plessis *et al A Practical Guide to Labour Law* (2002) at 321.

3 Statement of the Research Problem

The LRA focuses on the proactive use of conciliation, arbitration and adjudication to resolve labour disputes with speed and efficiency.[22] It attempts to ensure that procedures appropriate for the resolution of various types of labour disputes are in place. For this purpose, the CCMA, and bargaining councils are established.[23] Bargaining councils are, together with the CCMA, tasked by the LRA with the speedy resolution of collective and individual labour disputes. The Act envisages that bargaining councils will play a prominent role in this regard. Although it performs a very important role, the labour dispute resolution function is under-researched in South Africa. In this regard, Jeremy Dephne[24] has noted big gaps in information and understanding between the CCMA and its users.

To date, bargaining councils in [illegible]tries in South Africa have not risen to the responsibilities entrusted to them. Concern has been expressed by the Minister of Labour in an Industrial Action Report, and by the Director of the CCMA that employers and employee organisations have been reluctant to resolve their labour disputes internally through their bargaining councils, and have unnecessarily overloaded the CCMA, often with trivial issues[25]. Concern has also been expressed about the bargaining councils relatively low dispute settlement rate. The Department of Labour has reported a 22% settlement rate by accredited councils, as compared to 73% by the CCMA.[26]

---

[22] Finnemore *et al* op cit note 3 at 216.
[23] Brand *et al* op cit note 9 at 33.
[24] Jeremy Daphne 'CCMA user forums: Objectives and Outcomes of the CCMA Dispute Prevention Unit' 17 May 2002 www.ccma.org.za. (accessed 02 February 2004)
[25] Statement by the Minister of Labour at a Media briefing on the release of the CCMA Annual Report and the Department of Labour Report on Industrial Action on 6 September 1999.
[26] *Preliminary Annual Report 2001 /2002* (2002) at 33 www.labour.gov.za. (accessed 10 June 2003).

The LRA stipulates the powers and functions of bargaining councils as: to conclude and enforce collective agreements; to prevent and resolve labour disputes; to perform dispute resolution functions; to establish and administer a fund to be used for resolving disputes; to promote and establish training and education schemes; and to establish and administer funds for the benefit of the parties; as well as to deal with requests for exemptions from collective agreements.[27] The CCMA, on the other hand, is entrusted with wide-ranging powers. It has to determine a suitable approach in its attempt to resolve disputes.[28] The main function of the CCMA is to endeavour to conciliate and arbitrate labour disputes in terms of the LRA.[29] Both workers and employers can call upon it to resolve disputes.

The LRA requires that bargaining councils be accredited by the CCMA, and for this purpose a number of prerequisites have been specified.[30] In many cases, accreditation has not yet been achieved. As a result, funds have not been allocated, and the procedures and panels of conciliators and arbitrators required to attend to dispute resolution have not been put in place. It is doubtful, moreover, whether the parties to the wide-ranging disputes in organised industrial relations are conversant with, and ready to utilise, the dispute resolution services of their bargaining councils.

Looking back over almost ten years of labour dispute resolution in terms of the LRA, some important questions have been raised as to whether the new system has lived

---

[27] Section 28 of the LRA.
[28] Anstey M "the workplace Revolution: Are dispute resolution mechanisms keeping pace?" (1998) *Track Two,* 22- 23.
[29] Op cit note 4.
[30] In terms of s 52 of the Labour Relations Act bargaining councils must apply to the CCMA for accreditation to perform dispute resolution functions or they must appoint an accredited agency to perform that function.

up to its promise. Issues often raised include delays in statutory dispute resolution processes, and lack of funding for the institutions entrusted with dispute resolution.

In light of the above highlighted problems that involve both the CCMA and bargaining councils, this study examines the law governing labour dispute resolution. It undertakes a review of the institutions, more specifically the bargaining councils and (CCMA), in facilitating the settlement of labour disputes, with a focus on their modes of operation, to assess their effectiveness, and suitability for the settlement of labour disputes. The analysis includes a description of the present dispute resolution system, of which both the bargaining councils and the CCMA form a part. It also pays attention to the grounds for review of CCMA awards. Literature pertinent to the research questions is also reviewed. These include publications and documents prepared by or for the CCMA and bargaining councils, relevant research publications, law reports, the CCMA awards, books, and journal articles.

4 Assumptions and limitations of the study

The present study is premised on the assumption that the problems and challenges confronting bargaining councils and the CCMA are rather fundamental in nature and that a detailed and comprehensive study, as proposed in this study, is required so that a full understanding can be gained and creative solutions found to the problems to ensure the value of bargaining councils. An exploration of functions of both the CCMA and bargaining councils is done to gain new insights and to determine priorities for future research.

The present study has certain limitations that need to be taken into account when considering the study and its contribution. This study has focussed on the law governing labour dispute resolution. Instead of trying to examine the labour dispute resolution in general, the study has been clearly limited to: the establishment, functions, operation and jurisdiction of the bargaining councils and CCMA; ascertain which structures and processes the bargaining councils have put in place to conciliate and arbitrate disputes within their jurisdiction; and, to examine the grounds for judicial review of decisions rendered by the CCMA.

Conciliation and arbitration processes in the context of the CCMA can be seen as being too wide or robust for a study of this kind. It was considered more fruitful to focus on bargaining council processes, representation in the CCMA proceedings and the nature of private and CCMA arbitration awards.

The conclusions as well as limitation of this study bring forth some fruitful possible avenues for future research. The most important avenue for future research lies in critically analysing the nature and relevance of the conciliation and arbitration processes, especially in the CCMA context.

6. Outline of Chapters

Chapter Two deals with the historical development of labour dispute resolution in the South African context.

Chapter Three examines the institutional and legislative framework for dispute resolution, and the different procedures prescribed by the LRA to resolve labour disputes.

Chapter Four examines the criteria used in the process of accreditation of bargaining councils. In so doing, the strengths and weaknesses inherent in the functioning of the system is underlined, with a view to bringing forward practical suggestions for policy and legislative intervention. Focus is placed on the dispute resolution functions of bargaining councils.

Chapter Five examines the institutional and legislative framework for dispute resolution by the CCMA, and the different procedures provided by the statute to resolve labour disputes. Focus is placed on the establishment, operation and jurisdiction of the CCMA.

Chapter Six provides an analysis of the grounds for review of CCMA awards and Chapter Seven contains a summary, conclusions and recommendations towards enhancing the effectiveness of the existing labour disputes resolution mechanisms.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF LABOUR DISPUTE RESOLUTION IN SOUTH AFRICA

1. Introduction

South Africa's transition to democracy has led to a new labour relations dispensation that encapsulates the new government's aim to reconstruct and democratize society and the economy in the labour relations arena.[1] In 1994, the Department of Labour announced a comprehensive programme directed at the total revision of the country's labour dispensation. Until 1979, South African legislation relating to industrial bargaining was well-known for its racially discriminatory provisions, and for the vastly inferior treatment it accorded to black workers and their organisations.[2] The first labour legislation to structure and regulate the relationship between employers and their employees was the Industrial Conciliation Act 11 of 1924. This piece of legislation was designed for the promotion of collective bargaining between employers and organised labour. In its provisions, this Act excluded black workers from the definition of "employee". This created a discriminatory system, where white workers were protected at the expense of black workers.[3] This situation existed until 1979 when trade unions were recognised within the system of labour relations. In 1977, the whole spectrum of labour relations changed after the appointment of the Wiehahn Commission, which was established to investigate the adequacy and appropriateness of existing labour legislation. During this

[1] Section 1 of the Labour Relations Act 66 of 1995 (hereafter "the Act" or "LRA").
[2] Du Toit *et al Labour Relations Law: A Comprehensive Guide (1999)* at 29.
[3] Griffiths HR and Jones RA *South African Labour Economics* (1980) at 152.

period the labour arena was affected by both economic and political problems and at the same time major developments occurred in the wake of recommendations made by the Wiehahn Commission.[4] One of these developments was the introduction of the concept of unfair labour practice into our law.

With the political overhaul and global pressures brought to bear on the South African economy of post-1994, new challenges arose for the industrial relations system. Negotiations between organised labour, the state, and business were conducted in the National Economic Development and Labour Council (Nedlac).[5] A task team was appointed, and six months later a draft bill was tabled in Parliament. The objective was to give effect to government policy as reflected in the RDP, and to ensure that the legislation complied with both the Constitution, and the relevant ILO conventions.[6] Of great importance is the enactment of the [illegible] Relations Act[7] which sought to address the disparities of the past. The new system supported collective bargaining as the primary source for the building of relationships between employers and employees. It also made provision for a process for the resolution of labour disputes.[8]

Indeed a new system of industrial relations which would meet the challenges posed by globalisation was necessary in order to address the injustices of the past and the need to ensure a growing and competitive post-1994 economy. This Chapter begins by describing the South African dispute resolution system. This provides a clear basis for a discussion of how our current system of dispute resolution functions. As a starting point,

---

[4] Ibid.
[5] Du Toit et al op cit note 2 at 36.
[6] Op cit note 1.
[7] Ibid.
[8] Ibid.

a historical development of the South African labour dispute resolution system may be set out.

2. Historical Background

2.1 South African industrial relations: Pre 1924 – 1956

The system of labour dispute resolution in South Africa dates back to the nineteenth century, and is characterised by four periods, each of which is marked by legislative changes. Initially, unions were not recognised.[9] The process only begins in 1915, when the Transvaal Chamber of Mines agreed to recognise white unions.[10] But in 1920, when the price of gold dropped, mine owners decided to look forward to the introduction of new machinery, which resulted in strike action.[11] The strikes of 1922 made the government realise that there was a need for the establishment of statutory machinery which would govern both collective bargaining and the settlement of disputes. Following the Rand Rebellion of 1922, the Industrial Conciliation Act ("the Act")[12] was promulgated. This legislation was characterised as part of the Pact Government's 'civilised labour' policy, which was instituted in exchange for white labour peace.[13] The primary purpose of the Act was to prevent industrial unrest by providing machinery for collective bargaining and for conciliation in the event of disputes.[14] According to Finnemore *et al*,[15] the Act represented "an attempt to promote self-regulation within the

[9] Cunningham PW & Slabert JA *Industrial Relations Handbook: Historical Development of Industrial Relations* (1989) Issue 1 at 2-3.
[10] Ray and Jack Simons *Class and Colour in South Africa 1850-1950* (1968) at 3.
[11] Ibid.
[12] Industrial Conciliation Act No 11 of 1924.
[13] Cunningham et al op cit note 9 at 2-6.
[14] Ibid at 2-8.
[15] Finnemore et al *Introduction to Labour Relations in South Africa* (1998) at 158.

pluralist system, and with the emphasis on orderly dispute resolution where necessary". It recognised the registration of trade unions with the exclusion of blacks. These were only whites, coloured and Asian employees, and mixed race unions.[16]

The Act set up machinery in the form of industrial councils and conciliation boards for the settlement of disputes. However, the employers and trade unions were not compelled by the Act to use the industrial council system. For example, these structures were voluntary in nature; both employee and employer had to form an industrial council. On 30 June 1931, there were forty-three of them, a majority registered for a particular district and representing the skilled trades, like printing, engineering, building, motor industry, tailoring, cabinet-making, hair dressing, clothing and baking[17]. Only registered trade unions and employers' organisations could constitute an industrial council. The council could be registered if the Minister of Labour considered the parties sufficiently representative of the employers and employees within the relevant area and industry.[18]

Where there was no industrial council in place, provision was made for the creation of an *ad hoc* conciliation board for the settlement of disputes between employers and employees.[19] The industrial councils were entrusted with the responsibility to settle disputes and prevent strikes and to specify minimum wage rates and other employment conditions by agreement. No strike or lockout was allowed in areas covered by agreement. If negotiations broke down, the matter would be referred to the arbitrator, whose award was binding.[20] It was possible for these councils to conclude legally

---

[16] Kritzinger A S "The Nature and Role of Local Bargaining in South African Industrial Relations: A Comparative view on structures and mechanisms" (1991) 1 *SAJLR* 15 at 1- 25.
[17] Ray and Simons op cit note 10 at 4
[18] Op cit note 12.
[19] Rycroft and Jordan *A Guide to South African Labour Law* (1992) at 250.
[20] Ray and Simons op cit note 10 at 3.

enforceable agreements. Such an agreement bound the parties if they so wished and had it promulgated by the Minister. Once gazetted, it became legally binding on all the parties involved in the industry and area affected. In terms of s 9(3) of the Act[21], failure to comply with agreements that had been made binding constituted a criminal offence.

Collective agreements were regarded as a form of common law contract entered into between unions and employers, with the object of creating bargaining rights and obligations enforceable either as a matter of industrial relations practices or through the civil courts.[22] In other words, collective agreements were a form of permissible domestic legislation.[23] The question arising out of the council agreements was in what ways a settlement has to be reached in order to bind the parties to the dispute. This matter was dealt with in *South Africa Association of Municipal Employees (Pretoria Branch) & another v Pretoria City Council*[24], where a dispute arose between a trade union and an employer in connection with the dismissal of an employee who was a member of the trade union. The matter was submitted to the industrial council concerned, which decided that the employee should be reinstated; but the employer refused to reinstate him. The employee thereupon applied to the court to give effect to the decision of the council. The court dismissed the application upon other incidental grounds. It went on to point out that members of the council have purely statutory functions, and that the council decision was only binding by virtue of its members in terms of the Act which may affect others.

---

[21] Op cit note 12.
[22] Thompson C and Benjamin P *South African Labour Law (formerly De Kock's Industrial Laws of South Africa)* (1997) A1-9.
[23] Ibid.
[24] 1947 (1) SA 138 (T).

Further, an industrial agreement arrived at by a council was not really an agreement or contract, but a piece of legislation which bound the parties and others only if and when the Minister declared it to be binding under the provisions of the Act. Dowling J in deciding the case concluded that no binding agreement had come into effect, and that an Industrial Council Agreement should be viewed as a piece of permissible domestic legislation which binds the members of the council only once publication by the Minister in terms of s 48 had taken place.[25] This decision was confirmed in *S v Prefabricated Housing Corporation (PTY) Ltd & Another*[26]:

> "It is true that the type of document now under consideration is termed under the Act and industrial parlance an "agreement" and is said to be "negotiated" or "entered" into, but technically it is not a contract in the legal sense. The parties to the industrial council are the employer(s) or employee(s) and trade unions in their representatives (section 18). They do not contract inter se to produce the measure. They may negotiate or enter into the agreement, but it is the industrial council as the corporate body that decides whether to adopt it and transmit it to the Minister for consideration and promulgation. Moreover it only becomes effective if and when the Minister deems it expedient to declare it binding by notification in the Gazette (section 48(1)). It is noteworthy too, that it is the Minister who fixes the period of its duration and that he can also declare it (or parts of it) to be binding on employers and employees in the industry other than those who entered into the agreement and for an area additional to the area for which the industrial council is registered."

The learned Judge concluded that from all the provisions it was clear that an industrial agreement is not a contract, but a piece of subordinate domestic legislation made in terms of the Act by an industrial council and the Minister.

---

[25] Supra at 17.
[26] 1974 (1) SA 535 (A) at 539.

Industrial council agreements were also extended to all the employers and employees within the jurisdiction of a council. The printing and newspaper industry was the first to set a pattern of enforcing industrial council agreements. The employers were entrusted with the duty of maintaining discipline in the South African Typographical Union.[27] Their agreement provided for a joint board to sit in judgment on defaulting union members, and gave those expelled a right of appeal to the industrial council.[28]

The Industrial Conciliation Act (the Act) divided the working class along racial lines, in that it excluded all blacks from the definition of "employee".[29] This was clear from the definition of "employee" in the Act. For example in s 24[30] of the Act, the term "employee" was defined to exclude a person whose contract of service or labour was regulated by any black pass laws and regulations. The exclusion of pass-bearing blacks from the definition of employee effectively excluded them from the provisions of the Act. This resulted in a one-sided system that favoured skilled white workers at the expense of black employees. The labour market was almost entirely racially regulated. This is in the sense that wages established at industrial councils, and extended to black workers, were often expressly racist.[31] This wage gap was the end result of the exclusion.

The system resulted in what had been termed as "regulatory bureaucracies".[32] However, with this character it transpired that the Industrial Conciliation Act required some revision. In this respect, a commission under the leadership of Van Reneen J was appointed to investigate the industrial legislation. The recommendations of the

---

[27] Ray and Simons op cit note 9 at 3.
[28] Ibid.
[29] Ibid.
[30] Op cit note 12.
[31] O'Regan C "Reflecting on 18 years of Labour Law in South Africa" 1979 – 1997 (1997) 18 *ILJ* at 889.
[32] Finnemore op cit note 15 at 158.

commission led to the replacement of the 1924 Act by the Industrial Conciliation Act.[33] The Act effected only a few changes. It made provision for the extension of industrial council agreements to blacks, and for representation of pass bearing black workers at industrial council meetings by an inspector of the Department of Labour.[34] The amended Act[35] maintained that disputes between employers and employees were to be resolved through conciliation. The dispute resolution functions of industrial councils and conciliation boards were also widened; and they were required by the Act to deal with all disputes occurring in their registered jurisdiction.[36]

A new commission emerged (the Botha Commission) in 1948, which recommended the establishment of a co-ordinating body to which industrial council agreements would have to be referred for scrutiny prior to ratification and extension by the Minister.[37] The Commission argued that party representation existed during that period was granted to black employees in the industrial situation, it would have led to equality between races.[38] Subsequently, it recommended that black trade unions be granted recognition under separate legislation, subject to a reasonable degree of control and guidelines. It also recommended that such control be exercised by officials of the Department of Labour and that registration be granted in stages.[39] The government failed to implement the recommendations of the Botha Commission. Instead it opted for the enactment of the Bantu Labour (Settlement of Disputes) Act[40], later known as the Black

---

[33] Act 36 of 1937.
[34] Du Toit et al *The Labour Relations Law: A Comprehensive Guide*, (1999) at 6-7.
[35] Op cit note 33.
[36] Ibid.
[37] The Report of the Industrial Legislation Commission of Enquiry (UG 62-1951) at 341.
[38] Ibid.
[39] Ibid.
[40] Act 48 of 1953 (the 1953 Act).

Labour Relations Regulation Act.[41] This piece of legislation was designed for the prevention and settlement of disputes involving black workers. The Act provided for a procedure to be followed when dealing with disputes. For example section 10 of the Act provided as follows:

> "When a black labour officer suspected a dispute, or when a dispute had arisen, he had to inform a regional committee, the Divisional Inspector of Labour and the industrial council concerned (if any) and then, in consultation with the works committee (if such existed), endeavour to settle the dispute. If this failed the matter had to be referred to the Central Labour Board. It then became the task of the board to secure a settlement in co-operation with the labour officer and the Divisional Inspector of Labour. If the board's efforts were unsuccessful, it had to report this fact to the Minister of Labour, and indicate whether in its opinion the matter should be referred to the wage board with a view to a determination being made on the conditions under which a settlement should be arrived at."

The 1953 Act managed to keep black unions out of the workplace, in that it provided for special machinery in the form of committees and separate conciliation boards to deal with disputes involving black labour and white employers.[42] This Act was viewed as government policy to discourage black unionism.[43]

2.2 Developments from 1956 – 1994

In 1956, the government enacted the Industrial Conciliation Act.[44] The major objectives of the Act were to provide mechanisms for collective bargaining, and to prevent and settle disputes.[45] In pursuit of its objectives, it followed in the steps of its predecessor, by encouraging the formation of industrial councils and conciliation boards

---

[41] Van Jaarsveld SR and van Eck BPS *Principles of Labour Law* (1998) at 346.
[42] Coetzee JAG *Industrial Relations in South Africa*, (1976) at 54.
[43] Cheadle H and Mureinik E 'Works Committees and Trade Unions' (1980) 1 *ILJ* at 249 at 260.
[44] Later Labour Relations Act No 28 of 1956 (the 1956 Act).
[45] The Preamble to the 1956 Act.

charged with the duty to settle disputes which arose between employers and employees or trade unions.[46] Trade unions were made important role players in the settlement of labour disputes. In *Amalgamated Engineering Union v Minister of Labour,*[47] it was held that:

> "The whole idea underlying the trade union system... is that the trade union concerned should act as spokesman of its members whenever a dispute arises between employers and employees. Under the 1956 Act when parties declared a dispute it had to be referred to an industrial council, and where no industrial council has jurisdiction, apply for the appointment of conciliation boards to resolve disputes through conciliation."

Although trade unions catering for blacks were not illegal, they were prevented from registering, in terms of s 4 of the Industrial Conciliation Act.[48]

The Industrial Conciliation Act further fragmented the labour component. The definition of "employee" was changed [illegible] blacks altogether. Industrial councils were voluntary bodies made up of equal numbers of employer and trade union representatives, who would negotiate on terms and conditions to be applied in the industry. The duties of the industrial council were to prevent disputes from arising by negotiating agreements; to attempt to settle disputes which had arisen; and to deal with any matter of mutual interest to employers and employees.[49] During this period there were one hundred and four registered industrial councils.[50] When an agreement had been reached, the industrial council would send the agreement to the Minister of Manpower who, in his discretion, could promulgate the terms of the agreement so that they would be

---

[46] Op cit note 12.
[47] 1949 (4) SA (A) 912.
[48] Op cit note 44.
[49] Du Plessis et al A Practical Guide to Labour Law (1998) at 132.
[50] Op cit note 15 at 69.

binding on all the employers and employees within the industry.[51] On the other hand, section 24 of the Act determined those matters that could be dealt with by an industrial council agreement if it was promulgated by the Minister.[52] The agreements provided for minimum wages, overtime, public holidays, and similar substantive conditions of employment.[53] The Minister could extend these agreements to cover those employers and employees who did not belong to an industrial council.[54]

The most important innovation of the Act was the establishment of the industrial tribunal which was entrusted with the power:

- to hear appeals against the decisions of the Registrar in respect of a wide range of matters;
- to undertake arbitrations voluntarily requested by the parties to industrial councils, or conciliation b[illegible]o conduct compulsory arbitration for essential services;
- to determine demarcation disputes;
- to conduct investigations and make recommendations on the desirability of job reservations; and,
- to investigate and report on any matter referred to it by the Minister in connection with the objects of the Act.[55]

It is clear that the tribunal was provided with limited adjudicative power, and operated as a standing commission in terms of the Act.[56] This is also evidenced by s 76,

---

[51] Op cit note 44.
[52] Ibid.
[53] Ibid.
[54] Finnemore et al op cit note 15 at '70.
[55] Du Toit et at op cit note 2.
[56] Ibid.

which authorised the industrial tribunal to determine disputes with regard to whether any wage-regulating measure was binding on any employer, employee, trade union or employers' organisation, or was applicable to any undertaking, industry, trade or occupation.[57]

In the late 1970s, the industrial relations system and the apartheid regime were to face major challenges. The dualistic system began breaking down under pressure from the growing union and its international trade union allies and from many sections of South African capital that feared increased and unregulated conflicts on the shop floor. Since 1973, significant changes had taken place, including strikes undertaken with respect to wages and the 1976 uprising.[58] According to Du Toit et al, the outbreak of strikes in Durban in 1973, was a sign of the end for the racially exclusive system.[59] These events clearly underlined the [illegible] of the then existing legislative framework. As a result of increased industrial unrest, the Black Labour Relations Regulation Act[60] was amended by the Black Labour Relations Amendment Act 70 of 1973. Under the Act,[61] black workers were also allowed to use liaison or works committees to represent their interests at the level of undertakings, and as channels for negotiation with their employers. The status of these committees depended on their statutory establishment.[62] The workers through the liaison or works committee system

[57] Op cit note 44.
[58] Du Toit et al op cit note 2 at 28.
[59] Ibid.
[60] Op cit note 40.
[61] Ibid.
[62] In *Piet Bosman Transport Works Committee v PE Bosman Transport (Pty) Ltd* (1979) (1) SA 389 (T) at 69A-C where Ellof J held that "A works committee ... is a statutory body with the limited functions of establishing and maintaining dialogue with an employer of Blacks ... and negotiating with him on behalf of his Black employees. It is nowhere provided that it may take up the cudgels on behalf of the employees further than with the employer himself. It is certainly not provided that it may assume the garb of litigant ... the statute itself does not vest a committee ... with the power of going to court".

were allowed to negotiate binding agreements with the employer on wages and working conditions, and were granted permission to strike.[63] Although it was the function of these committees to negotiate agreements concerning wages, the employer could control the committee or hamper the attempts of the employees to negotiate an agreement.[64] From the outset, the negotiation rights of these structures were limited, as they were not allowed to negotiate on wages. On certain occasions the judiciary emphasized the right of the committee to negotiate wages and other conditions of employment. For example, in *Ngcobo v Associated Engineering Ltd t/a Glacier Bearings,*[65] the court held that:

> "I have no doubt that the applicants were wholly within their rights in insisting that their functions as set out in s 7(2) as amended should be recognised and that the respondent's refusal to do so was unlawful. The respondent was obliged to modify 'the existing system', whatever it was, to comply with s 7 (2)."

In the event of a dispute between black workers and their employer, the matter had to be settled by the regional committee for the area, in consultation with a plant level

---

[63] Slabbert et al "Managing Industrial Relations in South Africa" *Industrial Relations Handbook* (1989) at 2-11.

[64] *Ibid.* In *Ngcobo v Associated Engineering Ltd t/a Glacier Bearings* (1980) 1 *ILJ* 126 (D); 1980 (3) SA 646 (D) James JP stated that 'in the present case the application is based on the allegation that no Black liaison committee existed at Glacier Bearings when the majority of Blacks requested the creation of a works committee. While a Black liaison committee undoubtedly existed in 1973 with objects laid down in accordance with the functions then detailed in the law, when those functions were altered by the amending Act the objects of the committee should have been suitably amended to embrace those extended functions. This was done and I am quite satisfied on the papers that, after the amendment of this Act, the respondent refused to recognize the existence of a Black liaison committee at Glacier Bearings which had the functions laid down by the law as amended. ... In my judgment the effect of all this is that the respondent never recognized the existence of a Black liaison committee with the right to carry out the functions laid down in s 7 (2) as amended and that when the applicants representing the Black employees finally accepted that the respondent would not agree to a liaison committee having powers; laid down under the Act and accordingly refused to have anything more to so with it, the liaison committee ceased to exist. In these circumstances there is no bar to the establishment of a works committee amongst the Black employees of Glacier Bearings because of the existence of a Black liaison committee.'

[65] Supra at 130G.

committee. Failing this, the dispute had to be referred to the Central Black Labour Board.[66] If settlement cannot be achieved, the board had to report to the Minister.[67]

The workers rejected the committee system. Instead they joined new unregistered unions, which were excluded from the industrial councils. Although these unions were excluded from the industrial councils, they decided to build their own shop steward structure, and negotiated agreements with employers at plant level.[68] This shows that statutory structures for black workers were largely ignored. However by the end of 1975, more than 2 700 of these committees had been established.[69]

In 1977, in the aftermath of the 1976 Soweto uprising a Commission of Inquiry (the Wiehahn Commission) into labour legislation was appointed. Following the appointment of the Wiehahn Commission which was introduced to investigate a major spectrum of labour legislation, the whole [illegible] labour relations raised public interest.[70] The Commission recommended a number of reforms and in 1979 it tabled its report in Parliament.[71] The Commission reported that African workers should be allowed to join registered unions, and also be given direct representation on industrial councils and conciliation boards.[72] Since then, other major changes were enacted in a series of amendments, in the course of which the Industrial Conciliation Act changed to the Labour Relations Act 28 of 1956.[73] The Act[74] amended the Industrial Conciliation Act significantly, and extended the statutory sphere to black unions. First, it removed the

---

[66] Kritzinger op cit note 16 at 25.
[67] In terms of s 2 of the 1953 Act.
[68] Finnemore and Van Rensburg op cit. note 15 at 9.
[69] Griffiths and Jones op cit note 3 at 153.
[70] Du Toit et al op cit note 2 at 17
[71] *Report of the Commission of Inquiry into Labour Legislation* (RP 47/ 1979).
[72] Ibid.
[73] Amendments were contained in the Industrial Conciliation Amendment Act 94 of 1979 and Act 95 of 1980, Labour Relations Amendment Act 57 of 1981, Act 51 of 1982 and Act 2 of 1983.
[74] Labour Relations Amendment Act 94 of 1979.

exclusion of black workers by amending the definition of "employee" in the Act. It also deleted the provisions for job reservations, and inserted a provision forbidding race discrimination in industrial agreements.[75]

Although black workers were included in labour legislation from 1979, their new unions were wary of membership of these councils. They preferred to develop their strength at the workplace and negotiate directly with the employer.[76] To participate in the system, trade unions had to register in terms of the Labour Relations Act[77]. And at the same time it was possible for all workers through their union to conclude an agreement in the industrial council which could legally bind employers and trade unions in that particular industry.[78] In the 1980s there was a rapid growth of black trade unions, but these unions were poorly organised and did not have sufficient power to enter industrial councils.[79] The trade union [illegible] was suspicious to be involved in the process of registration and industrial council. They felt that the system was part of oppression of the past.[80] The management, on the other hand, refused bargaining at workplace level, and insisted that unions should join industrial councils.[81] Despite their organisational and political differences, all the emerging unions looked forward to unity amongst other things.[82]

Another important innovation of the 1979 legislation [83] was the establishment of the National Manpower Commission which was charged to advise the Minister on

---

[75] Thompson et al. op cit note 20 at A1 – 27.
[76] Finnemore et al. op cit note 15 at 158.
[77] Op cit note 44.
[78] Ibid.
[79] Finnemore et al op cit note 15.
[80] Ibid.
[81] Ibid.
[82] Eddie Webster et al *Work and Industrialization in South Africa: an Introductory Reader* (1994) at 263.
[83] Op cit note 74.

matters of labour policy. A further major change was the creation of an Industrial Court[84] armed with powers to regulate industrial relations and to adjudicate "unfair labour practice" claims.[85]

Friedman[86] notes that the terms of reference of the Wiehahn Commission were to rationalise the then existing labour legislation, to seek possible means of adapting the industrial relations system to changing needs, and to eliminate bottle-necks and other problems experienced in the labour sphere.

The Industrial Court was given a wide discretion to interpret the "unfair labour practice" concept. Section 1 of the Industrial Conciliation Amendment Act[87] defined an "unfair labour practice" as "any labour practice which in the opinion of the Industrial Court is an unfair practice". But later, it was amended by the Industrial Conciliation Amendment Act of 1980,[88] which defi[illegible]y act or omission, other than strike or a lockout, which has or may have the effect that –

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

---

[84] The Industrial Court was established in 21 June 1979.
[85] O'Regan op cit note 31 at 897.
[86] Friedman, S *Building Tomorrow Today: African Workers in Trade Unions:* 1970 – 1984, (1997) 19.
[87] Op cit note 74.
[88] Act 95 of 1980 and later by Labour Relations Amendment Act 9 of 1991 and was in force until the promulgation of the 1995 LRA.

(iv) the labour relationship between employer and employee is or may be detrimentally affected thereby."

By virtue of this definition, the parties were enabled to channel all manner of disputes which might otherwise have ended in industrial action to the Industrial Court via the "unfair labour practice" provision.[89] The functioning of the Industrial Court was premised on the distinction between disputes of rights and disputes of interests. The decisions of the Industrial Court on "unfair labour practice" brought some relief to vulnerable workers. Benjamin[90] notes that although initially conceived as a statute to preserve the collective peace, further refinements to the Act emphasised that the judicial remedies were also intended to assist isolated employees. In respect of the 1980 amendments, individuals were to use conciliation board mechanisms in the event of an "unfair labour practice" dispute. In terms of this Act[91], no dispute about unfair labour practice could be channelled to the Industrial Court unless statutory conciliation efforts at industrial councils or conciliation boards were exhausted.[92] A dispute, for example, about wages could be referred to the Court only after attempts for a negotiated settlement either on industrial council or conciliation boards had failed.[93]

---

[89] Bendix S *Industrial Relations in the New South Africa* (1996) at 493.
[90] Thompson et al op cit. note 20 at A1 -27.
[91] Act 95 of 1980.
[92] Uytrecht, PV "Dispute settlement by Industrial Councils" (1983) *ILJ* 161 at 163.
[93] The role of an industrial council in relation to unfair labour practice is clear from the wording of s 28 of the Labour Relations Act 23(1) of 1956. Section 23 (1) reads:

> " An industrial council shall, within the undertaking, industry, trade or occupation, and in the area, in respect of which it has been registered, endeavor by negotiation of agreements or otherwise to prevent disputes from arising, and to settle disputes that have arisen or may arise between employers or employers' organizations and employees or trade unions and take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interests to employers or employers' organizations and employees or trade unions."

In the case of an unsettled dispute, both parties had to agree to its referral to an arbitrator or to the Industrial Court.[94] A dispute concerning an unfair labour practice could only be referred to the Court after an industrial council having jurisdiction had failed to settle the dispute. Ehlers[95] noted that although it was required to try and settle an alleged 'unfair labour practice' dispute, the court was not compelled to bring the alleged dispute to finality. Section 46(9) (d) made provision for industrial council or if there was no industrial council to report to the Minister that it could not settle the dispute and, on receipt of such a report, the dispute would forthwith be referred to the Industrial Court for determination. For example, in *Moses Nkadimeng v Raleigh Cycles (SA) Ltd,*[96] the Court held that compliance with the provisions of s 46 (9)[97] is peremptory, and that proceedings regarding an unfair labour practice could not be referred to the court before an industrial council or conciliation board had attempted settlement, unless agreement was reached and a report was made that settlement was not possible.

The work of the Industrial Court was concerned mainly with applications for *status quo* orders. The Act allowed the Industrial Court to grant urgent interdicts prohibiting unfair labour practices, introduced a presumption of liability on the part of trade union members, office-bearers and officials for damages caused by unlawful industrial action, and established a Labour Appeal Court.[98] For example, if a dispute could not be resolved, the court had to decide whether or not a certain labour practice

---

[94] Thompson et al op cit note 20 at 62.
[95] Ehlers DB 'Dispute Settling and Unfair Labour Practices: The Role of the Industrial Court vis-à-vis the Industrial Council' (1982) 3 *ILJ* 11 at 14.
[96] (1981) 2 *ILJ* 34 (IC).
[97] Section 46(9) of the Industrial Conciliation Act 94 of 1979 reads as follows:
> "Notwithstanding the provisions of paragraph (a), an industrial council or, whenever there is no industrial council having jurisdiction in respect of the dispute, the parties to the dispute may agree to report to the Minister that it is or they are satisfied that it or they will not be able to settle the dispute, and upon receipt of such a report, the dispute shall forthwith be referred to the industrial court for determination".

[98] Labour Relations Amendment Act 83 of 1988.

constituted an "unfair labour practice". If necessary, the Court had to grant appropriate relief to the aggrieved party in terms of s 46(9). Pending the final determination of a dispute, the Industrial Court could grant interim relief by way of s 43 (*status quo)* orders.

In respect of disputes of rights, the Court used the "unfair labour practice" concept to build up an extensive jurisprudence on individual employment rights and collective labour law.[99] The first important decision was rendered in 1980.[100]

Aside from its powers to make interim and final determinations in respect of unfair labour practices, the Industrial Court was also given the power to adjudicate in regard to a matters or disputes arising out of the application of laws administered by the Department of Manpower.[101] The functions of the Industrial court were spelled out in s17 (11) of the Act.[102] Section 17(11) (a) was seldom used,[103] as a result of which it was

---

[99] O'Regan op cit note 30 at 901.

[100] In *MAMU v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (IC), it was contended that it was unfair to rely on the natural termination of a fixed-term contract, where there was the expectation of renewal, on the grounds of belonging to a trade union or participating in its activities. It was argued that just as the legislature in s 25 of the Wage Act, No 5 of 1957, prevented the employer from relying on the common law-rights of termination on the grounds of trade union activities, just so the legislature through the Industrial Court and the 'unfair labour practice' provisions should prevent an employer from defeating the social policy consideration underlying the victimization provisions by relying on the natural termination of a fixed-contract. Following this Persons DP (as he then was) held that the failure to renew a fixed term migrant labour contract, where an expectation of renewal existed, could constitute an "unfair labour practice".

[101] For example, by s 17(11) (a) of Act No 5 of 1980.

[102] Section 17(11) provides as follows:

" The functions of the Industrial Court shall be-

(a) to perform all the functions, excluding the adjudication of alleged offences, which a court of law may perform in regard to a dispute or matter arising out of the application of the provisions of the laws administered by the Department of Manpower;

(b) to decide any appeal lodged with it in terms of s 16 or 21A [which relates to appeals from decisions of the industrial registrar and appeals by an employer or registered employer's organization or registered trade union who feels aggrieved by the refusal of his or its application for admission as a party to an industrial council];

(c) to conduct arbitrations referred to it in terms of ss 45, 46 or 49;

(d) to advise the Minister on any matter contemplated in s 46(7) (c);

(e) to determine any question referred to it in terms of s 76 [which relates to demarcation between industries];

(f) to make determinations in terms of s 46 [which relates to disputes concerning an unfair labour practice];

(g) to deal with any matter which it is required or permitted to deal with under this Act; and

repealed in 1988, and the amendments codified the unfair "labour practice concept".[104]. After the passing of the 1988 Act, there were some changes, in that the decision of an industrial council regarding unfair labour practices was binding on the parties and only if the parties agreed thereto in writing. Since the promulgation of this Act, a more detailed set of procedural arrangements emerged by which parties sought to regulate their relationships, and excluded the provisions of the LRA and Industrial Court.[105] The 1988 amendments to the Labour Relations Act attempted to partly remedy the situation. The Labour Appeal Court, which was established during this period, was heavily criticised in its dealings. The trade unions regarded it as employer-biased. The dissatisfaction exploded, resulting in an agreement between employers, government and labour for more changes to be inserted.[106]

In 1991, the Act[107] was again amended.[108] The amending Act re-introduced the earlier definition of unfair labour practice, thereby depriving the Industrial Court of its power to regard strikes as unfair. It was, however, given the power to grant an interdict in cases of illegal strikes.[109] Mediation was also encouraged. It was only after conciliation attempts had been exhausted that parties were allowed to resort to other statutory mechanisms. For example, the Minister could upon application by the industrial council or conciliation board and after a deadlock had been reached, appoint a

---

(h) generally to deal with all matters necessary or incidental to the performance of its functions under this Act."

[103] As regards court of law disputes under s 17 (11) (a) of the Act, the Court in *Moses Nkandimeng v Reileigh Cycles* (1981) 2 *ILJ* 34 (IC) ruled that it had no jurisdiction to grant an interdict to prevent the commission of unfair labour practice.

[104] Op cit note 98.

[105] A Rycroft *The Private Regulation of Industrial Conflict* (1990) at 260.

[106] Op cit note 89 at 497.

[107] Op cit note 44.

[108] Labour Relations Amendment Act No 9 of 1991 ("the 1991 Act").

[109] Op cit note 20 at A1- 28.

mediator.[110] The parties also could agree to arbitration as a method of settling their disputes.[111]

According to Christie,[112] the Industrial Court was not the ideal institution to settle labour disputes quickly and inexpensively. For example, in October 1994, the roll of the Industrial Court had reached more than 5000 cases, of which over 3000 were awaiting trials, and it was estimated that the court had a backlog of some eight months. [113]

By the early nineties, following the release of Nelson Mandela, a new era had dawned in industrial relations. And the signing of the Laboria Minute in 1990 was a turning point. An agreement was reached between COSATU, NACTU and SACCOLA and formalised in the Laboria minute. It committed all the role-players to consultation and consensus on any labour legislation before submission to Parliament.[114] As a result of the commitment of the parties, the National Economic Forum and National Manpower commission was established. The successor of these bodies is the National Economic Development and Labour Council (NEDLAC).[115] The Laboria minute was a crucial moment in the transition to democracy as a whole.

2.3 The New era from 1994 – present

In 1994, the new government came into power, and many changes were introduced. The first move of the democratically elected government was to establish a

---

[110] Section 44 of Act No 9 of 1991.
[111] O'Regan C "Possibilities for Worker Participation in Corporate Decision-making" (1991) at 116.
[112] Christie S and Madhuku L *Labour Dispute Resolution in Southern Africa* (1996) at 17.
[113] Martin Brassey & John Brand *Business Day* 26 April 1995. See the Explanatory Memorandum to the Draft Bill GN 97 of 10 February 1995 at 140.
[114] Cheadle et al *Current Labour Law* (1998) at 2.
[115] Ibid.

legal task team to draft a new Labour Relations Act.[116] After a prolonged consultation process the Act was formally passed by Parliament at the end of 1996, very importantly in the LRA.[117] During this period centralised bargaining was promoted. Under the LRA, the definition of employee was extended to cover all employees in employment relations, whether in the private sector or public sector[118]. It introduced an entirely new set of institutions aimed at providing speedy, economic, accessible and non-legalistic procedures for consensus-based resolution and adjudication of labour disputes.[119]

The drafting of the Labour Relations Bill was a democratic process in which all parties were involved (for example, employers, labour and the government). In 1995, the draft Bill was tabled in Parliament. The *Explanatory Memorandum,*[120] which accompanied the Bill, included the following with regard to the then dispute resolution machinery and its procedures:-

> "Existing statutory conciliation procedures are lengthy, complex and pitted with technicalities. Successful navigation through the procedures requires a sophistication and expertise beyond the reach of most individual and small business. The merits of the dispute often get lost in procedural technicalities. Errors made in the initiation of conciliation procedures can be fatal to an applicant's claim for relief. A lack of resources, and poor remuneration and training all conspire to render the statutory conciliation services ineffectual. These factors encourage workers and employers to resort to other methods to resolve disputes. The absence of procedures for the independent and effective mediation of disputes means that many resolvable disputes culminate in industrial action. Our statutory conciliation institutions settle on average only 20% (Conciliation Boards) to 30 % (Industrial Councils) of disputes."[121]

---

[116] Op cit note 1.
[117] Baskin J & Sagar S *Discussion Paper: South Africa's new Labour Relations Act (*1995) at 1.
[118] Section 213 describes "employee" as 'anyone, with the exception of an independent contractor, who works for someone else or for the State and receives remuneration or who is entitled to receive remuneration; and anyone else who assists in any way to continue or run the business of the employer.
[119] Van Jaarsveld and Van Eck *Principles of Labour Law* (2002) at 417.
[120] See Explanatory Memorandum to the Draft Labour Relations Bill (1995).
[121] Ibid at 147.

The success rate of these institutions was found to be incompatible with Independent Mediation Services of South Africa (IMSSA) as well as by equivalent agencies in foreign jurisdictions.[122]

It was against this background that the Commission for Conciliation, Mediation and Arbitration (CCMA) the bargaining councils/ statutory councils and private agencies, as well as the Labour Court and the Labour Appeal Court were established. The old industrial councils were replaced by bargaining councils. Both the CCMA and the bargaining councils were empowered by the LRA to settle labour disputes. One of the primary objectives of the Act is to provide procedures and mechanisms for more effective dispute resolution. Under this Act, the bargaining council must endeavour to settle disputes through conciliation, and if the dispute cannot be settled, it has to be referred to conciliation or arbitration either through a bargaining council with jurisdiction or through the Commission for Conciliation, Mediation and Arbitration (CCMA).[123]

[122] Ibid.
[123] Slabbert J.A and Swanepoel B.J *Introduction to Employment Relations Management,* (1998) at 42.

CHAPTER THREE

LEGAL FRAMEWORK OF LABOUR DISPUTE RESOLUTION UNDER THE LABOUR RELATIONS ACT, 66 OF 1995.

1. General Introduction

The Labour Relations Act[1] brought about some major changes in our labour law, in that new rights and duties were established. The NEDLAC Executive Council in its agreement on the Bill concluded as follows[2]:

> "The New Act, among others, provides for a more structured collective-bargaining system, greater certainty of rights and obligations, and the inclusion of new rights. It endeavours to provide a smoother and more efficient process for dispute resolution, and establishes several institutions that will play a profound role in South African Labour relations in future years. These include a new Labour Court and the Commission for Conciliation, Mediation and Arbitration (CCMA). The Act also provides for the establishment of statutory councils at industry level for purposes of seeking agreements on dispute resolution, on training and education schemes, and on pension, provident and similar funds. Bargaining councils will replace existing industrial councils, and will provide the locus for the conclusion of collective agreements on a range of issues including wages and conditions of employment, and policy proposals on industrial policy."

The system of labour dispute resolution is one of the cornerstones of the Act,[3] which recognises the need for general dispute resolution mechanisms, as well as the need for specific forms of dispute resolution.[4] In this respect, it is argued that the dispute resolution system prescribed in the Act attempts to effect a general dispute resolution system by addressing both the need for accessibility and efficiency and the need for

[1] Act No 66 of 1995 (hereafter "the Act" of LRA).
[2] Nedlac Agreements and Reports 1995. www.nedlac.org.za. (Accessed on 22 July 2004).
[3] Op cit note 1.
[4] Brand et al *Labour Dispute Resolution* (1997) at 17.

specific dispute resolution procedures in specific contexts.[5] The Act also recognises the different sorts of labour disputes, and attempts to provide procedures appropriate for the resolution of various types of disputes, while at the same time depending on the dispute resolution institutions.[6] According to Basson *et al,*[7] the Act established a new system of dispute resolution which is fast, efficient and accessible to all employees in the industry. In the view of Christie and Madhuku,[8] the effective resolution of labour disputes lies at the heart of sound labour relations that advance social justice and ensure lasting industrial peace. A dispute resolution system must enshrine broad principles of industrial democracy. It must acknowledge that active participation by the parties to the dispute is more likely to succeed than a system in which third parties dictate the terms of settlement. The outcomes of these disputes should be left to the parties involved, and state participation should be as limited as possible.

This chapter focuses on the institutional and legislative framework for dispute resolution.

2. Dispute Resolution and International Labour Standards

According to Olney,[9] the International Labour Standards addressing the issue of dispute prevention and settlement are general in nature, and need to be adapted to national conditions. The International Labour Organisation advocated for the inclusion by states of voluntary mechanisms for the prevention and resolution of disputes. This was

---

[5] Ibid.
[6] The Act distinguishes between disputes of rights and disputes of interests.
[7] Basson et al *Essential Labour Law* (2005) at 335.
[8] Christie S & Madhuku L *Labour Dispute Resolution in Southern Africa* (1996) at 4.
[9] Shauna Olney "Social dialogue and Conflict Resolution: Dispute Prevention and Resolution: An ILO Perspective" (2004) www.eurofound.eu.int. (accessed on 10 June 2005)

evidenced by the Voluntary Conciliation and Arbitration Recommendation, 1951 (No, 92) which recommended that voluntary mechanisms which are free of charge and expeditious, be made available to assist in the prevention and settlement of industrial disputes.[10] The Voluntary Conciliation and Arbitration Recommendation, 1951 (No 92) provides as follows:

"Articles-

1. Voluntary conciliation machinery, appropriate to national conditions, should be made available to assist in the prevention and settlement of industrial disputes between employers and workers.
2. Where voluntary conciliation machinery is constituted on a joint basis, it should include equal representation of employers and workers.
3. (1) The procedure should be free of charge and expeditious; such time limits for the proceedings as may be prescribed by national laws or regulations should be fixed in advance and kept to a minimum.

   (2) Provision should be made [illegible] the procedure to be set in motion, either on the initiative of any of the parties to the dispute or ex officio by the voluntary conciliation authority.
4. If a dispute has been submitted to conciliation procedure with the consent of all the parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation is in progress.
5. If a dispute has been submitted to arbitration for final determination with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while arbitration is in progress and to accept the arbitration award.
6. No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike.

[10]Recommendation concerning Voluntary Conciliation and Arbitration Recommendation, R092 made at the General Conference no 34 of the International Labour Organization held at Geneva in 1951 www.ilo.org/ilolex/cgi-lex/convde.pl. (Accessed 10 June 2005).

What was intended in this Convention is clear from the above provisions. For example, the promotion of the establishment of joint conciliation mechanism with equal representation of employers and employees, stresses the voluntary nature of both conciliation and arbitration procedures. The International Labour Standards also link dispute prevention with collective bargaining.[11] Article 4 of Convention 98 provides as follows:

> " Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers and employers' organisations and workers' organisations with a view to the regulation of the terms and conditions of employment by means of collective agreements."

The central provision of the Collective Bargaining Convention, 1981 (No 154) declares that measures adapted to national conditions should be taken with a view to:

(a) making collective bargaining possible for all employers and all groups of workers in the branches of activity covered by the Convention;

(b) extending collective bargaining progressively to all matters relating to working conditions, terms of employment, and relations between employers and workers or their organisations;

(c) encouraging the establishment of rules of procedure agreed to between employers' and workers' organisations;

(d) not hampering collective bargaining by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules; and,

[11] The Right to Organise and Collective Bargaining Convention 1949. www.ilo.org/public/standards.htm (Accessed on 10 June 2004).

(e) ensuring that bodies and procedures for the settlement of disputes are so conceived as to contribute to the promotion of collective bargaining.[12]

3. Collective Bargaining

Collective bargaining in South Africa has recently undergone stupendous changes. This is so as several principles and procedures have been developed and implemented to meet the required international standards of collective bargaining. There has been a statutory system of collective bargaining in South Africa. The first item of labour legislation to structure the relationship between employers and employees was the Industrial Conciliation Act of 1924.[13] This piece of legislation was designed for the promotion of collective bargaining between employers and organised labour.[14] Prior to the adoption of Constitution,[15] there [illegible]te as to whether constitutional rights to collective bargaining should be included in the Constitution. This was answered in *Ex parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa,*[16] where the Court held that:

> "[C]ollective bargaining implies a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries … Once a right to collective bargaining is recognised implicit within it will be the right to exercise some economic power against partners in collective bargaining."

This resulted in the enactment of Section 23 of the Constitution[17] provides which provides as follows:

---

[12]International Labour Standards concerning Industrial Relations.www.ilo.org/public/standards.htm. (Accessed on 10 June 2005).
[13] Industrial Conciliation Act 11 of 1924 ("the 1924 Act").
[14] See the Preamble to the 1924 Act.
[15] The Constitution (1996).
[16] 1996 (10) BCLR 1253 (CC) at para 64.
[17] The 1996 Constitution.

"(1) everyone has the right to fair labour practices.

(2) Every worker has the right

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) The employer has the right to:

(a) form and join an employer's organisation; and,

(b) to participate in the activities and programmes of an employer's organisation.

(4) Every trade union and every employer's organisation has the right:

(a) to determine its own administration, programmes and activities;

(b) to organise; and,

(c) to form and join a federation.

(5) Every trade union, employer's organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1)".

The right to collective bargaining has been recognised by the international community since 1949.[18] In terms of a convention agreed to by the member states of the International Labour Organisation (ILO), "measures appropriate to national to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisation, with a view to the regulation of terms and conditions of employment by means of collective agreements". South Africa as a member state of the ILO, has committed itself to fulfilling its obligations in terms of

[18] Steenkamp et al "The Right to Bargain Collectively" (2004) 25 *ILJ* at 943.

international law. South Africa has given effect to its obligation by entrenching the right to collective bargaining as a constitutional right, and by providing extensively for collective bargaining in labour law. These rights are entrenched in the Bill of Rights.[19] Section 23(5) of the Constitution provides as follows:

> "Every trade union, employer's organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1)."

The same emerges from section 1 of the Act, which states that the purpose of the Act is to advance economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling the primary objectives of the Act. These include the promotion of orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision-making in the working place, and the effective resolution of labour disputes.[20]

According to Steenkamp,[21] "the inclusion of the right to collective bargaining in the Bill of Rights signifies the recognition by South African community that collective bargaining would no longer be a mere social objective, but would have the status of a fundamental right, that is, a right is mandatory for a life worthy as a human being, a life that cannot be enjoyed without that right. Moreover, as a fundamental right, the state of South Africa is constitutionally bound to 'respect, protect, promote and fulfil the right to collective bargaining."

---

[19] Op cit note 15.
[20] These goals were reiterated in the case of *National Union of Metal Workers of SA & other v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC) where the Court held that, the Act sought to provide a framework whereby both employees and employers and their organization could partake in collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace and the effective resolution of labour disputes.
[21] Op cit note 18 at 944.

The LRA, unlike its predecessor introduced a new model of collective bargaining that is voluntary in nature, except in certain circumstances stipulated by the Act.[22] Mischke[23] asserts that:

> "...there are limits to voluntarism, and the LRA tempers the effect of voluntarism by providing, first, for the resolution of disputes relating to refusal to bargain, and second, by providing for the acquisition and exercise of organisational rights by trade unions. It would serve little purpose to refrain from imposing a duty to bargain if it meant that employers could, with impunity, refuse to engage with trade unions representing significant numbers of their employees – after all, this would undermine the promotion and protection of collective bargaining".

This model was designed to enable the bargaining parties to determine the nature and structure of collective bargaining and the economic outcomes that should bind them, and, where necessary, to negotiate [illegible] structures within which agreements are reached and the terms of these agreements.[24]

The Act does not contain a definition of collective bargaining.[25] However, our Courts have acknowledged collective bargaining as a means of maintaining good labour relations. In *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of*

---

[22] In *SASBO v Standard Bank* [1998] 2 BLLR 208 (A), the Appellate Division noted that the previous Labour Relations Act imposed no express duty to bargain. The Court held that the extent to which the parties were obliged to do so was left for the Industrial Court to decide in the exercise of its "unfair labour practice" jurisdiction.

[23] Mischke C 'Getting foot at the door: Organizational Rights and Collective Bargaining in terms of LRA' (2004) 13: 6 *CLL* 51 at 51.

[24] Explanatory Memorandum to the Draft Labour Relations Bill (GN 97 of 10 February 1995) at 122.

[25] The main objectives of collective bargaining are stipulated in section 1 of the LRA as follows:

- The provision of institutionalized structures and processes whereby potential conflicts over matters of mutual interest e.g. wages and working conditions may be channeled and resolved in a controlled manner thus reducing unnecessary disputes;
- The creation of conformity and predictability through the development and commitment to collective agreements which establish common substantive conditions and procedural rules;
- The promotion of employee participation in managerial decision-making that concerns the working lives of employees; and
- The enhancement of democracy, labour peace and economic development at a national level.

the Constitution of the Republic of South Africa, 1996, [26] the Constitutional Court stated that:

> "Collective bargaining is based on the need for individual workers to act in combination to provide them with sufficient power to bargain effectively with employers. Individual employers on the other hand, can engage in collective bargaining with their workers and often do so. ... The failure by the text to protect such a right represents a failure to comply with the language of CP XXVIII, which specifically stated that the right of employer to bargain collectively should be recognised and protected."

The whole process of collective bargaining is based on the understanding that there are differing, and often conflicting, interests to be reconciled between the workers and the employer. The aim is to reach a settlement on matters of mutual interest through negotiation. The terms of this settlement are recorded as a collective agreement signed by the parties.[27] Collective bargaining in South Africa, for many years has been endorsed as the most appropriate means of regulating workers' terms and conditions of employment, in line with ILO Convention No. 84.[28] Article 2 of the Collective Bargaining Convention of 1981 defines collective bargaining as follows:

> "to include all negotiations which take place between an employer, a group of employers or one or more employer's organisations on the other hand or one or more worker's organisations on the other for:
>
> (a) determining working conditions and terms of employment;
>
> (b) regulating relations between employers and workers; and,

---

[26] Supra note 16 at 1255.

[27] Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2003) at 257. A collective agreement is defined in s 213 of the Act as:

> "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the other hand:
>
> (a) one or more employers;
>
> (b) one or more registered employers' organisations; or
>
> (c) one or more employers and one or more employers' organisations".

[28] Op cit note 7 at 230.

(c) regulating relations between employers or their organisations and the workers' organisations."

Labour law commentators generally share this understanding. For example, Basson *et al*[29] define collective bargaining as a process by means of which employees in an organised relationship seek to reconcile or negotiate with their employers or employer's organisations in an organised relationship, with regard to employment conditions and other matters of mutual interest. Grogan,[30] in a similar fashion describes collective bargaining as the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation. It is inherent in the notion of collective bargaining that a single employee cannot be a party to collective bargaining. South African courts distinguish between consultation and bargaining. For example, in *Metal & Allied Workers Union v Hart,*[31] the Industrial Court stated that:

> "[T]here is a distinct and substantial difference between consultation and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise and agreement."

According to Van Jaarsveld and Van Eck,[32] the main purpose of collective bargaining has been described as follows:

> "[B]y bargaining collectively with organised labour management seeks to give effect to its legitimate expectations that the planning of production, distribution, etc, should not be frustrated through interruptions of work. By bargaining

---

[29] Basson et al op cit note 7 at 253.
[30] Grogan J *Workplace Law* (2005) at 355.
[31] (1985) 6 ILJ 478 (IC) at 493H-I.
[32] Van Jaarsveld and Van Eck *Principles of Labour Law* (2002) at 331-332.

collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and has to be compatible with the physical integrity and moral dignity of the individual and also that jobs should be reasonable secure."

Collective bargaining also plays an important role in the resolution of disputes. According to National Labour & Economic Development Institute,[33] South Africa's labour relations system is one which is developed around the concept of voice regulation, or consensual labour relations. Voice regulation refers to the constructive role that collective bargaining between employees and employers plays in resolving disputes. Furthermore, voice regulation in the labour market provides a mechanism to balance the often conflicting interests of employers and employees. Bendix,[34] describes the functions of collective bargaining as follows:

"At least, the process of bargaining endows the parties with equal status. It also rests on the presuppositions that neither party is completely wrong, that concessions by either party do not necessarily signify weakness in that party and that, while the individual goals of the parties may be important, the ultimate achievement of these goals should not occur at the cost of disrupting the organisation as a whole. For these reasons collective bargaining, though not ideal, has hitherto served as the most feasible and mutual beneficial method of resolving basic and ongoing conflicts between the parties to the labour relationship."

In support of the above view the Constitutional Court in *Numsa v Bader Bop (Pty) Ltd and another*[35] stated that"

"It is also important to comprehend the dynamic nature of wage-work bargaining and the context within which it takes place. Care must be taken to avoid …concrete, principles

[33] National Labour & Economic Development Institute *South Africa Country Analysis* (2004) at 78.
[34] Bendix S *Industrial Relations in South Africa* (1996) at 255.
[35] Supra note 20 at Para 13.

governing that bargaining which may become absolute or inappropriate as social and economic conditions change."[36]

According to Anstey,[37] collective bargaining and institutionalised dispute settlement systems are founded on a particular balance of forces in society. He maintains that current forces for change have seen this balance of power shift in favour of employees. Brand[38] notes that whereas collective bargaining had been recognised as a desirable means of resolving conflict between employers and employees, it was not compulsory in South Africa. Instead, employers and employees were encouraged to bargain collectively, and a specific duty to do so would arise only where it was contained in an industrial council constitution or agreement.[39] This implies that there was no obligation on employers and trade unions to bargain collectively in the absence of a specific agreement to do so. Under the Act,[40] it was left to labour courts to encourage collective bargaining as the preferred method of settlement of disputes. Those courts were able to fashion a duty to bargain under their general unfair labour practice jurisdiction.[41]

During the process that led to the enactment of the LRA, disagreement arose between trade union and employer representatives concerning the status of collective bargaining. The trade union preferred a legally enforceable duty to collective bargaining. On the other hand they wanted the economy to be divided into a small number of sectors,

---

[36] Ibid.
[37] Mark Anstey in Van Rensburg R 'The Workplace Revolution: Are dispute resolution mechanisms keeping pace?' (1998) Issue 2 *Labour Relations in SA* at 22, 23.
[38] Brand J and Cassim NA 'Duty to Disclose – A Pivoral Aspect of Collective Bargaining' (1980) 1 *ILJ* 1 at 249.
[39] Ibid.
[40] The Labour Relations Act No 28 of 1956.
[41] Op cit note 27.

each covered by a centralised bargaining forum for the centralised negotiation of terms and conditions of employment and other matters of mutual interests. The employers opposed the views, holding that collective bargaining should not be compelled by law, and that the determination of level of bargaining should be left to the parties.[42] It is apparent from the above that collective bargaining is not only a means of encouraging a settlement on matters of mutual interest, but also plays a major role in maintaining peace and stability within the industry, and also plays a social and economic role. This was the view expressed by Rycroft[43] who explains that collective bargaining fulfills three functions; namely –

- It has an economic role in its establishment of wages and standards for employees that are reasonable.
- It fulfils a social function in that it establishes an industrial justice system which protects employees from arbitrary action by management, and which recognises the right to human dignity.[44]
- It performs a political function, in that it brings a measure of democracy to the workplace, allowing employees to have a say in matters that affect their working lives.

As far as the status of collective bargaining is concerned, the 1995 LRA does promote and encourage collective bargaining.[45] At the same time, trade unions and employers are not compelled to bargain collectively.[46] This has been articulated in

---

[42] Basson et al *Essential Labour Law* (2002) at 22.
[43] Rycroft A and Jordaan B *A Guide to South African Labour Law* (1992) at 116.
[44] Ibid.
[45] The Preamble to the Labour Relations Amendment Act No 12 of 2002 provides for the enforcement of collective bargaining agreements.
[46] Section 23 (5) of the Act reads: "Every trade union, employer's organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.

ECCAWUSA & others v Southern Sun Hotel Interest (Pty) Ltd,[47] where the Labour Court held that:

> "Although the concept of the duty to bargaining in good faith was recognised in relation to the unfair labour practice jurisdiction of the 1956 Labour Relations Act, this is not the approach adopted in the current Act. Accordingly the duty which existed under the 1956 Act, under the unfair labour practice jurisdiction, has not been incorporated into the current Act. There is no legal duty, implied by the Act, or any other law, to the effect that there is a duty to bargain in good faith. In the absence of such a duty being incorporated into the Act, it was not clear which law the applicants relied upon to say that the duty to bargain in good faith is incorporated into the recognition agreement. This approach was not helped by the applicants' bare assertion in the founding affidavit that such an implied term exists. The applicants bear at least an onus to show prima facie that such a term is implied in the recognition agreement which they have done."

It is at this point that the force and effect of the constitutionally protected right to bargain collectively becomes relevant. This raises the question whether the constitutional entrenchment of the right to engage in collective bargaining does not impose a reciprocal duty to bargain collectively. The issue of a duty to bargain has been debated since the introduction of unfair labour practice in our law.[48] The industrial court refused to acknowledge a duty to bargain. The court in *MAMU v Hart (Pty) Ltd* [49] noted that "negotiations should always assume a voluntary character in order to be effective." But in 1988, the court reconsidered the issue in *FAMU v Spekennham Supreme,*[50] when it stated that: "I do not believe that voluntarism has any further right of existence in a

---

To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1)."

[47] (2000) 21 *ILJ* 1090 (LC) at 1098.

[48] Rycroft et al op cit note 43 at 132.

[49] (1985) 6 ILJ 478 (IC) at 489A.

[50] (1988) 9 ILJ 628 (IC).

system which is principally intended to combat political unrest."[51] The status of collective bargaining has been resolved under the 1995 Act.

It could be argued that a constitutional protected right includes both a legally enforced right and a duty to bargain collectively. Section 23(5) of the Constitution, which confers on every trade union, employers' organisation and employer the right to engage in collective bargaining, does not impose a duty to bargain. Steenkamp *et al*[52] similarly note that: "It is trite law that all statutes, including the LRA, must be read and interpreted against the backdrop of the Constitution, and in this instance, s 23(5) of the Constitution which guarantees to every trade union, employer's organisation and employer the right to engage in collective bargaining."[53] According to Cheadle,[54] it was never the intention of the legislature to impose a duty to bargain in good faith rather envisaged the freedom to engage in collective bargaining. They suggest that a distinction must be drawn between a positive right to bargain and the freedom to bargain.[55] They also argued that freedom to bargain does not require the state to bargain with public sector trade unions, or enact statutes that compel bargaining. Further that the entrenchment of a freedom further implies that the state cannot, subject to the limitation clause, prevent collective bargaining either.[56] In *SA National Defence Union v Minister*

---

[51] Ibid at 636- 637.
[52] Steenkamp *et al op cit* note 18 at 942, 954.
[53] Ibid.
[54] Cheadle et al *The South African Constitutional Law: The Bill of Rights* (2002) at 390-5.
[55] Ibid.
[56] Ibid at 388. Section 23(5) of the Constitution says:

> "Every trade union, employers' organization and employer has the right to engage in collective bargaining."

It continues:

> "National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

Section 36(1) of the Constitution provides as follows:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic

of Defence & others,[57] the High Court considered whether the Minister of Defence had a duty to bargain with SANDU, a union catering for members of the National Defence Force, in terms of the Defence Act No 44 of 1957 read with the Constitution. The Court noted that the former phrase duty to bargain 'recognised the right to bargain collectively, with a correlative duty to bargain on the other side'. The right to engage in collective bargaining , on the other hand, conferred freedom to bargain collectively – a freedom which may not be violated, but which does not impose a duty on any one else. Van der Westhuisen J held that, while s 25(3) recognised the right to engage in collective bargaining, it did not impose a corresponding duty to participate in collective bargaining. However the High Court came to a different conclusion in *SANDU & another v Minister of Defence & others.*[58] Smit J stated that:

> "As SANDU has a right to engage in collective bargaining in terms of the provisions of section 23(5) of the Constitution the conferral of such a right must, in my view impose a correlative duty on some person since the right "binds" the state according to section 8(1) of the Constitution. In the present context clearly the person who is bound is the Minister in his official capacity as the employer. In other words, section 23(5) of the Constitution imposes an obligation on the Minister to engage in collective bargaining."

These cases failed to give clarity as to the meaning and scope of the constitutional right to bargain collectively. The question whether the constitutional right to bargain

---

society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation and its purpose;
(d) the relation between the limitation and its purpose;
(e) less restrictive means to achieve the purpose."

Subsection (2) provides:

"Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[57] 2003 24 *ILJ* 1495 (T) at 1497I-J.

[58] 2003 (3) SA 239 (T); [2003] 9 BLLR 932 (T) at 934.

collectively includes a duty to bargain collectively remains an open question. This debate may have to be resolved by the courts in future. Since the debate has arisen in connection with a group not covered by the LRA, such as members of the National Defence Force, it might be difficult to get clarity. These judgments deal specifically with collective bargaining in the military context.

Although the LRA imposes a duty to bargain on the state, it does not do so in respect of private employers.[59] The LRA, expressly commits employers and employees to workplace democracy. Similarly, Cheadle *et al*[60] noted that while there can be no doubt that the promotion of collective bargaining is one of the central themes of the LRA, it does not does not impose a positive duty to bargain collectively. Instead, it provides the organisational framework in terms of which the constitutional right may be exercised.

It is apparent from the above [illegible] to bargain is important. It is also clear from the explanation given in the explanatory memorandum that the duty to bargain is left to the parties to decide by themselves. In the course of the debate on the Labour Relations Bill, the Task Team noted that until the enactment of the "unfair labour practice" definition in 1979, collective bargaining structures were voluntarist in the sense that while the law encouraged collective bargaining on an industry-wide basis, a party could not be compelled to bargain other than by the exercise of economic power by the

[59] The Explanatory Memorandum of the Labour Relations Bill (Government Gazette No. 16259) at 122 justified these actions as follows:

> "[T]he fundamental danger in the imposition of a legally enforced duty to bargain and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, the id the rigidity which is introduced into a labour market that needs to respond to the changing economic environment. the ability of the South African economy to adapt to the chaining requirements of a competitive international market is ensured only where the bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both structures within which agreements are reached and the terms of these agreements ... While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing a series of organisational right to strike."

[60] Cheadle et al op cit note 48 at 390.

party seeking bargaining rights.[61] During the 1980s, the industrial court, acting in terms of provisions ostensibly designed to protect individual rights assumed jurisdiction to intervene in collective disputes. Here the court had issued orders compelling parties to engage in collective bargaining. It determined appropriate bargaining partners and defined appropriate bargaining topics.[62] Collective bargaining is further restricted and regulated according to the subject matter of the negotiations.

3.1 Forums for Collective Bargaining: Bargaining Council and Statutory Council.

The Act has created forums for collective bargaining, namely, bargaining councils and statutory councils. Under the 1956 Act, industrial councils could be formed by registered trade unions and employers' organisations as forums for centralised bargaining. According to Du Toit et al. the LRA adheres to the same principles.[63] Section 1 of the Act supports promotion of collective bargaining at sectoral level as one of the primary objectives of the Act. As a result, the Act provided for the establishment of bargaining councils and statutory councils.

The bargaining councils, the then industrial councils, were traditionally the most important collective bargaining forums.[64] The workings of the council are documented in the 1995 *Annual Report of the Department of Labour.* Bargaining councils are the successors to the then industrial councils which existed in terms of the 1956 Act. They are established when one or more registered trade unions and one or more employers'

---

[61] Op cit note 24.
[62] Ibid. at 292.
[63] Du Toit et al. op cit note 27 at 245.
[64] Van Jaarsveld et al. op cit note 32 at 219.

organisations agree to the establishment of a bargaining council for a specific industry.[65] They are voluntary in nature require the corroboration of both parties. According to Du Toit *el al*[66] the Act favours centralised bargaining, offering inducement to participation in bargaining councils, and introducing a measure of compulsion by permitting the establishment of statutory councils with attenuated functions upon application by registered trade unions and employer' organisations. The main function of a bargaining council is to negotiate collective agreements.[67] In terms of section 51 of the LRA bargaining councils have to resolve disputes about matters of mutual interest between parties to a bargaining council.

The Act also makes provision for the establishment of statutory council. These are set up in industries or sectors where there are representative trade unions or/and employers' organisations. Section 3[illegible] Act provides that, one or more registered representative trade unions or one or more registered representative employer's

[65] Section 27 of the Act.
[66] Op cit note 27 at 246.
[67] Section 28 of the Act provides that:
"Bargaining councils should attempt to achieve the following-
- to conclude collective agreements; to enforce those collective agreements, and to prevent and resolve labour disputes;
- to perform the dispute resolution functions referred to in section 51; and to establish and administer a fund to be used for resolving disputes;
- to promote and establish training and education schemes;
- to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;
- to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area;
- to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lock-out at the workplace;
- and to confer on workplace forums additional matters for consultation;
- to provide industrial support services within the sector;
- and to extend the services and functions of the bargaining council to workers in the informal sector and home workers".

organisation(s) can apply to the registrar for the establishment of a statutory council in respect of a sector and area for which no bargaining council is registered. The most important requirement set by this provision is that of representivity. If the registrar is satisfied that the council is representative of the sector or area as determined by NEDLAC or the Minister of Labour, and that there is no other council registered in the same area, it will publish a notice in the Government Gazette. This means that the application will have to set out in respect of which sector and area establishment and registration is sought.

The powers and functions of a statutory council are outlined in section 43(1) of the Act as follows:

- to perform dispute resolution functions;
- to promote and establish train[illegible]cation schemes;
- to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment schemes or funds for the benefit of the parties to the council, and
- to conclude collective agreements to give effect to the above-mentioned matters.

In terms of section 43(2), a statutory council may agree in its constitution to perform any other functions allocated to the bargaining council. This includes the negotiation of collective agreements regulating terms and conditions of employment. A collective agreement reached in a statutory council is binding on its members,[68] and the council may also request the minister to extend the agreement to all parties who fall within the registered scope of the council, as well as non-parties.[69]

[68] Section 31 of the Act.
[69] Section 32 of the Act.

4. Collective agreements

Collective bargaining is a process whereby employers and employees negotiate with one another, with regard to conditions of employment.[70] A successful process of collective bargaining will usually result in the conclusion of a collective agreement. Because of the important role played by collective agreements in our industrial relations system, it is also important to discuss their role and status. Le Roux[71] has described the important role played by collective agreement as follows:

> "They regulate (or affect) the terms and conditions of employment of large portion of the South African labour force. They are also an important source of procedures for the resolution of disputes and often grant valuable organisational and collective bargaining rights to unions."

The previous legislation of 19[illegible] not contain any definition of collective agreements. But the Labour Relations Act of 1995 does provide a definition of collective agreements, and regulates them in far more detail that its predecessor, the 1956 Act. Section 213 of the 1995 Act defines a collective agreement as:

> 'A written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand -
>
> (a) one or more employers;
>
> (b) one or more registered employers' organisations; or,
>
> (c) one or more employers and one or more employers' organisations.'

The implication of this section is that the individual employer now has a right to bargain collectively. This right was omitted in the Draft Bill of Rights. The

---

[70] Van Jaarsveld et al op cit note 32 at 303.
[71] PAK Le Roux 'Collective Agreements: their role and status' (2003) 12 *CLL* 91 at 91

Constitutional Court in *re Certification of the Constitution of the Republic of South Africa*[72] stated that:

> "collective bargaining is based on the need for individual workers to act in combination to provide them collectively with sufficient power to bargain effectively with employers. Individual employers, on the other hand, can engage in collective bargaining with their workers and often do so."

The definition also stipulates that a collective agreement must be in writing. According to Landman,[73] agreements which do not comply with the said requirements will not be covered by the Labour Relations Act. The formality of these agreements was discussed in *Communication Workers Union v Telkom SA Ltd,*[74] and it was held that:

> "When one considers the importance attached to collective agreements by the Act, it is apparent that there is a very good reason for requiring a relative degree of formality. Collective agreements are intended to facilitate a degree of self-regulation by parties, even to the extent of agreeing on dispute settlement mechanisms relating to the interpretation or application of their agreement. This purpose would hardly be served by the uncertainty which almost inevitably flows from accepting the notion that collective agreements could consist of letters, memoranda, minutes, reports, or even a combination of those, the correctness, completeness, or accuracy of which could very well be in dispute. Collective agreements as defined in the Act should be read to mean an agreement in the form of a document embodying the terms of the agreement and signed by parties."

The Commissioner's opinion in the *Telkom* case may be criticised. The commissioner employed a stricter approach where he found that a collective agreement should be in writing and signed by the parties. It is submitted in this regard that there is

---

[72] Supra note 16.
[73] Landman AA 'Collective Agreements: Which Judicial Pigeon hole for new bargaining agreements?' (1996) 5 *CLL* 71 at 72.
[74] (1998) 19 *ILJ* 389 (CCMA) at 398.

nothing in the LRA which suggests that in order for an agreement to qualify as a collective agreement it must be signed. As long as it is in writing, whether it is signed or not is a matter that has to be decided by the parties. However, according to Le Roux,[75] although the agreement must be in writing, it is not necessary for it to be signed by parties. Furthermore, it does not need to be contained in one document; it can be in more than one document. In *SAMWU v Western Cape Local Government Organisation,*[76] the trade union and the employers' organisation (WECLOGO) agreed at a meeting of their bargaining councils to negotiate on the restructuring of municipal service delivery, and passed a resolution 'that the parties bargain at the next bargaining council meeting. The Commissioner held that the resolution of a bargaining council did not constitute a collective agreement, even though the resolution was in writing, and even though it may have evidenced consensus between th

According to Le Roux,[77] this decision might be incorrect one within the context of bargaining councils where the bargaining process is relatively formal and where formal agreements are usually entered into. Le Roux suggested that in order to qualify as a collective agreement, the content of the agreement must relate to a specified subject-matter; namely, terms and conditions of employment or any other matter of mutual interest.[78] According to Du Toit *et al*[79] 'terms and conditions' of employment are taken to refer to express or implied terms of the contract of employment in the narrow sense, and do not include the physical conditions or the surrounding circumstances of employment. On the other hand, the expression "any other matter of mutual interest" has

[75] Op cit note 64 at 92.
[76] [2000] 10 BALR 1160 (CCMA).
[77] Op cit note 64 at 92.
[78] Ibid at 93.
[79] Du Toit et al. op cit note 27 at 206.

received attention in the courts.[80] According to Basson and others,[81] a matter of mutual interest is a wider concept, and it embraces any issue that concerns both parties and would include topics such as the restructuring of the workplace and the training of employees. Thompson and Benjamin,[82] point out that:

> "[it] brings the complete array of employment and labour relations matters within the scope of collective agreements. Almost anything in which the qualifying parties have an interest – shared or opposing – and which is capable of joint and autonomous regulation is fit for inclusion in a collective agreement."

Under the 1956 Act, bargaining council agreements could regulate matters of mutual interest to employers and employees. This term was widely interpreted to mean - "Whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned ..."[83]

The agreement is generally negotiated every year; however, the period now extends to as long as three years, making for greater stability in the relevant sectors. These agreements may be negotiated and concluded between an employer and a union at workplace or enterprise level or by the parties to a bargaining council. Du Plessis *et al*[84] differentiate between a "recognition agreement" concluded in terms of the 1956 Act and the "collective agreement" in the 1995 LRA. Accordingly a recognition agreement is a

---

[80] In *SACCAWU v Bredasdorp Spar* [1998] 4 BLLR 406 (CCMA) at 408. In this case the commissioner had to decide whether or not the employer had complied with the terms of a settlement agreement relating to dismissal. He stated that: "The definition of a collective agreement in the LRA states that it is "an agreement concerning terms and conditions of employment or any other matter of mutual interest". The term "mutual interest" is not defined; however its use throughout the Act makes clear that it refers to monetary maters – what use to be a "dispute of interest". The agreement in question was not such an agreement, but was an agreement in settlement of a dispute of right. I therefore do not believe the agreement qualifies as a "collective agreement."

[81] Basson et al. op cit note 7 at 256.

[82] Thompson and Benjamin *South African Labour Law* AA1 – 135 (Service No 41, 2000).

[83] Op cit note 64 at 93.

[84] Du Plessis et al *A Practical Guide to Labour Law* (2002) at 211.

collective agreement in terms of the definition, but, whereas the recognition agreement is contractual in nature, collective agreements enjoy statutory status.[85]

Now the question is who is bound by collective agreements. The 1956 Act determined who would be bound by collective agreements entered into by industrial councils (now called bargaining councils). This Act focused on industry level, and not outside bargaining councils. During the late 70's and early 80's there was a tremendous growth in collective bargaining outside these forums at the level of the individual workplace and later at enterprise level.[86] As a result, difficulties were encountered, more specifically in reconciling the concept of a collective agreement with that of individual contract. This created problems in determining the legal nature and validity of collective agreements. The one argument was that these agreements should be treated as contracts of employment and enforceable as such. The Industrial Courts made creative use of their unfair labour practice jurisdiction to arrive at practical solutions. Thus this argument was dealt with in *South Africa Association of Municipal Employees (Pretoria Branch) & another v Pretoria City Council,* [87] where a dispute arose between a trade union and an employer in connection with the dismissal of an employee who was a member of the union. The matter was submitted to the industrial council concerned, which decided that the employee should be reinstated; but the employer refused to reinstate him. The employee thereupon applied to court to give effect to the decision of the council. The court dismissed the application upon other incidental grounds. The Industrial Court reasoned, that if an industrial council agreement could be binding on the parties to the council only once the agreement had been published in terms of section 48 of the Act

[85] Ibid
[86] Op cit note 42 at 9.
[87] 1947 (1) SA 138 (T) at 142.

then 'a fortiori where the applicant is not a member or a party to the industrial council he cannot be bound by such a settlement agreement.[88] The Court held that an industrial council agreement arrived at by a council was not really an agreement or contract, but a piece of legislation which bound the parties and others only if and when the Minister declared it to be binding under the provisions of the 1956 Act.[89] Dowling J, in the above case, concluded that no binding agreement had come into effect, and that an Industrial Council Agreement should be viewed as a piece of permissible domestic legislation which binds the members of the council only once publication by the Minister in terms of s 48 has taken place.[90] This decision was followed in *S v Prefabricated Housing Corporation (PTY) LTD & Another,*[91] where the Judge concluded that from the provisions of the Act it is clear that an industrial agreement is not a contract, but a piece of subordinate domestic legislation made in terms of the Act by an Industrial Council and the Minister.[92] The problems inherent in the previous system were solved in the LRA of 1995. The current LRA gave statutory force to agreements that qualify as collective agreements as defined in section 213. Section 23 of the LRA creates specific statutory contract binding and enforceable in terms of its provisions between the parties to such an agreement and non-parties.[93] According to s 23 of the LRA.

"(1) a collective agreement binds –

(a) the parties to the collective agreement;

(b) each party to the collective agreement and the members of every other

---

[88] Ibid.
[89] Ibid
[90] Ibid at Para 17.
[91] 1974 (1) SA 535 (A).
[92] Ibid at 537.
[93] See In *Ceramic Industries Ltd t/a Betta Sanitaryware v NACBAWU* (1999) 20 *ILJ* 123 (LC).

party to the collective agreement, in so far as the provisions are applicable between them;

(c) the members of a registered trade union and the employers who are members of a registered employer's organisation that are party to the collective agreement if the collective agreement regulates –

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;

(d) employees who are not members of the registered trade union or trade union party to the agreement if -

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and,

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

(2) A collective agreement binds, for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employer's organisation for the duration of the collective agreement.

(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are bound by the collective agreement.

(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement that by giving reasonable notice in writing to the other parties."

In terms of section 23 of the LRA, a collective agreement firstly binds the parties to it. Secondly, it establishes contractual rights and obligations between each party to the agreement and members of every other party to the agreement in so far as the provisions are applicable to them. Lastly, a collective agreement creates rights and obligations

between the individual members of a union party and the individual employer-members who are members of the employers' organisation party.

This provision eliminates the problem created by agreements which bind employees who are not members of the union party. Section 23(1) (d) clearly promotes a majoritarian principle, as it stipulates that a collective agreement binds employees who are not members of the trade union party to the agreement, provided that the union represents a majority of the employees in the workplace. This requires that non-members must be identified in the agreement and if they are, they will also be bound by such an agreement.[94] Individual members cannot therefore repudiate collective agreements with which they are not happy, or escape their effects, by resigning from the union.[95] The application of this principle is illustrated by the case of *Mzeku & others v Volkswagen of SA (Pty) Ltd,*[96] where the employees [illegible] tools over a dispute with their union, NUMSA. NUMSA had entered into an agreement with the company which the company would issue an ultimatum to the workers to resume work at a particular time. The appellant workers failed to do so. Although the matter was ultimately decided on a different basis, the court observed:

> "Since the union is a registered union there can be no doubt that it was entitled to conclude a collective agreement with the first respondent to deal with a matter of mutual interest. As the union was a representative union having majority membership in the first respondent's workplace, it could conclude a collective agreement that was binding even on employees who were not its members. That is a benefit which is enjoyed by a

---

[94] In *SACCAWU v Crown Furniture's* (1998) 19 *ILJ* 663 (CCMA) at 667, the commissioner stated that:
> "It is noteworthy that, if regard is had to 23 (1) (d), collective agreements bind not only the parties to the agreement and their members, but also non-parties and non-members, under particular circumstances, which need not be related here. Suffice to say that under those circumstances also non-members, persons who terminate their membership subsequent to the agreement becoming binding, and persons who become members after the agreement becomes binding, are bound by the agreement."

[95] Grogan op cit note 30 at 329.

[96] (2001) 22 *ILJ* 1575 (LAC) Para 67.

registered trade union which has the majority of employees in a workplace as its members. If the union in this case could go as far as that, it cannot, in our view, be reasonably suggested that it could not bind its own members by the collective agreement of 28 January."

This position was also confirmed in *MCC Contracts (Pty) ltd v National Union of Mineworkers & others,*[97] where the individual respondent employees were accommodated in hostel accommodation at the appellant employer's expense. The number of employees using this facility dwindled, and the employer negotiated a new agreement with the Federal Mining Union (FMU) that amended the employment contracts of employees, who were, as from 1 October 1999, obliged to provide their own accommodation, in lieu of which they were paid a living-out allowance. The respondent union and the individual employees made an urgent application to the Labour Court for an interdict preventing the employer from paying the allowance in lieu of providing accommodation on the ground that this constituted a unilateral change to their terms and conditions of employment.

The Labour Court granted the order, and the employer appealed to the Labour Appeal Court, which reversed the decision because it found that the collective agreement bound the respondent employees. The FMU was the majority union (only 81 of the 691) employees belonged to the respondent trade union). The Court concluded that the collective agreement identified the respondent employees, and was expressly made to bind them.

[97] (2000) 5 LCD [Part 8] (LAC). See also *Sigwali & others v Libanon (A Division of Kloof Gold Mine Ltd)* (2000) 21 *ILJ* 641 (LC)).

The question is and was always, what legal effect these agreements have on an individual contract. The answer to that will be found in section 23(3) which regulates the interaction between collective agreements and contracts of employment. In terms thereof, where applicable, a collective agreement varies any contract of employment between an employee and an employer who are both bound by the collective agreement. It must however be understood that the agreement will only vary the contract of employment to the extent that it introduces more favourable terms and conditions of employment and to the extent that it does not contravene any statutory provision.[98] Steenkamp *et al,*[99] note that collective agreements have the effect of varying any contract of employment between the employer and the employees who are bound by the agreement. Accordingly, this is what makes collective agreements most important for regulating relations between employe[illegible]oyees.

5 The Effectiveness of Dispute-Resolution Procedures and Mechanisms

The nature of an employment relationship is such that disputes between employee and employers occur frequently. These disputes may involve conflict over control of the enterprise, decision-making within the workplace, and even disagreement as to profit-

[98] The Constitutional Court in *Larbi Odam v MEC for Education* 1998 (3) 102 BCLR (CC) held that collective agreements infringing the constitution will not be upheld. This case was brought by foreign teachers against the educational authorities. Regulation 2 (2) of the Regulations regarding the Terms and Conditions of Employment of Educators provided that no person could be appointed as an educator in a state school in a permanent capacity unless he or she was a South African citizen. The first respondent therefore issued certain foreign teachers who have been temporarily employed by it with notices terminating their employment. The Constitutional Court held that the fact that the regulation in question was negotiated and agreed upon in Education Labour Relations Council, and was the product of collective bargaining, was not relevant. If the purpose of an agreed provision was to discriminate unfairly against a minority, its origin in a negotiated agreement could not provide grounds for justification. Resolution by majority was the basis of all legislation in democracy, yet it too was subject to constitutional challenge if it discriminated unfairly.

[99] Op cit note 18 at 957.

distribution.[100] For this reason, it was seen as necessary to have an effective dispute-resolution system.[101]

A distinction has been drawn between types of disputes, and has been regarded as the most important aspect of the system for the resolution of labour disputes.[102] These disputes are generally known as disputes of rights, disputes over rights, or legal disputes and as disputes of interests, or as disputes over social or economic matters.[103] According to Basson et al,[104] a dispute of right is a dispute about the interpretation or application of an already existing right. These rights may originate in the common law, in contract, or in legislation. In contrast a dispute of interest involves no right to begin with. An interest dispute is about the creation of a new right or, more commonly, about the variation of an existing right.

What constitutes a dispute [illegible] of interests is described by Rycroft *et al,*[105] as follows:

> "Disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or 'economic disputes') concern the creation of rights such as higher wages, modification of collective agreements etc. Collective bargaining, mediation, and as a last resort, peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interest, while adjudication is normally regarded as an appropriate method of resolving disputes of right."

---

[100] Rycroft A and Jordan B *A Guide to South African Labour Law* (1992) at 114.
[101] Section 1 of the LRA.
[102] Aaron "Settlement of Disputes over Rights" in Aaron and Wedderburn (Eds) *Comparative Labour Law and Labour Relations* (1992) at 335.
[103] Op cit note 32 at 415.
[104] Basson et al op cit note7 at 229.
[105] Rycroft and Jordaan op cit note 116 at 169.

Under the 1956 Act, it was not an easy task to draw a line between these kinds of disputes. Grogan,[106] notes that during this era it was tempting to conclude that the outcome should always be left to 'power-play'. This leaves one with the important question as to what is entailed by a dispute. Section 51(1) of the Act defined a dispute as being:

"(1)...any dispute about a matter of mutual interest between –

(a) one the one side -

(i) one or more trade unions;

(ii) one or more employees; or

(iii) one or more trade unions and one or more employees; and

(b) on the other side -

(i) one or more employers' organizations;

(ii) one or more employers; or

(iii) one or more employers' organizations and one or more employers."

In terms of the Act, a dispute includes an alleged dispute. The Act[107] does not provide a focused description of a dispute. This implies that a reference in the Act to a dispute may include a dispute of interest, a dispute of right, as well as an individual and collective dispute. Brand *et al*[108] also describe a dispute as a highly formalised manifestation of conflict in relation to workplace related matters, which may include the failure to address a grievance.

This leads to the inference that disputes of rights should best be left to the court or arbitrators to decide upon them. On the other hand, disputes of interests should be left to

[106] Grogan op cit note 30 at 357.
[107] Op cit note 1.
[108] Brand et al op cit note 4 at 11.

parties to determine the dispute themselves through negotiations.[109] This serves to enhance the objectives of the Act, which are to provide for more effective dispute resolution procedures and mechanisms for both rights and interests disputes.[110] Before the introduction of the 1995 Act, the procedures for the resolution of disputes in the industrial court were regarded as complex and technical, and even excluded the parties from taking part in their resolution.[111] The 1995 Act created structures such as:

- Bargaining and Statutory councils,
- Commission for Conciliation, Mediation and Arbitration,
- the Labour Court and
- the Labour Appeal Court which would be responsible for the resolution of disputes.

These institutions use conciliation, arbitration and adjudication as their methodology, and they are vital to the success of the Act. Conciliation requires that specially trained conciliators (or a mediator) should attempt to facilitate the conclusion of a settlement agreement by the parties out of their own free will. This is designed to make sure that a significant number of disputes are settled at an early stage. To limit waste of resources, the LRA ensures that labour litigation be presided over by experienced

[109] In *Black Allied Workers union & others v Umngeni Iron Works* (1990) 11 *ILJ* 589 (IC) at 591A- C, the Court noted that: "[I]t is clear from many authorities and the text-books on the subject, that an employer is obliged to negotiate to end a dispute of interest but that there is no obligation on the employer to come to an agreement with the other party to the dispute. Where there is a wage issue, it is an employer's right to determine the level of wages which he is prepared to pay. Both negotiation and economic action which can be described as an extension of negotiation are aimed as including the employer to come to a certain decision but it still remains his right to decide, his right to manage his business."

[110] Op cit note 14.

[111] Basson et al op cit note 7 at 229.

arbitrators and judges. Procedures are made as simple as possible in order to speed up the labour litigation. [112]

In dispute resolution there are four routes to follow depending on the nature of a dispute

Two Stages	Path to follow			
1.Conciliation	1	2	3	4
	BC/CCMA	BC/CCMA	CCMA	CCMA
2. Arbitration / Adjudication				
	BC/CCMA		CCMA	LC

In practical terms, self-regulation is the primary mechanism for regulating conflicts in collective relationships.[113] The employers and employees are encouraged to regulate and resolve their own disputes through collective bargaining. The parties may agree between themselves to use private dispute resolution procedures.[114] They may also conclude collective agreements setting out their preferred arrangements for resolving disputes. Both registered employers' organisations and trade unions have to ensure that all their collective agreements contain procedures for resolution of disputes about their

[112] Ibid at 230.
[113] Op cit note 27 at 83.
[114] The Independent Mediation Service of South Africa (IMSSA) was established in 1984 as an independent, non-profit organisation.

interpretation and application.[115] In addition to that, their constitutions must establish procedures to resolve disputes about the interpretation and application of the constitutions as well as disputes between parties.[116] If the collective agreement does not provide a (private) dispute resolution procedure, or if that procedure is not operative, or if it has been frustrated, the provision of section 147 (1) of the Act come into play.[117]

This implies that the Act encourages the existence of a relationship between the statutory and private system of disputes resolution.[118] This is evident from the long title to the Act, which states that:

---

[115] Section 24 of the Act provides as follows:

(1) Every collective agreement, excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

(2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if-

(a) the collective agreement does not provide for a procedure as required in subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

[116] In *Communication Workers Union and Telkom SA Ltd* (1998) 19 *ILJ* 389 (CCMA) at 398 it was held that collective agreements are intended to facilitate a degree of self-regulation by parties even to the extent of agreeing on dispute settlement mechanisms relating to the interpretation and application of their agreement.

[117] Section 147 (1) of the Act provides as follows:

"(a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the disputes is about the interpretation or application of a collective agreement, the commission may –

(i) refer the dispute for resolution in terms of the procedures provided for in that collective agreement; or

(ii) appoint a commissioner, or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of the Act.

(b) The commissioner may charge the parties to a collective agreement a fee for performing the dispute resolution functions if –

(i) their collective agreement does not provide a procedure as required by section 24(1); or

(ii) the procedure provided in the collective agreement is not operative.

(c) The commission may charge a party to a collective agreement a fee if that party has frustrated the resolution of the dispute.

[118] The Explanatory Memorandum at 150 states that: "one of the draft Bill's central themes is its recognition of privately agreed procedures. Where these exist, the parties are not required to follow the statutory agreed procedures. A dispute will proceed through the mechanisms agreed to by the parties. This

"the purpose of the Act is to provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established) and through independent alternative dispute resolution services [sic] accredited for that purpose."

More evidence of the relationship between the statutory and the private systems of dispute resolution may be found in section 24 (1) and (2) of the Act.[119] According to Brand *et al,*[120] once parties have agreed to private dispute resolution procedures, these procedures generally take precedence.

6. Conclusion

The Labour Relations Act[121] promotes collective bargaining. The LRA has indeed provided a framework within which collective bargaining can flourish. Although there is not much agreement on the way in which legislation should promote collective bargaining, section 23(5) of the Constitution provides some guidance in this respect. The Act makes provision for the voluntary establishment of centralized bargaining forums called bargaining and statutory councils. It also regulates the binding nature and enforcement of collective agreement. To allow employees an opportunity to have a say in matters that affect their working lives, is a huge advantage to the employers in relation to productivity and competitiveness within the industry.

---

will prevent time consuming and costly duplicating of procedures for the parties and relieve the Commission of a significant percentage of disputes."

[119] Ibid.

[120] Brand et al op cit note 4 at 35.

[121] Act No 66 of 1995.

It is clear that the South African government adhered to its obligation by enshrining the right to collective bargaining and by providing for collective bargaining in labour law. It is also clear from a reading of the LRA that it was the intention of the legislature to respect, protect, promote and fulfil the rights to collective bargaining. Section 1 of the LRA states that the purpose of the Act is to advance economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling the primary objectives of the Act. These include the promotion of orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision-making in the working place, and the effective resolution of labour disputes. This will clearly save undue expense in courts, and ensure that everyone whose interests are affected will have those interests represented.

For collective bargaining to [illegible], a balance should be struck between legislative interference and freedom to bargain collectively. According to Naledi,[122] South Africa's labour relations system is one which is developed around the concept of voice regulation, or consensual labour relations. Voice regulation refers to the constructive role that collective bargaining between employees and employers plays in resolving disputes. Furthermore, voice regulation in the labour market provides a mechanism to balance the often conflicting interests of employers and employees. As far as the status of collective bargaining is concerned, the 1995 LRA, does promote and

[122] National Labour & Economic Development Institute *South Africa Country Analysis* (2004) at 78.

encourage collective bargaining.[123] At the same time trade unions and employers are not compelled to bargain collectively.[124]

The following chapter gives the whole picture of bargaining councils in South Africa, focusing on the dispute resolution functions of the council.

[123] The Preamble to the Labour Relations Amendment Act No 12 of 2002 provides for the enforcement of collective bargaining agreements.

[124] Section 23 (5) of the Act reads: "Every trade union, employer's organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1)."

CHAPTER FOUR

THE DISPUTE RESOLUTION FUNCTION OF BARGAINING COUNCILS

1. Introduction

The origin of bargaining councils lies in the Industrial Conciliation Act.[1] This Act provided for the establishment of industrial councils. When the government of South Africa came into power, it promoted centralised bargaining. According to Du Toit *et al,*[2] South African law has never compelled the formation of centralised bargaining structures at industry level. Under the old Act[3] industrial councils could be formed by registered trade unions and employers' organisations as forums for centralised bargaining. The advantages and disadvantages of centralised bargaining have been the subject of debate for quite some time, trade unions advocated for centralised bargaining while there was a division among employers.[4] According to Du Toit *et al*[5] the impetus towards centralised bargaining gained further momentum with the formation of the Congress of South African Trade Unions (COSATU) in 1985. From its inception, COSATU advocated for the establishment of one union per industry, and within a few years called for the formation of national, industry-wide councils in all sectors.[6]

---

[1] Act 11 of 1924.
[2] Du Toit et al *Labour Relations Law: A Comprehensive Guide* (2003) at 245.
[3] Labour Relations Act No 28 of 1956.
[4] Baskin J 'The need for centralized (but flexible) bargaining' (1995) 19 *SALB* at 49.
[5] Op cit note 2 at 12.
[6] Ibid. Trade unions argued that centralized bargaining –
- is the best means of establishing industry wide-minimum and fair standards;
- allows for an efficient use of skilled negotiations;
- leads to one collective agreement per sector concluded by skilled negotiations, avoiding a plethora of poor-quality agreements with potential for disputes;
- strengthens the capacity of bargaining agents;
- develops more meaningful and cost-effective social benefit funds; and
- leads a proactive style of unionism, in which common employer-employee interests are advanced, as opposed to a narrow, definitive approach.

The Labour Relations Act[7] has three options for centralised bargaining, namely –

- one or more registered unions and registered employers' organisation may agree to establish a centralised centralized bargaining arrangement by means of a collective agreement;
- statutory councils have to be established with the assistance of Department of Labour. Once established the statutory council has the same dispute resolution function as the bargaining council for the sector and area which it covers; and
- centralized bargaining forums in the form of bargaining councils are to be established.

At the end, collective bargaining continued at both centralised and plant levels. The most important innovation of the LRA was the establishment of a bargaining council.[8] The Reconstruction and Development Programme also supported the formation

---

The employers on the other hand contended that centralized bargaining –

- undermines economic growth by setting high wage entry levels for small businesses;
- removes bargaining from the key actors at plant level;
- denies access for bargaining forums for trade unions with strong plant representation but lacking representivity at sectoral level;
- lacks flexibility by failing to take account of regional and enterprise differences; and
- exposes employers to a double risk of strike action.

[7] Act No 66 of 1995 (hereafter "the Act" or "LRA").

[8] Finnemore *Introduction to labour Relations in South Africa* (1997) at 162. Finnemore characterised the advantages of having centralised bargaining as contributing to improved relationships and leading to positive outcomes and to constructive and satisfying relationships. In this respect a reference has been made to Van Coller, a former director of SEIFSA, who identified advantages of a sound council as follows:

- "The council is a joint body that belongs to the parties, and one which they have put together. This fosters relationship building.
- The parties share the cost of the council, again underlying joint ownership.
- It provides skilled administration which ensures that the mechanisms of negotiations, as well as relationships, run smoothly. Good minutes are kept, finances are controlled, and the administration can be a resource to both parties.
- It provides a formal, statutory framework which has to be respected. The relationship between the parties is given a structure, both by law and through the constitution. This encourages respect for the process of collective bargaining.
- If the council employs agents, they can be seen as neutral parties who ensure fair play and compliance with the agreements.

of bargaining councils. It also advocated for enhanced jurisdiction which would grant them an extended scope of operations.[9] The LRA strongly supported the establishment of bargaining councils.[10] It created these institutions to resolve disputes in the workplace through conciliation and arbitration. According to Du Toit *et al*,[11] industrial councils were commonly recognised as having three primary functions: the prevention of disputes by collective bargaining, the settling of disputes, and the general regulation of matters of mutual interest. The LRA has retained these functions for bargaining councils but has significantly enlarged upon them. The primary function of a bargaining council is to negotiate collective agreements. Collective agreements may deal with terms and conditions of employment, or any other matter of mutual interest.

The most important function entrusted to the bargaining councils is the resolution of disputes concerning matters of mutual interest within their registered scope, whether the dispute is between parties to the council or whether one or more of the parties to the

---

- The council can be a vehicle for joint ventures such as provident funds, medical schemes and training bodies. This can held to build trust, outside the adversarial contracts of collective bargaining.
- By placing the parties in an equal relationship in all aspects, it acts to level the playing fields in the collective bargaining relationship. This helps to build positive perceptions."

[9] Contained in the programme of the African National Congress in 1994: *The Reconstruction and Development Programme: A Policy Framework*. It was stated as follows:

> "[e]effective implementation of the RDP requires a system of collective bargaining at national, industrial and workplace level, giving workers a key say in industry decision making and ensuring that unions are fully involved in designing and overseeing changes at workplace and industry level. Industrial bargaining forums or industrial councils must play an important role in the implementation of the RDP. Agreements negotiated in such forums should be extended through legislation to all workplaces in that industry."

[10] Op cit note 7.

[11] Op cit note 2 at 135. The functions of the then industrial councils were set out in s23 of the 1956 Act as follows:

> " an industrial council shall within the undertaking, industry, trade or occupation, and in the area, in respect of which it has been registered, endeavour by negotiation of agreements or otherwise to prevent disputes from arising, and to settle disputes that have arisen or may arise between employers' organizations and employees or trade unions and take such steps as it may think expedient to bring about regulation or settlement of matters of mutual interest to employers or employers' organizations and employees or trade unions".

dispute are not parties to the council.[12] This is a major shift of disputes from the doorsteps of the CCMA to bargaining councils, designed to give parties control over their own affairs.[13] The dispute resolution function is conferred upon bargaining councils by its constitution and section 51 of the LRA. The parties also agree on how their labour disputes should be resolved. In this respect parties are free to develop their dispute resolution mechanisms/processes. This chapter examines the establishment, jurisdiction, accreditation, functions, and also the processes and instruments used by the bargaining councils to settle disputes.

2. Overview of Bargaining Councils

The legal pattern of dispute resolution by bargaining councils may only be understood if the institutional and legislative framework for dispute resolution system is taken into consideration. The LRA emerged in consequence. It provided for different procedures to resolve labour disputes and in this respect, the bargaining councils were established. Bargaining Councils are creatures of statute, which owe their existence to the LRA. They are not new: they replaced the old industrial councils. It is not only the name which has changed. Their dispute resolution functioning has also changed. The LRA describes Bargaining Councils as basically the same as the old industrial councils.

---

[12] Du Plessis et al *A Practical Guide to Labour Law* (1998) at 224.

[13] The NEDLAC Executive Council in its agreement on the Bill stated as follows: "The Act also provides for the establishment of statutory councils at industry level for purposes of seeking agreements on dispute resolution, on training and education schemes, and on pension, provident and similar funds. Bargaining councils will replace existing industrial councils, and will provide the locus for the conclusion of collective on a range of issues including wages and conditions of employment, and policy proposals on industrial policy".

It was stated that when the new Act came into operation, the names of the industrial councils changed to bargaining councils.[14] Nicholson[15] defined the industrial council as:

> "A corporate body established by mutual agreement between employers or employer's organisation on the one hand and employees or registered trade union(s) on the other hand for the purpose of practising self-government, over the industry in which the parties represent the interest of the employer and employees respectively".

A bargaining council is an organisation, registered by the Department of Labour. It is a voluntary one, established by one or more registered trade unions and one or more registered employers' organisations. In order for the bargaining council to exist, the following general provisions must apply:

- the parties to the proposed council must register[16] the council;
- and also adopt a constitution which will meet the requirements of section 30 of the LRA.

The LRA provides that a bargaining council may be established in respect of industrial or service sectors within a specific geographical area. It may also be established for more than one sector.[17]

In the private sector bargaining councils can only be formed if one or more unions co-operate with one or more employers' organisations in adopting a constitution and

---

[14] The Act clearly stated this point in Schedule 7 Section 7, it states "an industrial council registered in terms of the Labour Relations Act immediately before the commencement of this Act is deemed to be a bargaining council under this Act and continues to be a body corporate."

[15] Nicholson A "The Challenge of the New Industrial Relations Dispensation in SA" (1979) at 104.

[16] In terms of section 27(1) of the LRA, one or more registered trade unions and one or more registered employers' organizations may establish a bargaining council for a sector or area by (a) adopting an institution that meets the requirement of section 30 and (b) obtaining registration of the bargaining council in terms of section 29.

[17] S 27(4) was introduced as an amendment by the Labour Relations Amendment Act 142 of 1996.

seeking registration.[18] Parties wishing to form a bargaining council must lodge with the registrar a signed constitution, together with the application forms indicating the industry or service sector and geographical area for which the bargaining council is to be registered. The registrar is required to publish a notice in the *Government Gazette,* and invite the general public to lodge their objections within a period of 30 days. Such objections are limited to non-compliance with the formalities of the LRA. Section 29 of the Act states that the registrar may only allow such registration once certain requirements have been fulfilled. These are that:

- the constitution of the council complies with the requirements of the Act;
- adequate provision is made for the representation of small and medium enterprises;
- parties to the council are su[illegible]epresentative of the sector and area determined by NEDLAC or the Minister; or
- there is no other bargaining council registered for that area or sector,

Therefore, the registrar is obliged to register the council in terms of the LRA, and issue a certificate which must be sent to the applicant, together with a copy of the constitution.[19] The registration certificate must specify the registered scope of the bargaining council, that is the sector and area for which it is registered. An added dimension to the establishment of new bargaining councils in what is now called a 'sector' is that NEDLAC has to consider the appropriateness of the sector and area in which the parties wish to register the council and demarcate its parameters. The registrar

[18] Op cit note 8.
[19] Section 29 of the LRA.

must determine whether the parties to the council are "sufficiently representative".[20] The LRA does not specify what "sufficient representative" is in the context of registration of a bargaining council. Section 49 (1) of the LRA provides that "the registrar may, when considering representivity of the council, take into account the nature of the sector and the situation in the area in which the parties to the proposed council operate".

The implication for this is that the council will have jurisdiction in respect of a particular sector and area only. In *Genrec Mei (Pty) Ltd v Industrial Council Iron and Steel Engineering & Metallurgical Industry,*[21] the Appeal Court held that in order to determine whether or not an industrial council has jurisdiction over a dispute, it is not the locus of the dispute that is at issue, but the location of the undertaking in which the dispute arises.

Section 30 of the Act[22] highlights some of the key differences between industrial councils and bargaining councils. It provides that the bargaining council shall provide in its constitution for:

- the procedure for the appointment of parties to the council, and the appointment of alternates to the representatives;
- the representation of small and medium enterprises;
- appointment or election of office-bearers and officials, their functions, and the circumstances and manner in which they may be removed from office, and the dispute resolution procedure;

---

[20] The wording of the Act is similar to that of s 19 (3) (d) of the 1956 Act. Section 29 (11) (b) (iv) of the 1995 Act requires the parties to the bargaining council to be sufficiently representative of the sector and area designated by NEDLAC.
[21] (1995) 16 *ILJ* 51 (A) at 56.
[22] Section 30(1) of the LRA.

- it must also make provision for the exemption from collective agreements, the banking and investment of its funds; the purposes for which its funds may be used, the delegation of its powers and functions, the admission of additional members to the council, and the procedure for constitutional amendments, and winding-up.

According to Du Toit *et al,*[23] the constitution of the council takes precedence over the general provisions of the Act. In *Pornet v La Grange & others,*[24] the Labour Court had to decide whether the provisions of a bargaining council should override those of the LRA. In this case, a dispute arose over a provision in the bargaining council constitution which provided that allegations of an unfair dismissal would have to be taken to the bargaining council within 21 days. The [illegible]d that because the constitution was a collective agreement, the parties were bound by the constitution, even though its provisions were more stringent than those of the LRA.

[23] Du Toit et al op cit note 2 at 133.
[24] (1999) 20 ILJ 916 (LC).

TABLE 1.

Number of registered employers' organisations and trade unions and bargaining councils and membership total of registered trade unions (1994 – 1999).[25].

This column shows how many bargaining councils are registered under the 1995 Act from its inception to1999:

Year	Employers' organisations	Trade unions	Bargaining Councils	Members of registered trade unions
1994	191	213	86	2 470 481
1995	188	248	80	2 690 727
1996	196	3[illegible]4	77	3 016 933
1997	-	-	75	775 583
1997	-	-	76	632 992
1999	252	-	78	-

2.1 Parties and representatives to the Council

The statute only allows registered unions and registered employers' organizations to form a bargaining council.[26] This means that parties to the bargaining council, are both trade unions and employers' organizations that were involved in the formation of a

[25] Department of Labour *Annual Report* 1996 (RP 83 /1997) 19; Department of Labour *Annual Report* 1998 (RP 65 / 999) 62-62. These numbers from 1994 – 1999 do not reflect the true coverage of bargaining councils, trade unions, employer's organizations and the number of workers covered.

[26] Section 56 of the 1995 LRA. The LRA, in section 213 defines a 'trade union' as:

> "an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organizations"

Employers' organizations means:

> "Any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade union."

bargaining council or who were admitted later to the council. Section 56 of the LRA provides for admission of parties to the council. Any registered trade union or registered employers' organization may apply in writing to a council for admission as a party to that council. If the council refuses to admit a new member, that organization or union may approach the Labour Court for an order admitting it as a member of the council.

In order for the trade unions and employers' organizations to be admitted to the bargaining council, both must register with the Department of Labour. The Registrar may only register unions and organizations when their constitution meets the required standards.[27] This is done in order to be sure of the proper election of office bearers and financial accountability. It is important for workers to be satisfied that their union is registered, and that it has complied with all the requirements of registration, like a proper name for the union, registered offices, proper constitution, and proven membership.[28] According to Van Jaarsveld *et al*[29] registration of bargaining councils has legal consequences in that the council acquires legal personality. This is also stated in section 50 of the LRA.[30] A certificate of registration of the organization is not sufficient alone;

---

[27] Op cit note 7.
[28] Minister M Mdladlana "Importance of registered unions" Media Statement Department of Labour 11 June 2004.
[29] Van Jaarsveld et al *Principles of Labour Law* (2002) at 301.
[30] Effect of registration of council is clearly stated in section 50 of the Act as follows:

"(1) A certificate of registration is sufficient proof that a registered council is a body corporate.

(2) A council has all the powers, functions and duties that are conferred or imposed on it by or in terms of this Act, and it has jurisdiction to exercise and perform those powers, functions and duties within its registered scope.

(3) A party to a council is not liable for any of the obligations or liabilities of the council by virtue of it being a party to the council.

(4) A party to, or office-bearer or official of, a council is not personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith by a party

the commissioner must determine whether the person qualifies under the statutory definition and only happens when a party challenges the qualification of the representative.[31] Trade unions and employers' organizations are no longer required to demonstrate representivity within a particular sector in order to be registered, and the Registrar may not refuse registration on that ground alone.[32] If the council refuses to admit a new member, that organization or union may approach the Labour Court for an order admitting it as a member of the council. This was stated in *Fuel Retailers Association of SA v Motor Industry bargaining Council,*[33] where the Fuel Retailers Association had tried more than once to join the council, but the application was dismissed because the council was of the view that the association was not sufficiently representative to meet the requirements set out in the constitution of the bargaining council. The Labour Court held that, in considering whether or not to order the bargaining council to admit the new member, it has to consider whether the party seeking admission falls within the registered scope of the council, the representivity of the council, stability in the industry, and the reasons advanced by the existing parties for objecting to the applicant party. Other relevant factors include other advantages to the industry, whether the admission of the applicant party would contribute to the promotion of orderly collective bargaining, and the extent to which the applicant party may disrupt the working of the council. The Labour Court, also considered the contribution which the

---

to, or office-bearer or official of, a council while performing their functions for the council.

(5) Service of any document directed to a council at the address most recently provided to the registrar will be for all purposes service of that document on that council."

[31] Du Toit et al op cit note 2 at 111.
[32] Grogan J *Workplace Law* (2005) at 322.
[33] {2001] 6 BLLR 605 (LC).

applicant party could make to the organizational diversity of the council within its sector and area and the threshold for admission criteria. The Court in the event, ordered that the Fuel Retailers Association be admitted as a member of the bargaining council.

At the end of 1996, there were 196 employers' organizations registered.[34] The rights afforded to a registered union are more significant that those attainable under the 1956 Act.[35] According to the Department of Labour Annual Report 2000/2001, the department initiated a process of cancellations of registration of unions that had failed to comply with the 1995 Act. At the end of the period, the total number of registered unions declined by 35 as compared the previous year. Registrations of 72 trade unions were cancelled in terms of the Transitional Arrangements of the 1995 Act. A number of them failed to amend their constitutions to comply with the 1995 Act. In terms of Item 5 of Schedule 7 of the Act, they were deem[illegible]gistered at the commencement of the LRA, 1995. The number of registered employers' organizations also decreased slightly from 260 in 1999 to 252, and they represent 63 499 employers.

[34] *Annual Report Department of Labour* (1996) at 20.

[35] For example, only a registered union has access to the following rights: the ability to conclude collective agreements, and their extension to non-parties; participation to agency and closed shops; establishment of workplace forums; *locus standi* to act on its own behalf and that of its members, and more importantly participation in bargaining and statutory councils.

The following is the statistical reflection of registered labour organisations for various sectors:

Bargaining councils:

- **Private sector** **52**
- **Public Sector** **1 + 4 sectoral councils**
- **Local government bargaining council** **1**

Total: **58**

Table 2 below indicates the current number of registered labour organizations.

Year	Registered trade unions	Membership	Registered employer's organizations	Bargaining councils
2000	462	3 552 113	252	73
2001	485	3 939 075	265	73
2002	504	4 069 000	270	62
2003	369	3 277 685	239	56
2004	341	3 134 865	229	58

Preliminary Annual Report of the Department of Labour for the period 1 April 2004 – 31 March 2005.

As of the end of the year 2000, there were 17 trade union federations and 10 federations of employers' organizations. The total number of bargaining councils in the private sector stood at 73.

In terms of the 1995 LRA, if a dispute should arise regarding the exercise or application of these rights, it may be referred to a bargaining council with jurisdiction or to the CCMA if there is no council with jurisdiction. If the dispute remains unresolved by the council or CCMA, it must be referred to the Labour Court for adjudication.

2.2 Duties and Responsibilities of bargaining councils

The reasons for having bargaining councils are clear from the functions and duties accorded to it by the Labour Relations Act.[36]

Section 28 of the Act provides that:

"bargaining councils should attempt to achieve the following-

- to conclude collective agreements;
- to enforce those collective agreements;
- to prevent and resolve labour disputes;
- to perform the dispute resolution functions referred to in section 51;
- to establish and administer a fund to be used for resolving disputes;
- to promote and establish training and education schemes;
- to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;
- to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area;
- to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lock-out at the workplace;

[36] Ibid note 4.

- and to confer on workplace forums additional matters for consultation; and,
- to provide industrial support services within the sector;

and to extend the services and functions of the bargaining council to workers in the informal sector and home workers".

Unlike s 24 of the 1956 LRA, the 1995 LRA does not provide for banking and investing other funds established by the council but not part of the council funds.[37] Through the bargaining council system the employees are in a position to bargain collectively and resolve disputes fairly and quickly as envisaged by the LRA. According to Van Jaarsveld *et al*,[38] the principal aim and functions of bargaining councils is to bring peace and harmony in labour sectors in which bargaining councils have jurisdiction. Bargaining councils have a very important role to play in the settlement of disputes.[39]

[37] Legrange R in *Annual Survey of SA Law* (2001) at 516.
[38] Van Jaarsveld et al op cit note 29 at 441.
[39] Section 51 provides as follows:

"(1) in this section, dispute means any dispute about a matter of mutual interest between-
(a) On the one side –
(i) one or more trade unions;
(ii) one or more employees; or
(iii) one or more trade unions and one or more employees; and
(b) On the other side-
(iv) one or more employers' organizations;
(v) one or more employers; or
(vi) One or more employers' organizations and one or more employers.
(2) (a) (i) the parties to a council must attempt to resolve any dispute between them in accordance with the constitution of the council.
(ii) For the purposes of subparagraph (i), a party to a council includes the members of any registered trade union or registered employers' organization that is a party to the council.
(b) Any party to a dispute who is not a party to a council but who falls within the registered scope of the council may refer the dispute to the council in writing.
(c) The party who refers the dispute to the council must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
(3) If a dispute is referred to a council in terms of this Act[11] and any party to that dispute is not a party to that council, the council must attempt to resolve the dispute -
(a) Through conciliation; and
(b) If the dispute remains unresolved after conciliation, the council must arbitrate the dispute if-

3 The dispute resolution functions of bargaining councils

The most important function of the bargaining council is the resolution of disputes that arises within its sector and area. The Constitution of the council must provide for a procedure in terms of which disputes between parties to the council are to be resolved.[40] The dispute resolution function of bargaining councils is not confined to particular employees and employers in an industry. The council's dispute resolution function extends to all employers and employees falling within its jurisdiction, irrespective of whether they are members of the trade union and trade unions which are parties to the council.[41] The LRA made resolution of rights disputes a central function of bargaining council. According to Du Toit *et al*,[42] by granting bargaining councils the dispute resolution power the legislature intended to shift part of the burden of dispute resolution from the CCMA to private processes such as those offered by the bargaining councils. In addition it is also left to the parties to exercise control over their own affairs.

Van Jaarsveld[43] pointed out that, previously, industrial councils had limited conciliatory powers to resolve labour disputes. Unresolved disputes were referred to the Industrial Court for adjudication. Contrary to the old position, the functions of bargaining councils are not limited to the conciliation of labour disputes. They extend

---

(i) This Act requires arbitration and any party to the dispute has requested that it be resolved through arbitration; or
(ii) All the parties to the dispute consent to arbitration under the auspices of the council.

(4) If one or more of the parties to a dispute that has been referred to the council do not fall within the registered scope of that council, it must refer the dispute to the Commission.

(5) The date on which the referral in terms of subsection (4) was received by a council is, for all purposes, the date on which the council referred the dispute to the Commission.

(6) A council may enter into an agreement with the Commission or an accredited agency in terms of which the Commission or accredited agency is to perform, on behalf of the council, its dispute resolution functions in terms of this section."

[40] Op cit note 7.
[41] Basson et al *Essential Labour Law* (2005) at 271.
[42] Du Toit et al op cit note 2 at 131.
[43] Van Jaarsveld et al op cit note 29 at 441.

also to arbitration. The different ways in which these disputes may be dealt with are provided for in section 51 of the Act as follows:

> "a bargaining council must attempt to resolve any dispute arising within its registered scope, which is referred to it in writing, in accordance with the constitution of the council. The parties, who refer the dispute to the council, must satisfy the council that all the other parties to the other parties to the dispute have been served with a copy of the referral."

Some of the disputes that must be conciliated by a bargaining council include disputes about freedom of association, disputes about a refusal to bargain, unfair dismissals and unfair labour practice.[44] According to Basson *et al*,[45] bargaining councils also have jurisdiction to hear disputes relating to unilateral changes to terms and condition of employment, disputes about whether or not employees are entitled to severance pay and disputes relating to unfair discrimination. Some of these disputes may also be resolved by a bargaining council by means of arbitration.[46]

Not all bargaining councils are permitted to resolve labour disputes. In order for a council to be able to perform dispute resolution functions, it has to apply for accreditation by the CCMA. Section 52 of the Act provides that bargaining councils must apply to the CCMA for accreditation before they can perform any dispute resolution function in respect of non-parties. If the council is not in a position or is unwilling to perform dispute resolution functions itself, it may agree with the CCMA or another accredited dispute resolution agency that the CCMA or the agency will resolve the dispute for the

---

[44] Op cit note 7.
[45] Basson et al op cit note 41 at 340.
[46] A council may for example resolve a dispute about refusal to bargain of arbitration , as well as disputes relating to dismissal due to misconduct, the incapacity of the employee, alleged constructive dismissal or of the dismissal is for a reason the employee does not know and unfair labour practice disputes.

council.[47] Accreditation is regulated by sections 127-131 of the LRA. Section 127 provides as follows:

"(1) any council or private agency may apply to the governing body in the prescribed form for accreditation to perform any of the following functions –

(a) resolving disputes through conciliation; and

(b) Arbitrating disputes that remain unresolved after conciliation, if this Act requires arbitration."

According to Basson *et al*,[48] accreditation is a process that a person or organization which wants to perform dispute resolution procedures must comply with, and it ensures that the body will be able to resolve the dispute effectively as measured against the standards of the CCMA. Section 147(2)(b) of the Act requires the CCMA to charge a fee for performing the dispute resolution function of the bargaining council if the council's dispute resolution procedures are not operative.

The governing body of the CCMA may accredit such a body to perform dispute resolution functions if it is satisfied that the services provided by such a body will meet the CCMA's standards, and that the body will be able to conduct its activities effectively. The Governing body of the CCMA must also be satisfied that the person appointed to

[47] This jurisdictional issue was clarified in *Mandla v Belling & another,* [1997] 12 BLLR 1605 (LC). The Labour Court held that the relevant bargaining council did not have the necessary jurisdiction to perform dispute-resolution functions in terms of the 1995 Act. Rather, s 52 of the 1995 Act required that before performing dispute resolution functions or any other function referred to in s 51, it was necessary for the relevant council either to apply to the CCMA for accreditation or to appoint an accredited agency to perform those functions.

[48] Basson et al op cit note 41 at 272.

perform dispute resolution functions will do so in a manner independent of the state, any political party, trade union or employer, and is competent.[49]

Councils can now apply to the Governing body of the CCMA for accreditation to conciliate and arbitrate certain categories of disputes. A council may be accredited to conduct conciliations only, or conciliations and arbitrations.[50] These councils in their functions are restricted to particular disputes. For example, councils cannot conciliate all the disputes which the CCMA can, and are restricted from conciliating disputes relating to organisational rights, even in the sectors in respect of which they are registered, as well as disputes relating to the application and interpretation of collective agreements. Milton[51] observed that councils cannot conciliate all the disputes which the CCMA can, and are restricted from conciliating disputes relating to organisational rights, even in the sectors in respect of which they are registered, as well as disputes relating to the application and interpretation of collective agreements. He submitted that some may say that the dispute resolution function of councils has been restricted.

[49] Before an application for accreditation is approved, the governing body of the CCMA must consider the following:

- whether the services provided by the applicant meet the commission's standards;
- whether persons appointed by the applicant are competent and whether they will perform their functions independently of the state, any political party, trade union, employer or employers' organisation or federation;
- whether the applicant has an acceptable code of conduct and disciplinary procedure to govern the person's appointment to perform the functions of the council or private agency, and
- Whether the applicant promotes a service which is broadly representative of South African society. If the governing body decides to accredit the applicant council or agency, a certificate of accreditation is issued, the applicant's name is entered into the register of accredited councils and the accreditation is published in the Government Gazette.

[50] In terms of section 127, a council may not be accredited to perform conciliation and arbitration in respect of certain disputes, such as, disputes concerning organizational rights, workplace forums, ministerial determinations, demarcation issues, etc.

[51] Elaine Milton 'Bargaining Council and the Dispute Resolution System' (2002) at 1 www.ccma.org.za (accessed on 12 February 2004)

Du Toit *et al,*[52] noted that the rationale for limiting the jurisdiction of councils and agencies in this manner appears to be that disputes concerning constitutional rights of non-parties or matters relevant to the public policy should be reserved for the CCMA. Although this is so, the restriction may hamper the workings of the bargaining councils.

If the council is accredited, a certificate of accreditation will be issued to that effect, and the accreditation published in the *Government Gazette.*[53] During the financial year 2003/2004, there were 55 bargaining councils accredited to perform dispute functions. Some of these councils are accredited to perform conciliations, whilst others are accredited to do both conciliation and arbitration.[54] According to the report,[55] some bargaining councils were unable to perform their dispute resolution function due to the fact that they were in a process of merging into national structures. It transpired that other bargaining councils experienced difficulties in performing their dispute resolution functions. As a result, they requested the CCMA to undertake conciliation and arbitration until they were ready to perform those functions.[56] After the enactment of the 2002 amendment, certain other provisions that were previously made applicable to the council by way of accreditation now apply automatically, unless otherwise agreed by collective agreement.[57]

---

[52] Du Toit et al op cit note 2 at 135.
[53] During 1999 there were 28 bargaining councils accredited. The Building Industry Bargaining Council in East London applied for accreditation to perform its own dispute resolution functions in terms of the LRA, 1995. Since then the council operated under a "conditional accreditation". This council was one of the 21 councils, for its panelists to be trained to meet the requirements of accreditation. Having met all the requirements, the council was duly accredited on 31 March 1999. This is despite the fact that the original target for accreditation was set for August 1998.
[54] CCMA *Annual Report 2003/2004* (2004) at 23.
[55] Ibid.
[56] Ibid.
[57] Labour Relations Amendment Act 12 of 2002.

If the CCMA refuses to accredit a council or agency for some or all of the purposes applied for, it must advise the applicant to that effect in writing.[58] According to Du Toit *et al,*[59] written reasons are required because failure to obtain accreditation will adversely affect the integrity of a council or the viability of a private agency. This view is line with of the Constitution.[60] Section 33(2) of the Constitution reads as follows:

> "(2) Everyone whose rights have been adversely affected by an administrative decision has a right to be given written reasons."

Everyone may inspect the register and certificate kept in the offices of the CCMA. It may charge a fee in accordance with the tariff of fees determined by the CCMA for performing the functions for which it is accredited. And it may also apply to the governing body of the CCMA for a subsidy to perform those functions for which it is accredited.[61] The subsidy lapses at the end of the CCMA's financial year within which it was granted, but application for a renewal thereof may be made. The subsidy and accreditation may be withdrawn if the accredited council or agency fails to comply with the terms on which it was granted. And it may on application be amended and /or renewed.[62]

[58] Section 127(5) (b) of the Act.
[59] Op cit note 2.
[60] The Constitution (1996)
[61] Ibid. During the financial year of 2003/2004 an amount of R2, 3 million was paid in the form of subsidies.
[62] Van jaarsveld et al op cit note 29 at 441.

4. Processes and Instruments used by bargaining councils to settle labour disputes

According to Du Plessis *et al*,[63] an accredited council is entrusted with dispute resolution functions within its registered scope, whether the dispute is between parties to the council or whether one or more parties to the dispute are not parties to the council. The structure of dispute resolution retained its previous two-stage form of conciliation, arbitration followed by adjudication. The LRA distinguishes between many different types of disputes. For example, there are those which may be referred to adjudication and those which may be referred to arbitration. According to the Act, all disputes of right may be submitted first to conciliation by the bargaining council or its accredited agent or by CCMA, and thereafter to arbitration by one of the above institutions or in the final instance to a definitive determination by the Labour Court. This clearly creates a distinction in the manner in which disputes of rights and disputes of interests are treated.

The LRA[64] provides that parties to the council must attempt to resolve any disputes among themselves in terms of the council constitution. It is silent about how a council's constitution or their procedure must deal with disputes between parties. It requires that certain disputes must be dealt with by specific processes. If the parties choose the wrong process, it will result in long delays and may cause frustration to parties in their effort to resolve disputes.[65] It is up to the parties involved in the dispute to choose the method most likely to achieve their objectives. Depending on the nature of the relationship between the parties involved in the dispute, different methods of dispute

---

[63] Du Plessis, JV et al *A Practical guide to Labour Law* (2001) at 323.
[64] Section 51 (2) (a) of the LRA.
[65] Brand et al *Labour Dispute resolution* (1997) at 41.

resolution may be preferable. According to Ichharam,[66] the important factors that distinguish bargaining councils from industrial council in relation to their constitution is the fact that the constitution of industrial councils made reference to arbitration and also outlined the procedures for disputes that are referred to the council for arbitration. Accordingly, its importance is the fact that "under the old LRA and the labour laws preceding it, an industrial council could not handle arbitration cases. A dispute could only be referred to an industrial council, for conciliation. If the dispute is not resolved the council would thereafter, refer the case to a relevant body outside the council, and in most cases, this would be industrial court. Currently, however, if a council is accredited for arbitration, the bargaining council itself can hear such a case."[67]

Parties usually agree to use their own dispute resolution processes, often diverging from the one provided for by [68]. The LRA gives effect to this principle by providing that all collective bargaining constitutions must contain procedures for resolving disputes about their application and interpretation. Once an agreement to private dispute resolution has been reached, and the dispute is referred to the CCMA, such dispute may be referred to the appropriate body by the CCMA.[69] In many industries, dispute resolution methods are established and regulated by collective

---

[66] Ichharam M 'South Africa's Bargaining Council and their role in Dispute Resolution' (2002) MA thesis at 42.

[67] Ibid.

[68] This is in line with ILO Standards: Collective Agreements Recommendation, 1951 Convention (No 91) which provides as follows:

(1) Machinery appropriate to the conditions existing in each country should be established; by means of agreement or laws or regulations as may be appropriate under national conditions, to negotiate, conclude, revise and renew collective agreements, or to be available to assist the parties in the negotiation, conclusion, revision and renewal of collective agreements.

(2) The organization, methods of operation and functions of such machinery should be determined by agreements between the parties or by national laws or regulations, as may be appropriate under national conditions.

[69] Van Jaarsvelt et al op cit note 29 at 419.

bargaining instruments such as collective agreements. Section 59(9)[70] adds that a bargaining council may by collective agreement establish procedures to resolve disputes of mutual interest within the council's jurisdiction. This implies that, despite s 30 (1) (h)-(j), such procedures need not be included in the council's constitution if they are provided for in a collective agreement. In *Wanenburg v Motor Industry bargaining Council,*[71] the Labour Court applied procedures developed by the Council's Dispute Resolution Centre, even though they were not embodied in a collective agreement. It held that the power to resolve disputes is implied by section 28(1)(c) and (d), in order to give effect to the council's obligations in terms of sections 51(3) and 191(2) of the Act.

The purpose of giving the council this wide discretion is to ensure efficient and cost-effective resolution.[72] If the dispute referred to the council remains unresolved after conciliation, the council must arbitrate [illegible]. But it will only do so if firstly, the LRA requires arbitration and any party to the dispute has requested arbitration. Secondly, all the parties to the dispute consent to arbitration by the council.[73] The LRA requires that if a collective agreement does not contain a dispute resolution procedure, or if the procedure is not operative, the dispute may be referred to the CCMA.[74]

---

[70] The Labour Relations Amendment Act of 2002.
[71] (2001) 22 *ILJ* 242 (LC) at para 21.
[72] Supra at paras 20 - 23. It was held that "bargaining council must be allowed the flexibility to design their own dispute system so that the most inexpensive and effective procedures are adopted. If that means having a condonation application followed by internal appeal, so be it."
[73] Section 51 (3) (b) of the LRA.
[74] Section 147 (1) of the Act provides as follows:

"(a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the disputes is about the interpretation or application of a collective agreement, the commission may –
  (i) refer the dispute for resolution in terms of the procedures provided for in that collective agreement; or
  (ii) appoint a commissioner, or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of the Act.
(b) The commissioner may charge the parties to a collective agreement a fee for performing the dispute resolution functions if –

4.1 Collective agreements concluded in bargaining councils

One of the most important functions of the bargaining councils is to conclude collective agreements. Employers' organisations and trade unions can become parties to the bargaining council and can negotiate on behalf of their members, minimum terms and conditions of employment that will bind their members. Collective agreements concluded in bargaining councils, however, are accorded a higher status.[75] As in the case *SA Municipal Workers Union v Western Cape Local Government Organisation,*[76] where the trade union and the employers' organisation (WECLOGO) agreed at a meeting of their bargaining councils to negotiate on the restructuring of municipal service delivery, and passed a resolution 'that the parties bargain at the next bargaining council meeting'. WECLOGO did not adhere to this agreement and the union referred the dispute to the CCMA concerning the interpretation and application of a collective agreement. The commissioner held that a collective agreement as defined should have the form of an agreement, and s 24 of the LRA requires that a procedure be provided to resolve disputes. The Commissioner also considered the binding nature of collective agreements concluded in a bargaining council as well as the possibility of their extension to non-parties. He found that it would be contrary to public policy and orderly collective bargaining to regard each resolution of a bargaining council meeting as a collective agreement.[77] He stated further that although not specified in the definition of a collective agreement,

---

(i) their collective agreement does not provide a procedure as required by section 24(1); or

(ii) the procedure provided in the collective agreement is not operative.

(c) The commission may charge a party to a collective agreement a fee if that party has frustrated the resolution of the dispute."

[75] In particular, under specified conditions they may be extended to non -parties to the collective agreement.

[76] [2000] 10 BLLR 1160 (CCMA).

[77] Ibid at 1162-1163.

sections 31 and 32 of the LRA set collective agreements apart from other types of agreements and accord them a higher status.[78]

Section 31 of the LRA deals with the legal nature of collective agreements concluded in the bargaining council. Section 31 of the Act provides that:

> "Subject to the provisions of section 32 and the constitution of the bargaining councils, a collective agreement concluded in a bargaining council binds –
>
> (a) the parties to the bargaining council who are parties to the collective agreement;
> (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions thereof apply to the relationship between such party and the members of such other party; and
> (c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of the registered employers' organisation that is such a party, if the collective agreement regulates-
>
> (i) either terms and conditions of employment; or
> (ii) the conduct of employers in relation to their employees or vice versa.

According to Basson,[79] the phrase in s 31 of the LRA that 'subject to the constitution of the bargaining council' implies that parties to the bargaining council may be bound by a collective agreement even if they are not parties to that agreement. Previously, in terms of section 27(7), read with section 48(1) of the 1956 Act, it was possible and often the case, for the agreement to be made binding on parties to the council who were not party to the agreement.[80]

The effect of the provisions of a bargaining council agreement under the1956 Act is that the minimum terms and conditions of employment negotiated by a bargaining

---

[78] Ibid.
[79] Basson at al op cit note 41 at 274.
[80] Op cit note 3.

council and contained in an agreement published in the Government Gazette may bind all the employers and employees in the industry.

Section 32 of the LRA[81] contains the most important provision relating to bargaining council agreements. It provides that a collective agreement may be extended to non-parties who are not within the registered scope of the council. This will be the case if one or more registered trade unions representing a majority of employees and one or more registered employers' organisations who represent the majority of employers vote in favour of such an extension. The bargaining council then has to request the Minister in writing to extend the application of the agreement. Within 60 days of receiving the request, the Minister must extend the agreement by publishing a notice in the Government Gazette declaring that, as from a specified date and for a specified period, the collective agreement may [illegible] on the non-parties specified in the notice.[82] In certain circumstances collective agreements may not be extended.[83] At the

---

[81] Section 32 provides as follows:

"(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the if at a meeting of the bargaining council request,

(a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and

(b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

(2) Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice."

[82] According to the Department of Labour *Preliminary Annual Report 2004/2005* (2005) at 16 www.labour.gov.za during 2004/2005 92 collective agreements of bargaining councils were extended to non-parties covering 629 298 workers. These agreements were main collective agreements on wage increases and for issues such as council levies, sick leave, benefits, pension and provident fund benefits.

end of 2000, a total of 80 agreements were published, two of which were First Main Agreements and 49 Amending Agreements. The private sector bargaining council agreements cover some 751 872 workers and approximately 20 482 employers who are members of employers' organizations, which are parties to councils.[84]

Section 32 of the LRA sets out certain requirements that have to be met before a collective agreement can be extended. The primary requirement is that the parties to the agreement and the parties to the council must comply with representivity requirements. Bargaining council agreements therefore reinforce and give expression to existing legislation. If a council agreement is declared binding on a trade union or employers' organisation, all members of that trade union will be bound by that agreement, including non-parties, on a date after the agreement has been declared binding. Members of a trade union or employers' organisation will also remain bound by the provisions of the agreement even if they should subsequently cease to be members of the union or organisation. A bargaining council agreement will remain binding for the period specified in the notice in the Government Gazette. The question is: Why does the LRA

---

[83] In terms of section 32(3) there are circumstances where the collective agreement may not be extended unless the Minister is satisfied that the following prerequisite are met:

(i) one or more trade unions and employers' organisation have voted in favour of the extension;
(ii) the majority of employees employed within the registered scope of the bargaining council are members of the trade unions that are parties to the bargaining council;
(iii) the members of the employers' organisations that are party to the bargaining council employ the majority of the employees employed with the registered scope of the bargaining council;
(iv) the non-parties specified in the request fall within the bargaining council's registered scope;
(v) the collective agreements establishes or appoints an independent body to grant exemptions to non-parties and includes fair criteria for the consideration of applications for exemptions and the terms of those exemptions from the provisions of the collective agreements as soon as possible. The primary objective of granting exemptions is to protect the interests of small and medium sized businesses; and
(vi) the terms of the collective agreement do not discriminate against non-parties.

[84] CCMA *Annual Report 2000/2001*. www.ccma.org.za.

provide a mechanism for extending bargaining council agreements to non-parties? Does this not infringe the right of non-parties to bargain collectively entrenched in section 23 of the Constitution? It is submitted that the extension of agreements to non-parties by section 32 has the effect of limiting the right of non-parties to bargain collectively. It is argued that the extension amounts to the imposition of a standard, as opposed to a standard arrived at through collective bargaining. In this respect, it is submitted that the process of extension of collective agreements is not immune from constitutional scrutiny.

Similarly Christie and Manley,[85] assert that the extension of an agreement of a council whose parties are merely sufficiently representative is potentially open to constitutional challenge. Employers may contend that restrictive minimum conditions violate their property rights or the right to freely engage in economic activity. Davis *et al*[86] suggest that the most likely challenge under the constitution will be the limitation introduced by minimum wage legislation and the extension of collective agreements to non-parties. He further suggests that in instances where collective agreements are extended to non-parties, the process of bargaining may well occur, but two indispensable elements of bargaining, namely the conclusion of collective agreements and the exercise of economic power, will be prohibited. Accordingly, these limitations constitute substantial inroads into the right to bargain collectively.[87]

The question that arises is whether these limitations meet the standards required for constitutional limitations under section 36(1) of the Constitution.[88] The Constitution

---

[85]Sarah Christie and Isabel Manley "Soft Law or rough justice? Employment Dispute resolution for Unfair dismissal in the UK and South Africa" (2002) www.industriallawsociety.org.uk/papers/edr.htm.
[86]Dennis Davis et al *Fundamental rights in the Constitution: commentary and cases: a commentary on chapter 3 on the fundamental rights of the 1993 Constitution and chapter 2 of the 1996 Constitution* (1997) at 225.
[87] Ibid.
[88] Section 36 of the Constitution reads as follows:

provides for the limitation of fundamental rights by way of a general limitation clause in s 36. In terms of section 36 it is only the law of general application which can validly limit the right in the bill of rights. This involves an enquiry, and evidence has to be led in order to be able to justify a limitation of a right. The section 36 enquiry involves weighing up the harm done by the law, the infringement of a fundamental right, against the benefits that the law seeks to achieve, the reasons for the law or the purpose of the law.[89] In this scenario, the enquiry begins with the purpose of the limitation. The purpose of s 32 is to secure the integrity of a collective bargaining system structures at sectoral level. According to Davis,[90] in order to understand the importance of that purpose, it is necessary to understand the social, economic and political policies that underpin the choice of sectoral bargaining as the preferred level of bargaining. In this regard, he suggests the following:

- Firstly, it provides a system of industrial self-governance. Employers and employees in an industry determine their own terms and conditions of employment.
- Secondly, bargaining councils provide an opportunity for industry-wide coverage of employee benefit funds and schemes, particularly retirement and medical schemes, and thereby achieve important fiscal objectives of relieving the

(1) "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided on subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[89] De Waal et al *The Bill of Rights Handbook* (2001) at 156.
[90] Op cit note 85 at 225.

overburdened fiscus or its social pension and medical care obligations as far as employees in the formal sector are concerned.

- Thirdly, the bargaining council, the institutional form of industry-level bargaining, provides an important vehicle for the development of industry proposals in the democratic process of determining industrial policy.

Davis notes that the extension of agreement to non- parties performs an important role in securing the integrity of sectoral collective bargaining institutions. He argues that the lack of an extension mechanism in industry-wide bargaining will undermine one of he institutions essential to its proper functioning, the employers' organisation. In this respect, he notes that "if the collective agreements are not extended by law they may be imposed on non-party employers by ec[illegible]ce, giving rise to a system of pattern bargaining where the pattern is set in the bargaining council and then systematically imposed on non-parties by the exercise of economic power."

The next step in the enquiry is to consider the means to achieve the purpose. According to Davis, this limitation is not a complete denial of the right to bargain. In this respect he argues that the employer can participate in collective bargaining through an employers' organisation. Secondly, by refusing to join the employers' organisation, an employer can affect the representivity of the employers' organisation – it is a necessary condition for an extension of an agreement that the parties are at least sufficiently representative. Thirdly, these agreements do not in themselves foreclose all collective bargaining between a non-party employer and its employees.

Although these limitations may pass constitutional scrutiny as a matter of fact, they do constitute substantial inroads into the right to bargain collectively. Similarly, Du Toit *et al,*[91] note that:

> "The extension of an agreement of a council whose parties are merely sufficiently representative is particularly vulnerable to constitutional challenge on the grounds of violation of employer's property right or the right to engage in economic activity. Whether it would pass the test contained in section 36 of the Constitution would ultimately depend on the terms of the extended agreement. The policy considerations justifying extension, it is submitted, will generally amount to legitimate social objectives, outweighing competing interests. A key issue would be whether the exemption procedures offer an adequately safeguard against alleged disproportionate interference with interests not adequately represented by the council. In this context, the proposal outlined above for a more inclusive prior investigation introduces greater proportionality and more effective insulation against constitutional challenge.
>
> By contrast, a collective agreement concluded outside a council is a statutory instrument entered into between private parties. Even though it may be made binding on non-parties [s 23 (1)(d)] it has no official interposed and, assuming that the agreement is in compliance with section 23, any constitutional challenge will ultimately have to be directed at the provision itself.

Basson *et al*[92] observe that the extension of bargaining council agreement does have certain advantages. In this respect they argue that it establishes standards for employees and employers that do not bargain collectively, especially in the case of small employers where there are few union members. The extension of council agreements also prevents employers within a sector from competing with each other on the basis of the terms and conditions of employment that they offer their employees. These matters

[91] Op cit note 2 at 267.
[92] Basson et al op cit note 41 at 276.

are taken out of competition. Basson *et al*[93] argued further that employers can agree with unions to maintain reasonable conditions of employment without the fear that their production costs will undermine their competitiveness in the market. To the extent that section 32 infringes the right to bargain collectively, protected by section 23(5) of the Constitution, Basson *et al,*[94] noted that:

> "Even though the provisions of the LRA that provide for the extension of bargaining council agreement may appear to be an infringement of the right to bargain collectively protected by section 23 of the Constitution these provisions also promote equality throughout the sector and area and it also contributes to ensuring that fair labour practices are maintained ... Generally speaking, the provisions of section 32 of the LRA does not represent an undue infringement of the right to bargain collectively – collective bargaining is not prohibited or limited. Instead, the positive aspects of collective bargaining (such as the collective regulation of terms and conditions of employment) and benefits of collective bargaining are extended to employees who would normally have these benefits."

4.1.1 Exemptions from bargaining council agreements

The Act provides that the constitution of the bargaining council must contain a provision making it possible for the parties to obtain an exemption from the provisions of a collective agreement concluded in the council.[95] In determining whether exemption should be granted the courts and arbitrators must consider the following: [96]

- whether an exemption will give an employer an unfair competitive advantage;

---

[93] Ibid at 277.
[94] Ibid.
[95] Section 30(1) (k) read with s 32 (3) (f) of the Act. During the period running 2004/2005 the total number of application for exemptions was 7 373 and applications that were from small enterprises were 4 344, which constituted 59% of all applications. The number of applications granted, is 5670 and 3 497 were from small enterprises. This constituted 60% of all applications granted.
[96] DuToit et al op cit note 2 at 266.

- the effect of the exemption on the fair, equitable and uniform application of the agreement;
- the consent of employees;
- the need to create an environment conducive to small business growth, and
- the fact that an employer is suffering a substantial detriment.

The reason why the legislature decided to include these exemptions in the constitution of the bargaining councils is explained by Basson *et al.*[97] According to the authors, "because a bargaining council agreement can bind a wide range of different employers within the sector and area over which it has jurisdiction, there is a possibility that not all employers will be able to comply with all the provisions of a collective agreement, for example, because they are not financially strong enough to do so".[98]

4.1.2 Enforcing bargaining council agreements

In terms of section 53 of the previous LRA[99], non- compliance with an industrial council agreement was criminalised. However the 1995 LRA has decriminalised enforcement of collective agreements. The LRA was amended in 2002 by the insertion of a provision which provides that a bargaining council may monitor and enforce compliance with its collective agreements.[100] Prior to the amendment, bargaining councils were confined to requiring the Minister of Labour to appoint designated agents

[97] Op cit note 41.
[98] Ibid at 277.
[99] Op cit note 2.
[100] Section 33A (1) of the LRAA of 2002.

with powers of investigation. Section 33 of the LRA provides for the appointment and powers of designated agents[101] of bargaining councils:

> "The Minister may at the request of a bargaining council, appoint any person as the designated agent of that bargaining council to promote, monitor and enforce compliance with any collective agreement concluded in that bargaining council.
>
> (1A) A designated agent may –
>
> (a) secure compliance with the council's collective agreement by –
>
> - issuing compliance orders;
> - publishing the contents of collective agreements;
> - following up complaints and conducting investigations; and
> - any other means the council may adopt; and
>
> (b) perform any other functions that are conferred or imposed on the agent by the council."

Prior to the 2002 amendment, it was also accepted that a bargaining council may be a party to arbitration proceedings through which it sought to enforce a collective agreement, at least where the arbitration is conducted by an independent body appointed by the council. In *Motor Industry Bargainig Council (Western Cape Region) v COFESA,*[102] where the arbitrator was of the view that the legislature could not have intended for a bargaining council to make provisions in its constitution for a procedure to settle disputes which would in law be outside its powers to implement or enforce. The arbitrator held, further, that the bargaining council rather than the CCMA, had jurisdiction in the matter as the dispute related to the interpretation or application of a

---

[101] The agent has wide powers including being able to:
- Subpoena witnesses to give evidence;
- Subpoena a person in control of a relevant book, document or object to produce the item and to answer questions;
- Enter and inspect premises at any reasonable time after having labour court authorisation to do so;
- Retain any relevant book, document or object for a reasonable period of time.

[102] (2001) 22 ILJ 556 (ARB).

collective agreement and the collective agreement concluded in the council included a dispute resolution procedure as required by section 24(1) of the LRA. It is now resolved that disputes concerning compliance with bargaining council agreements that cannot be resolved by conciliation are referred to arbitration.[103] Section 33A of the LRA deals with enforcement of collective agreements by bargaining councils.[104]

It is clear that section 33A has been included to provide an explicit statutory basis for arbitrations dealing with the enforcement of bargaining council collective agreements. What is required of an arbitrator acting in terms of s33A is to make an appropriate award, including specific orders.

5. Referral disputes to the Bargaining council: Types of Disputes

(i) Dispute between parties to a ba[illegible]ncil:

[103] Du Toit et al op cit note 2 at 269.

[104] Section 33A provides as follows:

"(1) Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreements in terms of this section or a collective agreement concluded by the parties to the council.

(2) For the purposes of this section, a collective agreement is deemed to include -
(a) any basic condition of employment which in terms of section 49(1) of the Basic conditions of Employment Act constitutes a term of employment of any employee covered by the collective agreement; and
(b) the rules of any fund or scheme established by the bargaining council.

(3) A collective agreement in terms of this section may authorise a designated agent appointed in terms of section 33 to issue a compliance order requiring any person bound by that collective agreement to comply with the collective agreement within a specified period.

(4) (a) the council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by an arbitrator appointed by the council.
(b) If a party to arbitration in terms of this section, that is not a party to the council, objects to the appointment of an arbitrator in terms of paragraph (a), the commission, on request by the council, must appoint an arbitrator.
(c) If an arbitrator is appointed in terms of subparagraph (b) –
(i) the council remains liable for the payment of the arbitrator's fee, and
(ii) the arbitration is not conducted under the auspices of the Commission."

If a dispute arises between an employers' organization and a trade union, that is, the parties to the bargaining council, the dispute must be resolved in terms of the dispute resolution procedure contained in the constitution of the council. The constitution of every bargaining council must contain a procedure for the resolution of disputes of this nature.

(ii) Disputes where one of the parties to the dispute is not a party to the bargaining council: If there is a dispute where one of the parties to the dispute is not a party to the council, but the dispute falls in the sector and area over which the council has jurisdiction, the dispute must still be referred to the council. A council may resolve a dispute of mutual interest involving a non-party if it is accredited to do so. In *Kem-Lin Fashions CC v Brunton,*[105] it was held that a council requires accreditation only to conciliate and arbitrate disputes of mutual interest between a non-party and the council about the registration of the non-party. Even though it was not accredited, the council had jurisdiction to arbitrate such a dispute by virtue of a collective agreement extended to non-parties. The council must attempt to resolve the dispute through conciliation. If conciliation fails (in the case of rights dispute) the council must resolve the dispute through arbitration if the LRA requires the dispute to be resolved through arbitration, or if the parties to the dispute agree that the council must arbitrate the dispute. If conciliation fails (in the case of an interest dispute) and the LRA do not require the dispute to be resolved through arbitration, or if the parties do not agree to arbitration, they may resort to a strike or lockout in order to place pressure on the other party.

[105] [2001] 1 BLLR 25 (LAC) at 24.

(iii) The resolution of unfair dismissal disputes

In view of the fact that most disputes relate to allegedly unfair dismissals, the resolution of these disputes deserves special emphasis. The procedure for resolving unfair labour practice dispute is similar to the disputes resolution procedure for unfair dismissals.[106] The dispute must first be referred to a bargaining council for conciliation. If conciliation fails, the matter may be referred to arbitration by the council of the CCMA.[107]

---

[106] Basson et al op cit note 41 at 197.

[107] Section 191 of the Act provides as follows:

"Disputes about unfair dismissals and unfair labour practices

(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –

(i) A council, if the parties to the dispute fall within the registered scope of that council; or

(ii) The Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within –

(i) 30 days of the date of a dismissal or, if it is later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date within 90 days of the date on which the employee became aaware of the act or occurrence.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

(2A) Subject to subsections (1) and (2), an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the Commission once the employee has received that notice.

(3) The employee must satisfy the council or the Commission that a copy of a referral has been served on the employer.

(4) The council or the commission must attempt to resolve the dispute through conciliation.

(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the commission received the referral and the dispute remains unresolved-

(a) the council or the Commission must arbitrate the dispute at the request of the employee if –

(i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b) (iii) applies;

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favorable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

(iii) The employee does not know the reason for dismissal; or

(iv) The dispute concerns an unfair labour practice; or

Under previous legislation, disputes about alleged unfair dismissals had to be referred to the Industrial Court. The position has changed, in terms of the 1995 LRA: some dismissal cases have to be finalised by bargaining or statutory councils or the CCMA, while others must be referred to the Labour Court for adjudication. At the end of

---

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is-
  (i) automatically unfair;
  (ii) based on the employer's operational requirements;
  (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
  (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a close shop agreement.

(5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns-
  (a) the dismissal of an employee for any reason relating to probation;
  (b) any unfair labour practice relating to probation;
  (c) any other dispute contemplated in subsection (5) (a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.

(6) Despite subsection (5) (a) or (5A), the director must refer the dispute to the labour Court, if the director decides, on applicat[illegible]y to the dispute, that to be appropriate after considering-
  (a) the reason after dismissal;
  (b) whether there are questions of law raised by the dispute;
  (c) the complexity of the dispute;
  (d) whether there are conflicting arbitration awards that need to be resolved;
  (e) the public interest.

(7) When considering whether the dispute should be referred to the Labour Court, the director must give the parties to the dispute and the commissioner who attempted to conciliate the dispute, an opportunity to make representations.

(8) The director must notify the parties of the decision and refer the dispute-
  (a) to the Commission for arbitration; or
  (b) to the Labour Court for adjudication.

(9) The director's decision is final and binding.

(10) No person may apply to any court of law to review the director's decision until the dispute has been arbitrated or adjudicated, as the case may be.

(11) (a) The referral, in terms of subsection (5) (b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.
  (b) However, the Labour Court may condone non-observance of that timeframe on good cause shown.

(12) If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.

(13) (a) an employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in the Act.
  (b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5) (b)."

2000, a total of 16 808 disputes were referred to bargaining councils, compared with 13 212 in 1999. Of these, 3 834 were settled at bargaining council level, compared with 3 625 during 1999.[108] According to Du Toit *et al,*[109] seven of these councils received more than 1000 referrals.

6 Jurisdiction of bargaining councils

The jurisdiction of bargaining councils is very important. The bargaining councils do not have jurisdiction to resolve all labour disputes. The jurisdiction to resolve these disputes is dependent on their nature. *In National Industrial Council of the Printing and Newspaper Industry v Copystat Services (Pty) Ltd,*[110] the plaintiff, an industrial council, sued for a declaratory order to determine which provisions of the industrial council agreement applied to [illegible] of the defendant company, there being a dispute in the matter. The court held that, in terms of section 20(1) of the Act, read with a clause in the constitution of the council, the industrial council had *locus standi* to bring the action. Goldstone J, as he then was, held further that the procedure in the constitution of the industrial council for dealing with disputes within the area of jurisdiction of an industrial council as envisaged in section 21(1)(f) is only applicable to members and parties to the industrial council.

Although it was submitted that the finding was correct, it has attracted a certain amount of criticism. De Kock,[111] in criticising the judgment of Goldstone, pointed out that the statement would seem clearly to indicate that, in the opinion of the court, the

---

[108] CCMA *Annual Report 2000/2001* www.ccma.org.za.
[109] Du Toit et al op cit note 2 at 131.
[110] 1980 (3) SA 631 (W).
[111] De Kock A 'Industrial Council Dispute Procedure' (1981) 2 *ILJ* at 17.

dispute procedure envisaged by section 21(1)(f) does not apply to "non- parties". In this regard he refused to accept that the section 21 (1) (f) dispute procedure is not applicable to "non -parties". However, section 21 procedures referred to all disputes in the industry concerned within the area in respect of which the council is registered. And if it had been intended that such disputes should be confined only to those between parties to the council, this would surely have been explicitly stated.

De Kock found it inconceivable that the scope of the dispute procedure should be restricted to parties. He argued that an industrial council has jurisdiction to settle disputes within the scope of its registration. In support of his contention, he cited three sections of the Act which he felt indicate that the council has such a "wider" jurisdiction.[112]

Benjamin,[113] in his reply, suggested that in using these sections in support of his proposition, De Kock failed to distinguish between the different functions embodied in the Industrial Conciliation Act.[114] However, an agreement arrived at by the parties to a council can be made binding by the Minister on all employers and employees within the scope of the councils' registration. Further, the agreement, as gazetted, regulates wages and conditions of work in the industry, and the council is given specific powers to administer agreements. For that matter, the extension of the agreement by the Minister to non-parties and the power given to the Council to enforce the agreement are not indications of a general jurisdiction but are specific instances of statutory authority

---

[112] Ibid at 18. The sections which he quoted to prove that the are other indications that an industrial councils' jurisdiction extends beyond the parties are stated as follows:
"(a) The provisions whereby an industrial council agreement can be declared binding upon non-parties;
(b) the powers of designated agents of industrial councils under s 62;
(c) The provision in s 65(1) (d) (i) whereby strikes and lock-outs has been considered by an industrial council having jurisdiction (if there is one)."

[113] Benjamin P 'Industrial Council Dispute procedure: Another view' (1981) 2 *ILJ* at 20.

[114] Act 28 of 1956.

clearly essential to the effective regulation of conditions of work in an industry.[115] Benjamin considered that if the intention of the legislature is that the dispute procedure should be binding on all employers and trade unions within the scope of registration of a particular council, it does not make sense to distinguish between parties and non-parties in respect of the sanction.

The Industrial Court in *Industrial Council for the Motor Transport Undertaking (Goods) v Bothma & Sons (Pty) Ltd,*[116] endorsed the view that in determining whether or not a particular industrial council has jurisdiction over a dispute, the locus of the dispute is not the issue, but rather, what is of importance is the location of the undertaking in which the dispute arises; what constitutes an undertaking is a question of fact. Thus, where a company had its head-office in the Free State, but operated two branches in Gauteng with their own separate full-time staff, for jurisdictional purposes the industrial council in question enjoyed jurisdiction over the two branch offices, despite the location of the head-office.

As already pointed out, the jurisdictional scope of bargaining council is to be found in its certificate of registration, and consequently an agreement negotiated by the council cannot go beyond such certificate in respect of sector contained in. A council may arbitrate any dispute between parties to the council for which it is stated in the constitution or dispute resolution procedure or if all parties to the dispute consent to such

[115] Supra note 70 at 20.

[116] [1997] 2 BLLR 140 (IC).

arbitration. Other disputes are conciliated by the council, but if conciliation fails, they are referred to the Labour Court for adjudication.[117]

6.1 Conciliation

Conciliation is the first step in most dispute resolution processes prescribed by the Act. According to Basson *et al*,[118] conciliation is a process whereby a conciliator 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. The settlement and the resolution of the dispute is determined and agreed to by the parties themselves. The conciliation process focuses on consensus or agreement. The conciliator does not impose a settlement on the parties but tries to get the parties themselves to agree to a settlement that is mutually acceptable.

Finnemore *et al*,[119] in a similar vein, states that "conciliation may be defined as a direct process whereby a third person, the conciliator, plays an active role as a fact finder,

---

[117] These disputes include disputes about dismissal for operational requirements, automatically unfair dismissals, dismissal because of an unprotected strike and an alleged infringement of freedom of association.

[118] Basson et al op cit note 41 at 336.

[119] Finnemore et al *Contempary Labour Relations* (2002) at 307. In general the functions of conciliation are to create an environment which provides for:

- Clarification and focus on the issues in dispute;
- Improved communication between the parties;
- Controlled release of the tension by allowing parties to air their grievances in front of an impartial person who may moderate heated interactions;
- More objective fact finding;
- Exploration of the real interest of the parties;
- Creativity in seeking alternatives solutions;
- A more realistic view of the power balanced between the parties;
- A non-binding process which allows parties to test proposals with the opposing party without any commitment should no final agreement be achieved;
- Mediation of offers and counter-offers by an experienced "go-between" until an agreeable settlement point is determined;
- Access to advice on where a realistic settlement of the dispute may lie;
- Legal advice;

mediator and initiator of creative ideas to assist parties who are in dispute to resolve their differences and reach their own mutually acceptable agreement."

The importance of conciliation is illustrated by the case of *Hotel Liquor Catering Commercial & Allied Workers Union & Others v Glamorock North (Pty) Ltd.*[120] This case deals with the dismissal of employees during a strike. The respondent attended the conciliation meeting, but the Commissioner did not arrive on time. When the commissioner arrived, the respondent had already left. The commissioner issued a certificate stating that the matter remained unresolved. The employees of the respondent issued a notice to strike, and embarked on a strike. The respondent employer contended that the strike was unprotected, because the dispute was not conciliated. Mlambo J held that:

> "Conciliation is a primary process through which disputes are resolved within the scheme of the Labour Relations Act. So much so that the Act makes provision that the Labour Court may refuse to determine any dispute if the Court is not satisfied that an attempt was made to conciliate the dispute (s157 (4) (a)). All disputes have to be referred for conciliation first before they can be arbitrated or adjudicated. That conciliation is paramount is demonstrated by the absence in the LRA of a provision similar to the one in the 1956 Act which enabled parties to bypass conciliation by simply agreeing that they were satisfied that conciliation would not resolve their dispute. Section 157 (4) (b) however provides that a certificate issued in terms of s 135(5) is sufficient proof that an attempt was made to conciliate the dispute concerned. Whilst this may be so the Labour Court cannot exclude the possibility that it may in appropriate cases refuse to determine the dispute even if a certificate was issued. One of such situations is if it is shown for instance, that the certificate was obtained improperly."[121]

- Help with drafting a formal and clear agreement that reflects the outcome of any settlement;
- Finally, achieving a formal agreement, usually in writing, that is perceived as legitimate by both parties.

[120] (1999) 20 ILJ (LC).
[121] Ibid at 646H-J.

6.2 Arbitration

In terms of the LRA, arbitration is a compulsory process where a neutral third party, for example (a CCMA commissioner, bargaining council arbitrator, or an arbitrator nominated by an accredited agency) hears both parties' versions of events and then decides the dispute between them. According to Finnemore *at al,*[122] arbitration may be defined as a direct intervention process whereby a third person, the arbitrator, plays a decisive role in resolving a dispute between two parties by conducting a fair hearing and weighing up argument and evidence, and making a final decision (award) to which the parties must adhere.

If a process of conciliation has failed and the parties still need their dispute to be resolved, then the option will be to take the dispute to arbitration. There are those disputes which are best resolved by arbitration and the statute also requires them to be resolved this way. Then the arbitration will come into play. According to Brand *et al,*[123] South African arbitration has developed as a response to the failure of the past system of dispute resolution.[124] Finnemore,[125] describes the general functions of arbitration in terms of a structured process which provides:

---

[122] Ibid note 8. The functions of arbitration are to create a structured process which provides:

- Opportunity for employees and employers to easily promote and defend their rights.
- A fair hearing of the dispute by an independent, well-trained person.
- A certain procedure for resolving disputes which may have built-in time frames for reaching finality.
- A binding dispute resolution mechanism where negotatiation and conciliation have failed.
- A means t avoid unnecessary labour unrest.
- Development of jurisprudence regarding the interpretation of labour legislation.

[123] Op cit note 65 at 115.

[124] This is clear from the Explanatory Memorandum to the Labour Relations Act of 1995 150 where it was stated as follows:

> "Existing statutory conciliation procedures are lengthy, complex and pitted with technicalities. Successful navigation through the procedures requires a sophistication and expertise beyond the reach of most individuals and small business. The merits of the dispute often get lost in procedural technicalities. Errors made in the initiation of conciliation procedures can be fatal to an

- an opportunity for employees and employers to easily promote and defend their rights.
- a fair hearing of the dispute by an independent, well- trained person;
- a certain procedure for resolving disputes which may have built-in time frames for reaching finality;
- a binding dispute resolution mechanism where negotiation and conciliation have failed;
- a means to avoid unnecessary labour unrest; and,
- and development of jurisprudence regarding the interpretation of labour legislation.

7. Review of private arbitration and arbitration proceedings of bargaining councils (Arbitration Act 42 of 1965): Test for review

Although the parties are free to refer their matters to dispute resolution mechanisms provided by the LRA, they usually make use of other dispute resolution options. Parties usually agree to use their own dispute-resolution processes distinct from that provided for by the Act.[126] These procedures are referred to as private dispute resolution procedures.[127] In this respect, O'Regan,[128] stated as follows:

---

applicant's claim for relief. A lack of resources, and poor remuneration and training all conspire to render the statutory conciliation services ineffectual."

[125] Op cit note 8 at 310.

[126] This is in line with ILO Standards: Collective Agreements Recommendation, 1951 Convention (No 91) www.ilo.org/ilolex/cgi-lex/convcle.pl. (Accessed 10 June 2005) which provides as follows:

(3) Machinery appropriate to the conditions existing in each country should be established; by means of agreement or laws or regulations as may be appropriate under national conditions, to negotiate, conclude, revise and renew collective agreements, or to be available to assist the parties in the negotiation, conclusion, revision and renewal of collective agreements.

"As a means of third party dispute settlement, private labour arbitration has grown dramatically since 1984 when the Independent mediation Services of South Africa (IMMSA) was formed under whose auspices most private labour arbitration takes place".

Both registered employers' organisation and trade unions have to ensure that all their collective agreements contain procedures for resolution of disputes about their interpretation and application. Collective agreements disputes have to be resolved very quickly, because if they are left unresolved this may hamper the relationship between the employer and employers' organisation and trade union or unions.[129] For example, section 24 requires parties to collective agreements to regulate how disputes in terms of these agreements should be resolved.[130] It must comprise conciliation, and if that fails, arbitration. In the absence of such an agreement, the parties choose other processes in terms of the Act.[131] Section 24(2) states that if there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission for Conciliation, Mediation and Arbitration (the CCMA) if:

(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or,

---

(4) The organization, methods of operation and functions of such machinery should be determined by agreements between the parties or by national laws or regulations, as may be appropriate under national conditions.

[127] Brand et al op cit note 65 at 31 – 37.

[128] O' Regan 'The Development of private Labour Arbitration in South Africa – A review of the Arbitration awards' 1989 *ILJ* 557 at 559.

[129] Basson et al op cit note 41 at 262.

[130] In *SA Breweries v Commission for Conciliation, Mediation and Arbitration & others (2002) 23 ILJ* 1467 (LC); [2002] 9 BLLR 894, the Labour Court confirmed that if there is a collective agreement providing for private dispute resolution procedures, and the employee is a member of the union that entered into the agreement, then the collective agreement will take precedence. In such a situation, the CCMA will not have jurisdiction to hear the matter.

[131] In terms of s 24 (4) of the LRA the dispute must be referred to the CCMA for conciliation.

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of collective agreement.

In terms of section 28 of the Act,[132] the award is final and is not subject to further appeal. Van Jaarsveld[133] compared dispute resolution under the auspices of the CCMA, the Labour Courts or the civil courts with that of private resolution procedures. In the light of this, it was concluded that, there are number of advantages associated with the private arbitration of labour disputes.[134] This was supported by Landman J in the case of *Eskom v Hiemstra,*[135] where it was stated that the concept of final and binding arbitration has several advantages which are thought to outweigh the judicial system; namely, a speedier result, privacy and tailor-made or individualised justice. The private arbitration of labour disputes is not without disadvantages, but for the purpose of this discussion it is not worth mentioning them.

[132] Arbitration Act 42 of 1965.
[133] Van Jaarsveld et al op cit note 29 at 457.
[134] Ibid. Accordingly to Van Jaarsveld et al the main advantages are the following:

"(i) the parties to a dispute can appoint as the private arbitrator a specialist and person of choice in relation to the dispute before hand;
(ii) Private arbitration could be an expedient way of finalizing a dispute. There is, in contrast to the CCMA, the Labour Courts or the civil courts, no court roll where parties have to wait their cases;
(iii) Private arbitration is private and confidential. This process does not take place in an open court and the presence of the public and the press;
(iv) The parties to the dispute can adapt the procedure to be followed through consensus. The CCMA, Labour court and civil court procedures are regulated by sets of rules;
(v) the private arbitration award is final and is not subject to appeal unless the parties reach such an agreement. In the case of the Labour Courts, there may be an appeal to the Labour Appeal Court and in the case of the High Court there is an appeal to the Supreme Court of Appeal;
(vi) arbitration procedures are mostly more informal and less intimidating than court proceedings;
(vii) private arbitration may in certain instances be a less expensive means of finalizing a dispute than through court proceedings. It must be remembered though, that the parties themselves are responsible for the arbitrator's professional fee. The state is responsible for the salaries of commissioners of the CCMA and judges of the courts."

[135] 1999 *ILJ* 2362 (LC); [1999] 10 BLLR 1041 (LC) at 1046E.

A dissatisfied party may take a private arbitration award on review in terms of the Arbitration Act.[136] The Labour Court has exclusive jurisdiction to review private arbitration proceedings, including review of bargaining council proceedings conducted in terms of the Arbitration Act.[137] This must not be confused with the jurisdiction of the Labour Courts to review the statutory arbitration awards arrived at by the CCMA.[138] Most of bargaining council arbitration is conducted under the LRA, and not the Arbitration Act. Section 146 excludes the application of Arbitration Act. The difference between the scope of review in compulsory arbitration and private arbitration was explained in the case of *ACTWUSA v Veldspun (Pty) Ltd.*[139] The Appeal Court held that:

> "When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly if not explicitly (and subject to the limited poser of the Supreme Court under section 3(2) of the Arbitration Act) abandon the right to litigate in courts of law and accept that they will be bound by the decision of the arbitrator. There are many reasons for commending such a course and especially so in the labour field where it is frequently advantageous to all the parties in the interests of good labour relations to have a binding decision speedily and finally made. In my opinion the courts should in no way discourage parries from resorting to arbitration and should deprecate conduct by a party to arbitration who does not do all in his power to implement the decision of the arbitrator promptly and good faith."

The standard of review of private arbitration is set out in the Arbitration Act.[140] Section 33 of the Act provides as follows:

---

[136] Op cit note 129.
[137] Ibid.
[138] Section 145 of the Labour Relations Act sets out the grounds for reviewing CCMA awards and is worded in terms identical to s 33 of the Arbitration Act. After a period of uncertainty about the issue of what test should be applied to CCMA arbitration awards was finally settled by the Labour Appeal Court in *Shoprite Checkers (Pty) ltd v Ramdaw NO & others* (2001) 22 *ILJ* 1603 (LAC). However, in *Carephone (Pty) Ltd v Marcus (*1998) 19 *ILJ* 1425 (LAC) the court applied the "justifiability" test as ground for review on CCMA awards for the first time.
[139] 1994 (1) SA 162 (A); (1993) 14 *ILJ* 1431 (A) at 169F-H.
[140] Op cit note 129.

"(1) Where –

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or,

(c) an award has been improperly obtained,

the court may, on application of any party to the reference after due notice to the other party or parties; make an order setting the award aside."

In *Transnet Ltd v Hospersa and another,r*[141] the Court applied the subsection in accordance with the view adopted in *Carephone (Pty) Ltd v Marcus NO & others.*[142] Mlambo J said the following:

"The provisions of s 33 of the Arbitration Act are similar to the provisions of section 145 of the LRA. The Labour Appeal Court ruled in *Carephone (Pty) Ltd v Marcus and others* (1998) 19 *ILJ* 1425 (LAC) that arbitration awards of the commission can only be reviewed in terms of s 145. In that judgment the Labour Appeal Court noted that the judicial functions of the Commission and other organs of the state, though not transforming these bodies into courts of law, remains administrative action within the ambit of the administrative justice section of the Constitution.

Froneman DJP noted that s 33 and 23(b) of schedule 6 to the Constitution introduced a requirement of rationality in the merit or outcome of the administrative decision going beyond procedural impropriety. In Paragraph 36 of the judgment Froneman DJP stated:

> 'In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order so substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.'

[141] (1999) 20 *ILJ* 1293 (LC) at 1297D-I; [1999] 7 BLLR 732 (LC).
[142] (1998) 19 *ILJ* 1425 (LAC).

In my view the standard of review of awards of the CCMA as set out by the Labour Appeal Court applies equally to awards issued in terms of the Arbitration Act. One reason is the similarity between s 145 of the LRA and s 33 of the Arbitration Act. The other reason is that inconsistencies and confusion could prevail if this court were to apply different standards of review."

A distinction is drawn between appeals and reviews. This is clear from the case of *Ken-Lin Fashions v Brunton & another,*[143] where the applicant brought an application in the Labour Court, and when it was dismissed, appealed to the Labour Appeal Court. The appeal was again dismissed. The applicant then sought a certificate from the LAC in terms of Rule 18 of the Constitutional Court Rules on a constitutional matter allegedly arising out of the appeal. Rule 18 sets out the procedure for leave to appeal directly to the Constitutional Court where a decision on a constitutional matter has been given in any court other than the Supreme Court of Appeal. The LAC held that Rule 18 contemplates involvement of the Constitutional Court before the appeal process itself has been exhausted, and therefore leave to appeal against the judgment of the LAC cannot be obtained from the Constitutional Court in this manner.[144] The Court held further that the requirements for review as set out in s 145 of the LRA and those set out in s 33 of the Arbitration Act 42 of 1965 are not the same.[145]

The test to be applied in reviewing an arbitration award made in terms of the agreement to refer a dispute to private arbitration was considered in *Stocks Civil*

[143] (2002) 23 *ILJ* 882 (LAC); [2002] 7 BLLR 597 (LAC).
[144] Ibid at para 2.
[145] Ibid at paras 4 &5.

Engineering (Pty) Ltd v Rip NO.[146] Van Dijkhorst AJA extracted from the case law the following principles applicable to the review of private arbitration awards:

> "A court is entitled to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally explicit in the agreement under which an arbitrator is appointed that he is fully cognisant with the extent of limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result *per se* not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would [illegible] by the arbitrator as it would be a breach of the implied terms of his appointment.[147]

On this judgment, Meyer[148] commented as follows: "The courts have interpreted this provision very restrictively and it has proved very difficult to review private arbitration awards. The courts would generally not interfere with an award even if the arbitrator made a mistake of law or misunderstood the evidence lead during the arbitration."

The implication of this is that the principle to be considered is what is intended by the parties and to give effect to their views.[149] This means that, although this might be a

---

[146] (2002) 23 ILJ 358 (LAC).
[147] Ibid at para 54.
[148] Nicola Meyer "Private Arbitrations: The test for review" 11:9 (2002) *Contemporary Labour Law* 90.
[149] O' Regan "The Development of private Labour Arbitration in South Africa – A review of the Arbitration Awards" 1989 *ILJ* 557, 565 where she stated as follows:
> " ...in moving away from the intention of the parties, whether expressed, implied or imputed, the arbitrator loses touch with the authority given to him or her by the parties."

difficult task to do, clearly the intention of the parties is an important factor. To complement this, Summers, [150] noted:

> "One of the marked characteristics of collective agreements is their incompleteness, resulting in part from the failure of the parties for foresee or provide for many future problems, and in part from their inability to reach real agreement on certain issues which they do foresee. The counter principle that the binding effect of a contract is not rigidly circumscribed by what parties ha din mind when they signed it legitimates the exercise by arbitrators and court of a creative function in completing the agreement. It invites inquiry beyond the often futile or artificial search for not-existent intent and encourages explicit consideration of such factors as the purposes of the parties and the institutional needs of collective bargaining, justice and fairness between the parties, the interests of third parties, and the public interest. It also prevents preoccupation with the particular wording of the document and focuses more intention on the legal effect to be given the agreement. In terms of these considerations, the choice is made in terms of the results to be reached; the agreement is then completed or shaped to accomplish that result."

The initial controversy over whether the LRA or the Arbitration Act[151] governs arbitration by bargaining councils has been settled in favour of the LRA. In *Reddy v KwaZulu-Natal Department of Education & Culture & Others*,[152] the appellant, an educator employed by the Department of Education and Culture, Kwazulu-Natal, applied for the post of principal at one of the schools. A selection committee recommended him for the post. The governing body of the school had reservations about the appellant and as a result they appointed another candidate to the post. The appellant referred the matter to the Education Labour Relations Council, complaining that he was a victim of an unfair labour practice. The parties agreed that the matter should be referred for arbitration. The

---

[150] Summers 'Collective Agreements and the Law of Contracts' (1969) 78 *Yale Law Journal* 525 at 551-2, cited by O'Regan op cit note 146 at 569.
[151] Ibid note 129.
[152] (2003) 24 *ILJ* 1358 (LC).

respondent arbitrator held that the reasons for which the governing body had decided not to appoint the appellant were unfair, unreasonable and unjustifiable, and that the decision not to appoint him constituted unfair discrimination. The arbitrator ordered the department to compensate the appellant. The award was set aside by the Labour Court. On appeal, the Department contended that the arbitrator's order requiring the Department to pay compensation was grossly unreasonable in the light of his finding that the governing body had discriminated against the appellant. Zondo JP held that:

> "Notwithstanding the contention advanced by Mr Stewart, who appeared for the appellant, to the effect that the arbitration conducted by the second respondent was a private arbitration the award of which could only be reviewed and set aside in terms of the narrow grounds[153] of review set out in section 33 of the Arbitration Act 42 of 1965, I have no hesitation in finding that this was not a private arbitration. This arbitration was conducted under the auspices of the third respondent. This is what the parties said in paragraphs 4 of the founding affi[illegible]51.1 and 51.2 of the appellants' answering affidavit. Accordingly, the second respondent was performing functions in terms of the Act when he conducted the arbitration and issued the award. This means that the arbitration proceedings, or the award issued thereto, can be reviewed under section 158(1) (g) of the Act and is not confined to the narrow grounds set out in section 33 of the Arbitration Act. In terms of section 158(1) (g) the Labour Court is given power, despite section 145, "to review the performance or purported performance of any function provided for in this Act or any act or omission or any person or body in terms of this Act on any grounds that are permissible in law".

[153] The grounds of review provided for in s 33 are that:

- any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator; or
- an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- an award has been improperly obtained.

8. A Discussion: Challenging the bargaining council.

The LRA focuses on the proactive use of conciliation, arbitration and adjudication to resolve disputes as well as their speedy and effective resolution.[154] The LRA attempts to ensure that procedures appropriate for the resolution of various types of disputes are in place. It strongly supported the establishment of bargaining councils.[155] It also created these institutions to resolve disputes in the workplace through conciliation and arbitration. According to Du Toit *et al,*[156] industrial councils were commonly recognised as having three primary functions: the prevention of disputes by collective bargaining, the settling of disputes, and the general regulation of matters of mutual interest. The LRA has retained these functions for bargaining councils, but has significantly enlarged upon them. The primary function of a bargaining council is to negotiate collective agreements. Accordingly, collective agreements may deal with terms and conditions of employment, or any other matter of mutual interest.

The most important function entrusted to the bargaining councils is the resolution of disputes concerning matters of mutual interest within their registered scope, whether the dispute is between parties to the council, or whether one or more of the parties to the dispute are not parties to the council.[157] This is a major shift of disputes from the doorsteps of the CCMA to bargaining councils, designed to give parties control over their

---

[154] Finnemore et al op cit. note 8 at 216.

[155] Op cit note 7.

[156] Op cit note 2 at 135. The functions of the then industrial councils were set out in s23 of the 1956 Act as follows:

> " an industrial council shall within the undertaking, industry, trade or occupation, and in the area, in respect of which it has been registered, endeavour by negotiation of agreements or otherwise to prevent disputes from arising, and to settle disputes that have arisen or may arise between employers' organizations and employees or trade unions and take such steps as it may think expedient to bring about regulation or settlement of matters of mutual interest to employers or employers' organizations and employees or trade unions".

[157] Du Plessis et al *A Practical Guide to Labour Law* (1998) at 224.

own affairs.[158] This dispute-resolution function is conferred upon it by virtue of its constitution and section 51 of the LRA. The parties also agree on how their labour disputes should be resolved. The parties are free to develop their dispute resolution mechanisms.

The LRA envisages that bargaining councils will play a prominent role in this regard. Although it performs a very important role, the labour dispute resolution function is under-researched in South Africa.

To date, bargaining councils in most industries in South Africa have not risen to the responsibilities entrusted to them. Concern has been expressed by the Minister of Labour in an Industrial Action Report, and by the Director of the CCMA, that employers and employee organisations have been reluctant to resolve their labour disputes internally through their bargaining councils, and [illegible] essarily overloaded the CCMA, often with trivial issues.[159] Concern has also been expressed about the bargaining council, relatively low settlement rate. The Department of Labour reported a 22% settlement rate by accredited councils, as compared with 73% by the CCMA.[160] Also many commentators have raised some concern about the workings of the bargaining councils. Brand[161] observed that:

---

[158] The NEDLAC Executive Council in its agreement on the Bill stated as follows: "The Act also provides for the establishment of statutory councils at industry level for purposes of seeking agreements on dispute resolution, on training and education schemes, and on pension, provident and similar funds. Bargaining councils will replace existing industrial councils, and will provide the locus for the conclusion of collective on a range of issues including wages and conditions of employment, and policy proposals on industrial policy". www.nedlac.org.za (accessed on July 2003).

[159] Statement by the Minister of Labour at a Media briefing on the release of the CCMA Annual Report and the Department of Labour Report on Industrial Action, on 6 September 1999.

[160] *Preliminary Annual Report 2001 /2002* (2002) at 33. www.labour.gov.za.

[161] John Brand ' CCMA Achivements and Challenges – Lessons from the first years' 12th Labour Annual Law Conference, Durban July 1999. labcon12/workshop2. www.irnet.co.za (accessed 13 June 2001).

"The statistics around bargaining councils also tell us an interesting story, which is that there is a time bomb ticking there. The intention of the Labour Relations Act to shift 49 per cent of the burden of dispute resolution from the CCMA to the bargaining councils is not working. The problem is the system of accreditation and subsidation, according to which accredited bargaining councils may not charge the parties a fee – they may only use the subsidy given by the state. The budget is R 120 million, yet subsidy payment thus far is at R5 million. The attitude of the Department of Labour is that the employers and the unions must raise a levy and pay for bargaining councils themselves. The employers say that it is inequitable that by agreeing to participate voluntarily in bargaining councils in compliance with the government's policy of centralized bargaining they are being forced to pay their own dispute resolution when their colleagues across the street who are not parties to centralized bargaining get it for free in the CCMA. Some of the big bargaining councils are tapping into their existing dispute resolution fund and exhausting it. More alarmingly they are tapping into other valuable funds in the hope that the subsidy is going to be forthcoming. We must appreciate that it is not. The money is not there. There is no way that bargaining councils are going to be subsidized to that extent and we n[illegible]olution for that problem."

Mosime[162] added to this dimension. Looking at the bargaining issue further, he stated that:

"The major problem that we identified when we started working with bargaining councils was that they themselves do not have proper training. It took us a long time to identify agents in the bargaining council that could be trained to handle conciliation and arbitration disputes. The other problem is that there was a need at the time we took over accreditation and subsidation for a radical transformation of some of the bargaining councils. Our experience shows that some of these bargaining councils operate like family business. There is a massive amount of education that has to go into some of these bargaining councils, and the extent of corruption and unethical behavior is enormous. So they are making it difficult for us to transform them quickly into functioning dispute resolution agents. At the moment we have only accredited 21 bargaining councils. The number is not satisfactory and that is why we think that some

[162] Op cit note 148. Senior Convening Commissioner, Gauteng CCMA.

kind of intervention is needed to assist the bargaining councils. Some of them are in serious financial trouble and are near collapse."

Brand[163] also commented on the issue of bargaining councils. He said –

"The fundamental problem with bargaining councils is that people do not appreciate that they are voluntary institutions. The second thing that they do not understand is that people do not pay tax voluntarily. If you shift the whole jurisdiction onto bargaining council and say to people: "Pay for it yourselves" without forcing them in law to contribute the tax they are not going to pay tax. So if the money is not available and the state is not giving them money there is not prospect of the system working. It is as simple as that. I fear that what has been quietly happening before our eyes is the collapse of centralized bargaining and bargaining councils because we have failed to appreciate that they are voluntary institutions and that you cannot load them with responsibilities and expect employers to pay. They are not going to co-operate unless you force them to pay levy. But then you have to ask yourself why the other employers do not also pay a levy?"

The above comments are very crucial to any future debate about the effectiveness and efficiency of the bargaining councils in resolving the disputes. In this regard, it is submitted that the bargaining council does have a role to play in the entire industrial relations spectrum, not only as a dispute resolution mechanism. Looking at the whole collective bargaining framework, the resolution of disputes by bargaining councils will save undue expense in courts and ensure that everyone's interests are taken care of.

As already pointed out, the jurisdictional scope of a bargaining council is to be found in its certificate of registration, and consequently an agreement negotiated by the council cannot go beyond such certificate in respect of sector contained in. A council may arbitrate any dispute between parties to the council for which it is stated in the constitution or dispute resolution procedure, or if all parties to the dispute consent to such

[163] Ibid.

arbitration. This wider jurisdiction of bargaining councils makes these bodies essential for industrial peace. It is perhaps appropriate to conclude with a citation which conceives a bargaining council system in a positive light. Milton [164] observes as follows:

> "Whilst not all councils are accredited to arbitrate, studies of the councils which are accredited to perform this function, showed a fairly low incidence of arbitration awards being rendered. However, where matters were arbitrated, the process was fairly speedy and the overall quality of arbitration awards found to be similar to those produced by CCMA commissioners. It was concluded that certain bargaining councils played a significant role in the dispute resolution process, processing disputes effectively and speedily. Whilst it was a matter of concern that few employees achieved reinstatement or re-employment, there was nothing to suggest that they would have achieved better results by approaching a different dispute resolution organization. However, many types of council are currently not efficient and play a very marginal role in resolving disputes."

These councils in their functions are restricted to particular disputes. The bargaining council system may be fine in concept; the issue might be in the restrictions and changes brought by the legislation, and these need to be examined in order to provide a solution. It would be appropriate to quote Milton[165] again:

> "Councils can now apply to the Governing body of the CCMA for accreditation to conciliate and arbitrate certain categories of disputes. However, councils cannot conciliate all the disputes which the CCMA can and are restricted from conciliating disputes relating to organisational rights, even in the sectors in respect of which they are registered, as well as disputes relating to the application and interpretation of collective agreements. Hence, some may say that the dispute resolution function of councils has been restricted. It may be argued that these restrictions, coupled with changes in the enforcement of bargaining council agreements have weakened the position of bargaining councils. In addition, it would seem that many of the bargaining councils in the private sector are struggling and may need to redefine their roles if they are to survive. This is

---

[164] Elaine Milton 'Bargaining Councils and the Dispute Resolution System' (17 July 2000) summary of a research project, CCMA. www.ccma.co.za (accessed on 12 February 2004).
[165] Ibid.

strongly indicated by the fact that several councils have dissolved or are facing dissolution and also by the growing number of small and medium enterprises which do not register with the councils."

CHAPTER FIVE

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

1. Introduction

The major shift that took place in industrial relations in the 1970's gave rise to a need for more appropriate forms of dispute resolution in the workplace. As a result the 1995 LRA[1] was introduced immediately after the first democratic elections in South Africa. This was premised on a more co-operative model based on collective bargaining, greater participation, organizational rights, effective resolution of disputes, and higher levels of cooperation resulting in greater flexibility and improved productivity outcomes.[2] The success of this statutory intervention has been borne out by extensive reliance on mediation and arbitration in terms of the LRA. The Act also recognizes and actively promotes private procedures negotiated by the parties for the resolution of disputes.

The drastic reforms which were contained in the Act came as plausible innovation to many.[3] According to Minister of Labour,[4] the LRA provides for a mechanism and a

---

[1] The Labour Relations Act 66 of 1995 (hereafter "the Act" or "LRA").
[2] Ibid.
[3] The reasons which necessitated these drastic changes were advanced by the Ministerial Task Team in the Explanatory Memorandum to the Labour Relations Bill 1995 at 147 as follows:

- the dispute resolution procedures were complicated, it created legal technical problems and they were time consuming;
- industrial councils and conciliation boards did not have much success with the conciliation of labour disputes;
- the industrial court had to ensure status and was not part of the hierarchy of the courts of law;
- Industrial Court procedures were characterized by long delays and postponements. Appeals from the Industrial Court to the Labour Appeal Court and finally to the Appeal Court involved a procedure which resulted in a waste of time;
- the Industrial Court and the Labour Appeal Court did not have exclusive jurisdiction in respect of labour issues, resulting in problems to develop uniform and clear legal principles in respect of labour law.

[4] Speech given by Minister MMS Mdladlana at the Opening of the CCMA Pretoria Office at Metropark Building in Pretoria 27 January 2005.http://www.labour.gov.za.media/speeches.jsp?speechdisplay_id=9943 (accessed on 18 February 2005).

structure aimed at providing speedy, economic, accessible and non-legalistic procedures for consensus-based resolution of disputes.

Although it is difficult to identify precisely what went wrong with the 1956 legislation, it is clear from the wording of the explanatory memorandum to the LRA, that the formation of the CCMA indicates a paradigm shift from the cumbersome method of resolving disputes to a more approachable, informal, flexible and improved system. This is better than getting many disputants queue at the industrial court for a matter to be resolved.[5] The characteristics of the dispute resolution system under the LRA are that –

- employers, trade unions and employees are encouraged to regulate and resolve their own disputes through collective bargaining;
- strike action must be avoided in most rights disputes;
- unionized and non-unionised disputants have easy access to conciliation through simple and non-technical procedures (as lawyers are excluded);
- disputes should be resolved quickly.[6]

The LRA was amended in 2002,[7] and in terms of these amendments the CCMA was required to issue rules and guidelines, which it eventually did. This brings us to the question: What impact has these amendments brought upon the operation of the CCMA?

It is clear again from the issues that will be raised in this chapter that labour dispute resolution has again become complex and relatively technical. Applicants seeking relief may find themselves bogged down in legal technicalities in respect of

[5] Op cit note 3.
[6] Ibid at 115, 147 -151.
[7] Labour Relations Amendment Act 12 of 2002.

issues such as jurisdiction or application for condonation, issues few individuals and unrepresented employees, for example are really equipped to handle.

This chapter examines the CCMA, its structure and its establishment, jurisdiction, operation, and conciliation and arbitration procedures in order to understand the efficiency and effectiveness of this institution.

2. The CCMA

The CCMA is the central institution in the statutory labour dispute resolution system established by the LRA. It was established as a dispute prevention and resolution body, managed by a governing body nominated by the National Economic, Development & Labour Council (NEDLAC).[8] It has jurisdiction and offices in all provinces of South Africa. It was established to overhaul the [illegible] of the industrial court, and also provide for the speedy, cost effective, efficient and accessible resolution of labour disputes.[9] The statute has made this body impartial, independent and completely separate from the

[8] It comprise of three representatives from the state, three representatives of organized labour, three representatives from organized business, a chairperson and the Director of the CCMA.

[9] The reason for its establishment was set out in the explanatory memorandum to the Labour Relations Bill (1995):

> "Existing statutory conciliation procedures are lengthy, complex and pitted with technicalities. Successful navigation through the procedures requires a sophistication and expertise beyond the reach of most individuals and small business. The merits of the dispute often get lost in procedural technicalities. Errors made in the initiation of conciliation procedures can be fatal to an applicant's claim for relief. These factors encourage workers and employers to resort to other methods to resolve disputes. The absence of procedures for the independent and effective mediation of disputes means that many resolvable disputes culminate in industrial action. Our statutory conciliation in situations settles on average only 20% (conciliation boards) to 30% (industrial Councils) of disputes. In other countries settlement rates as high as 70% to 90%. (Conciliation boards were boards established for dispute resolution by the old Department of Manpower in cases where no industrial council had jurisdiction."

department of labour, to shield it from any party-political interference by the State, employers, trade unions, employers' organizations and federations of these bodies.[10]

It cannot be said with certainty that this body is free from any government intervention, because the State has played a major role in the enactment of laws and their enforcement. This research cannot cover all the complex problems posed by the role the state plays in dispute resolution. But it suffices to say that the State's role has been undergoing major changes over the years as a result of the transformation that has swept through our country. The differentiation that characterized the South African industrial relations system in the past has been toned down. This is due to the significant development in statutory regulation, which is reflected in the LRA and other related statutes..[11]

The CCMA was created as an organ of State, not as a court of law.[12] Being an organ of state makes the Commission a unique labour dispute resolution institution. In *Carephone (Pty) Ltd v Marcus,*[13] Froneman DJP set out certain characteristics and requirements of the CCMA and its processes:

---

[10] Section 113 of the Act provides that the CCMA is independent of the state, any political party, trade union, employer or employer's organization, federations of trade unions or a federation of employer's organizations.

[11] The Constitution (1996); Basic Conditions of Employment Act, of 1997 etc.

[12] This is clear from the wording of section 112 of the LRA read with section 165 of the 1996 Constitution. Section 112 reads as follows:

> "The Commission for Conciliation, Mediation and Arbitration is hereby established as a juristic person." Section 165 of the Constitution provides:
>
> "(1) the judicial authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
>
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[13] 1998 *ILJ* 1425 (LAC) 1430-1432.

(a) The CCMA exercises a public power and function because it resolves disputes between parties in terms of the Labour Relations Act without needing the consent of the parties. This makes the CCMA an organ of state in terms of the constitution;

(b) The CCMA is bound by the bill of rights;

(c) In terms of the constitution, the service provided to the parties by the CCMA must be impartial, fair, equitable and unbiased;

(d) The proceedings must be lawful and procedurally fair;

(e) The reasons for an award must be given publicly and in writing;

(f) The award must be justified in terms of the reasons given; and,

(g) The award must be consistent with the fundamental right to fair labour practices required by the constitution.

It is clear from the above that the CCMA is not one of the judicial pillars of the state. It only has powers and functions as provided for in the LRA and the rules entrusted to it by any other law. This was confirmed by the Labour Court in *National Bargaining Council for the Road Freight Industry v Meyer t/a Oakley Carriers,*[14] where it was stated that the CCMA is not a court but a tribunal with wide-ranging investigative powers and diverse functions. There is presently an ongoing debate as to whether the functions performed by CCMA Commissioners constitute administrative action during the course of arbitration proceedings constitute administrative action or quasi-judicial functions. Should the functions of a CCMA Commissioner fall within the purview of administrative action, the provisions of the Promotion of Administrative Justice Act 2000 (PAJA)[15] would be applicable to such action. The vexed discussion about PAJA and the CCMA is avoided here as this is covered in chapter six. However, a reference would be made here

[14] (2000) 21 *ILJ* 1391 (LC).
[15] Act No 3 of 2000.

to what was said by Froneman DJP in *Carephone (Pty) Ltd v Marcus No & others.*[16] According to the learned Judge:

> "The substantive answer to the argument is to be found in the purpose of the administrative justice section of the Bill of Rights. That purpose is to extend the values of accountability, responsiveness and openness to institutions of public power which might not previously have been subject to those constraints. Courts of law have in any event always been subject to the kind of requirements set out in the section. It would simply be incongruous to free other public institutions exercising judicial functions from those constraints. It is not necessary to seek the origins of those constraints in other provisions of the Bill of Rights, such as the access to justice provisions (section 34). Administrative action may take many forms, even if judicial in nature, but the action remains administrative."[17]

2.1 The role and Responsibility of the CCMA

The CCMA is entrusted with a number of functions. The most important of those functions are clearly stated in section 115 of the LRA, namely, to resolve disputes referred to it. The commission, when performing these functions, uses two methods: (1) that of conciliations, and if conciliation fails, it may also resolve the dispute through arbitration. Also where all parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission. Apart from conciliation and arbitration, the CCMA performs other additional functions as follows:[18]

- accrediting and subsidizing councils and private agencies to undertake conciliation and arbitration;
- conducting and overseeing ballots of registered unions and employers' organizations if so requested;

---

[16] Supra note 13.
[17] Ibid at 1099F-G.
[18] This is provided for by section 115 of the Act.

- to receive and consider applications for establishment of workplace forums
- to publish rules and guidelines with regard to any matter dealt with in the LRA;
- compile and publish information and statistics about its activities;
- advising parties to a dispute on procedure to be followed and conducting relevant research;
- also provide registered trade unions or employer's organizations with advice or training relating to the primary objectives of the Act; and,
- assist with the combating of sexual harassment in the workplace.

It is therefore apparent that the functions of the CCMA go further than dispute resolution. Clearly, it also plays a central role in the functioning of the Act. This was also the sentiments expressed in *SACCA[illegible]ecialty Stores Ltd,*[19] where the Labour Appeal Court noted that:

> "It is not necessary to go into any detail on the varied and important functions the commission has to perform in respect of many vital aspects in terms of the [Labour relations] Act [66 of 1995]. Suffice to say that it plays a pivotal role in the effective functioning of the Act."

According to Du Toit *et al,*[20] the effective functioning of the CCMA is crucial to the success of the labour dispute resolution system. This view is also supported by Brand[21] In his evaluation of the CCMA's performance, Brand contends that the CCMA has achieved much in terms of cheap and easy access, simplicity of process, expedition, and

---

[19] 1998 *ILJ* 557 (LAC) at 560D.
[20] Du Toit et al *Labour Relations Law* (2001) at 43.
[21] John Brand "CCMA: Achievements and Challenges - Lessons from the first years" Paper presented to the 12th Annual Labour Law Conference Durban July 1999.

high levels of legitimacy. In relation to accessibility, Brand[22] notes that 175 046 disputes were referred to the CCMA between its opening in November 1996 and 30 April 1999, the vast majority being unfair dismissal disputes. A large portion of these were referred by both domestic workers, agricultural workers and workers from the informal sector. Accordingly this is an indication of its accessibility to workers.[23] Furthermore, the simplicity of the referral procedure and absence of formal pleadings have contributed to accessibility, and 'ensured that illiteracy and lack of skill and resource are not an entry barrier to the system'.[24]

3 CCMA Processes and Procedures

Conciliation and arbitration are the most important tools used by the CCMA to resolve disputes. The underlying purpose of the Act is:-

> "To provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose."

Section 135 of the Act provides:

> "(1) when a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve the dispute through conciliation."

The Act anticipated that an initial step to resolve a dispute will be taken through conciliation, failing which arbitration or adjudication will follow. This means that

---

[22] Ibid.
[23] Ibid.
[24] Ibid at 4
[25] Op cit note 1.

disputes must first be conciliated before other measures may be contemplated. For example, in disputes of interests, such as wage conflicts, must first be referred to conciliation by the CCMA or bargaining councils or accredited agencies before contemplating strike action or lock-out.[26]

The LRA was amended in 2002,[27] and in terms of these amendments the CCMA was required to issue rules and guidelines, which it eventually did. These rules[28] regulate:

- the practice and procedure in connection with the resolution of disputes through conciliation and arbitration,
- the process by which conciliation is initiated, and the form, content and use of that process the way in which arbitration process works,
- the forms to be used by the parties and the CCMA.

However the question is, since the conciliation and arbitration procedures are contained in the legislation, what impact will these rules have on the operation of the CCMA. This question will be answered hereunder.

3.1 Types of Disputes

The Act identifies different categories of disputes that may be referred to the CCMA, namely:

- disputes referred in terms of the Act;
- disputes about matters of mutual interests; and,

---

[26] Van Jaarsveld and Van Eck *Principles of Labour Law* (2002) at 425.
[27] Labour Relations Amendment Act 12 of 2002.
[28] Rules for the conduct of the proceedings before the CCMA (CCMA Rules) published in *Government Gazette* 25515 of 10 October 2003.

- disputes referred to the CCMA in terms of other legislation.

The LRA provides that all disputes emanating from various provisions of the Act must be referred to the CCMA. This includes disputes about the interpretation or application of the LRA, and specific disputes for which a special procedure is prescribed.[29] In terms of section 133 of the Act, 'matters of mutual interests' encompass all disputes other than disputes referred to the CCMA in terms of the Act. In addition to this, the Act provides that disputes arising out of other statutes must be referred to the CCMA. This clearly shows that the Act has endowed the CCMA with wide powers, the implication of which is that the CCMA has wide jurisdiction to deal with disputes emanating from other statutes beside the LRA. For example:

[29] Section 191 which was introduced by s46 of the Labour Relations Amendment of 2002 provides as follows:

"(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –

(i) A council, if the parties to the dispute fall within the registered scope of that council; or

(ii) The Commission, if no council has jurisdiction."

(b) A referral in terms of paragraph (a) must be made within –

(i) 30 days of the date of a dismissal or, if it is later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date within 90 days of the date on which the employee became aware of the act or occurrence.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

(2A) Subject to subsections (1) and (2), an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the Commission once the employee has received that notice.

(3) The employee must satisfy the council or the Commission that a copy of a referral has been served on the employer.

(4) The council or the commission must attempt to resolve the dispute through conciliation."

- Labour statutes, such as the Basic Conditions of Employment Act,[30] Employment Equity Act,[31] Unemployment Insurance Act,[32] and Skills Development Act,[33] empower the CCMA to deal with disputes arising from these statutes through conciliation and arbitration.
- Eviction and rights of occupiers in terms of the Extension of Security of Tenure Act.[34]
- Other non-labour statutes such as Pension Funds Act,[35] which provide that disputes about pension or provident fund should be referred to the CCMA.

In as much as it is interesting to see CCMA acting on other matters not coming straight from the LRA, it is suggested that in those cases it should play a very limited role. In *Faure v Marais,*[36]

> "To the extent that it is an aspect of an employment relationship, the right to occupy land, including an undertaking to vacate premises, is a matter of mutual interest to employers and employees. It may therefore properly be dealt with in a settlement agreement, including a collective agreement, concluded under the auspices of the CCMA or, for that matter, a bargaining council. The enforcement of such an agreement will fall, in part, to the CCMA and the Labour Court and, to the extent that it involves an order of eviction, to the Land Claims Court or a Magistrate's Court. This dual jurisdiction does not deprive the CCMA of the jurisdiction to supervise a settlement on these terms."[37]

[30] Act 75 of 1997 ('BCEA').
[31] Act 55 of 1996 ('EEA').
[32] Act 63 of 2001 ('UIA').
[33] Act 97 of 1998 ('SDA')
[34] Act 62 of 1997.
[35] Act 24 of 1956.
[36] (1999) 20 ILJ 1794 (LC).
[37] Ibid at 1800D-E

As much as the CCMA has jurisdiction in terms of these legislations, this does not make it the "soul food". There are other institutions with enforcement powers which are capable of dealing with these matters. Therefore, for the efficiency and effectiveness of this institution it is suggested that the role of the CCMA should be limited institutionally. This view is shared by Du Toit *et al*,[38] who warns that although the CCMA may have jurisdiction to conciliate disputes, "public policy suggests that its jurisdiction under the mutual interest framework should be limited and that it should defer to the agencies with enforcement jurisdiction over labour law." In this respect they argue that if the proper laws dealing with deferring jurisdiction to other forums are not properly implemented the jurisdictional problem will evade the system.[39]

It is clear from the wording of the Act that any party to the dispute may refer a matter to conciliation, with the exception of dismissal disputes which may only be referred by the dismissed employees. In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and others,*[40] the court accepted the finding by the commissioner that, having regard to the wording of section 191(1), the legislature intended that only the parties directly affected are involved in referring the dispute to the CCMA. Although the dismissed employees should be assisted in referring the dispute, such assistance should be limited and they should sign the referral form themselves.

The categorization of these disputes might be very important in many respects, especially to enable the commissioner establish whether there is a dispute or not.[41]

---

[38] Du Toit et al *Labour Relations Law* (2003) at 93.
[39] Ibid.
[40] (1998) 19 ILJ 327 (LC).
[41] Du Toit at al. op cit note 38 at 97.

3.2 Referral of disputes to the CCMA: Jurisdiction of the CCMA

Before entertaining a dispute the CCMA must determine first whether it has jurisdiction to hear the matter. The issue of jurisdiction has become the major issue in the South African labour dispute arena. This might be due to the fact that bargaining councils, the CCMA, the High Court and the Labour Court share dispute resolution functions among themselves. Most parties to labour disputes encounter jurisdictional problems, more especially in unfair dismissal cases.[42] Some individuals may refer a dispute to the CCMA, only to have the dispute come back to them because the CCMA or bargaining council lacks jurisdiction to hear the matter. For those parties it is difficult to comprehend why the CCMA does not have jurisdiction to hear the matter.

The CCMA does not have inherent jurisdiction to hear a matter. It may only hear matters which fall within its statutory jurisdiction. After a dispute has been referred to the CCMA, the first enquiry is to establish whether it has jurisdiction to conciliate the dispute or not. There has been some debate as to whether the CCMA can pronounce upon its own jurisdiction. This issue was settled in *Avroy Shlain Cosmetics (Pty) Ltd v Kok & another.*[43] The employer contended that the first respondent was not an employee but an independent contractor, and therefore the CCMA did not have jurisdiction to hear the matter. In this respect, the employer applied to the Labour Court for an order declaring that the first respondent was not an employee, he was not dismissed and therefore the CCMA had no jurisdiction to conciliate or arbitrate the matter.

The employee objected to the court's jurisdiction to hear the application on the basis that in terms of s 191 (5) the dispute, including whether the first respondent was an employee, had to be resolved by the CCMA. The court agreed.

---

[42] Basson et al *Essential Labour Law* (2005) at 342.
[43] (1998) 19 *ILJ* 336 (LC); [1997] 12 BLLR 1556 (LC).

Judge Jali disagreed with the contention that because the legislature does not expressly confer this power upon the CCMA, the CCMA therefore may not enquire into jurisdictional facts. The judge made reference to a textbook by Baxter on administrative law where he states that: "Whenever it acts, a public authority must determine the scope of its own powers. It must ascertain whether prescribed conditions exist and it must determine the permissible limits of its authority in the circumstances...."[44]

In this regard, the learned judge concluded that "The CCMA or any tribunal for that matter can, on a preliminary basis, subject to subsequent review by a court, decide on its jurisdiction, i.e. it should be the very first enquiry which the CCMA will have to make before it proceeds to determine whether the dismissal of an employee was fair or not."[45]

The Labour Court adopted a similar approach in *BHT Water Treatment (a division of Afchem (Pty) Ltd incorporating BWTSA) v CCMA & others*[46] An employee referred a constructive dismissal issue to the CCMA. The employer contended that the employee was not dismissed, and therefore the CCMA has no jurisdiction to hear the matter. The CCMA ruled that it had jurisdiction to conciliate the matter and the employer took that ruling on review, claiming that the CCMA had no jurisdiction to hear the matter, as the employee had not been dismissed. The Court held that there were two jurisdictional issues to be considered and that the commissioner had to be satisfied that the jurisdictional facts existed before entering into conciliation.

---

[44] Ibid at 346H.
[45] Ibid at 346H-J.
[46] [2002] 2 BLLR 173 (LC).

Clearly, the courts have shed some light on the issue whether the CCMA may pronounce upon its own jurisdiction. It is submitted that jurisdictional issues are the most critical part of every labour relations matter especially those pertaining to dispute resolution. Therefore, if these matters are not properly resolved by a proper forum this will be costly for the parties and that will in turn affect the efficiency of labour dispute resolution. This view is supported by many commentators.[47]

Urmilla Patel,[48] in an article dealing with the competing jurisdiction of the High Court, Labour Court and the CCMA notes that:

> "For the CCMA to fail to deal with jurisdictional issues would defeat the objectives of the LRA, which is to effectively resolve labour disputes – this is required to be done in an economical and expedient manner. To refer a jurisdictional issue to the Labour Court each and every time would result in [illegible] processes and lengthy delays which would only serve to frustrate parties. With this in mind, the CCMA has thus entrenched this position in Rules 6 and 9 of its Rules which require that when a jurisdictional issue which has not been determined arises then the conciliating or arbitrating commissioner may only proceed to deal with the matter if the commission has the necessary jurisdiction and must then require the referring party to prove such jurisdiction."

Jurisdictional disputes do not only arise on forum issues; they can also arise on whether factual circumstances exist to give the CCMA jurisdiction to hear the matter. This most frequently occurs in unfair dismissal disputes. Section 191 of the Act sets out the procedure for the resolution of unfair dismissal disputes. Section 191(5) provides as follows:

---

[47] Du Toit et al. op cit note 38 at 93.

[48] Urmilla Patel 'The CCMA perspective on the competing jurisdiction of the High Court, Labour Court and the CCMA – Forum Shopping' 27 June 2002. http://www.ccma.org.za/DisplayNews1.asp?ID=8 (accessed on 18 February 2005).

"(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –

(i) A council, if the parties to the dispute fall within the registered scope of that council; or,

(ii) The Commission, if no council has jurisdiction."

When referring a dispute to the CCMA for conciliation, it is suggested that certain jurisdictional factors have to be present.[49] They are:

- there must be a dispute;
- the dispute has arisen within an employment relationship;
- the dispute falls within the jurisdiction of the CCMA;
- the issue in dispute is not subject to a collective agreement;
- the parties are not subject to a bargaining council with jurisdiction; and,
- the referral is timeous.

The question is: At which stage of the proceedings should these jurisdictional points be considered? Is it prior to conciliation, during, or after conciliation? Meyer[50] has different views about this question:

> "When one considers the nature of conciliation process, which is aimed at the resolution of the dispute through negotiation and compromise rather than through "judicial" or quasi-judicial" procedures, one could take the view that this is not the appropriate mechanism or forum for the resolution of jurisdictional disputes and that these issues

[49] Du Toit et al, op cit note 38 at 92.
[50] Nicky Meyer 'The jurisdiction of the CCMA Commissioners at conciliation proceedings' (2002) 12 *CLL* 31 at 32.

should be reserved for the arbitral or adjudicative process that may follow if conciliation fails."

One is inclined to follow this view in two respects. First, the CCMA, before it pronounces on any matter must decide first whether it has the power to hear the matter or not. This means that the jurisdictional inquiry has to be done before or during the conciliation stage. To put it differently, the CCMA will only be able to exercise its powers once it has jurisdiction to do so. Secondly, the CCMA rules are designed to facilitate the effective use of the Commission.[51] These rules set out how the Commissioner must determine whether (s) he may conciliate the dispute or not. Rule 14 of the CCMA Rules,[52] states that:

"If it appears during conciliation proceedings that a jurisdictional issue has not been determined, the commissioner m[illegible] the referring party to prove that the Commission has the jurisdiction to conciliate the dispute through conciliation."

This question also arose in the case of in *BHT Water Treatment (a division of Afchem (Pty) Ltd incorporating PWTSA) v CCMA & others.*[53] In this case the Labour Court accepted that jurisdictional points should be decided at the conciliation phase, and that the commissioner should only proceed to conciliate if he or she has jurisdiction to consider the matter. The court further pointed out that there are two jurisdictional issues to be considered, and the commissioner has to be satisfied that both these jurisdictional facts exist before entering upon conciliation. The issues are in this case, namely-

- whether there was a dispute about the fairness of a dismissal, and

[51] Op cit note 28.
[52] Ibid.
[53] Supra note 45.

- whether the parties fell within the registered scope of a bargaining council.

In this respect, Pillemer AJ stated that:

> "(Questions) affecting jurisdiction which does not involve a decision on the merits of the dispute is to be resolved prior conciliation in terms of Rule 6 of the CCMA Rules. On the structure of section 191 it is plain that what is not contemplated at the stage of conciliation is arbitration, on opposed application, on the question of whether or not that was a dismissal."[54]

Grogan[55] notes that prior to conciliation the commissioner is required to establish that it has jurisdiction to entertain the matter. In so doing s/he must determine whether the dispute has been referred within the time limit, that an employment relationship exists between the parties, that the dispute arose after the commencement of the Act, and that the matter does not fall under the jurisdiction of bargaining councils.

In unfair dismissal disputes, the most frequent jurisdictional objections include the absence of employer-employee relationship, whether the referral was made within the required time period, and whether or not condonation should have been applied for. These issues will be dealt with hereunder.

3.2.1 The dispute has arisen within an employment relationship

The CCMA has jurisdiction to deal with matters between the employer and employee. This means that the dispute must arise out of the employment relationship. In *Richards Bay Iron & Titanium (Pty) Ltd t/a Richards Bay Minerals & another v Jones &*

---

[54] Ibid at 174H-I
[55] Grogan *Workplace Law* (2005) at 444.

another,[56] the employee referred a dispute to the CCMA, alleging that she had been dismissed by the first respondent. Richards Bay Minerals denied that she was an employee. The employee then replaced her application with one citing both the first and second respondent as her employers. Richards Bay Minerals then brought an application for a declaration order preventing the CCMA from conciliating the unfair dismissal dispute on the basis that the second respondent was the employer. The court dismissed the application, stating that:

> "Implicit in these provisions, it seems to me, is the proposition that a dispute cannot be referred to the CCMA unless the parties to it share a mutual interest and, where they are individuals, that this interest takes the form of a bond of employment between them."[57]

Again in *JJ van der Westhuizen v RJJ van Vuuren t/a Mathabo Real Estate,*[58] the jurisdiction issue turned on whether the employment relationship between the parties. The employee referred an alleged unfair dismissal to the CCMA. The commissioner first had to determine whether an employment relationship between the parties had existed. The commissioner referred to the Estate Agency Affairs Act, which prohibits a person from acting as an estate agent if he does not have a fidelity fund certificate. The question was whether the employer was legally capable of being an employer in terms of that law and under the LRA. It was found that legally there was no such employment relationship, and that one is precluded from applying equitable considerations, because the employee knew the legal position very well, and deliberately took the risk involved. If the employee had been employed as an unsuspecting, say cleaner, then an employment relationship might have existed. On the basis that there was

[56] (1998) 19 *ILJ* 627 (LC).
[57] Ibid at 629F-G.
[58] [2003] 6 BLLR 573 (LC).

no employment contract between the parties, the Court concluded that the CCMA had no jurisdiction to resolve the dispute.

The court found that the commissioner's reasons were unsatisfactory. The issuing of a certificate of outcome was dependent on the completion of a conciliation process whether or not it resolved the dispute. The conciliation could only be validly conducted if it concerned a dispute which fell within the purview of the Act. Therefore, if the referring party was not an employee, no dispute could have arisen, and consequently no certificate should have been issued.

The court also stated that the issuing of a certificate implies that a dispute exists over which the CCMA enjoys jurisdiction and that the jurisdictional facts for a valid arbitration have been satisfied.

The court concluded that the commissioner had been required to address and determine the question of CCMA jurisdiction before he could entertain any other aspect of the dispute between the parties, including the application for condonation of the late referral. Because the commissioner had not done this, the certificate of outcome was set aside, and the matter was referred back to the CCMA for consideration.

The court adopted a similar approach in *SA Broadcasting Corporation v CCMA & others,*[59] where the third respondent referred a dispute about unfair dismissal to the CCMA. At the conciliation hearing the SABC disputed the jurisdiction of the CCMA. It was contended that the respondent was not an employee as contemplated in terms of s 213 of the Act. The commissioner found in favour of the third respondent, and issued a

[59] (2003) 24 *ILJ* 211 (LC); [2003] 5 BLLR 497 (LC).

certificate of outcome. Then the matter went on review. The Labour Court examined the questions whether a conciliating commissioner should enquire into, and make a finding upon, the question whether the referring party is an employee of the other party. The court held that jurisdictional disputes relating to whether there is an employment relationship between parties can be resolved during the arbitration proceedings, and that a certificate of non-resolution that had been issued did not stop the parties from raising a preliminary point. The court found against the CCMA jurisdiction and held that …a finding by a conciliation commissioner cannot bind a commissioner subsequently appointed to arbitrate the same dispute on the question of whether the requisite employer/employee relationship exists. The Court concluded that the commissioner's finding on this issue constitutes nothing more than his or her opinion and binds no one, including the arbitrating commissioner.

More recently in *AVBOB Mutual Assurance Society v CCMA, Bloemfontein & others*,[60] the third respondent referred a dispute to the CCMA. The dispute was unsuccessfully conciliated and a certificate of non-resolution was issued. The matter then proceeded to arbitration where the Commissioner found that the third respondent was an employee of the applicant and that the CCMA accordingly had jurisdiction to find that the third respondent had been unfairly dismissed. The Labour Court was called upon to review this finding of the CCMA. The third respondent argued that the Labour Court was precluded from dealing with the issue whether the CCMA had jurisdiction, because a certificate of outcome had already been issued following the conciliation process. It was contended that the court could not interfere with the decision of the CCMA until the

[60] (2003) 24 *ILJ* 535 (LC).

certificate of non-resolution had been set aside. Pillemer AJ found that this argument was without merit and stated: "If the CCMA had no jurisdiction to arbitrate because the [third respondent] was not an employee it also had no jurisdiction to conciliate and its purported action is of no relevance once the jurisdictional point is taken before a forum that has power to decide the issue and is found to be good"[61].

3.2.2 The issue in dispute is not subject to a collective agreement

If after receiving a dispute it appears that the dispute is about the application or interpretation of a collective agreement, and should therefore have been dealt with in terms of the dispute resolution procedures laid down in that collective agreement, the CCMA has a discretion to-

(i) redirect the dispute to be dealt with accordingly, or

(ii) assume jurisdiction and appoint a commissioner to resolve it.

Both registered employers' organisations and trade unions have to ensure that all their collective agreements contain procedures for the resolution of disputes about their interpretation and application. Collective agreements disputes have to be resolved very quickly, because if they are left unresolved they may hamper the relationship between the employer or employers' organisation and trade union or unions.[62] For example, section 24 of the LRA requires parties to collective agreements to regulate how disputes in terms

[61] Ibid at 539.
[62] Basson et al op cit note 39 at 262.

of those agreements may be resolved.[63] The procedure must comprise conciliation, if it fails, then arbitration. In the absence of such an agreement, the parties may choose other processes in terms of the Act.[64] Section 24(2) of the LRA states that if there is a dispute about the interpretation or application of collective agreement, any party to the dispute may refer the dispute in writing to the Commission for Conciliation, Mediation and Arbitration (the CCMA) if:

(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or,

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of a collective agreement.

3.2.3 The parties are not subject to a bargaining council with jurisdiction

In many cases, the Act provides that a dispute must be referred to a bargaining council with jurisdiction, or, in the absence of such a council, to the CCMA. This means that the CCMA will not have jurisdiction over a dispute if there is a bargaining council with jurisdiction. This is one of the issues that may be resolved by the CCMA commissioner at the beginning of conciliation. However, in some cases, a dispute must be referred to the CCMA, even if there is a bargaining council with jurisdiction.

---

[63] In *SA Breweries v Commission for Conciliation, Mediation and Arbitration & others* (2002) 23 *ILJ* 1467 (LC); [2002] 9 BLLR 894: the Labour Court confirmed that if there is a collective agreement providing for private dispute resolution procedures, and the employee is a member of the union that entered into the agreement, then the collective agreement will take precedence. In such a situation the CCMA will not have jurisdiction to hear the matter.

[64] In terms of s 24 (4) of the LRA the dispute must be referred to the CCMA for conciliation.

In terms of section 147 of the Act, the CCMA has discretion to decide whether or not to deal with a bargaining council matter. It also stipulates that if the CCMA does decide to deal with the matter, it may charge the council a fee for performing a dispute resolution function of the council. This refers to disputes such as the one contemplated in section 16(6) of the Act. That subsection provides that disputes about disclosure of information must be referred to the CCMA and that the CCMA must attempt to resolve that dispute by conciliation, upon failure of which arbitration follows. This also includes disputes about organizational rights.[65] In *Spilhaus & Co (WP) Ltd v CCMA,*[66] the Labour Court found that it would be 'over-technical' to find that the CCMA lacked jurisdiction to conciliate and arbitrate a dispute that was subject to bargaing council jurisdiction. However, the absence of bargaining council jurisdiction is a precondition for the CCMA to conciliate a dispute, unless the CCMA consciously and appropriately exercises its discretion to do so.

In a more recent case of *Magic Company v CCMA & others,*[67] the respondent employee referred a dismissal dispute to the CCMA. The applicant failed to attend either the conciliation or arbitration proceedings. An award was subsequently issued in favour of the employee. On review, the applicant contended that the CCMA lacked jurisdiction to arbitrate the dispute because it fell within the scope of a bargaining council, and that the award was unjustified. The Labour Court held that the CCMA had properly assumed jurisdiction because the employee was not a party to the council. Murphy AJ observed that the applicant had not annexed to its founding affidavit proof of its claims that it fell

[65] Section 21 and 22 of the LRA.
[66] [1997] 8 BLLR 1116 (LC) at 1119.
[67] [2005] 4 BLLR 349 (LC).

within the jurisdiction of a bargaining council. The applicant only handed in two documents at the review hearing. The first document was a certificate of registration certifying that the applicant was registered by the bargaining council as an employer in the entertainment industry. The second was a certificate of accreditation of council issued by the CCMA in terms of section 127 of the Act. The applicant was supposed to have annexed these documents to its founding papers. This led the court to conclude that:

> "On the face of it, therefore, it would seem that the bargaining council did indeed enjoy jurisdiction in respect of the dismissal dispute. Section 191 of the LRA (66 of 1995) provides that where there is a dispute about the fairness of a dismissal the dismissed employee may refer the dispute in writing to a council if the parties fall within the registered scope of the council, or to the CCMA, if no council has jurisdiction. Although no argument was presented on the point, the use of the word "may" in section 191 could be interpreted to mean that a dismissed employee has an election to refer the dispute either to a council with jurisdiction [redacted] CCMA. More likely though, keeping in mind the voluntarist scheme of the Act, the election contemplated is the employee's right to decide whether to refer a dispute to a relevant body at all...."[68]

3.2.4 The referral must be made timeous

Disputes about unfair dismissal and unfair labour practices must be referred to the CCMA within the time limits prescribed by section 191, failing which condonation must be applied for. The CCMA has its own Rules,[69] and Rule 9 regulates the late filing of any referral document or application. That rule provides as follows:

---

[68] Supra at 351J-352A-B.
[69] Rules for the Conduct of proceedings before the CCMA first published in October 2003 and subsequently amended.

"(3) an application for condonation must set out the grounds for seeking condonation and must include details of the following:

(a) the degree of lateness;

(b) the reasons for the lateness;

(c) the referring parties' prospects of succeeding with the referral and obtaining the relief sought against the other party;

(d) any prejudice to the other party; and,

(e) any other relevant factors."

This implies that if a dispute is referred late, the CCMA has no jurisdiction to conciliate, unless the applicant successfully applies for condonation. If the referral is late, condonation must be granted prior to the commencement of the conciliation proceedings, as condonation in such cases is a jurisdictional precondition for the validity of all that follows.[70] This means that even the 30-day period for conciliation will only start to run when condonation has been granted.[71]

In terms of the LRA the commissioner may permit an employee to refer a dispute late on good cause shown. This was the issue in *Shoprite Checkers (Pty) Ltd v CCMA & others,*[72] where the employee had referred a dispute to the CCMA outside the 30-day period, but had not applied for condonation. Conciliation failed, and the matter was referred to arbitration. The arbitrator found the dismissal to be unfair. On review, the

[70] B Van Zyl, E Schlesinger & F Brand *CCMA Rules* (2003) at 162. In *Van Rooy v Nedcor Bank Ltd* [1998] 5 BLLR 540 (LC), the Labour Court held that 'the fatality of a late referral is cured by condonation if granted and only then will the Commission have jurisdiction to conciliate the dispute. For this Court to have jurisdiction to deal with the dispute the Commission must have jurisdiction too. As the Commission lacked the necessary jurisdiction, so does this Court.'

[71] Du Toit et al op cit note 38 at 98.

[72] (1998) 19 *ILJ* 892 (LC) at 896G – I.

court rejected the union's contention that it must be assumed that condonation was granted because the commissioners were aware of the date of the dismissal and then proceeded to conciliate and arbitrate the dispute. The court held that a commissioner who seeks to apply the provisions of section 191(2) is enjoined to make a factual enquiry into whether the referral is in time or not. Secondly, the employee is required to show good cause before a commissioner can allow a dispute to be referred outside the 30 - day time limit. The Court held further that:

> "The section makes it clear that condonation is not there merely for the asking. The employee must tender an adequate explanation for the delay. This explanation must be considered by the commissioner. Due regard must be had to the other generally accepted requirements for condonation as contemplated in the words "good cause". None of the above appears to have been done in this case. This being so, the third respondent had no jurisdiction to conciliate the matter. It follows that the arbitrator had no jurisdiction to deal with the matter. It was argued on behalf of the employee that because the parties had agreed that the only issue before the arbitrator was one of procedural fairness the issue of jurisdiction could not now be raised. In this regard the law is clear. Just as the arbitrator could not vest himself with jurisdiction where none existed, nor could the parties do so. In any event the arbitrator was under a duty to enquire into and to establish that he did indeed have the jurisdiction."[73]

The LRA requires that at the end of the period of 30 days, the commissioner must issue a certificate stating whether the dispute has been resolved or not. According to Du Toit et al,[74] it does not matter even if the referral is late and the condonation not granted;

[73] Ibid at 896I-897C.
[74] Du Toit et al, op cit note 38 at 98.

a certificate of outcome will be issued and be valid unless set aside on review. In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO,*[75] Zondo JP held that:

> "[W]here a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and the council or commissioner has issued a certificate in terms of section 191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside."

Du Toit et al,[76] in this respect argued that the effect of the current CCMA Rules is similar to that of the previous rules. Reference is made to Rule 22 of the rules, which provides that if during arbitration proceedings it appears that a jurisdictional issue has not been determined, the commissioner must require the refereeing party to prove that the CCMA has jurisdiction. They argued further that:

> "If the purpose is to allow for the correction of procedural defects, it may also open the door to the rule in *Fidelity Guards v Epstein (Pty) Ltd.* As the date of the dismissal is a jurisdictional fact, it may be put in issue at any time. Thus if the conciliating commissioner failed to consider the issue of condonation the arbitrating commissioner may be called upon to do so. In this event, it is submitted, the commissioner would have to suspend the hearing and advise the parties of the need for a formal application for condonation. Given the purpose of the Act of promoting the effective resolution of

[75] [2000] 12 BLLR 1389 (LAC) at para 12.
[76] Du Toit et al op cit note 38 at 99.

labour disputes, there would seem to be no basis for excluding the rule in *Fidelity Guards v Epstein* or refusing condonation of late referrals."[77]

This issue was also considered in *Moses v Roopa NO,*[78] where the applicant failed to timeously refer a dispute concerning his dismissal to the CCMA. In his application for condonation, he alleged that he was late in his referral because his attorney was attempting to settle the matter. In response, the employer denied that the applicant had ever been in its employ. The Commissioner then refused to grant condonation. The matter was referred to the Labour Court for review. The court was of the opinion that where a dispute of fact existed, the parties should have been given a proper hearing. In particular the applicant should have been given an opportunity to challenge the version of the company, and a failure to do so constituted a breach of the rules of natural justice. The application for condonation was then remitted to the CCMA for reconsideration by another commissioner.

In *Maglies Water Board v La Grange NO & others,* [79]Jammy AJ observed that the applicant had neglected to raise the issue of a late referral and the subsequent validity of the certificate of outcome throughout the proceedings. The applicant chose to do so only in the application to review the proceedings. The court took exception to this, and indeed held such a practice to be 'unconscionable, bordering on fraud and frustrating the purposes of the Act.'[80]

---

[77] Ibid.
[78] [2001] 2 BLLR 174 (LC).
[79] (2002) 23 *ILJ* 1055 (LC); [2002] 1 BLLR 48 para 17.
[80] Ibid.

All the above cases point to a need for thorough scrutiny of the referral forms. The courts also gave clarity on preliminary points to be determined by the courts, namely:

- the first relates to the fact that the commissioner will only be able to conciliate the matter once he has jurisdiction to do so. The jurisdictional factors must exist, and the commissioner must see to it that they do exist.
- at which stage of the proceedings these factors should be raised. It is clear that the employer can raise this point at the conciliation stage. A party wishing to dispute the jurisdiction of the CCMA should do so prior to the conciliation stage. Lateness of referrals may be raised at the conciliation stage; if the employer does not use this opportunity, and the certificate of outcome is issued, which will mean that the CCMA will have the jurisdiction to arbitrate the dispute. This will bar the employer from raising the issue of a late referral at this stage. The option open to the employer would be to have the certificate set aside on review.
- Lastly, it draws a line between merits and jurisdictional issues. It is clear that an objection based on the merits will not be entertained at conciliation proceedings.

4 Representation in CCMA proceedings

Although the law on representation is different in conciliation and arbitration, it is convenient to deal with both of them at the same time. One issue which has been the cause of debate has been the inability of the parties at conciliation and arbitration

proceedings to elect whom they wish to represent them. Prior to the 2002 amendment, representation in conciliation and arbitration proceedings was dealt with in terms of ss 135(4), 138 (4) and 140(1).

Section 135 reads as follows:

> "(4) In the conciliation proceedings a party to a dispute may appear in person or be represented only by –
>
> (a) a director or employee of that party; or
>
> (b) any member, office bearer or official of that party's registered trade union or registered employer's organization."

Section 138 provided:[81]

> "(4)In any arbitration proceedings, a party to the dispute may appear personally or may be represented by one of the following persons:
>
> (i) a legal practitioner;
>
> (ii) a director or employee of a
>
> (iii) a member, official or office-bearer of that party's registered trade union or registered employer's organization.

Section 140(1) reads as follows:

> "(1) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings, unless –
>
> (a) the commissioner and all the other parties consent; or
>
> (b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
>
> i. the nature of the questions of law raised by the dispute;
>
> ii. the complexity of the dispute;
>
> iii. the public interest; and

[81] Section 138(4) as amended by s127 of LRAA of 1998.

iv. the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute."

In terms of Rule 13 of the CCMA Rules, a party to the dispute must appear in person, irrespective of whether s/he is represented.[82] According to Du Toit *et al,*[83] legal representation was only allowed in certain circumstances, more especially in dismissal disputes. The issue of representation at arbitration proceedings is not clear. Under the repealed sections a party in arbitration proceedings was not entitled to be represented by consultants, candidate attorneys, para-legal officers, and officials of unregistered trade unions and employers' organizations. Section 138(4) was qualified by s 140(1), which contained an exception to a party's right to be legally represented during the arbitration proceedings. The Act provided that legal practitioner will only be allowed if all the parties consented, or if the commissioner concluded that it was unreasonable to expect a party to deal with the dispute without legal representation.[84] In *Coyler v Essack NO & others,*[85] the commissioner allowed an employee legal representation in terms of s 140(1) of the LRA. When the arbitration proceedings resumed, the arbitrator discovered that 'the attorney', was in fact a candidate attorney. The commissioner then withdrew the

[82] Rule 13 of the CCMA Rules reads:

"(1) the parties to a dispute must attend a conciliation in person, irrespective of whether they are represented.

(2) If a party is represented at the conciliation but fails to attend in person, the commissioner may -

(a) continue with the proceedings;

(b) adjourn the proceedings; or

(c) dismiss the matter by issuing a written ruling.

(3) In exercising a discretion in terms of subrule (2), a commissioner should take into account, amongst other things –

(a) whether the party has previously failed to attend a conciliation in respect of that dispute;

(b) any reason given for that party's failure to attend;

(c) whether conciliation can take place effectively in the absence of that party;

(d) the likely prejudice to the other party of the commissioner's ruling

[83] Du Toit et al op cit note 38 at 110.

[84] Section 140(1) (a) and (b) of the Act.

[85] (1997) 18 *ILJ* 1381 (LC).

employee's right to legal representation. On review the court found that the discretion had not been judiciously exercised, and that the commissioner committed a gross irregularity by continuing with the proceedings with an unrepresented employee whom the commissioner had decided previously was entitled to legal representation.

The amendment Act,[86] replaced s 115(2) (*c* A)[87] with section 115(2A)(k) which provides that the CCMA, may make rules regulating the right of any person or category of persons to represent any party in any conciliation and arbitration proceedings. The Rules were issued, and took effect on 1 August 2002. According to Van Zyl *et al*, [88]these rules in their current form do not contain a specific rule providing for representation of parties in conciliation and arbitration proceedings. The only rule which touches on this is Rule 25[89] which deals with the procedural aspects relating to objections to a representative appearing before the CCMA and provides that the representation of parties at the CCMA is dealt with in sections 135(4), 138(4) and 140(1) of the LRA, together with the exposition of the said sections as it read prior to being repealed. Although these ss 135 (4), 138(4) and 140(1) were deleted from the LRA, they continued to be in force through the insertion of items 26 and 27 of part H of Schedule 7 to the LRA, which relate to the transitional provisions arising out of the application of the Labour Relations Amendment Act of 2002 (LRAA). These items provide that they

[86] Introduced by s 22 of the Labour Relations Amendment Act of 2002.
[87] This was inserted in 1998 by the Labour Relations Amendment Act No 127 of 1998.
[88] Op cit note 65 at 37.
[89] Rule 25 of the CCMA rules provides:

"(1) If any party to the dispute objects to the representation of another party to the dispute, or the commissioner suspects that the representative of a party does not qualify in terms of the Act, the commissioner must determine the issue.

(2) The commissioner may call upon the representative to establish why the representative should be permitted to appear in terms of the Act.

(3) A representative must tender any documents requested by the commissioner, in terms of subrule (2), including constitutions, payslips, contracts of employment, documents and forms, recognition agreements and proof of membership of a trade union or employer's organization.

remain in force until such time as rules made by the CCMA in terms of s 115(2A) (m) come into force.

Le Roux[90] notes that Rule 25 was formulated on the assumption that the restrictions set out in ss 135(4), 138(4) and 140(1) still applied. He argued that this assumption is made clear in that there is a footnote to Rule 25[91] with states that the right to legal representation is set out in these sections. The argument that this assumption was correct has been considered in recent CCMA arbitrations.

In *CEPPWAWU obo Nyanga v Mondipak,*[92] the Commissioner ruled that representation in CCMA proceedings is still regulated by the repealed provisions of section 135(4), 138(4) and 140(1) of the LRA.

The issue was again considered in *Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudau & others*[93] where Netherburn CC was required to attend CCMA arbitration. The managing member of the corporation attended the arbitration with an attorney. He requested that he be permitted to be represented by an attorney. The commissioner refused the request. He also refused an application for postponement, so that the managing member could prepare for the arbitration. The managing member of the corporation and the attorney then left the proceedings, and the proceedings were concluded without them. The Commissioner found that there was an unfair dismissal and the matter was taken on review.

---

[90] Le Roux PAK 'the right to legal representation at the CCMA: The LRA, the CCMA Rules and the Labour Court' (2003) 13 *CLL* 1 1, 12.

[91] Footnote 5 begins as follows:

> "The representation of parties at the Commission is dealt with in sections 135(4), 138(4) and 140(1) of the Act."

[92] [2003] 7 BALR 807 (CCMA).

[93] (2003) 23 *ILJ* 1712 (LC).

The corporation sought relief such that the matter should be referred back to the CCMA to be considered by another commissioner, and that the CCMA be ordered to permit the corporation to be represented by a lawyer. They based their argument on the unconstitutionality of s 140(1). In this respect, the corporation argued that s140 was unconstitutional on the basis that the right to fair labour practices, the right to fair administrative action, the right to a fair trial, and the right to equality had been infringed. The Court rejected all those arguments and upheld the constitutionality of s 140. It found that although there is a constitutional right to legal representation in appropriate circumstances, there was no absolute and automatic right in terms of the Constitution,[94] and the right to legal representation would arise when the requirement of a fair hearing made legal representation appropriate.

The court held further that whereas a constitutional right to legal representation applied in respect of proceedings in a court, the same did not always apply in respect of a tribunal, where legal representation may be appropriate in some circumstances, but not in others.

According to Smythe,[95] the judgment in *Netherburn* effectively counters the rulings of various commissioners who have concluded that in the absence of a rule or statutory provision regulating the issue, parties before the CCMA in matters relating to conduct and capacity dismissals enjoy an automatic right to legal representation.

---

[94] The Constitution.
[95] Nicholas Smythe 'Legal Representation at the CCMA – Latest Developments' (2003) 24 ILJ 1875, 1876.

On 27 August 2003, the governing body of the CCMA re-issued the CCMA rules and inserted provisions identical to the repealed sections.[96] As is evidenced in the above cases, the repeal of these sections and the substitution of s 115(2A) for 115(2A) (m), caused a lot of confusion. Smythe, in his explanation on how this controversy arose, argues that the right to legal representation was regulated by ss 134(4), 138(4) and 140(1) of the Act, but during the 2002 negotiations on the amendment to the Act, it was agreed that legal representation would be governed by rules which would be formulated by the governing body of the CCMA. This was captured in the proposed item 27 of schedule 7, which at the time of the discussions on the rules, read:

> "Until such time as rules made by the Commission in terms of s 115(2A) (k) of the Act come into force, sections 135(4), 138(4) and 140(1) of the Act remain in force as if they had not been repealed, and any reference in this Item to those sections is reference to those sections prior to the amendment by this Amendment Act."[97]

Section 115(2A) (k) of the LRA provided:

> "The Commission may make rules regulating the right of any person or category of persons to represent any party, at any conciliation or arbitration proceedings."

Smythe observes that due to different opinions about legal representation, it became difficult for the governing body of the CCMA to agree on the rules; as a result no provisions regulating legal representation were included in the new CCMA rules. However, when the final version of the LRAA emerged, item 27 had been amended to read:

---

[96] Ibid.
[97] Item 27 of schedule 7of the LRAA.

"Until such time as rules made by the Commission in terms of section 115(2A) (m) come into force, sections 135(4), 138(4) and 140(1) of the Act remain in force."

What had previously been s 115(2A) (k) had been changed to s115 (2A) (m). Section 115(2A) (m) provides that the CCMA may make rules –

'Regulating all other mattes incidental to performing the functions of the Commission.'

Smythe observes further that, "from a policy point of view, it has been contended that if unrestricted legal representation were to be allowed, the costs of resolving labour disputes would escalate considerably for both employers and the unions. This in turn would add to the cost and inconvenience of engaging employees, and would further exacerbate the current unemployment problem. Certain constituencies consequently contend that the current dispensation is in the national interest, and ought to be preserved."

Smythe argues that, although this is not the end of the debate, the issue has been settled for the mean time. The new provisions will take effect once the revised rules are published, and representation shall once again be regulated by wording equivalent to the now repealed ss 135(4), 138(4) and 140(1).

It was expectantly anticipated that the August 2002 legislative amendments would relax the provisions and allow wider rights of representation to more categories of labour legal practitioners and representatives, including labour consultants and paralegal officers who had always been excluded from representing clients at both CCMA conciliation and arbitration proceedings. But this did not materialize.

It is clear, in terms of section 115(2A) read with rule 25 of the CCMA rules, that parties during arbitration proceeding have no absolute right to legal representation. According to the *Netherburn*[98] judgment, the diminished rights to legal representation are not unconstitutional and thus, the *status quo* on representation remains, at least, until the next challenge. Rule 25 was redrafted, and the relevant sections were retained, albeit in footnote 5 to Rule 25. Furthermore, Rule 13(1)[99] and Rule 17 (7)[100] retained the LRA provisions on representation.

5 The Conciliation process

The dispute resolution system of the CCMA has two processes, namely conciliation and arbitration. The law makes it difficult for parties to proceed to adjudication without first attempting to settle the dispute through conciliation. The Act requires that the CCMA must conciliate all disputes within its area of jurisdiction. But what is conciliation? Brand *et al*[101] define conciliation as:

> "A process by which a conciliator appointed by the CCMA, a bargaining council or statutory council, or an accredited agency helps the parties to a dispute to reach a settlement. This can be done by any consensus-building process including mediation, by fact-finding or by making recommendations, including advisory arbitration ... It is generally a compulsory process by which one party refers the dispute to conciliation and the other party is compelled to attend. It may be invoked voluntarily by both parties."

---

[98] Supra note 90.

[99] Rule 13(1) states that: "The parties to a dispute must attend conciliation in person irrespective of whether they are represented."

[100] Rule 17(7) provides that:

> "If the dispute concerns an unfair dismissal and the party has alleged the reason for dismissal relates to the employee's conduct or capacity, a party may only be represented by a legal practitioner in the circumstances contemplated in section 140(1)."

[101] Brand J et al *Labour Dispute Resolution* (1997) at 58.

Basson *et al*,[102] note that when one is dealing with conciliation s/he must take into consideration a number of important factors such as that:

- Conciliation is generally a compulsory process: a party does not necessarily submit to conciliation voluntarily, but may instead be compelled to take part in that process by virtue of the provisions of the LRA, 1995. Nothing prevents parties to a labour dispute from voluntarily referring a dispute to conciliation.
- The conciliation process is based on consensus or agreement. The third party (the conciliator) helps the parties to the dispute to reach an agreement. The conciliator does not impose a settlement on the parties, but instead tries to get the parties themselves to agree to a settlement that satisfies all.
- If conciliation is provided for by the LRA, the conciliator is appointed either by the bargaining council, the statutory council, the CCMA or the accredited agency.

Theron and Godfrey,[103] on the other hand, note that conciliation is viewed as the most expeditious and relatively inexpensive mechanism for the resolution of labour disputes. For that matter, the object of conciliation is to settle disputes. The Act does not say exactly what is meant by conciliation, but it is stated in section 135 (3) that the commissioner must determine the appropriate process to be used in the conciliation, which may include:

(a) mediating the dispute;

(b) conducting a fact-finding exercise; and

---

[102] Basson et al *Essential Labour Law* (2002) at 203.

[103] Theron J and Godfrey S 'The Labour Dispute Resolution System and the Quest for Social Justice: A case Study on the CCMA. Unfair Dismissals and Small Businesses (2001) Institute of Development and Labour Law University of Cape Town 4.

(c) making a recommendation to the parties, which may be in the form of an advisory, arbitration award.

This means that the parameters of the conciliation procedures are thus set by the processes that are followed. This was also confirmed in *NUMSA v Cementation Africa Contracts (Pty) Ltd,*[104] where Waglay AJ remarked as follows:

> "More importantly what is crucial is to understand what the process of conciliation entails. Although conciliation may appear to convey the meaning of bringing together disputants to attempt a reconciliation, the Act obliges the commissioner seized with the conciliation to determine, as provided for in section 135(3)-
>
> "A process ...which may include –
>
> (a) mediating the disputes;
> (b) conducting a fact finding exercise; and
> (c) making a recommendation to the parties which may be in a form of an advisory award'."

> In the circumstances, the process, via an independent third party, seeks compromises from both sides, which neither may be prepared to make otherwise, purely to resolve the matter. For the process to be successful, the parties need to have sufficient confidence in the commissioner to raise issues or to make concessions. This the parties do because they are confident that the process is confidential, which it has to be in order for the commissioner to be able to assist the parties to resolve the dispute. Conciliation, therefore, as provided by the LRA is not a mechanical chairing of a meeting by an independent third party, but includes an active participation by the commissioner to intervene in the thought processes of the parties in an attempt to resolve the dispute, and to this, the commissioner is granted the right to determine his/her own process."

[104](1998) 19 ILJ 1208 (LC) at 1213F-J.

Basson *et al*,[105] describe mediation as a process whereby a third party who intervenes in the dispute attempts to assist the parties in reaching a settlement on which each party can agree. According to Steadman,[106] in the legislative system, mediation is referred to as conciliation and it includes fact-finding, and the making of recommendations. It is clear that the aim of mediation therefore cannot be to achieve industrial peace, but rather to ensure that parties reach an agreement. A precondition for successful mediation is that the parties share the view that the dispute should be solved by an agreement. It is submitted that where such a common stance is lacking, there is no point to call in the mediator. This suggests that mediation is based on voluntary participation.[107] Confidentiality and voluntary participation are both core characteristics of mediation. The LRA offers protection for the confidentiality of the conciliation process. In terms of section 126(3) of the LRA the CCMA may not disclose to anyone, including a court, any information, knowledge or document which it acquired confidentially or without prejudice except on the order of the court'. The provisions of s 126(3) are confirmed by the CCMA Rules.[108]

Rule 16 of the rules provides as follows:

1) Conciliation proceedings are private and confidential and are conducted on a 'without prejudice' basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.

---

[105] Basson et al op cit note 39 at 203.
[106] Felicity Steadman 'The Experience of Workplace mediation in South Africa – lessons for the UK?' www.cedr.co.uk/inde/library/articles/workplace_mediation_in_SA.htm (accessed on 3 April 2005).
[107] Given the voluntary nature of the process, there should be nothing to prevent the parties agreeing to settle their disputes through arbitration, should mediation fail.
[108] Op cit note 63.

2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation.

It is not clear under which circumstances a commissioner should be compelled to disclose information. But in *NUM v Elandsfontein Colliery (Pty) Ltd,*[109] the Labour Court applied the principles governing legal privilege to mediation (and presumably to conciliation in terms of the LRA) in determining that if a party discloses any portion of what was offered or conceded in mediation, the entire process loses its protection. This implies that the principle of legal privilege can be invoked in mediation (and presumably applies to conciliation under the Act).[110]

It also suggests that parties are free to be creative as they wish to be. A commissioner has a duty not to divulge any information acquired from one party to another without the other party's consent. The statutory developments are encouraging because they create opportunities for the settlement of disputes at an early stage. As a matter of fact these rules will promote access to justice and greater flexibility in dispute resolution.

The commissioner may also choose to focus on determining the facts of the dispute, which is a fact-finding exercise, or may even provide disputing parties with recommendations in the form of an advisory award. An agreement on some of the issues should be recorded and signed by the parties. The settlement agreement may also be

[109] (1999) 20 *ILJ* 2656 (LC).
[110] Supra note 100 at 1210E.

made an order of court.[111] When these settlement agreements are breached, there is a controversy on which forum has jurisdiction to enforce their provisions or terms.

In *Ceramic Industries v NCBAWU,*[112] the court refused to enforce a settlement agreement in terms of section 158 (1) (c), on the grounds that it was a composite agreement embodying the settlement of the dispute and a collective agreement regulating the issues. It was, therefore, unenforceable by the Labour Court, and enforcement should have been sought in terms of s 24. The LRAA subsequently removed the words 'other than a collective agreement' from s 158 (1) (c), and introduced a new section 158 (1A), in terms of which agreements that settle disputes which could have been referred to the Labour Court or arbitration may be made orders of court.

On failure of the conciliation process, upon the lapse of thirty days, the commissioner must issue a certificate stating whether or not the dispute has been resolved. Section 135(5)[113] provides that:

"(5) When conciliation has failed, or at the end of the 30 day period or any further period agreed between parties –

(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;

(b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and

(c) the Commissioner must file the original of that certificate with the Commission.

This leaves one with the question as to whether the failure of the Commissioner to serve the certificate results in the CCMA lacking jurisdiction to arbitrate a dispute. The answer to this question is found in *Naidoo v JNP Development CC t/a Constantia*

[111] Section 158(1) (c) of the LRA.
[112] [1998] 11 BLLR 1120 (LC).
[113] Section 135(5) of the Act.

Construction.[114] The issue before the commissioner in this case was whether in circumstances where the employer was never served with a copy of the certificate of non-resolution, and given the peremptory language of section 135(5)(b) which holds that the commissioner must serve a copy of the certificate on each party to the dispute, this defect was fatal for the ensuing arbitration. Commissioner Van Dokkum ruled that the CCMA did not lack jurisdiction to arbitrate. In coming to that decision the commissioner took into consideration the following factors:

" (a) Notwithstanding the provisions of section 135, it is section 136 which sets out the prerequisites for a commissioner being appointed to arbitrate a dispute and those prerequisites are that a commissioner must issue the certificate and that any party to the dispute must request the arbitration.

(b) As it was common cause that those prerequisites were fulfilled, the CCMA had arbitration jurisdiction.

(c) Whilst section 135 does use peremptory language, it does not specify the consequences of a failure to fulfill its directives and there is no explicit link between section 135 and section 136.

(d) This is so because of the powers granted to a commissioner conducting an arbitration by section 138(1) to determine the dispute quickly and fairly with the minimum of legal formalities, coupled with the fact that respondent has not suffered prejudice through the omission of the CCMA to serve on respondents a copy of the certificate of non-resolution.

(e) In any event the respondent was always at liberty to uplift a copy of the certificate from the CCMA, or query its existence with the applicant's attorney."

---

[114] (1999) 20 *ILJ* 3026 (CCMA).

The effect of a certificate of non-resolution is only to establish that conciliation has failed. It does not determine the issues in dispute (unless the parties agree), or the nature of the dispute. In *De Vries v Lienel Murray Schwormstedt & Louw,*[115] a dismissed employee received a certificate of non-resolution 10 months after conciliation, and sought condonation for the late referral of the dispute from the Labour Court. The issue before the court was whether a party needs to be in possession of a certificate stating that the dispute remains unresolved before an unfair dismissal dispute can be referred for arbitration or adjudication.

The court in De Vries case held that the wording of the Act makes it clear that such a dispute can be referred for arbitration or adjudication where:

(a) A conciliation meeting has taken place and the employee is in possession of a certificate of non-resolution of the dispute;

(b) A conciliation meeting has not taken place, and 30 days have elapsed from the date on which the employee referred the matter for condonation.

The Court held further that a party does not require a certificate to refer a dispute for adjudication if the 30 day time period within which conciliation was to be held has expired.

6. The Arbitration process

If a dispute cannot be settled by conciliation, the CCMA may appoint a commissioner to arbitrate the dispute. The CCMA has exclusive jurisdiction to arbitrate certain disputes. According to Brand et al, arbitration may be defined as:

---

[115] (2001) 8 DLLR 902 (LC).

"A compulsory process by which an arbitrator appointed by the CCMA, a bargaining or statutory council, or an accredited agency hears the parties' respective cases and then determines the dispute between them. The process is subject to review in the Labour Court, but not appeal."

Theron and Godfrey[116] distinguish between conciliation and arbitration. They argue that arbitration is a more important process than conciliation based on the following respects:

- It entails a determination imposed by a third party (as opposed to an agreement entered into voluntarily);
- At the same time it represents an interesting case study of the extent to which it is possible to further the objectives of social justice through a process of adjudication.

The involvement of a third party in the arbitration does not make it a voluntary process. It is also not driven by the consensus reached by the parties during arbitration. According to Basson et al,[117] under certain circumstances and depending on the nature of the dispute, disputing parties are compelled to have the matter resolved by means of arbitration in terms of the LRA. Arbitration follows conciliation, and has to comply with two requirements, namely, it must follow the issue of a certificate stating that the dispute has not been resolved, and the request for arbitration must have been made by one of the parties to the dispute.

The LRA amendment of 2002 introduced a new dispute resolution process (Con-Arb), in terms of which certain disputes which could not be resolved through conciliation

[116] Op cit note 95 at 6.
[117] Op cit note 39 at 205.

had to be arbitrated immediately.[118] According to Grogan,[119] this applies in cases concerning the dismissal of an employee for any reason relating to probation or any alleged unfair labour practice relating to probation. He argues that this amendment is aimed at introducing a greater degree of efficiency into CCMA proceedings, and envisages a single process in which an attempt is made to resolve a dispute before it is arbitrated, rather than the "two stage" conciliation and arbitration procedure currently provided for in the statute. Since the promulgation of the amendments, the CCMA has conducted a total of 67 000 *con-arbs*. Between August 2002 to February 2005, out of 67000 cases, 33% of disputes were settled and 59% were finalized in one day. Out of this figure 16508 cases had been settled with the assistance of the CCMA and 964 cases settled by the parties themselves.[120] The Act allows parties to object to the *con-arb* process. This means that if a party raises an objection and such objection is received by the CCMA the process would be separated. Parties are given ample room to abuse the system in that it is easy for a party to raise objections for no apparent reason but simply to frustrate the other party. This could be problematic for the whole process and, if left unattended, will frustrate the objectives of the LRA, namely ensuring speedy resolution of labour disputes.

Section 138(1) of the LRA gives the commissioner discretion to make an appropriate arbitration award in order to determine the dispute fairly and quickly, and to deal with the substantial merits of the dispute with a minimum of legal formalities. This

---

[118] Section 191(A) of the Amendment Act of 2002.
[119] Op cit note 51 at 444.
[120] Edwin Molahlehi 'CCMA Developments: Review of Operations during 2004/2005 www.lexisnexis.co.za/ServicesProducts/presentations/18/EdwinMolahlehi.doc.html (accessed on 08 July 2005.)

is comparable to section 138(7) which requires the commissioner when conducting an arbitration to take into consideration the following issues:

(a) the dispute must be determined fairly and quickly;

(b) the arbitration must deal with the substantial merits of the dispute; and

(c) the arbitration must be conducted with the minimum of legal formalities.

Within the fourteen days of the conclusion of arbitration proceedings, the commissioner must issue an award, and must give brief reasons for his decision. In terms of the LRA the arbitrator may dismiss a matter where a referring party fails to arrive at the arbitration proceedings.[121] If the party who failed to arrive at the proceedings is not the referring party, then the commissioner may either continue or adjourn the proceedings.

The problem with the resolution of post 1995 labour disputes has been the enforcement of awards issued by the CCMA. Before the 2002 amendment, CCMA arbitration awards had to be made orders of the Labour Court to render them enforceable. This entailed applications to the Labour Court in terms of section 158 (1) (c) of the Act.[122] It is clear from the experience that the application process was often lengthy, expensive and not as effective as anticipated by the Act. This is borne out by the fact that the relevant provisions of the Act were amended. This view is supported by Landman and Constable[123] who point out that "such applications, though relatively simple for legal

---

[121] Section 138(5) of the LRA.

[122] The previous section 143 stated that:
"[a]n arbitration award issued by a commissioner is final and binding and may be made an order of the Labour Court in terms of section 158 (1) (c), unless it is an advisory award."

[123] Adolph Landman & Chantal Constable 'Enforcing CCMA awards' (2004) 19 Employment Law 3 at 5.

practitioners, often prove too technical for ordinary workers. They also cause delay and entails costs".

The Act was amended in 2002. One of the important amendments is that of section 143 of the Act which reads:

> "(1) An arbitration award issued by a commissioner is final and binding, and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.
>
> (2) An arbitration award may only be enforced as soon as the director of the CCMA has certified that it is an award.
>
> (3) ...
>
> (4) If a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court."

The arbitration awards of CCMA Commissioners are subject to review by the Labour Court and the amendments to the Act do not alter this position and divert the power of review to the director of the CCMA. What is required by section 143 is for the director to certify that the arbitration award is indeed an arbitration award. This was also the view of Landman and Constable[124] in their discussion of section 143. In that analysis they made the following observations:

> "The scheme created by section 143 requires the director of the CCMA to certify that an arbitration award is indeed an award "contemplated in subsection (1)". This means that the director must satisfy himself that the award is indeed a award (and note, for example, a mere ruling or other form of interlocutory decision), and that the award is not advisory

[124] Ibid at 5.

(for example, where a commissioner has ruled on a dispute concerning a refusal to bargain under section 64(2)), where the parties have approached the CCMA for a ruling under section 83A(c) of the BCEA or 200A(3) of the LRA or where the commissioner has either of his or her own accord at the request of the parties decided to issue an advisory award). The director must also presumably ensure that the award has indeed been "issued by a commissioner" – i.e. that it has been issued and signed in accordance with section 138(7)(a) and it has been served on both parties in accordance with section 138(7)(b). However, the director may not assume a review function by, for example, refusing to certify an award because it reaches an unjustifiable conclusion or because the commissioner has arguably exceeded his or her powers. The new section 143 cannot be intended to authorize the CCMA director to usurp the review functions of the Labour Court."[125]

Section 158(1)(c), which empowers the Labour Court to "make an arbitration award an order of the court", was not repealed by the amending Act. Parties therefore have a choice of remedies. For example, a successful party may approach the court for an order to make an award a court order in terms of section 158(1) (c) of the LRA. The procedure is now different since the amendment accords arbitration awards the same status as orders of a Civil Court.[126] If the award is for payment of an amount of money, the successful party will be able to issue a warrant of execution, and have the Deputy Sheriff enforce the award. All that will be necessary is for the director of the CCMA to certify an award as an arbitration award. It is clear from the above that it will no longer be necessary for parties to proceed to the Labour Court in terms of section 158(1)(g) and have the Labour Court make an arbitration award an order of Court before it can be enforced.

[125] Ibid.
[126] Such as the Labour Court the High Court or the Magistrate's Court.

Grogan[127] observes that the certification by the director is now the quickest and least costly means of enforcing the awards. On a similar note, Schooling[128] observes that the certification is a simple procedure, and is intended to avoid the cost and delays of approaching the Labour Court. It is indeed a very simple procedure. This is proved by the fact that immediately after the certification, a writ of execution may be issued, and the award enforced by the sheriff in the same way as any court order. Although these procedures have been regarded as very simple, the wording of the relevant sections have given rise to some difficulties in relation to the nature of an award and who has the power to rescind it once it has been certified. This was demonstrated in the case of *Tony Gois t/a Shakespeare's Pub v Van Zyl & Others.*[129] In this case the employee obtained an award in his favour following his unfair dismissal. Then he called upon the director of the CCMA to certify the award. The employer only became aware of the award when the writ was served, and applied to the CCMA for the rescission of the award. The CCMA refused to entertain the rescission application on the basis that it lacked jurisdiction once the director had certified the award. The CCMA reasoned that through the certification process, the award had acquired the status of an order of the Labour Court. The employer launched an urgent application in the Labour Court to stay the writ of execution and order the CCMA to hear the rescission application.

Waglay J accepted that the ruling of the CCMA had the effect of finally disposing of the rescission application, and that this amounted to a performance, or purported performance, of a function provided for in the LRA which was open to review in terms of

[127] Op cit note 51 at 445.
[128] Heather Schooling 'Certification of CCMA awards' (2003) 13 *CLL* at 28.
[129] [2003] 11 BLLR 1176 (LC).

s 158(1)(g) of the Act. He noted that the purpose of the amended section was to simplify the process of executing CCMA awards, yet the effect of the CCMA's interpretation of this section was to include the Labour Court in a process from which the legislature has chosen to exclude it. He further noted that the certification process was a mechanism to allow for the enforcement of awards and did not alter the nature of the award. The employer was awarded costs on a punitive scale.

7. Discussion

The aims of the Labour Relations Act are to advance economic development, social justice and labour peace, as well as orderly collective bargaining at the sectoral level and to create effective dispute resolution and prevention mechanisms for labour disputes. The CCMA was established primarily for that purpose. This view is supported by Christie and Minley.[130] They observe that the CCMA was created as a quick, efficient, and effective dispute resolution institution.[131] This factor, together with others, makes the CCMA a truly unique labour dispute resolution institution in South Africa and in some other SADC counties. This is a view shared by the current Labour Minister Membathisi Mdladlana[132] who notes that:

"The institution has, by and large, achieved the original objectives set for it by the stakeholders. For example:

- It has managed an average of 86 000 disputes referrals per annum and has had in excess of 700 000 disputes referred to it since its inception;

---

[130] Sarah Cristie & Isabel Minley 'Soft law or rough justice? Employment Dispute Resolution for unfair dismissal in the UK and South Africa' (2002) Industrial *Law Society* 1-3.

[131] In their explanation they noted that at its inception the CCMA's annual caseload was projected to be approximately 33 100. But in 1997 its first full year of operation, it received 60 007 disputes nearly double the projected total and in the year to 31st March 2001 the CCMA received 103096 disputes. Ibid.

[132] Briefing paper by Minister Mdladlana http://www.ccma.org.za/DisplayNews1.asp?ID=17 (accessed 18 February 2005). Again expressed in the CCMA launch of the new office in Pretoria in 27 January 2005.

- On overage, 509 cases are referred to the CCMA every working day. To achieve this, commissioners handle four conciliations or two arbitrations per day;
- Some 97% of all jurisdictional cases are scheduled within 39 days after referral;
- The CCMA has been designed in such a manner as to cope with the inevitable workload produced by its success;
- On overage, conciliations take 38 days and arbitration 87 days to complete, that is, from the referral to the achieving stage;
- It settles more than 70% of cases by conciliation, a four-fold improvement on the previous system;
- The CCMA has also been designed to persuade the social partners to operate within its regulatory framework rather than outside it. This becomes evident when one considers that in the past eight years, South Africa has experienced its most significant period of labour peace in decades;
- The resort to unprocedural industrial action has also been eliminated as a characteristic of South African labour relations;
- As a public institution, the CCMA serves as a model of racial representivity, with 89% of its staff being employed from p[illegible]isadvantaged communities;
- It provides technical support to new dispute settlement institutions in a number of SADC countries;
- It provides subsidy, support and assistance to 54 bargaining councils; and
- Provide straining to stakeholders with the view to ensuring effective dispute management at the workplace."

The easy access of the CCMA and its wide jurisdiction contributes to its failings. This is explained by the fact that between November 1996 and the end of 1997, the CCMA handled 45 515 cases compared with a budgeted caseload of 33 100, an excess of 37, 5%. Its caseload increased by 35% in 1998, and has continued to grow. During the period running from 2000/2001, there were 103 096 cases referred to the CCMA.[133]

[133] CCMA Annual Report 2001.

The achievements of the CCMA are not an indication of the smooth operation of this institution. The agency has been faced with challenges since its inception. This is evidenced by the fact that from its inception, CCMA caseload has increased and backlogs have developed making it imperative for the CCMA develop and publish clear procedural guidelines to assist it in the management of disputes.[134] But these guidelines have proved not to be authoritative. This is evidenced from the fact that three years down the line, new rules for the conduct of proceedings before the CCMA were published by the governing body of the CCMA.[135] Secondly, the LRA of 1995 was amended in 2002, and in terms of this Act the CCMA was required to issue rules and guidelines, eventually this

[134] Guidelines on Conciliation Proceedings, published in the *Government Gazette* (GN 986 GG 18936) on 5 June 1998. These guidelines were designed:

- to inform users of the CCMA of its policies and procedures;
- to assist commissioners in the performance of their functions, and
- to promote consistency in the CCMA's approach to the conduct of proceedings.

[135] *Ibid* note 5 at 3. Sarah Christie & Isabel Minley also notes that:

> "When the CCMA was established it had no clear rules to regulate its processes. There was a set of flow diagrams describing the dispute resolution chain of events and a minimalist set of regulations but nothing for the CCMA. There were internal guides but very little was communicated to the users. CCMA senior commissioners in the different provinces tried various approaches in an overly optimistic anticipation that something that could be dubbed "best practice" would emerge. Unsurprisingly this was slow to be borne. Some of its operational practices were driven by the nature of its electronic case management system. For instance, the statute does not prescribe formal hearings. Indeed, the LRA provides that the commissioner shall devise a process for conciliation, which may include mediation, fact-finding or an advisory award. But the CCMA has an electronic case management system. It was geared to 'schedule a hearing' and a notice to set down a hearing. But what was not properly planned, was how the supposed flexibility of conciliation – which the statute called for – could be retained with the rigidities of the case management system. In the absence of statutory regulation and a competent rules board, CCMA conciliation and arbitration was subordinated to its electronic system whereas it ought to have been the other way round. As the caseload increased, inconsistencies in approach between certain provinces emerged; backlogs developed and it became imperative that the CCMA develop and publish clear procedural guidelines. These were developed in 1999 and used during that year but only published formally in 2000. These guidelines for conciliation and arbitration hearings were in response to its own case management problems and to develop consistency. They have been revised from time to time, becoming ever more formal although there is deference to plain language in their expression."

occured.[136] The 2002 amendments to the LRA have also given the CCMA the power to make rules regulating;

- the practice and procedure in connection with the resolution of disputes through conciliation and arbitration,
- the process by which conciliation is initiated, and the form, content and use of that process the way in which arbitration process works,
- the forms to be used by the parties and the CCMA,

The Minister of Labour[137] warns that, although the CCMA is an example of an accessible, high quality, low-cost service to the public, it still faces challenges ahead. According to him:

> "Although there will inevitably be users who complain about the service, and the staff may not be completely happy with their conditions of service, to the ordinary worker, it has made a tremendous difference. It is an example of an accessible, high-quality, low cost service to the public that should be emulated elsewhere in the public service. It nevertheless faces challenges in the period ahead, as we all grapple with ensuring that we transform our labour market to achieve appropriate balance between security and flexibility. In essence, the CCMA needs –
>
> - to become more proactive and not merely a resolver of disputes, which are often the product of weakness in our labour market;

[136] The Rules for the Conduct of proceedings before the CCMA were published in Government Notice No R 1448 of 10 October 2003 by the governing body of the CCMA in terms of section 115(A) of the Labour Relations Act No 66 of 1995. Section 115(2A) was inserted by section 22(a) of the Labour Relations Amendment Act, No 12 of 2002.

[137] Minister of Labour, Membathisi Mdladlana at a farewell function to Professor LD Dekker 'Tribute to a Comrade' Embark Magazine 2000. http://wbs.mgmt.wits.ac.za/initiatives/showArticle.xml?AarticleId=4000118 (accessed on 18 February 2005).

- to consider ways in which it can inform and educate workers and employers of their rights and obligations, so that disputes do not arise in the first place;
- to strengthen collective bargaining and bargaining councils so that disputes can be resolved internally or by the parties themselves through council structures;
- to diversify the kinds of mediation and facilitation it does, including playing a preemptive and pro-active role in respect of strikes and retrenchment disputes; and
- Finally, it needs to provide a leadership role in the way in which it's Commissioner arbitrate, so that clear examples and direction are provided for parties when they have to deal with similar issues. This is particularly important in relation to employment equity issues."

CHAPTER SIX

THE REVIEW OF THE CCMA ARBITRATION AWARDS UNDER THE LRA.

1. Introduction

When the Labour Relations Act[1] came into operation, it had as one of its primary objectives the speedy and effective resolution of labour disputes.[2] The LRA, in order to achieve its objectives, had to provide for a procedure and machinery to resolve disputes by means of statutory conciliation, mediation and arbitration.[3] In this respect, new institutions such as the CCMA were established. The CCMA is a state-funded but independent body, responsible for providing a variety of services. Its jurisdiction includes unfair dismissals, unfair labour practice disputes and other issues specified in the Act.[4]

The CCMA replaces the old conciliation boards established in terms of the previous Labour Relations Act,[5] and assumes the arbitral functions of the former Industrial Court.[6] The main function of the CCMA is the resolution of disputes through conciliation and arbitration. Previously, under the 1956 LRA, the dispute resolution process was voluntary in nature, but now it is compulsory. In terms of ss 115(1) and (2) of the LRA, the CCMA must attempt to resolve a dispute through conciliation. Should conciliation be unsuccessful, the CCMA may arbitrate the dispute. In circumstances where the CCMA lacks jurisdiction to resolve the matter, the dispute may be referred to

---

[1] Labour Relations Act 66 of 1995 (hereafter "the Act" or "LRA").
[2] Explanatory Memorandum to the Draft Bill of [1995] 16 *ILJ* 278-336.
[3] Van Eck et al. *Principles of Labour Law* (2002) at 419.
[4] Op cit note 3 at 425.
[5] The Labour Relations Act 28 of 1956.
[6] Grogan J *Workplace Law* (2005) at 442.

the Labour Court for adjudication. Even in those disputes in respect of which the Labour Court has jurisdiction, the CCMA may arbitrate the dispute, but must do so with the consent of the parties.[7] However, such consent must be given expressly.[8] Arbitration follows conciliation, and has to comply with two requirements, namely, that there must be a certificate issued by a commissioner stating that the dispute has not been resolved, and that the request for arbitration must have been made by one of the parties to the dispute. The Labour Relations Amendment Act[9] introduced a new procedure (Con-Arb), in terms of which certain disputes which could not be resolved through conciliation had to be arbitrated immediately.[10] According to Grogan,[11] this applies in cases concerning the dismissal of an employee for any reason relating to probation or any alleged unfair labour practice relating to probation.

Section 138(1) of the Act gives the commissioner discretion to make an appropriate arbitration award in order to determine the dispute fairly and quickly, and to deal with the substantial merits of the dispute with a minimum of legal formalities. The commissioner is required to give brief reasons for her/his decisions.[12] In terms of s143(1) of the LRA, an arbitration award of the CCMA Commissioner is final and binding, and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.

---

[7] Op cit note 1.
[8] Ibid.
[9] Act No 12 of 2002 (hereafter "the LRAA").
[10] Section 191(A) of the 2002 Act.
[11] Op cit note 6 at 444.
[12] Section 138(7) of the LRA.

The awards made by the CCMA and the proceedings leading to them are subject to review by the Labour Court. Section 145(1) of the LRA, provides for the review of arbitration awards on application by a party within six weeks of the date on which the award was made, unless the party alleges that the award is defective because of corruption. For the purposes of s 145 of the LRA, an award may be defective on any of the listed grounds:

- if the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator (for example, where the commissioner accepted a bribe from one of the parties);
- if the commissioner committed a gross irregularity in the conduct of the arbitration proceedings, (for example, where the commissioner refused a party to be represented by a trade union of which he or she is a member);
- where the commissioner exceeded his or her powers (for example, where the commissioner orders payment of 24 months' compensation in an unfair dismissal case, where the prescribed maximum 12 months' compensation); or,
- if the award has been improperly obtained.

Accordingly, if the Labour Court finds that the commissioner has committed 'misconduct' in relation to his or her duties, or 'gross irregularity in the conduct of arbitration proceedings', or has exceeded his or her powers, or that the award was improperly obtained, the award may be set aside.

This chapter focuses on CCMA arbitration awards, the grounds for the review of the awards, and the standards applied by the courts when invoking these grounds.

2. Overview of CCMA Arbitration Awards

According to the LRA,[13] arbitration is a compulsory process in which a neutral third party[14] hears both parties' version of events, and then decides the dispute between them. Arbitrators, unlike conciliators, are entrusted with the power to make final decisions. From what has been stated above, it is clear that arbitration is a more formal process, and the arbitrator must make a determination of the outcome of the dispute in the form of an award. In arbitration, the commissioner issues an award after hearing evidence. Arbitration constitutes a complete rehearing of the matter.[15] And such an award is subject to review by the Labour Court. According to Du Toit *et al*[16], the award must dispose of the dispute, and an award which is vague or does not award a final solution is reviewable. It is instructive to look at what has been said by our courts in relation to arbitration awards. Froneman DJP (as he then was) in *Carephone (Pty) Ltd v Marcus NO & others,*[17] stated as follows:

> "The vast majority of labour disputes, if not successfully conciliated in terms of the Labour Relations Act 66 of 1995 (LRA), end up in compulsory arbitration before the Commission for Conciliation, Mediation and Arbitration (the commission). Arbitration is intended to dispose of a dispute finally (s143 (1) of the LRA). Where arbitration is consensual the rationale for this finality, without the further intervention of a court of law, is understandable. In the case of compulsory statutory arbitration the failure to provide further legal redress may be perceived as unsatisfactory by a losing party. The LRA does not provide for any appeal against an arbitration award made by a commissioner exercising the commission's functions of arbitration in terms of the LRA.

---

[13] Op cit note 1.
[14] A CCMA commissioner, bargaining council arbitrator or an arbitrator nominated by an accredited agency.
[15] Grogan op cit note 6 at 446.
[16] Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2003) at 141.
[17] (1998) 19 ILJ 1425 (LAC) at 1427; [1998] 11 BLLR 1093 (LAC).

It does, however, provide for the review of the award by the Labour Court in certain circumstances".

The commissioner is required by s 138(1) of the LRA to conduct the arbitration in a manner which the commissioner regards as appropriate, so that the dispute is resolved fairly and quickly. This is equivalent to section to section 138(7), which requires the commissioner, when conducting arbitration, to take into consideration the following issues:

(a) the dispute must be determined fairly and quickly;

(b) the arbitration must deal with the substantial merits of the dispute; and,

(c) the arbitration must be conducted with the minimum of legal formalities.

Within fourteen days of the conclusion of arbitration proceedings, the commissioner must issue an award. What if the Commissioner failed to comply with the 14-day time limit prescribed by the Act? Would that render an award invalid? In *Meyer v CCMA & another,*[18] Mr Meyer referred a dismissal dispute to the CCMA and the commissioner issued an arbitration award. The commissioner then emigrated before signing the award. On review, it was argued on behalf of Mr Meyer that the award was a nullity. The Labour Court held that, although it had been ruled that failure by commissioners to comply with the provision requiring them to issue their awards, in those cases there had been a substantial compliance with the Act.[19] The court went further, and said that while a brief delay will not render an award invalid, an extended delay may have that effect.[20]

[18] [2002] 2 BLLR 186 (LC).
[19] Ibid 188B.
[20] Ibid at 188B-C.

The Commissioner is required to give brief reasons for his/her decisions.[21] This means that the commissioner must make a reasoned and appropriate award which will meet the objective standards of the LRA. One may ask what an appropriate award is. According to Grogan,[22] an inappropriate award is generally described as 'irrational' or 'unjustifiable'. Accordingly, they are 'irrational 'or unjustifiable' if there is an error of law, or if the commissioner reached a conclusion not supported by evidence. This is what was decided in *Carephone v Marcus NO &others.*[23] Froneman DJP held that the conclusions reached by the commissioner must be 'justifiable in relation to the evidence properly before him or her'.[24]

The commissioner must be very careful when scrutinizing evidence before himor her. She or he must not base the decision on evidence which was not presented to him or her and admitted as evidence. This issue was raised in *DB Thermal (Pty) Ltd v CCMA & other.*[25] It was alleged on behalf of the applicant that the commissioner had committed a gross irregularity, in that he had based his decision on grounds which did not accurately, correctly, or in any way reflect the facts that were common cause. Gamble AJ held that while the commissioners are obliged to determine the dispute with a minimum of legal formality, they are not permitted to ignore the rules of evidence.[26] Furthermore, they are required to give decisions on the evidence that is "properly" before them.[27] The learned judge concluded that "I consider that it was the arbitrator's duty to point out to the parties (all of whom were lay people) that there was an obligation on them to adduce evidence in

[21] Section 138(7) of the LRA.
[22] Grogan op cit note 6 at 447.
[23] Supra note 17. This case was followed in *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 *ILJ* 340 (LAC); and *Shoprite Checkers (Pty) Ltd v Ramdam NO & others* (2001) 22 *ILJ* 1603 (LAC).
[24] Ibid.
[25] [2000] 10 BLLR 1163 (LC) at 1168H-1169A.
[26] Ibid at 1667E.
[27] Ibid at 1668J.

the form referred to above in order that he could properly determine the matter. His failure to do so in the present circumstances also amounts to gross irregularity which renders the award reviewable."[28]

This section is in line with the objectives of s1 of the LRA, which seeks to promote the speedy resolution of labour disputes. This was also the sentiment of Pretorius JA in *Shoprite Checkers v CCMA.*[29] The judge expressed himself on this aspect as follows:

> "... equally important policy consideration for demanding of commissioners of the CCMA when they conduct arbitrations that they comply with the more stringent standards implicit in section 33 of the Constitution. Not only the interests of justice, but also sound policy relations may well be served by arbitration decisions which comply with the standards implicit in section 33 of the Constitution than by arbitration decisions which do not necessarily comply with those standards, but serve to end labour relations disputes more speedily."[30]

This view was also supported by Tip AJ in *Standard Bank of South Africa Ltd v CCMA,*[31] where he stated that:

> "It is in my view incorrect to construe this primary object as though it reduces to the accomplishment of nothing more than rapid and final dispute resolution. Those two elements are certainly part of a properly structured and functioning system, but they are by no means the only ones. The Act requires 'effective resolution'. That carries with it also the necessary elements of respect for and confidence in the process. If standards of fairness, consistency and reasonableness are not as much part of the CCMA arbitration process as are the objectives of speed and finality, then effective dispute resolution will not be achieved nor, ultimately the advancement of labour peace as enumerated in s1."[32]

---

[28] Supra note 24 at 1669A-B.
[29] (1998) 19 ILJ 892 (LC); [1998] 5 BLLR 510 (LC) at 517I-J & 518A.
[30] Ibid at 899G-I.
[31] 1998 ILJ 903 (LC) 909I-J; [1998] 6 BLLR 622 (LC) at 627A-B.
[32] Ibid at 909I-J.

In *Pep Stores (Pty) Ltd v Laka No & Others,*[33] Mlambo J held that although a review is different from an appeal, it does not mean that a reviewing court may not inquire into the correctness of the award. The commissioner is charged with making an 'appropriate award' under section 138(9) of the LRA. According to the learned judge, an award will be found to be inappropriate if it is shown that the commissioner relied on evidence not placed before him, and that the commissioner committed a serious error of law.

Subject to the discretion of the commissioner, it is required by the LRA for a party to the dispute to give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.[34]

The LRAA[35] empowers the CCMA to hand down arbitration awards which are not only final and binding, but which may be enforced as if they were orders of the Labour Court, unless the award is an advisory award.[36] There are two ways of setting aside an arbitration award. These are by way of review or application for rescission. Section 144 provides for variation and rescission of arbitration awards. Rule 32 deals with how to apply to vary or rescind arbitration awards or rulings.

In terms of s144 of the Act, the commissioner may rescind an arbitration award on his or her own accord or on application by any party affected by that award on the grounds that:

- the award was wrongly sought, or,
- made in the absence of a party affected by that award, or

---

[33] (1998) 19 *ILJ* 1534 (LC); [1998] 9 BLLR 952 (LC)
[34] Basson et al *Essential Employment Discrimination* Law (2005) at 107.
[35] Op cit note 9.
[36] Section 143 of the LRA.

- the award contained an ambiguity, or an obvious error or omission (but only to the extent of that ambiguity, error or omission)
- or was granted as a result of a mistake.

According to Basson *et al*,[37] rescission or variation is also possible if the award was granted as a result of a mistake common to parties to the proceedings. This is in line with Rule 32 of the CCMA rules,[38] which provides as follows:

"(1) An application for the variation or rescission of an arbitration award or ruling must be made within fourteen days of the date on which the applicant became aware of:

(a) the arbitration award or ruling ; or

(b) a mistake common to the parties to the proceedings

(2) A ruling made by a commissioner which has the effect of a final order, will be regarded as a ruling for the purposes of this rule."

Rule 32 gives effect to section 144 of the LRA, which sets out the grounds on which arbitration awards may be varied or rescinded, and the powers granted to commissioners in this regard and regulates the procedural aspects in relation thereto.[39]

2.1 Distinction between Review and Appeal in Labour matters

There is no provision in our statutes which caters for an appeal against CCMA arbitration awards. The awards are only subject to review by the Labour Court. Under the 1956 LRA, parties who were dissatisfied with decisions of the industrial court could appeal, first to the old Labour Appeal Court and, if unhappy, to the Supreme Court of

[37] Basson et al op cit note 31 at 345.
[38] Rules for the conduct of proceedings before the CCMA (CCMA Rules) published in Government Gazette 25515 of 10 October 2003.
[39] Van Zyl *et al CCMA Rules* (2003) at 362.

Appeal.[40] According to Grogan,[41] the appeals under the previous Act entailed placing before the court the complete record of the industrial court trial, and requesting the court to decide if on the evidence presented, it would have come to the same conclusion. He argued that sometimes the courts of appeal decided that they would come to the same conclusion, sometimes not. He further noted that the appeal process allowed both the courts to re-examine the case on its merits, and to decide what the outcome should have been in the light of the proven facts. The Explanatory Memorandum which accompanied the 1995 Labour Relations Bill, in respect of the dispute resolution applicable in terms of the 1956 Act, remarked as follows:

> "The Bill does not permit an appeal from the arbitrator's award. This is designed to speed up the process and free it from the legalism that accompanies appeal proceedings. Appeals also lead to inordinate delays and high costs. This, in turn, has a negative impact on reinstatement as a remedy and undermines the basic purpose of the legislation."[42]

According to the Explanatory Memorandum to the LRA, the 1956 Act process was complex and technical; it was not a user-friendly system of dispute resolution. It was also characterized by long delays and matters appealed from industrial court to the Labour Appeal Court often took time to be finally settled.[43] The LRA of 1995 sought to provide for a speedy resolution of labour disputes through institutions like the CCMA.[44] In this regard, it provides for review of CCMA arbitration awards in section 145 of the Act.

---

[40] Op cit note 5.
[41] Grogan J 'Defective Decisions' (1998) 14 *Employment Law* at 4.
[42] Op cit note 2.
[43] Ibid
[44] Basson et al op cit note 31 at 335

There is a distinction between review and appeal. Review is not an appeal, but involves a claim that the arbitrator committed misconduct, gross irregularity in the proceedings, that the commissioner exceeded his or her power as an arbitrator and for that an award was improperly obtained.[45] According to Basson *et al,*[46] on appeal, the merits of the case are heard again, and the deciding body takes a new decision on the merits and the facts of the case. On the other hand, the review process is regarded as an efficient mechanism for controlling administrative organs, because the court of review focuses on the manner in which the decision was reached, not the record of proceedings.

South African courts have clearly drawn a distinction between appeal and review. For example, in *Mthembu Mahomed Attorneys v CCMA,*[47] the court held that it must be accepted that the legislature knew the difference between appeal and review, and that it had to be accepted that if it did not intend the two concepts to exist it must have said so. The court in *Carephone (Pty) Ltd v Marcus NO & others*[48] stated as follows:

> "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgment will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matters in some way or another. As long as the judge determining the issue is aware that he or she enters into the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, a process will be in order … it seems to me that no one will ever be able to formulate a more specific test other than, in one or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at."[49]

---

[45] Grogan op cit note 6 at 448.
[46] Op cit note 31 at 345.
[47] (1998) 19 ILJ 144 (LC); [1998] 2 BLLR 150 (LC).
[48] Supra note 17.
[49] Ibid at Para 36.

Although the court in *Carephone* emphasized that the distinction between appeal and review has not been abolished, it is submitted that the dividing line between appeal and review is not a clear one. This is also the sentiment of Grogan. He states that the courts have managed to highlight the difference between review and appeal, but the 'justifiability and rationality tests have blurred the distinction to a considerable extent'.[50] In *Coetzee v Lebea NO & Another,*[51] Cheadle AJ distinguished between appeals and reviews upon the following basis:

> "The fact that a reviewing court may have come to a different result if the matter had been brought on appeal can never be, on its own, a basis for attacking the process of reasoning. If it did, then the distinction between appeal and review would be obliterated. And whatever effect the constitutional entrenchment of the right to administrative justice may have on our common law, it does not mandate a destruction of the distinction between these remedies. What then distinguishes the two remedies when it comes to applying them to the reasoning p[illegible]oyed by a tribunal? It seems to me that the seeds of the distinction lie in the phrase so commonly used to describe a process failure in the reasoning phase of tribunals preceding the failure to apply one's mind. That test is different from the one that applies on an appeal, namely, whether another court could come to a different conclusion. Accordingly, once a reviewing court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion. The best demonstration of applying one's mind is whether the outcome can be sustained by the facts found and the law applied. The emphasis is on the range of reasonable outcomes not on the correct one."[52]

According to Du Toit *et al,*[53] the distinction between review and appeal appears to be one of degree. This was also stated by Nicholson AJ in *Toyota South Africa Motors (Pty) Ltd v Radebe:*[54]

---

[50] Grogan op cit note 6 at 448-9.
[51] (1999) 20 ILJ 129 (LC).
[52] Ibid at 131H.
[53] Du Toit et at al op cit note 16 at 155.
[54] [2000] 3 BLLR 243 (LAC).

"[i]f there is yawning chasm between the sanction which the court would have imposed and that which the commissioner imposed then it would seem to me that a gross irregularity has been committed. The use of the word "gross" indicates that the irregularity has to be so egregious that a court can conclude that the function of assessing a fair sanction has been misconceived. It is always difficult to define the extent to which the commissioner has to deviate from the normal sanction for such to constitute a "gross irregularity".[55]

Nicholson AJ argued that an attack of an award on the basis that is not justifiable, is for all intents and purpose an appeal.[56]

Default on the part of the commissioner when conducting arbitration will subject him or her to review. Generally, there is no right to appeal from the CCMA to the Labour Court. The party not satisfied with an arbitration award has a remedy, to make an application to the Labour Court for the setting aside of the award on review. Such an application must be done in terms of section 145 of the Act, as decided by the Labour Appeal Court in the *Carephone* case.[57] This view is supported by Basson,[58]who stated that section 145 of the LRA provides for the review of arbitration awards. Basson *et al* noted that a review must be distinguished from appeal. Further, that in the case of appeal, the merits of the case are heard again, and the deciding body takes a new decision on the merits and the facts of the case. In the case of review, on the other hand, the manner in which decision was reached is the focus of proceedings.[59]

[55] Ibid at 258C-D.
[56] Supra note 52 at 252C.
[57] Supra note 17.
[58] Basson et al op cit note 31at 345.
[59] Ibid.

3. The Test for Review of Arbitration awards: Section 145 versus Section 158

It is imperative for the purposes of the discussion to look first at how our courts have dealt with the controversy concerning the grounds of review in s145 and s 158(1) (g). There has been a protracted debate in relation to the test to be applied for the review of arbitration awards. Before entering into a detailed discussion, it is necessary to revisit the provisions of ss145 and 158(1) (g) of the Act.

S 145 Provides as follows:

> "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission for Conciliation Mediation and Arbitration may apply to the Labour Court for an order setting aside the arbitration award -
>
> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
>
> (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers th[illegible].
>
> (2) A defect referred to in subsection (1) means -
>
> (a) that a commissioner -
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or
>
> (b) that an award has been improperly obtained.
>
> (3) The Labour Court may stay the enforcement of the award pending its decision.
>
> (4) If the award is set aside, the Labour Court may -
>
> (a) determine the dispute in the manner it considers appropriate; or
>
> (b) make any order it considers appropriate about the procedures to be followed to determine the dispute".

On its parts, section 158(1) (g) of the Act provides:

> "The Labour Court may -

(g) despite section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law."

After a long debate concerning the test to be employed for review, a test was formulated in *Carephone v (Pty) Ltd v Marcus NO.*[60] Prior to *Carephone*, it was noted that the courts had been divided on whether arbitration awards could be set aside only on the grounds set out in s145 of the Act, or whether the wider grounds mentioned in s 158(1)(g) were applicable. Those in support of s145 alone were of the view that the limited grounds for review would serve to enhance an expeditious resolution of disputes.[61] Others held that a review in terms of s 158(1) (g) was competent. The reasoning behind the inclusion of s 158(1) (g) was based on the fact that the Labour Relations Act itself was designed to give effect to the Bill of Rights, which in turn guarantees fair administrative action.[62]

Some decisions support s145 as the exclusive basis for review of CCMA arbitration awards. In *Edgars Stores (Pty) Ltd v Director CCMA,*[63] the court found that the right to review is limited to the grounds set out in s145, and does not include everything exhaustively 'permissible in law'. In *Ntshangane v Special Metals,*[64] Mlambo J held that the supervisory role of the Labour Court over CCMA arbitration did not mean that it should entertain every conceivable attack under the guise of review in

---

[60] Supra note 17.
[61] In *Standard Bank of South Africa Ltd v CCMA & others* (1998)19 ILJ 903 at 910, Tip AJ notes that "the Act requires 'effective resolution'. That carries with it also the necessary elements of respect for and confidence in the process. If standards of fairness, consistency and reasonableness are not as much part of the CCMA arbitration process as are the objectives of speed and finality, then effective dispute resolution will not be achieved nor, ultimately, the advancement of labour peace as enumerated in section 1.
[62] *Ntshangane v Special Metals* (1998) *ILJ* 584 (LC); [1998] 3 BLLR 805 (LC).
[63] (1998) 19 *ILJ* 350 (LC); [1998] 1 BLLR 34.(LC)
[64] Supra note 59.

terms of s 158 (1) (g). Furthermore, a distinction had to be drawn between the wide grounds recognized by the civil courts, and those applicable to arbitration conducted in terms of the Act. Contrary to this case, in *Shoprite Checkers (Pty) Ltd v CCMA,*[65] Pretorius AJ held that the Labour Court is not limited to the narrow grounds of review set out in s 145, but is required to review an award on any ground permissible in law. According to him, if the legislature had intended s 158(1) (g) not to apply to CCMA arbitration awards, it would have said so. He went further, and said that while there are sound policy reasons for limiting the review of such awards to the narrow grounds set out in s 145, there are compelling reasons why the commissioner should comply with the more stringent requirements of the Constitution. The learned acting judge concluded that the Constitution requires administrative action to be 'justifiable in relation to the reasons given for it'[66] and therefore, an award is reviewable if it is not capable of reasonable justification when regard is had to the factual premises on which it was based.

In *Standard Bank of SA Ltd v CCMA,*[67] the Court aligned itself with the reasoning in *Shoprite Checkers* namely-

> "If the legislature had intended that s 158(1)(g) should not cover CCMA arbitrations, then it would have been quite a simple and obvious matter for it to have introduced that section with the words "subject to the provisions of section 145". The fact that it did not do so lends further weight to the arguments in support of the conclusion I have reached. Section 3(b) of the LRA enjoins the court to interpret the provisions of the LRA 'in compliance with the Constitution'".[68]

---

[65] Supra note 23 at Para [22].
[66] Section 33 of the Constitution.
[67] (1998) 19 *ILJ* 903 (LC); [1998] 6 BLLR 622 (LC).
[68] Supra note 23.

It also did not decide the matter on the grounds of review under section 145. Instead, it opted for the grounds under s 158(1) (g) of the Act holding that:

> "The literal effect of this is that the legislature intended the general provisions of section 158(1) (g) to be operative, notwithstanding the existence of section 145. "Despite" means "notwithstanding", "in spite of" and "in the face of". The implications of this is plain: the Labour Court may review *inter alia* CCMA arbitrations "on any grounds that are permissible in law" and the provisions of section 145 are not to be viewed as detracting from that power.[69]

3.1 The *Carephone decision*

The earlier uncertainty as to whether the Labour Court could also review arbitration awards under the general or broad power of review in s 158 (1) (g) was resolved in *Carephone (Pty) Ltd v Marcus NO & others.*[70] The Labour Appeal Court held in this case that review of CCMA arbitration is limited to the grounds set out in section 145. The court read both sections, and held that s145 provides scope and constitutional basis for review, while s 158 (1) (g) broadens the scope of judicial review under the provision for the promotion of administrative of justice in terms of s 33 of the Constitution.[71] The court found section 145 to be capable of being interpreted in a manner which is consistent with the Constitution. It stated that 'if the result means that the word 'despite' in s158 (1) (g) should be read 'subject to', then so be it. According to

---

[69] Supra note 58 at 898H-J.

[70] Supra note 17.

[71] Section 33 of the Constitution reads as follows:

> "(1) everyone has the right to administrative action that is lawful, reasonable and procedural fair.
> (2) Everyone whose rights have been adversely affected by administrative action has to be given written reasons.
> (3) National Legislation must be enacted to give effect to these rights, and must-
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsection (1) and (2); and
> (c) Promote an efficient administration."

the court, this is lesser evil than ignoring the whole s 145, including its sensible provisions relating to time-limits'.[72] According to Grogan J[73] 'a legislative provision that appears, on the face of it, to be unconstitutional will not be so if the courts interpret it in a manner consistent with the Constitution. If the Labour court were to limit the grounds listed in section 145 as the High Court limited the application of section 33 of the Arbitration Act, section 145 would be unconstitutional'. He noted further that because section 145 must be rescued from its inherent unconstitutionality, it cannot be so interpreted. As for the apparent conflict between sections 145 and 158(1) (g), well, that disappears if section 145 is properly interpreted.

The extended scope of review has been built along the constitutional provision that administrative action must be 'justifiable in relation to the reasons given to it'. Froneman DJP noted that the Constitution requires that the process of arbitration must be-

> "a fair and equitable; that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing; that the award must be justified in terms of those reasons; and that it must be consistent with the fundamental rights to fair labour practices."[74]

The learned judge concedes that it is difficult to formulate the test for review other than asking a question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him or her and the conclusion he or she arrived at? He observes that "many formulations

---

[72] Supra note 17 at Para [28].
[73] Grogan J 'Justifiability is the key: Review judgment reviewed' (1998) 14 Employment Law at 4-6.
[74] Supra note 17 at 1099H.

have been suggested for this kind of substantive rationality required of administrative decision-makers, such as 'reasonableness' 'rationality' and 'proportionality'".[75]

In formulating the applicable test, Froneman DJP summarized the constitutional grounds for review as follows:

> "Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not matter any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA."[76]

The implication of this judgment is that when one talks about fair administrative action it means that an element of 'rationality' or 'justifiability' must be present. In other words, there must be a justifiable connection between the evidence before the CCMA commissioner and the conclusion that has to be reached after the evaluation of evidence before him. From this it is evident that the Labour Courts will not only review the procedural correctness of the CCMA arbitration awards, but that substantive rationality will also be considered. This was the view expressed in *Carephone case,* where Froneman DJP stated that:

> "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitable, involve the consideration of the "merits" of the matter in some way or another. As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute

[75] Ibid at 1103A-C.
[76] Supra note 17 at 1103B-C.

his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."[77]

Grogan observes that what has been said by Justice Froneman in *Carephone,*[78] amounts to a confirmation that the grounds of review do require judges to enter the arena of "the merits", coupled with a warning that they should be cautious when doing so. He argues that it is not a ruling, which some saw as the consequence that would follow if the Labour Court were to be bound by section 145, that an irrational award is unassailable if the commissioner conducted the hearing properly. He further states that "irrationality remains a ground of review, even if is now called 'unjustifiability'".

Although *Carephone* was considered to have put an end to the controversy, the Labour Appeal Court in *Toyota SA Motors (Pty) Ltd v Radebe and Others*[79] expressed doubts that the concept of an award being justifiable as to the reasons given constitutes an independent ground for review. According to Grogan,[80] the *Carephone* case has never ended the debate over the meaning of the provisions of section 145. The *Toyota* case therefore re-opened the debate. The Labour Appeal Court in *Toyota* concluded that:

> "(Justifiability of the award") ... is not part of s 145, which restricts an applicant to misconduct, corruption, gross irregularity and the excess of powers. I am not sure that Froneman DJP was importing the last mentioned ground into s 145 .... I have two difficulties with importing this ground into the Act. The first relates to the difference between appeals and reviews and the second relates to the constitutional implication of s 145."

The position was restated in *Cox v CCMA & others.*[81] Waglay J, after having considered the judgments in the *Carephone, Shoprite Checkers,* and the reservations

---

[77] Ibid at 1103A-C.
[78] Ibid at 1102I-J.
[79] [2000] 3 BLLR 243 (LAC) at Para [33].
[80] Grogan J "'Justifiability" is the key: Review judgments reviewed" (1998) *Employment Law* 14 at 4.
[81] (2001) 22 *ILJ* 137 (LC); [2001] 2 BLLR 141.

expressed about the judgment in *Carephone* by the Court in *Toyota*,[82] felt that all this left him without any option but to get involved in the debate. He commented that although he was not obliged to follow the decision in *Carephone* case, nor obliged to agree with the Labour Court in *Shoprite Checkers*. According to him, the test in *Carephone* does not broaden the scope of review. What it does hold is that an arbitration award of the CCMA commissioner must be logically connected to the evidence presented at arbitration. This means that the court will only interfere with the decision of an arbitrator in circumstances where the arbitrator fails to base his or her decision on the evidence before him or her, or is wrong in law. The end result will be that the commissioner failed to apply his mind to the issues before him, therefore committing an irregularity.[83] The basis of the decision has now been overtaken by the Promotion of Administrative Justice Act.[84]

The Labour Appeal Court again revisited the issue in the case of *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others*.[85] The Labour Court held that justifiability was not a ground upon which a CCMA award could be reviewed. The Court found that if justifiability was a ground of review, it would have concluded that the award was indeed reviewable. The court held further that a decision by a CCMA arbitrator is not administrative action, but action having judicial or quasi-judicial characteristics. The courts had been relying on the *Carephone* for some time. The Court in *Carephone* held that the issuing of an arbitration award by CCMA commissioner constituted administrative action.

---

[82] Supra note 23.
[83] Ibid at 144-145.
[84] Act 3 of 2000. Section 1 of the Act defines 'administrative action ' as 'any ground of review for all acts involving the exercise of public power.'
[85] (2001) 22 *ILJ* 1603 (LAC); [2001] 9 BLLR 1011 (LAC).

The *Shoprite* decision was then considered on appeal by the Labour Appeal Court. The main question before the Labour Appeal Court in the *Shoprite Checkers* matter was whether the Court's decision in the *Carephone* case was still "good law". Although the court criticized the decision in *Carephone,* it decided that it would be inappropriate to re-visit the *Carephone* decision for two reasons. It classified one reason as constitutional and the other as substantive. These reasons are found in both paragraphs 18 and 19 in the *Carephone* judgment. The LAC said:

> "[18] The constitutional answer to this submission is that although the commission or other organs of state may perform functions of a judicial nature they are not courts of law and thus have no judicial authority under the Constitution (ss165 and 239 of the Constitution). Their judicial functions do not transform them into part of the judicial arm of the state, nor does it make them part of the judicial process (...).
>
> [19] The substantive answer [illegible]ment is to be found in the purpose of the administrative of justice section of the Bill of Rights. That purpose is to extend the values of accountability, responsiveness and openness to institutions of public power which might not previously have been subject to those constraints. Courts of law were in any event always subject to the kind of requirements set out in the section. It would simply be in congruous to free other public institutions exercising judicial functions from those constraints. It is not necessary to seek the origins of those constraints in other provisions of the Bill of rights, such as the access to justice provisions (s34). Administrative action may take many forms, even if judicial in nature, but the action remains administrative."

In the course of coming to its decision, the court considered the Constitutional Court judgment handed down in *Pharmaceutical Manufacturers of SA: in re Ex Parte*

President of the RSA.[86] In this matter, the Constitutional Court found that "decisions must be rationally related to the purpose for which the power was given".

In the context of the *Pharmaceutical* case,[87] the Labour Appeal Court had regard to what the court had to say in the *Carephone*[88] case about the reviewability of CCMA awards on the grounds of unjustifiability. The Court noted that a requirement of rationality in the merit or outcome of the administrative action should be imported when determining the justifiability of an administrative act.

The Labour Appeal Court in the *Shoprite Checkers*[89] case then went on to consider whether the terms 'justifiable' and 'rational' bear the same meaning. In this regard, the court found that although the terms justifiable and rational may not strictly speaking be synonymous, they bear a sufficiently similar meaning to justify the conclusion that rationality can be [illegible] accommodated within the concept of justifiability used in *Carephone*. The Court went further and said that 'a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable'. The Court referred to the case of *Shoprite Checkers (Pty) Ltd v Ramdaw NO and others,*[90] where Wallis AJ, on a similar note stated, that:

> "Other than the fact that the CCMA is an organ of state acting in terms of statutory authority and exercising statutory powers, neither of which is decisive as the Constitutional Court has made clear, I can find no reason to characterize the work of a commissioner of the CCMA presiding over an arbitration in terms of s 136, 138, 139 or 141 of the LRA as being administrative action. The fact that the commissioner is not performing judicial functions under the Constitution and does not form part of the judicial arm of the state or come within the judicial process (*Carephone* para [18]) is

[86] 2000 (2) SA 674 (CC); 2000 (3) BCLR 241.
[87] Ibid.
[88] Supra note 17.
[89] Supra note 81.
[90] (2000) 21 *ILJ* 1232 (LC); [2000] 7 BLLR 835 (LC).

neither here nor there. The question is whether the conduct of such arbitration is administrative action and the answer is that it is not."[91]

After a thorough consideration of the above cases, the LAC concluded that, having regard to all the circumstances, and in order to bring about certainty and stability in the law, the debate must end. Furthermore, in the light of what has been discussed in all these cases and the possibility that the Promotion of Administration of Justice Act[92] may be applicable to arbitration awards issued by the CCMA, the court concluded that it would serve no purpose to consider whether or not the decision in *Carephone* was correct, and that "in those circumstances *Carephone* stays".[93]

What is important about this judgment is that it at least brings clarity as to when CCMA awards can be reviewed and not reviewed. It is submitted that what is required by the law is the speedy and conclusive disposition of labour disputes. An arbitration award handed down by the CCMA should bring finality to the resolution of disputes. This is the view which was expressed by Zondo JP in *Shoprite*[94] case, where he stated that:

> "In my view it is within the contemplation of the dispute resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but which nevertheless must be allowed to stand because they are not unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the Act's objective of the expeditious resolution of disputes would have no hope of being achieved. In my view the first respondent's award cannot be said to be unjustified when regard is had to all the circumstances of this case and the material that was before him."[95]

---

[91] Ibid at Para [90].
[92] Act 3 of 2000.
[93] Supra note 81 at 1024F-H.
[94] Ibid.
[95] Supra note 81 at 1043G-H.

The question is: Would courts allow incorrect decisions to stand because of the statutory objective which requires an expeditious resolution of disputes not compromise fairness? If the answer is yes, then would that not be contrary to the Constitution of the Republic of South Africa.? This was also the concern raised by Mark Wesley,[96] when he commented that:

> "The only note of concern to be sounded is a statement by the LAC in the judgment that the LRA's objective of expeditious dispute resolution may affect the standard of review, allowing awards which might otherwise be unsatisfactory to stand. It is not clear whether it is constitutionally permissible to grant greater latitude to officials to make incorrect decisions because of a statutory desire to have quick decisions. Perhaps a fuller consideration will be forthcoming from the court in future judgments."

It is submitted that although the arbitration of labour disputes by the CCMA is permissible in law, that does not mean that it is allowed to overstep its bounds. It must perform the functions in terms of the Act. An organ of state such as the CCMA is required to conduct itself in a proper way and to provide a well-researched and valued judgment. Whatever act it performs must be in line with the Constitution.[97]

Judge Froneman in *Carephone* noted that the Constitution[98] requires that the process of arbitration must be-

> "a fair and equitable; that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing; that the award must be justified in terms of those reasons; and that it must be consistent with the fundamental rights to fair labour practices."[99]

---

[96] Wesley M'Review of CCMA Arbitration Awards: *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) ILJ 22 at 1515, 1520.
[97] The Constitution (1996).
[98] Ibid.
[99] Supra note 17 at 1099H.

On a similar note, in *Best Boland Motors C v Dispute Resolution Centre & others*,[100] the Labour Appeal Court stated that:

> "The requirement that the dispute be determined fairly places the procedure fairly in line with the strictures in our constitution stipulating a fair trial. Our courts have consistently held that the essentials of such a trial are that it be held in public and that justice not only be done but be seen to be done. This necessitates, as a primary requisite, there are reasonable apprehension in secret. Pursuant to this imperative a presiding judicial officer should have no communication whatever with either party except in the presence of the other... unless the absent party has consented to such communication in his absence."

For reasons of fairness a commissioner must make a reasoned and appropriate award as required by the Act. An appropriate award is what has been described by Grogan as 'rational' and 'justifiable'. This means they are 'irrational' or 'unjustifiable' if there is an error of law or if the commissioner reached a conclusion not supported by evidence. This obliges a court to scrutinize awards to ensure that there is correlation between the award, the reasons for the award, and the material before the commissioner upon which the award is based. The LRA requires that the arbitration award be reviewable on the limited grounds provided by section 145. This is opening up an avenue for the review of unjust decisions of arbitrators. This has been confirmed in *Shoprite Checkers,* and this is indeed an important decision, because it brought clarity to the controversy that existed in relation to the basis upon which CCMA awards can be reviewed. This was also the views of Goldberg[101] who stated that the Labour Court in *Shoprite Checkers* created an extremely important piece of labour precedent.

[100] Unreported case (CA 12/02) delivered 12 /11/03.
[101] Jonathan Goldberg 'Clarity at last on when review okay' Daily Dispatch, Thursday, November 22, 2001.

Accordingly, the case has, once and for all, decided the whole question of review under s 145 of the Act. According to Perrott, Van Niekerk, and Woodhouse,[102] the implication of these judgments is that the debate as to whether CCMA awards can be reviewed and set aside if they are not justifiable in relation to the reasons given for them has hopefully come to an end. They further noted that "as far as the merits of the review are concerned the court found that even on the grounds of justifiability, the arbitration award did not stand to be reviewed."

Grogan[103] also notes that: "the Labour Appeal Court has finally settled the debate over whether CCMA awards are reviewable in terms of section 145 or section 158(1) (g) of the LRA, and has found that judgment favouring the latter was wrong. But, in doing so, it has left the common law and constitutional review grounds intact."

3.2 The CCMA Arbitration Awards In the Context of the Promotion of Administrative Justice Act 3 of 2000

Although the courts have managed to resolve the issue of s 145 and section 158(1) (g), there is still confusion about the applicability of the Promotion of Administrative of Justice Act 2000,[104] to labour matters. There is a debate as to whether the functions performed by the CCMA commissioners constitute administrative action during the course of arbitration proceedings, or constitute quasi-judicial functions. Should the functions of a CCMA commissioner fall within the purview of administration action, the provisions of the PAJA could be applicable to such action. This debate emerged from the

---

[102] Perrott Van Niekerk & Woodhouse Inc 'Case Law and legislation Review: Recent Labour Court rulings that affect the employment relationship' (2001) Employment Law notes at 6. www.elaw.co.za (accessed on 13 March 2005).
[103] Grogan op cit note at 6.
[104] Promotion of Administration Justice Act No 3 of 2000 (hereafter "PAJA").

case of *PSA obo Haschke v MEC for Agriculture & others.*[105] In the *Haschke* case, the applicant sought a review of the dismissal of his application for condonation. The applicant alleged that the commissioner had failed to provide reasons for its decisions as required by the PAJA. The first and second respondent argued *in limine* that the dispute was premature because the applicant should have requested reasons before resorting to litigation. The Labour Court noted that the controversy concerning the relevance of the PAJA in labour disputes has its roots in the *Carephone*[106] case. In the latter case, it was found that CCMA awards constitute administrative actions, not judicial or quasi-judicial action. Therefore, according to the Court, the awards ought to be reviewed under s 145. Further, the court added that such awards must be "justifiable in relation to the reasons given".

The Labour Appeal Court in the *Sidumo Checkers*[107] case sharply criticized the decision in the *Carephone* case. The Court, after considering the decision of the Constitutional Court in the *Pharmaceutical* case,[108] suggested that the PAJA applies to CCMA awards. Justice Zondo remarked as follows:

> "A 'decision' is then defined as meaning "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under any empowering provision, including a decision relating to" - among others,
>
> > "(a) making, suspending, revoking, or refusing to make an order, award or determination"
>
> Even though the view expressed by this court in *Carephone (Pty) Ltd v Marcus NO & others* (1998)19 *ILJ* 1425 (LAC) that the making of an arbitration award by the CCMA commissioner constitutes an administrative action might not be correct, it seems to me that the definitions of 'administrative action' and of 'decision' in s 1 of the PAJA may be

[105] [2004] 8 BLLR 822 (LC).
[106] Supra note 17.
[107] Supra note 81.
[108] Supra note 82.

> wide enough to include it. I say this despite the reference in the definition 'of an administrative nature'. It is not necessary to express a final view on this issue in this matter. It is sufficient if it appears that the PAJA may well be applicable to the making of an arbitration award by the CCMA because the question that has arisen in this matter is whether or not there is warrant to reconsider the decision of the court in *Carephone*."[109]

In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others,*[110] the applicant sought the review and setting aside of an order of the CCMA to reinstate an employee who had been dismissed for misconduct. It was argued on behalf of the applicant that s 140 of the LRA is inconsistent with s 33 of the Constitution.[111] The Court held that the CCMA arbitration function is not an administrative action, and that therefore, the PAJA does not apply to CCMA arbitration awards.

The Court in *Haschke*[112] noted that although labour law and administrative law may share many common characteristics, they are distinct from each other. In this regard Justice Pillay made reference to the Constitutional Court case of *Bato Star v Minister of Environmental Affairs and tourism, the chief Director Marine and Coastal Management Department of Environmental Affairs and Tourism Rights Holders,*[113] where O' Regan J rightly stated that:

> "Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The *grundnorm* of administrative law is now to be found, in the first place, not in the doctrine of *ultra vires* or in the doctrine neither of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its forces from the latter. The extent to which the

[109] Supra note 81 at 1023E-G.
[110] (2003) 24 *ILJ* 1712 (LC).
[111] The Constitution (1996).
[112] Supra note 101.
[113] Unreported case no CCT/03.

common law remains relevant to administrative review will have to be developed on a case by case basis as the Courts interpret and apply the provisions of PAJA and the Constitution."[114]

In the *Hashke* case Pillay J observes that in line with the final Constitution everyone has a right to fair labour practices, the LRA, the Employment Equity Act (EEA)[115] and the Basic Conditions of Employment Act[116] codified labour and employment rights.[117] The learned judge noted further that the LRA codified labour rights such as the right to due process, to substantively fair reasons, and the remedies for non-compliance. The court stated that the purpose of the LRA and the BCEA is to give effect to and to regulate the fundamental rights to fair labour practices conferred by section 23 of the final Constitution.[118] In this respect, the Court found that the labour laws must be interpreted in compli[illegible]he Constitution.[119] The learned judge argued that there is no need to invoke the provisions of the PAJA where the "unfair labour practice" clause in the Constitution can be invoked. However, if the right to administrative action is in conflict with the right to fair labour practices, the labour laws must prevail over the right to administrative action.[120]

The court in *Haschke*[121] had to decide whether the commissioner's rulings amounted to administrative action. It noted that arbitration proceedings are distinct from administrative processes. This distinction is also clear from the LRA and the CCMA Rules and Guidelines, that rulings are not the same as awards of commissioners. Awards

[114] Ibid at Para [22].
[115] The Employment Equity Act 55 of 1998.
[116] Act 75 of 1997.
[117] Supra note 101 at 825G-H.
[118] The Constitution (1996). Section 1(a) of the LRA and section 2(a) of the BCEA.
[119] The Constitution (1996).
[120] Supra note 101 at 825G-J & 826A-B.
[121] Ibid.

are reviewed on the narrow grounds of s 145, and rulings are reviewed under s 158(1) (g) of the LRA. The court went further, and stated that the grounds of review in s 145 are different from the PAJA grounds, because the PAJA grounds of review are a codification of the common law grounds of review. The concept of rationality under PAJA must be assessed in the context of meeting administrative law objectives, whilst the rationality test under labour law must be assessed in the context of labour law objectives. The Constitutional Court ruling in *Bato Star v Minister of Environmental Affairs and Tourism Certain Rights Holders*[122] gave some guidance on how far the courts should go in cases of review of awards, rulings or a public employer's decision. The Constitutional Court stated as follows:

> "What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."[123]

The court in *Haschke,*[124] after surveying a number of decisions, took the view that CCMA arbitration is not administrative action, that PAJA does not apply, and that section 145 of the LRA narrowed the grounds of review. The reasoning of the learned judge is

[122] Unreported case no CCT/03.
[123] Ibid Para [26]
[124] Supra note 101 at 824.

based on the following: Conceptually, arbitration is different from an ordinary administrative process. The mere fact that arbitration is conducted by an administrative organ does not make arbitration an administrative act. Rulings are similar to arbitration. They cannot constitute administrative action because, if they did, a ruling made by an arbitrator would be subject to test different from that to which the award was subject.[125]

The judge notes that the rules of the Labour and Labour Appeal Court do not yet make provision for applications under the PAJA. Such reviews would lie in the High Court.[126]

The judge went further to say that the grounds of review provided for in the PAJA are a complete codification of the common law grounds of review. That codification conflicts with specific grounds of review set out in the LRA. Under the common law, the review ground of irrationality must be applied in the context of administrative law objectives. If the PAJA were to apply to labour law decisions, the door would be opened still wider to interfere with decisions on their merits.[127]

Furthermore, the review procedure laid down by the PAJA is significantly more protracted than the procedure provided for in the LRA. So, too, are the remedies. The PAJA would enable individuals to litigate in matters which are regulated by collective bargaining. If this were to be encouraged, the effect of collective bargaining could be 'catastrophic'. All decisions affecting employment should accordingly be processed in terms of labour laws and the constitution.[128]

---

[125] Ibid at 826G-I & 827A-C.
[126] Ibid at 827C-D.
[127] Ibid at 828A-B.
[128] Ibid at 830C-D.

The test formulated in *Carephone* has not been followed by the courts in other cases. From the above judgments, it can be deduced that it is unlikely that there will be any uniform standard applicable in matters relating to reviews of CCMA arbitration awards. I agree with the judge in that if the courts apply the PAJA, this will affect the objectives and operation of the LRA, in that there will be no speedy resolution of disputes as envisaged by the Act. And, for that matter, arbitration awards are reviewed in terms terms of section 145 of the LRA which still has to be interpreted in accordance with the Constitution. Therefore, it is submitted that it may be wiser to treat reviews in terms of that particular legislation, which is s145, and not any other legislation.

4. Grounds of Review of CCMA Awards [s145]

The grounds of review are set out in section 145(2) of the Act. These include misconduct of the arbitrator, gross irregularity in the proceedings and the commissioner exceeding his/her power. It may also be set aside if it was improperly obtained. If it has been found by the Labour Court that a commissioner has committed 'misconduct' in relation to his or her duties, or committed a 'gross irregularity in the conduct of the arbitration proceedings', or has exceeded his or her powers, the Court should set aside the resulting award.[129] If the award is set aside, the Labour Court must use its power in terms of the Act, either to determine the dispute itself or to remit the matter to the CCMA to be heard by another commissioner.

It is clear that these grounds are not new in our law, and they do not go further than the grounds established in our common law. For example, section 33(1) of the

[129] Grogan op cit note 6 at 446-7.

Arbitration Act[130] has on a number of occasions permitted a court to interfere with an award on grounds which are directed at a lack of independence, for example, bias or corruption, impartiality, as well as gross irregularities. Landman J in *Volkswagen SA (Pty) Ltd v Brand No & others*[131], observed that s 145 is identical to s 33 of the Arbitration Act. Therefore in that respect, s 145 must be applied in the same way as s 33 of the Arbitration Act.[132] The judge cited with approval the decision in *Amalgamated Clothing & TextileWorkers Union v Veldspun Ltd,*[133] where Wallis AJ concluded that:

> "I have set this out in some detail becaue it can I think be seen from this broad and general exposition of the effect of section 33(1) of the Arbitration Act that the conduct which under the Act warrants the setting aside of an arbitration award made by a commissioner acting in terms of the LRA. The provisions of the Arbitration Act and the finality which its limited power of review provides in respect of awards have been applied and approved in relations to arbitrations in the field of labour relations.[134]

Landman J adopted what he viewed as a traditional test of review in viewing arbitration awards. In this regard, he made reference to what he had decided in *Eskom v Hiemstra NO and Others*[135], where he expressed himself as follows:

> "...compatible with the Constitution, section 33 (1) of the Arbitration Act of 1965 permits a court to interfere with the award on grounds which essentially are directed at a lack of independence, for example bias or corruption and impartiality as well as gross irregularities. A court may also interfere if there is a lack of jurisdiction, arising from various causes, because it destroys the fundamental requirement that there be a submission to arbitration."

---

[130] Act No 42 of 1965.
[131] [2001] 5 BLLR 558 (LC).
[132] Ibid at 572B-C.
[133] (1998) 19 ILJ 806 (LC).
[134] Ibid at para 56.
[135] 1999 (11) BCLR 1320 (LC) at Para [23].

The view was also expressed in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others.*[136] It was held that conduct which under the Arbitration Act warrants the setting aside of an arbitration award is as much conduct which should justify the setting aside of an arbitration award made by a commissioner acting in terms of s 145 of the Act.

The Labour Appeal Court in the *Carephone* case classified the basis on which the conduct of the commissioner in arbitration proceedings may be reviewed.[137] In this case, the test established was 'whether there is a rational objective basis justifying the connection made by the administrative decision maker between material properly available to him or her and the conclusion he or she eventually arrived at'. Ever since the *Carephone*[138] case, the courts have combined all the grounds in s 145 into the grounds of justifiability and rationality.[139] In relation to the justifiability and rationality test, the courts have the power to examine the reasoning behind the conclusion of the commissioner, which includes an assessment of how the commissioner evaluated the evidence, the inference drawn, and the manner in which the commissioner applied the

---

[136] (2000) 21 *ILJ* 1232 (LC), [2000] 7 BLLR 835 (LC).

[137] Supra note 17. The headnote summarizes the judgment as follows:

> "Section 158 (1) (g) of the LRA does not apply to the review of arbitration awards made by commissioners of the CCMA. The provisions of sections 245, 158(1) (g) and (h) apply to distinct and different forms of administrative action and do not overlap. Section 145 applies to the review of arbitration awards made by commissioners of the CCMA. Section 158(1) (h) applies to administrative action taken by the State employer. Section 158 (1) (g) is a residual power to review administrative action. The result is that the word "despite" in section 158(1) (g) should read as "subject to". It is a lesser evil than ignoring the whole of section 145, including its sensitive provisions relating to time limits.
>
> The provisions dealing with compulsory arbitration in the LRA, including section 145, are not in conflict with the constitutional imperatives for compulsory arbitration:
>
> (a) the process must be fair and equitable;
> (b) the arbitrator must be impartial and unbiased;
> (c) the proceedings must be lawful and procedural fair;
> (d) the reasons for the award must be given publicly and in writing;
> (e) the award must be justified in terms of those reasons;
> (f) The award must be consistent with the fundamental right to fair labour practices."

[138] Supra note 17.

[139] Grogan *op cit* note *6* at 448.

law to the evidence.[140] Section 145 is limited to determining the question of whether the procedure adopted at the arbitration was formally correct, and not whether the determination is correct.[141]

The *Carephone* test did not disregard the grounds of review in s145. In terms of s145, any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the CCMA may apply to the Labour Court for an order setting aside the arbitration award. In terms of the Act a defect means:

"(a) that the commissioner:

(i) Committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) Committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) Exceeded the commissioner's powers; or

(b) That an award has been improperly obtained."

What constitutes a defect was considered in the case of *Sasco (Pty) Ltd v Buthelezi & others.*[142] It was argued on behalf of the applicant that where the complaint is one of discrimination on the grounds of race, the fact that this manifests itself in non-promotion of the employee concerned, does not mean that a commissioner can acquire jurisdiction to resolve the dispute by way of arbitration. The court held that the commissioner misdirected himself in regard to the proper issues before him, and on this ground alone the portion of the award dealing with the alleged unfair labour practice

[140] Ibid.
[141] Ibid.
[142] (1997) 18 *ILJ* 1399 (LC); [1997] 12 BLLR 1639 (LC).

should be reviewed and set aside. It constitutes a defect in terms of s145 (2) (a) of the Act.[143]

According to Grogan,[144] the s 145 (2) grounds overlap in that misconduct is generally understood to relate to the manner in which the result was reached, while gross irregularity relates to the manner in which the proceedings were conducted. Excess of power occurs where the arbitrator steps outside the framework of the LRA by, for example, granting relief greater than that permitted in law. An award will be improperly obtained where, for example, the arbitrator was bribed or otherwise improperly influenced by one of the parties. Other forms of reviewable irregularity are the refusal by the commissioner to allow a party to cross-examine the other witnesses, or to call witnesses, remarks that indicate bias or partiality on the part of the commissioner, and failure by the commissioner to give parties a reasonable opportunity to present their case.[145]

4.1 Misconduct in relation to the duties of the commissioner (s 145 (2) (a)(i)

Landman and Van Niekerk[146] have noted that the phrase 'committed misconduct in relation to the duties of the commissioner as an arbitrator' stems from the Arbitration Act.[147] The meaning of "misconduct", in terms of the Arbitration Act, has been considered by the High Courts. In *Hyperchemichals Internations (Pty) Ltd & another v Maybaker Agrichem (Pty) Ltd & another,*[148] Preiss J was called upon to decide whether

---

[143] Ibid at 1642I-J.
[144] Grogan op cit note 6 at 448.
[145] Ibid.
[146] Landman A and van Niekerk A 'Practice in the Labour Courts' (2001) *Revision Service 5* at A-40.
[147] Act 42 of 1965.
[148] 1992 (1) SA 89 (W).

"misconduct" as used in section 33(1)(a) of the Arbitration Act, included the so called legal misconduct known to English law. He quoted the following from Mustill & Boyd's *Commercial Arbitration*:

> "Although from the point of view of logic the word misconduct is entirely appropriate to describe the conduct of proceedings otherwise than in the way required by law, the choice of language has proved to be unfortunate, especially since the 1889 Act referred only to the arbitrator having misconducted himself. Arbitrators ... were understandingly resentful of the implication that the work which they have carried out in good faith involved personal misconduct. The courts have been sensitive to this resentment and have constantly taken pains to point out to arbitrators that allegations of misconduct do not necessarily mean what they appear to say...There has been a tendency to invent a category of technical misconduct which is contrasted with misconduct of a more personal nature,"[149]

In *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicke,*.[150] the parties to the dispute had tacitly agreed that the sanction meted out by the employer was not at issue. But the commissioner on arbitration ordered that the employee be reinstated on the basis that that the sanction of dismissal was too severe. On review, the Labour Court held that the award was grossly irregular, and set aside the award.

Landman J noted that, although decisions interpreting the Arbitration Act might provide useful guidance, the Labour Court had to remember that civil court judgments under s 33 of the Arbitration Act dealt with voluntary arbitration, and that "there will be less reason to base judicial restraint ... on the premise that the parties have chosen their own judge and must bear the consequences of that choice".[151]

---

[149] Ibid at 94F-H.
[150] 1997 *ILJ* 1393 (LC); [1997] 12 BLLR 1632 (LC).
[151] Ibid at 1395.

In terms of the Act certain actions of commissioners may amount to misconduct. The question now is, if a commissioner has made a mistake, does that mistake amount to misconduct?

Landman J in *Reunert Industries*[152] case, said that in order for misconduct to exist in terms of s145, there are certain grounds that should exist, for example:

- There must have been some wrongful or improper conduct on the part of the commissioner.
- Misconduct in the sense used *inter alia* does not embrace what is referred to as 'legal misconduct' or 'technical misconduct' i.e. a *bona fide* misinterpretation of law or fact.
- Gross mistake may provide evidence of misconduct in the sense that it may be so gross or manifest that it could not have been made without misconduct on the part of the arbitrator.
- Gross carelessness may constitute evidence of misconduct.
- If the gross irregularity was committed with malice, it would probably also constitute misconduct.

According to Du Toit *et al,*[153] misconduct denotes some moral wrongdoing. Gross negligence may indicate misconduct, as might a gross mistake of law or fact. In *NEWU v John & another,*[154] the commissioner ordered a retrospective reinstatement of an employee in his employment with the second respondent. The award also added the condition that the employee would henceforth be employed for no more than 60 hours per

[152] Supra note 146.
[153] Du Toit et al op cit note 16 at 152.
[154] [1997]12 BLLR 1610 (LC).

week, and that his employment would continue to be temporary in the sense that it would "end as soon as the current work on site is completed". On review, the applicant contended that the first respondent committed a gross irregularity by adjusting the period in which the reinstatement would be made retrospective, so as to ensure that its member would not receive more than he would have had he worked the maximum hours permitted in law. The Labour Court dealt with the matter solely on the basis of section 145, and held that it could not interfere with a *bona fide* mistake of fact or law by the arbitrator; as such action did not amount to misconduct as contemplated by the Act.[155] The Court held further that although the first respondent could have ordered reinstatement subject to the condition that lawful working hours not be exceeded, he had not committed a gross irregularity by not doing so.[156]

The courts are not consistent in their decisions on exactly what amounts to misconduct. A view expressed by Grogan[157] where he noted that "given the manner in which the Court is interpreting the phrase 'gross irregularity in the proceedings', debate over the precise meaning of 'misconduct' is probably academic".

In *Mutual and Federal Insurance Co Ltd v CCMA & another,*[158] a commissioner ordered retrospective reinstatement of an employee who was dismissed for insubordination and making personal threats against a fellow employee. The applicant sought to have the award set aside on the basis that the commissioner failed to allow proper cross-examination or to allow the applicant's representative to address him in argument, and that the commissioner had been biased. The Labour Court held that the

---

[155] Ibid at 1625B.
[156] Ibid at 1628C-H.
[157] Grogan J, 'Defective decisions' (1998) 14 *Employment Law* at 5.
[158] [1997] 12 BLLR 1610 (LC).

failure or refusal by the commissioner to give the representative an opportunity to put the different or contradictory versions to the other side's witness should be regarded as a gross irregularity. Judge Jali cited with approval *Goldfields Investment Limited & another v City Council Johannesburg & another,*[159] where Schreiner J stated that:

> "It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of conduct of trial – they might be called patent irregularities – and those that take place inside the mind of judicial officer, which are only ascertainable from the reasons given by him and which might be called latent. Of course, even the first class are only material inasmuch as they prevent, or are deemed to prevent, the magistrate's mind of being properly prepared for the giving of the correct decision. But unlike the second they admit of objective treatment, according to the nature of the conduct. Neither in the case of latent nor in the case of patent irregularity need there may be any intentional arbitrariness of conduct or any conscious denial of justice. The law, as in *Ellis v Morgan (supra)* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, through mistaken, may come under that description. The crucial question is whether it prevented fair trial of issues then it will amount to a gross irregularity. Many patent irregularities have this defect. And if from the magistrate's reasons it appears that his mind was not in state to enable him to try the case fairly this will amount to a latent gross irregularity."[160]

In *Abdull & another v Cloete NO & others,*[161] the court had to consider whether the commissioners failure to apply his mind to the issues before him constitutes misconduct in relation to the duties of the arbitrator in terms of 145(2) of the LRA. Pretorius AJ, after thorough consideration of s138 of the Act, noted that s138 requires the commissioner to determine the dispute fairly and quickly, and to deal with the substantial

---

[159] 1938 TPD 551 at 560.
[160] Ibid at 560.
[161] (1998) 19 *ILJ* 799 (LC); [1998] 3 BLLR 264 (LC).

merits of the dispute according to the Act.[162] He held that if an arbitrator in relation to the duties as an arbitrator fails to apply his mind responsibly and fairly to the issues before him, he will be guilty of misconduct.[163] The learned judge noted that section 33(1) of the Arbitration Act[164] which is similar in terms to s 145(2) of the LRA are to be in the sense that it may be so gross or manifest that it construed on a strict and narrow basis. The judge referred to the case of *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem International (Pty) Ltd,*[165] where Preiss J said the following:

> "Mistake, no matter how gross, is not misconduct; at most, gross mistake may provide evidence of misconduct could not have been made without misconduct on the part of the arbitrator. In such a case a court might be justified in drawing an inference of misconduct. The award would then be set aside, not for mistake, but for misconduct."[166]

The learned judge then concluded that "it is not necessary for him to say any more in regard to the meaning of the word misconduct as that word is used in the LRA."[167]

In *Cox v CCMA & others,*[168] the court held that if an arbitrator fails to arrive at a decision based on the evidence properly before him, then it must be said that he has committed misconduct, as provided for in s 145(2)(a)(i) of the LRA of section 33 (1) (a) of the Arbitration Act.[169] This is consistent with the decision in *Stock Civil Engineering*

---

[162] Ibid at 268F.
[163] Ibid.
[164] Act 42 of 1965.
[165] 1992 (1) SA 89 (W).
[166] Ibid at 100.
[167] Supra note 157 at 803 para 14. See *Afrox Ltd v Laka*1999 *ILJ* 1732 (LC); [1999] 5 BLLR 467 (LC), where the Court referred the matter back to another commissioner at the CCMA, where the first commissioner refused to accept the record of a disciplinary enquiry, and stated: "A bona fide mistake by the arbitrator, whether the mistake is one of fact or law would likewise not render the arbitration award reviewable unless such mistake is so gross or manifest that would be evidence of misconduct or partiality
[168] [2001] 2 BLLR 141 (LC) at 146.
[169] Op cit note 160.

(Pty) Ltd v RIP NO & another,[170] where the Labour Appeal Court held that if an arbitrator fails to do what he or she undertook to do, the arbitrator has not functioned properly, and his or her award will be reviewable because the arbitrator has committed 'misconduct' for the purposes of Arbitration Act.[171]

According to Du Toit *et al,* misconduct also includes bias, which must be objectively established.[172] In *Mutual and Federal Insurance Co Ltd v CCMA & another,*[173] the applicant averred that the second respondent (the commissioner) had shown bias by telling one of its witnesses that managers of the applicant were incompetent, stating that he knew what the case was all about, regularly interrupting the proceedings, taking over the leading of witnesses and cross-examining them aggressively, and leading the employee's evidence. The Labour Court considered the allegations in the founding affidavit to the effect that the commissioner had exhibited antagonism towards the applicant and its representative by intimidating the applicant and its witnesses. As a result the commissioner was biased. The court noted that in such cases proof of actual bias was not necessary. The Court applied the test formulated in *BTR Industries SA (Pty) Ltd v MAMU & Others,*[174] where Hoexter JA said at 817C-D:

> "For present purposes there may be adopted the definition of 'bias' stated in the House of Lords by Lord Thankerton in *Franklin v Minister of Town & Country planning* 1948 AC 84 (HL) at 103. It was there stated that the proper significance of the word... 'is to denote departures from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office'."

---

[170] [2002] 3 BLLR 189 (LAC)
[171] Ibid at 204F-204A.
[172] Du Toit et al, op cit note 16 at 153.
[173] [1997] 12 BLLR 1610 (LC).
[174] (1992) 13 *ILJ* 803 (IC).

Hoexter JA also said at 822B-C:

> "Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended then that is the end of the matter. I find my self in complete agreement in what was forcibly stated by Edmund Davies L in the *Metropolitan property case at* 314C-D".

The court held that a litigant in the position of the company and its witnesses was likely to form the impression that the commissioner had been partial to the employee's case.[175] The Court noted that while section 138 of the LRA gave the commissioner broad powers to deal with the merits of the dispute with the minimum of legal formalities and could therefore play an inquisitorial role, this did not mean the commissioner was entitled to ignore the rules of natural justice. As the inquisitorial system is not the usual practice in our courts or tribunals it calls for more vigilance on the part of the commissioner, when he starts investigating the matter, as it might easily lead to a perception of bias especially with lay litigants.[176]

The implication of the above cases is that the commissioner or arbitrator in arbitration proceedings must conduct himself in a proper manner required by law. The commissioner must always apply his mind, and be cautious in every material respect. It is submitted that the commissioner must always guard himself from overstepping the bounds or entering into the arena. It is possible for one to infer bias from his behavior.

---

[175] Supra note 173.
[176] Ibid at 1619F-I. See *Venture Holdings Ltd t/a Williams Hunt Delta v Biyana (*1998) 19 *ILJ* 1266 (LC).

In the recent case of *Best Boland Motors C v Dispute Resolution Centre & others*,[177] the employee in this matter had claimed that he had been unfairly dismissed. The arbitrator found the dismissal to be both procedurally and substantively unfair. The employer took the matter to the Labour Court for review. The employer argued that the conduct of the arbitrator amounted to bias. This was based on the fact that, prior to the commencement of the arbitration proceedings, and again shortly after the commencement of the proceedings, the arbitrator and the employee left the venue and entered into a discussion. No explanation for this conduct was given. The Labour Court dismissed the application for review. The matter was then taken to the Labour Appeal Court. The LAC started by discussing the role and conduct of a commissioner during arbitration proceedings. The Court pointed out that in terms of s 138 of the LRA, a commissioner, or an arbitrator associated with an accredited agency, may conduct the arbitration in a manner the arbitrator considers appropriate, taking into account various factors, namely-

- that the dispute must determined fairly and quickly,
- the arbitrator must deal with the substantial merits of the dispute, and
- the arbitration must be conducted with a minimum of legal formalities.

The court went on to state that:

> "The requirement that the dispute be determined fairly places the procedure fairly in line with the strictures in our constitution stipulating a fair trial. Our courts have consistently held that the essentials of such a trial are that it be held in public and that justice not only be done but be seen to be done. This necessitates, as a primary requisite, there are reasonable apprehension in secret. Pursuant to this imperative a presiding judicial officer should have no communication whatever with either party except in the presence of the other… unless the absent party has consented to such communication in his absence."

[177] Unreported case (CA 12/02) delivered 12 /11/03.

In view of the above decisions, it is clear that certain actions by arbitrators' may amount to misconduct, and this includes bias and gross irregularity. This view finds support from Grogan,[178] who states that "gross irregularities are not limited to procedural errors, but include errors of law and fact that are so unreasonable as to warrant the inference that the functionary 'has not applied his mind to the matter in accordance with the behest of the statute'".

4.2 Gross Irregularity in the Conduct of Arbitration Proceedings [s 145(2)(a)(i)]

Du Toit *et al*[179] have noted that gross irregularity may be patent or latent, and may arise in relation to the commissioner's jurisdiction and the arbitration process. According to Landman *et al,*[180] not every irregularity will amount to a defect. In order to amount to gross irregularity the following grounds must exist:

- The irregularity must be a gross one and must therefore be a material one.
- If the gross irregularity was committed with malice it would also constitute misconduct.
- A failure to comply with the tenets of the *audi alteram partem* rule would also amount to gross irregularity.

In *Abdull & Another v Cloete NO & others*[181] Pretorius AJ made reference to the case of *Goldfields Investments Ltd & another v City Council of Johannesburg,*[182] where Schreiner J stated as follows:

---

[178] Grogan op cit note 6 at 5.
[179] Du Toit et al op cit note 72 at 153.
[180] Landman et al. op cit note 152 at A41
[181] Supra note 77 at 269-7.
[182] 1938 TPD 551.

"... gross irregularity falls in to two classes, those that take place openly, as part of the conduct of the trial they might be called patent irregularities. And those that take part inside the mind of the judicial officer, which are only ascertainable from the reasons given by the judicial officer and which might be called latent irregularities.... The crucial question is whether it prevented a fair trial of the issue. If it did prevent a fair trial of the issues then it will amount to a gross irregularity."[183]

Pretorius AJ concurred with Schreiner J, and held that the reasoning of the judge is an "appropriate description of the meaning of the term gross irregularity" as it is used in the LRA. He noted, further, that in the case before him, there was no indication that the commissioner had acted in bad faith. Therefore, his conduct could be described as latent "gross irregularity". In *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker,*[184] Landman J stated that a failure to comply with the tenets of the *audi alteram partem* rule would be an example of a gross irregularity.

The courts are not unanimous as to what is meant by gross irregularity. To establish reviewable irregularity, it is not clear whether the applicant must show that the irregularity had a material effect on the award, or whether, if there was no prejudice as to outcome, the award should stand because the irregularity was not gross. It has been said that the test for establishing gross irregularity should be that the conduct was such that there was no proper hearing.[185] In *Department of Justice v CCMA & others,*[186] the court held that the rule against gross irregularity goes in essence to the integrity of the hearing. The test is whether the conduct of the Commissioner in question is so grossly irregular

[183] Ibid at 560.
[184] 1997 *ILJ* 1393 (LC) at 1395; [1997] 12 BLLR 1632 (LC).
[185] Du Toit *et al. Labour Relations Law: A Comprehensive Guide* (2000) at 619
[186] [2001] 11BLLR 1229 (LC) at Para [6].

that it can be said that there was no proper hearing. Du Toit *et al*[187] give examples of conduct that the courts perceive as amounting to gross irregularity, namely,

1) Serious unfairness in directing the process of the hearing, and as such exercising the discretion and authority under s 138 inappropriately; this may include refusing to grant a postponement;

2) Undermining a party's right to challenge and lead evidence on the substantive issue in dispute, or as to the credibility of a witness;

3) Allowing a labour consultant to appear as a representative, in breach of section 138(4), and granting legal representation inappropriately.

In *AA Ball (Pty) Ltd v Kolisi & another,*[188] it was submitted on behalf of the applicant that the commissioner committed a gross irregularity, because the provisions of s 138(7) of the Act were not complied with in that the award was not issued within the period of fourteen days, nor was this period extended on good cause shown. Revelas J found that the commissioner had committed a gross irregularity by making an award based on a finding on an issue that was not raised by the parties themselves, or put to them by the commissioner during the proceedings.

In *Toyota SA Manufacturing (Pty) Ltd v Radebe & others,*[189] the review in this case was based on the grounds that the commissioner had not taken into account the trite

---

[187] Du Toit et al. op cit note 86 at 619.

[188] (1998) 19 ILJ 795 (LC); [1998] 6 BLLR 560 (LC). See In *Pep Stores v Laka* 1999 ILJ 1732 (LC); [1999] 5 BLLR 467 (LC) where the Court held that:
"... [t]he grounds mentioned in section 145 [of the LRA] are not limited to procedural defects. In enquiring whether an award was 'appropriate' and, the main concern was whether there had been a failure of justice. There would be a failure of justice where a Commissioner ignored evidence that had been placed before him, relied on evidence that was not placed before him, or committed a serious error of law. Where a commissioner had considered all the facts and applied relevant legal principles, his award was not reviewable simply because the Court would have come to a different conclusion".

[189] Supra note 40.

principle developed over the years that dismissal was the only appropriate sanction for dishonesty. The court held that "... [t]hese principles do not dictate that mitigating circumstances such as those taken into account by the third respondent, should influence the result of dishonesty, without exception. The applicant's case is directed at the outcome of arbitration and not the method by which the award was obtained. The commissioner wrote a well-reasoned award, and came to a conclusion that did not strike the court as shocking."[190]

In *Telkom SA Ltd v CCMA &others,*[191] the applicant claimed that the commissioner did not have the power to decide a matter that he was not called upon to decide. It was submitted that there was no evidence on record before the commissioner regarding substantive fairness of the dismissal. He further contended that in making a finding which is not supported by the evidence, the commissioner failed to apply his mind to the dispute before him thereby committing an irregularity in the conduct of the proceedings. The Court held that by ignoring the parties' agreements to restrict the issue to procedural fairness, the commissioner had committed a gross irregularity.

The Labour Court has also noted in a number of cases that there are the grounds which also amount to gross irregularity, such as misunderstanding the applicable onus of proof, misconstruing jurisdiction, and making findings which are not justified on the

---

[190] Ibid at 257E-G. Fundamentally different approach was adopted in *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & others* 1998] 19 *ILJ* (LC); [1998] 11 BLLR 1136 (LC). The second respondent the employee was dismissed by the applicant for dishonesty after he had been captured drinking a container of orange juice in a hidden camera. The commissioner found that because the applicant had not proved that the fruit juice which the second respondent had consumed belonged to it, or whether ownership had reverted to the supplier, it had failed to discharge onus of proving that the dismissal was fair. The matter went for review. On review the applicant contended that the first respondent (the commissioner) had misdirected himself by making finding that the second respondent had consumed expired stock that did not belong to it, and that dismissal was not the appropriate sanction. The Court held that dismissal is the appropriate sanction and that for an arbitrator to impose a lighter sanction constitutes a gross irregularity, and set the award aside.

[191] [2003] 1 BLLR 92 (LC).

evidence. The award may also be reviewed in cases where the commissioner refused to grant postponement. The power of a commissioner to grant postponement was considered in *MIT Tissue v Theron and others.*[192] The applicant in *casu* applied for a rescission of the award in terms of s 144(a) of the Act, which empowers a commissioner who made an award, either of his own accord, or on application by an affected party to vary or rescind an award where it was "(a) erroneously sought or erroneously made in the absence of any party affected by that award". The Court held that there are at least three reasons why the approach to application for postponement in CCMA arbitrations is not necessarily in line with that in civil Courts of law. The first ground is that:

- Arbitration proceedings must be structured to deal with the dispute fairly and quickly;
- Secondly, it must be d[illegible] "minimum of legal formalities"; and
- Thirdly, the possibility of making a costs order to counter prejudice in good faith postponements applications is severely restricted.

The Court noted the commissioner cannot be criticized for refusing to postpone the matter.

In terms of the Act, the commissioner may not refuse to grant a postponement where it is justified. In *Keerom Casa Hotel v Heinricks,*[193] the court held that the failure to properly consider a postponement is a gross irregularity. It held further that even failing to raise the need for a postponement where a party which has been prejudiced by a new issue does not ask for one and there is uncontroversial evidence that the

[192] [2000] 8 BLLR 947 (LC)
[193] [1999] 1 BLLR 27 (LC) at Para [29].

commissioner would have granted a postponement, had it been requested, constituted an irregularity.

In *Department of Justice v CCMA,*[194] it was held that although section 145(2) of the LRA suggests gross irregularity as applying to the process itself, it includes to a limited extent an enquiry into the merits of the dispute. This may happen, for example, where the CCMA misconstrued its jurisdiction or, as stated earlier, where the Commissioner made a finding that was not justifiable in relation to the evidence presented at the hearing. The court held that according to the test applied in the *Toyota* case, a court should only interfere with the decision of an arbitrator in circumstances where the arbitrator has failed to base his decision on the evidence properly before him, or is wrong in law.[195]

Among the many other forms of reviewable irregularity are refusal by a commissioner to allow a party to cross-examine the other's witnesses, or to call witnesses, remarks that indicate bias or partiality on the part of the commissioner, and failure to give parties an opportunity to present their case. In *Mutual and Federal Insurance Co Ltd v CCMA,*[196] the applicant alleged that the commissioner committed a gross irregularity by failing to allow (a) proper cross-examination of the employee, (b) to allow the company's representative to address argument on contradictions between the employee's evidence at the arbitration hearing and at the disciplinary enquiry, and (c) failure to give the company representative an opportunity to present closing arguments. The court, after a thorough consideration of the above allegations, held that:

[194] [2001] 11 BLLR 1229 (LC) at 1233.
[195] Ibid at 1233.
[196] Supra note 74.

"Where a witness has made a previous statement which tends to be inconsistent with a statement which is made at the hearing, the best known method of impeaching his credibility is to draw the witness's attention to the statement which he made previously and provide him with an opportunity to give an explanation. This would enable counsel and the Court to establish whether the witness is telling the truth or not. In the circumstances, the failure or refusal by the commissioner to give the representative an opportunity to put the different or contradictory versions to the other side's witness should be regarded as gross irregularity."

In *Legal Aid Board v John & another,*[197] the second respondent employee was employed by the Legal Aid Board. In December 1996, the Board ceased to pay him certain motor allowances. The employee referred the matter to the CCMA. The arbitrator found that the board had failed to hear the employee before withdrawing the motor allowance. He ruled that the board to make payment of the allowance from December 1996 until such time as the appropriate forum had decided whether the employee was entitled to receive such an allowance. On review, the applicant contended that the ruling of the CCMA arbitrators had deprived it of an opportunity to lead relevant evidence in the arbitration proceedings, and that this amounted to a gross irregularity. The court held that the exclusion of evidence as to the nature and content of the motor scheme resulted in the exclusion of relevant evidence, thereby depriving the applicant of an opportunity to put his case before the arbitrator. This resulted in his case not being fully and fairly determined. Therefore, this constituted a gross irregularity, as contemplated in s 145(2).[198]

Awards may be reviewed in cases where legal representation was granted inappropriately. This might also amount to gross irregularity in terms of section

[197] (1998) 19 *ILJ* 851 (LC); [1998] 4 BLLR 400 (LC).
[198] Ibid at 856B-C.

145(2)(a)(ii). The right of appearance in arbitration proceedings was restricted to officials of registered trade union and employers' organizations only. But section 138(4), of the LRA before its repeal, allowed the parties to be represented also by officials of unregistered trade unions and employers' organizations. In *Secunda Supermarket CC trading as Secunda Spar & ASAMBO v Dreyer & others,*[199] the commissioner refused to permit an official of an unregistered employers' organization to represent the first applicant in the arbitration proceedings. The Court held that there is no requirement in s 138(4) of the LRA that the right of representation is limited to a registered employers' organization. Section 140(1) of the LRA permits legal representation if the parties and the commissioner agree. A commissioner has a duty to advise parties of the discretion to allow representation in terms of s 140, so that the parties may make representations. Failure to afford parties legal representation when they are entitled to it, amounts to irregularity.[200]

The way in which the commission should approach s 140 (1) dealing with legal representation, was considered in *Ndlovu v Mullins NO & another,*[201] where Sutherland AJ, after examining the provisions of s 140(1) (a) and (b),[202] noted that the CCMA commissioner in relation to s 140(1) is required to do the following:

---

[199] (1998) 19 *ILJ* 1584 (LC); [1998] 10 BLLR 1062 (LC).

[200] Ibid 1065I. See also *Colyer v Essack NO & others* (1997) 18 ILJ 1381 (LC); [1997] 9 BLLR 1173 (LC). The commissioner allowed an employee legal representation in terms of s 140(1) of the LRA. When the arbitration proceedings resumed the commissioner discovered that 'the attorney' was in fact a candidate attorney. Then the commissioner withdrew the employee's right to legal representation. The Court found that the discretion had not been judicially exercised and that the commissioner committed a gross irregularity by continuing the proceedings with an unrepresented employee whom the commissioner had decided previously was entitled to legal representation.

[201] (1999) 20 *ILJ* 177 (LC); [1999] 3 BLLR 231 (LC).

[202] Section 140(1) reads as follows:

"(1) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138(4) are not entitled to be represented by a legal practitioner in the arbitration proceedings unless-

(a) the commissioner and all other parties consent; or

"[1] Determine whether or not the representatives who appear before her are persons who are qualified to do so.

[2] Consciously and expressly address the question of legal representation.

[3] If a person who appears before her is a legal representative, to determine whether or not all the other parties to the arbitration consent thereto and in this regard she should satisfy herself that the other parties who are not so represented are aware of their right to elect between consenting to legal representatives appearing for their opponents and objecting thereto.

[4] Independently of the parties, the commissioner should apply her mind to whether or not in the given circumstances it is appropriate for her to give her consent to the parties being legally represented; this is particularly important when only one of two parties is represented by a lawyer and there is a risk of uneven forensic performance in the conduct of the proceedings."

The court after analyzing the provisions of s 140(1) concluded that failure by the commissioner to satisfy the provisions of s 140 (1) resulted in a gross irregularity within the meaning of s 145 (2) (a) (ii), and was therefore reviewable. The decision in this case was followed in *Mthembu v Mahomed Attorneys v CCMA.*[203] The Court held that a commissioner committed a reviewable irregularity by excluding the lawyer and permitting a party to withdraw its consent.

Also in *SA Post Office v Govender & others,*[204] the first respondent applied to be allowed legal representation at the commencement of an arbitration concerning his dismissal. The commissioner refused the application, but allowed the third respondent's

---

(b) the commissioner concludes that it is unreasonable to expect the party to deal with dispute without legal representation, after considering –
  (i) the nature of the question of law raised by the dispute
  (ii) the complexity of the dispute;
  (iii) the public interest; and
  (iv) The comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute."

[203] (2002) 23 *ILJ* 1531 (LC); [2002] 2 BLLR 150 (LC).

[204] [2003] 8 BLLR 818 (LC) 821B-E.

attorney to remain in the room. The attorney remained, and wrote notes advising the third respondent on how to conduct his case. On review, the applicant contended that the presence of the attorney vitiated the entire proceedings. The court held that, by limiting legal representation on behalf of the party, the commissioner misconceived the ambit of s 140 of the LRA.[205] Furthermore, the commissioner undermined his ruling by permitting the attorney to participate in the process by writing notes to the third respondent to assist him in the conduct of the case. He concluded that this amounted to an irregularity.[206]

It is evident from the above cases that conduct that amounts to gross irregularity is not limited to specific cases, but at the same time it is impossible to give an exhaustive list of which acts if committed amount to gross irregularity. It is clear from the line of judgments that in order for a commissioner to escape committing misconduct or gross irregularity, he/she has to adhere to the rules laid down by the Act, and also consider the guidance lay down by the courts.

4.3 Exceeding Commissioners' Powers [s145 (2) (iii)]

A commissioner is empowered to control, and has a responsibility for the direction of, the proceedings. According to Du Toit *et al,*[207] the concept of exceeding one's power includes a failure to use a power or discretion that ought to be used. Accordingly, there are certain featutes that have to be considered when dealing with the issue of when the commissioner has exceeded his powers as an arbitrator. The commissioner exceeds his powers in the following circumstances:

---

[205] Ibid 821B-E.
[206] Ibid 821E-F.
[207] Du Toit et al. op cit note 86 at 621.

- If there is a material error of law, which may relate to proper characterization of the nature of the dispute, or the key principles of the relevant law, or he ignores or misconstrues the appropriate statute or legal principles including the applicable statutory discretion; or if the commissioner does not apply the proper test to interpret relevant statutory or case law, including the law of evidence;
- If the commissioner makes findings that are not justified by the evidence, this could include drawing inferences inappropriately;
- If the commissioner penalizes a party for the conduct of its representative;
- If the commissioner considers matters which were not in dispute;
- If the commissioner does not consider 'appropriate material'.

In *National Entitlement Workers Un... NO & another*[208] the Court tells us that 'excess of power' takes place "when the commissioner strays from the ambit of [his or her] jurisdiction or ... makes a ruling or awards a remedy, which is beyond [his or her] powers". The *Reunett Industries*[209] case provides an example. The employer sought to review an award made by a commissioner in terms of s145 on the basis that the commissioner had exceeded his power. The Court held that:

> "... the parties, as they are permitted to do by law expressly, or at least tacitly, limited the dispute and therefore the jurisdiction of the commissioner to the question whether the employer dismissed the employee on suspicion of (as submitted by the employee) or whether it proved his intoxication on a balance of probabilities. The employee did not place the adequacy of the sanction in issue. No doubt he was comfortable with the notion that dismissal for proven intoxication at the workplace, where he was responsible for the final tests of air-to-air and air-to-ground radios for military aircraft, was appropriate and

[208] [1997] 12 BLLR 1623 (LC)
[209] (1997) 18 ILJ 1393 (LC).

unchallengeable. It was in any event so provided for in the employer's rules. The commissioner exceeded her powers by entering into the question of the adequacy of the sanction and, in so doing, committed a gross irregularity by failing to hear the parties on the issue. Admittedly certain background facts had been tendered but the parties were unaware that the commissioner intended considering the adequacy of dismissal as a proper and appropriate sanction."[210]

This ground, namely, the exceeding of powers by a commissioner, was given a careful attention by the Labour Appeal Court in *Carephone*.[211] Of the first importance is that the award must be rationally justifiable. If it is not, the commissioner will have exceeded the powers vested in him/her by the LRA, and his/her award will be susceptible to review under section 145. Froneman DJP set the standard in the form of a question as follows: 'Is there a rational objective basis justifying the connection made by the commissioner between the material [illegible] available to him and the conclusion he eventually arrived at.'

A commissioner also exceeds his or her powers if he awards compensation in excess of the twelve months limit. In *Ensign Brickford SA (Pty) Ltd v Shongwe NO and others,*[212] a dismissal dispute of a shop steward was referred to the CCMA. The commissioner ruled that the applicant had acted procedurally unfairly by failing to inform the respondent union that it intended taking disciplinary action against the employee. The employee was awarded compensation equivalent to the remuneration he would have received between the date of his dismissal and the date of arbitration hearing. The applicant on review contended that the commissioner had erred by awarding compensation in excess of the amount the employee would have earned in twelve

[210] Ibid at 1637I-1638A-B.
[211] Supra note 17.
[212] (2001) 22 *ILJ* 146 (LC); [2000] 12 BLLR 1421 (LC) at 1427.

months. Molahlehi AJ rejected the applicants' contention that the Act places no limit on the amount of compensation that can be awarded for a procedural unfair dismissal. The Court found that it made sense to limit compensation under s194 (1) to 12 months, which is also provided for under section 194 (2) of the Act.

In *Stock Civil Engineering (Pty) Ltd v RIP NO & another,r*[213] an employee, a senior executive, was retrenched after the appellant decided to close down the branch of which he was managing director. The dismissal dispute was referred to private arbitration. The arbitrator found dismissal to be procedurally and substantively unfair, and ordered the appellant to pay the employee compensation equivalent to the amount he would have earned between the date of dismissal and the date of the arbitration was concluded. On review, the applicant contended that the arbitrator had failed to apply his mind to the question whether the employee should be awarded compensation. It was contended further that manner in which the arbitrator reached his findings on the merits and on awarding relief, rendered his award reviewable.[214]

The court found that the commissioners' arbitration is reviewable, and set aside an award where the commissioner exceeded his power in terms of s 145 (2) (a)(iii) of the Act. The Court noted that section 145(2)(a)(iii) is in line with section 33 (1) (b) of the Arbitration Act.[215]

The implications of these judgments are that, although the Commissioner is empowered to take control and responsibility of the proceedings this does not make him a final arbiter. It is submitted that the commissioner must exercise its powers within the

[213] [2002] 3 BLLR 189 (LAC) at 209 G-I.
[214] Ibid at 209G-I.
[215] Ibid.

parameters of the Act. This was the view expressed by Grogan,[216] that "excess of power" may have an even wider meaning. He noted that in private arbitration, arbitrators exceed their power by stepping outside the parameters set by their terms of reference. Therefore, according to him that is what is done by commissioners as well but must do so in terms of the Act. He argued that the commissioners do not only exceed their powers by assuming jurisdiction, they also exceed them by flouting a party's right to administrative justice. He stated further that:

> "The Court does not have to resort to section 158(1)(g) to justify invoking the common law and constitutional grounds when reviewing arbitration awards by commissioners. They are in any event, implicit in section 145(2)(a)(iii)."

4.4 The award was improperly obtained [s145 (2) (b)]

According to Landman *et al,*[217] the defect under this section is borrowed from section 33(1) (c) of the Arbitration Act,[218] which focuses on the misconduct of a party to the arbitration, where he/she obtained an award in his/her favour through fraud or dishonest means. The defect can also exist where there is misconduct on the part of the arbitrator. In *Moloi v Euijen & another,*[219] the applicant was dismissed for being absent from work without permission for a period of two weeks. On arbitration, the commissioner found that the applicant's dismissal was for a valid reason, and that the applicant's failure to attend a disciplinary hearing was not due to the fault of the employer. The employee referred an application to the Labour Court to set aside the arbitration award. The applicant alleged that the award had been improperly obtained

[216] Grogan op cit note 6 at 11.
[217] Landman et al. op cit note 69 at A 47.
[218] Ibid note 112.
[219] (1997) 18 ILJ 1372 (LC); [1997] 8 BLLR 1022 (LC) at 1029.

because there had been a "secret meeting" between the first respondent and the representative of the second respondent. Maserumule AJ noted that the phrase "an award has been improperly obtained" was borrowed from s 33(1) (c) of the Arbitration Act[220] where similar grounds appear thereof. The Court therefore, held that:

> "[s]ection 145(2) (b) must be read in the context of the whole section. The grounds of review set out in the section distinguishes between misconduct by the Commissioner (section 145 (2) (a) (i)) and the improper obtaining of an award as a separate ground of review (section 145 (2) (b). In my view, the latter subsection contemplates a situation where one party to the arbitration, through fraud or other improper means, obtains an award in his or her favour. This can either be in the form of a bribe or by misleading and false or fraudulent representations which lead to an award being granted in that party's favour. It is different, in my opinion, from a charge that the Commissioner misconducted himself, although it is quite possible that the Commissioner's misconduct may give rise to the improper obtaining of an award. For example, if a party to arbitration bribes the Commissioner and obtains an award in his favour, the award would have been improperly obtained and the Commissioner would also have misconducted himself."[221]

It is clear that the commissioner is required to conduct him/herself in a proper manner when conducting arbitration. The commissioner must adhere to both the rules laid down by the LRA and the guidelines laid down by the courts. The guidelines require that commissioners must conduct themselves in manner that the inference of bias is avoided.[222]

---

[220] Ibid note 112.
[221] Supra note 174 at 1029E-G.
[222] CCMA Guidelines Mach 1998.

5. Conclusion

When the Labour Relations Act[223] came into operation, it had as one of its primary objectives the speedy and effective resolution of labour disputes.[224] The LRA, in order to achieve its objectives, had to provide for a procedure and machinery to resolve disputes by means of statutory conciliation, mediation and arbitration.[225] In this respect new institutions were established, the Commission for Conciliation, Mediation and Arbitration (CCMA) being one of them. In order for that objective to be achieved the provisions of the LRA must be followed. This means that the powers and functions of the CCMA are governed by the LRA, non-compliance with the provisions of the Act will render their defective decisions reviewable. Section 138(1) of the Act gave the commissioner discretion to make an appropriate arbitration award in order to determine the dispute fairly and quickly, and to deal with the substantial merits of the dispute with a minimum of legal formalities. The commissioner is required to give brief reasons for her/his decisions.[226] In terms of s143(1) of the Act, an arbitration award of the CCMA Commissioner is final and binding, and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award. Default on the part of the commissioner when conducting arbitration will subject him to review. Generally, there is no right to appeal from the CCMA to the Labour Court. The party not satisfied with an arbitration award has a remedy, to make an application to the Labour Court for the setting aside of the award on review. Such an application must be done in terms of section 145 of the Act.

---

[223] Labour Relations Act 66 of 1995 (hereafter "the Act" or "LRA").
[224] Explanatory Memorandum to the Draft Bill of [1995] *ILJ* 278-336.
[225] Van Eck et al. *Principles of Labour Law* (2002) at 419.
[226] Section 138(7) of the LRA.

Section 145(1) of the LRA provides for review of arbitration awards on application by a party within six weeks of the date on which the award was made, unless the party alleges that the award is defective because of corruption. For the purposes of s 145, an award may be defective on any of the listed grounds:

The test formulated in *Carephone* has not been followed by the courts in other cases. From the above judgments, it can be deduced that it is unlikely that there will be any uniform standard applicable in matters relating to reviews of CCMA arbitration awards. I agree with the judge in that if the courts apply the PAJA, this will affect the objectives and operation of the LRA, in that there will be no speedy resolution of disputes as envisaged by the Act. And, for that matter, arbitration awards are reviewed in terms of section 145 of the LRA which still has to be interpreted in accordance with the Constitution. Therefore, it is submitted that it will be wiser to treat reviews in terms of that particular legislation which is s145, and not any other legislation.

The grounds of review set out in s145 are concerned with procedural irregularities which preclude an arbitration process from functioning as intended. The grounds of review go no further than the grounds established in our common law. Section 145 is limited to determining the question of whether the procedure adopted at the arbitration was formally correct and not whether the determination is correct.

The most important message conveyed by the above judgments is that:

- it brings clarity as to when CCMA awards can be reviewed;
- the commissioner must be very careful when scrutinizing evidence before him.

He or she must not base his or her decision on evidence which was not presented to him her and admitted as evidence. It is submitted that if the commissioner has managed to reach a reasoned conclusion, that will be a pointer towards an informal, efficient and cost-effective dispute resolution under the LRA.

CHAPTER SEVEN

SUMMARY, CONCLUSION AND RECOMMENDATIONS

One of the objectives of the Labour Relations Act (LRA) is to provide simplified procedures for the resolution of disputes through conciliation, mediation and arbitration. It is clear that the intention of the legislature was to simplify the labour dispute resolution system and, in this respect it is disappointing that the process and procedures designed by the Act are not as simple as they were intended to be.

The LRA promotes collective bargaining by providing a framework within which collective bargaining can flourish. Although there is not much agreement on the way in which legislation should promote collective bargaining, section 23 (5) of the Constitution provides some guidance in this respect. The LRA makes provision for the voluntary establishment of centralized bargaining forums called bargaining and statutory councils. It also regulates the binding nature and enforcement of collective agreements. Allowing employees an opportunity to have a say in matters that affect their working lives is a huge advantage to the employers in relation to productivity and competitiveness.

It is clear that the South African government adhered to its obligation by enshrining the right to collective bargaining in the Constitution and by providing for collective bargaining in the LRA. It is also clear from a reading of the LRA that it was the intention of the legislature to respect, protect, promote and fulfil the rights to collective bargaining. Section 1 of the LRA states that the purpose of the Act is to advance economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling the primary objectives of the Act. These include the

promotion of orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision-making in the work place, and the effective resolution of labour disputes. This should clearly save undue expense in courts, and ensure that everyone whose interests are affected will have those interests represented.

South African courts have acknowledged collective bargaining as a means of maintaining good labour relations. For collective bargaining to be strong, a balance should be struck between legislative interference and freedom to bargain collectively. According to National Labour & Economic Development Institute[1] South Africa's labour relations system has now been one which is developed around the concept of voice regulation or consensual labour relations. Voice regulation refers to the constructive role that collective bargaining between employees and employers plays in resolving disputes. Furthermore, voice regulation in the labour market provides a mechanism to balance the often conflicting interests of employers and employees.

Although collective bargaining has been recognised as a desirable means of resolving conflict between employers and employees, it was not compulsory in South Africa. Instead, employers and employees were encouraged to bargain collectively, and a specific duty to do so would arise only where it was contained in an industrial council constitution or agreement.[2] There was no obligation on employers and trade unions to bargain collectively in the absence of a specific agreement to do so. Under the 1956 LRA,[3] it was left to the industrial courts to encourage collective bargaining as the preferred method of settlement of disputes. These courts were able to fashion a duty to bargain under their general "unfair labour practice" jurisdiction.

---

[1] National Labour & Economic Development Institute *South Africa Country Analysis* (2004) at 78.
[2] Ibid.
[3] The Labour Relations Act No 28 of 1956.

During the process that led to the enactment of the LRA, disagreement arose between trade union and employer representatives concerning the status of collective bargaining. The trade union preferred a legally enforceable duty to collective bargaining. They also wanted the economy divided into a small number of sectors, each covered by a centralised bargaining forum for the centralised negotiation of terms and conditions of employment and other matters of mutual interest. The employers opposed these views and took the position that collective bargaining should not be compelled by law, and that the determination of the level of bargaining should be left to the parties.[4]

Collective bargaining is not only a means of encouraging a settlement on matters of mutual interest, but it also plays a major role in maintaining peace and stability within the industry in addition to playing a social and economic role. This is evidenced by the fact that:

- It has an economic role in its establishment of wages and standards for employees that are reasonable.
- It fulfils a social function in that it establishes an industrial justice system that protects employees from arbitrary action by management and recognises the right to human dignity.[5]
- It performs a political function in that it brings a measure of democracy to the workplace, allowing the employee to have a say in matters that affect their working lives.

[4] Basson et al *Essential Labour Law* (2002) at 22.
[5] Ibid.

As far as the status of collective bargaining is concerned, the 1995 LRA does promote and encourage collective bargaining.[6] At the same time, trade unions and employers are not compelled to bargain collectively.[7]

The LRA focuses on the proactive use of conciliation, arbitration and adjudication to resolve disputes as well as their speedy and effective resolution. It attempts to ensure that procedures appropriate for the resolution of various types of disputes are in place. The LRA strongly supported the establishment of bargaining councils. It created these institutions to resolve disputes in the workplace through conciliation and arbitration. The primary function of a bargaining council is to negotiate collective agreements. Accordingly, collective agreements may deal with terms and conditions of employment, or any other matter of mutual interest. Under the 1956 Act, bargaining council agreements could regulate matters of mutual interest to employers and employees. This term was widely interpreted to mean "whatever can be fairly and reasonably regarded as calculated to promote the well being of the trade concerned ..."[8]

Section 31 of the 1995 LRA deals with the legal nature of collective agreements concluded in the bargaining council. According to Basson,[9] the phrase in s 31 that 'subject to the constitution of the bargaining council' implies that parties to the bargaining council may be bound by a collective agreement, even if they are not parties to that agreement. Previously, in terms of section 27(7), read with section 48(1) of the

---

[6] The Preamble to the Labour Relations Amendment Act No 12 of 2002 provides for the enforcement of collective bargaining agreements.

[7] Section 23 (5) of the Act reads: "Every trade union, employer's organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1)."

[8] *Op cit* note 64 at 93.

[9] Basson *at al Op cit* note 40 at 274.

1956 Act, it was possible, and often the case, for the agreement to be made binding on parties to the council who were not party to the agreement.[10]

The effect of the provisions of a bargaining council agreement under the1956 Act is that the minimum terms and conditions of employment negotiated by a bargaining council, and contained in an agreement published in the *Government Gazette,* will bind all the employers and employees in the industry.

Section 32 of the Act[11] contains the most important provision relating to bargaining council agreements. It provides that a collective agreement may be extended to non-parties who are not within the registered scope of the council. It also sets out certain requirements that have to be met before a collective agreement can be extended. The primary requirement is that the parties to the agreement and the parties to the council must comply with representivity req[illegible] Bargaining council agreements therefore reinforce and give expression to existing legislation. If a council agreement is declared binding on a trade union or employers' organisation, all members of that trade union will be bound by that agreement, including non-parties on a date after the agreement has been declared binding. Members of a trade union or employers' organisation will also remain

[10] Op cit note 3.

[11] Section 32

"(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the if at a meeting of the bargaining council request,

(a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and

(b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

(2) Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice."

bound by the provisions of the agreement, even if they subsequently cease to be members of the union or organisation. A bargaining council agreement will remain binding for the period specified in the notice in the Government Gazette.

The extension of agreements to non-parties by section 32 has the effect of limiting the right of non-parties to bargain collectively. That extension amounts to the imposition of a standard as opposed to a standard, arrived at through collective bargaining. The process of extension of collective agreements renders collective agreements not immune from constitutional scrutiny.

The most important function entrusted to bargaining councils is the resolution of disputes concerning matters of mutual interest within their registered scope, whether the dispute is between parties to the council, or whether one or more of the parties to the dispute are not parties to the council. This is a major shift of disputes from the doorsteps of the CCMA to bargaining councils, designed to give parties control over their own affairs. This dispute resolution function is conferred upon it by virtue of its constitution, and section 51 of the Act. The parties also agree on how their labour disputes should be resolved and are free to develop their own dispute resolution mechanisms.

Under the 1956 Act, industrial councils could be formed by registered trade unions and employers' organisations as forums for centralised bargaining. Section 1 of the LRA supports the promotion of collective bargaining at sectoral level as one of the primary objectives of the LRA.

The LRA envisages that bargaining councils will play a prominent role in this regard. Although it performs a very important role, the labour dispute resolution function is under-researched in South Africa.

The jurisdictional scope of a bargaining councils is to be found in its certificate of registration, and consequently an agreement negotiated by the council cannot go beyond such certificate in respect of the sector contained therein. A council may arbitrate any dispute between parties to the council if all parties to the dispute consent to such arbitration. This wider jurisdiction of bargaining councils makes these bodies essential for industrial peace. However, these councils in their dispute resolution functions are restricted to particular disputes.

The LRA was amended in 2002 by the insertion of a provision which provides that a bargaining council may monitor and enforce compliance with its collective agreements.[12] Prior to the amendment, bargaining councils were confined to requiring the Minister of Labour to appoint designated agents with powers of investigation. Section 33 provides for the appointment and powers of designated agents[13] of bargaining councils.

Prior to the 2002 amendment, it was also accepted that a bargaining council may be a party to arbitration proceedings through which it sought to enforce a collective agreement, at least where the arbitration is conducted by an independent body appointed by the council. Section 33A is included to provide an explicit statutory basis for arbitrations dealing with the enforcement of bargaining council collective agreements.

The aims of the Labour Relations Act are to advance economic development, social justice and labour peace, as well as orderly collective bargaining at sectoral level, and to create an effective dispute resolution and prevention mechanisms for labour

[12] Section 33A (1) of Labour Relations Amendment Act of 2002.

[13] The agent has wide powers including being able to:

- Subpoena witnesses to give evidence;
- Subpoena a person in control of a relevant book, document or object to produce the item and to answer questions;
- Enter and inspect premises at any reasonable time after having labour court authorisation to do so;
- Retain any relevant book, document or object for a reasonable period of time.

disputes. In this regard, the CCMA was established for that purpose. The ease of access to the CCMA, and its wide jurisdiction, contributes to its failings. This is explained by the fact that between November 1996 and the end of 1997, the CCMA handled 45 515 cases as compared with a budgeted caseload of 33 100, an excess of 37, 5%. Its caseload increased by 35% in 1998, and has continued to grow. During the period running from 2000/2001, there were 103 096 cases referred to the CCMA.[14]

As much as the CCMA has jurisdiction in terms of other legislations not the LRA, this does not make it the only institution. There are other institutions with enforcement powers which are capable of dealing with these matters. Therefore, for the efficiency and effectiveness of this institution, it is suggested that the role of the CCMA should be limited. The courts have given some clarity on the issue whether the CCMA may pronounce upon its own jurisdiction. The jurisdictional issues are the most critical part of every labour relations environment. Accordingly, if these matters are not resolved in a proper manner by a proper forum, it will be costly for the parties and that will affect the efficiency of labour dispute resolution.

The Courts also gave clarity on preliminary points to be determined by the courts, namely:

- the first relates to the fact that the commissioner will only be able to conciliate the matter once he has jurisdiction to do so. The jurisdictional facts must exist, and the commissioner must see to it that they do exist.

[14] CCMA Annual Report 2001

- At which stage of the proceedings these factors should be raised. It is clear that the employer can raise this point at the conciliation stage. A party wishing to dispute the jurisdiction of the CCMA should do so prior to the conciliation stage. In late referrals it may be raised at conciliation stage; if the employer does not use this opportunity and the certificate of outcome is issued, that will mean that the CCMA has the jurisdiction to arbitrate the labour dispute. This will bar the employer from raising a late referral at this stage. The option open to the employer would be to have the certificate set aside on review.

Lastly, it draws a line between merits and jurisdictional issues. It is clear that an objection based on merits will not be entertained at conciliation proceedings.

The effective functioning of the CCMA is crucial to the success of the labour dispute resolution system. The achievements of CCMA are not an indication of a smooth operation of this institution. The 2002 amendments to the LRA,[15] have also given the CCMA the power to make rules regulating:

- the practice and procedure in connection with the resolution of disputes through conciliation and arbitration;
- the process by which conciliation is initiated, and the form, content and use of that process the way in which arbitration process works; and
- the forms to be used by the parties and the CCMA.

One issue which has been the source of debate has been the inability of the parties at conciliation and arbitration proceedings to elect whom they wish to represent them.

[15] Act No 12 of 2002.

Prior to the 2002 amendments, representation in conciliation and arbitration proceedings was dealt with in terms of s 135(4); s 138 (4) and s 140(1).

In terms of Rule 13 of the CCMA Rules, a party to the dispute must appear in person, irrespective of whether he is represented.[16] The issue of representation at arbitration proceedings is not clear. Under the repealed provisions a party in arbitration proceedings was not entitled to be represented by consultants, candidate attorneys, para-legal officers and officials of unregistered trade unions and employer's organizations. Section 138(4) was qualified by s 140(1), which contained an exception to a party's right to be represented by a legal representative during the arbitration proceedings. The Act provided that legal representation will only be allowed if all the parties consented, or if the commissioner concluded, that it was unreasonable to expect a party to deal with the dispute without legal representation.[17]

The amendment Act,[18] repealed these provisions and section 115(2A)(k) provides that the Minister of Labour, after consulting NEDLAC and the CCMA, may make rules regulating the right of any person or category of persons to represent any party in any conciliation and arbitration proceedings. The Rules were issued and took effect on 1 August 2002. In terms of section 115(2A), read with rule 25 of the CCMA rules, the parties during arbitration proceeding have no absolute right to legal representation.

Section 138(1) of the Act gives the commissioner discretion to make an appropriate arbitration award in order to determine the dispute fairly and quickly, and to

[16] CCMA Rules which took effect on 1 August 2002.
[17] Section 140(1) (a) and (b) of the Act.
[18] Introduced by s 22 of the Labour Relations Amendment Act of 2002.

deal with the substantial merits of the dispute with a minimum of legal formalities. The commissioner is required to give brief reasons for her/his decisions.[19]

The problem with the resolution of labour disputes has been the enforcement of awards issued by the CCMA. Before the 2002 amendment, CCMA arbitration awards had to be made orders of the Labour Court to render them enforceable. This entailed applications to the Labour Court in terms of section 158 (1) (c) of the Act.[20] But that application process was often lengthy, expensive and not as effective as anticipated by the Act. The Act was amended in 2002. One of the important amendments involved section 143 of the LRA. In terms of this section "an arbitration award of the CCMA Commissioner is final and binding, and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award. An arbitration award may only be enforced as soon as the director of the CCMA has certified that it is an award." What is required by section 143 is for the director to certify that the arbitration award is indeed an arbitration award. That amendment accords arbitration awards the same status as orders of a civil court.[21] If the award is for payment of an amount of money, the successful party will be able to issue a warrant of execution and have the Deputy Sheriff enforce the award. All that will be necessary is for the director of the CCMA to certify an award as an arbitration award. The certification by the director is now the quickest and least costly means of enforcing the award.

The awards made by the CCMA and the proceedings leading to them are subject to review by the Labour Court. Default on the part of the commissioner when conducting

---

[19] Section 138(7) of the LRA.

[20] The previous section 143 stated that:

> "[a]n arbitration award issued by a commissioner is final and binding and may be made an order of the Labour Court in terms of section 158 (1) (c), unless it is an advisory award."

[21] Such as the Labour Court, the High Court or the Magistrate's Court.

arbitration will subject him/her to review. Generally, there is no right of appeal from the CCMA to the Labour Court. The party dissatisfied with an arbitration award will have a remedy, to make an application to the Labour Court for the setting aside of the award on review. Such an application must be made in terms of section 145 of the Act.

Section 145(1) of the LRA provides for review of arbitration awards on application by a party within six weeks of the date on which the award was made, unless the party alleges that the award is defective because of corruption.

The test formulated in *Carephone (Pty) Ltd v Marcus*[22] has not been followed by the courts in other cases. From the relevant judgments,[23] it can be deduced that it is unlikely that there will be any uniform standard applicable in matters relating to reviews of CCMA arbitration awards. If the courts apply the PAJA, this will affect the objectives and operation of the LRA, in that there will be no speedy resolution of disputes as envisaged by the Act. And, in any event, arbitration awards are reviewed in terms of section 145 of the LRA which still has to be interpreted in accordance with the Constitution.

The grounds of review set out in s145 are concerned with procedural irregularities which preclude an arbitration process from functioning as intended. Those grounds go no further than the grounds established at common law.

---

[22] 1998 *ILJ* 1425 (LAC) 1430.

[23] See *Mzeku & others v Volkswagen of SA (Pty) Ltd,* (2001) 22 *ILJ* 1575 (LAC); *Shorprite Checkers (Pty) ltd v Ramdaw NO & others* (2001) 22 *ILJ* 1603 (LAC); *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others*23 *ILJ* 1712 (LC); B*ato Star v Minister of Environmental Affairs and tourism, the chief Director Marine and Coastal Management Department of Environmental Affairs and Tourism Rights Holders* Unreported case no CCT/03; *PSA obo Haschke v MEC for Agriculture & others.* [2004] 8 BLLR 822 (LC).

Section 145 is limited to determining the question of whether the procedure adopted at the arbitration was formally correct, and not whether the determination is correct.

The most important message conveyed by the said judgments is that:

- they bring clarity as to when CCMA awards can be reviewed; and
- the commissioner must be very careful when scrutinizing evidence before him. He must not base his decision on evidence which was not presented to him and admitted as evidence.

If the commissioner manages to reach a reasoned conclusion, that will be a pointer towards an informal, efficient and cost-effective dispute resolution under the LRA.

2. Recommendations

- For collective bargaining to be strong a balance should be struck between legislative interference and freedom to bargain collectively.

- The bargaining councils do have a role to play in the entire industrial relations spectrum and not only as a dispute resolution structure. Looking at the whole collective bargaining framework, it is recommended that the bargaining councils should be given a chance as the resolution of disputes by these councils will save undue expense in courts and ensure that everyone's interests is taken addressed.

- The bargaining councils are restricted in their dispute resolution function to particular disputes. The working of the councils should be extended to cover a wider spectrum than is currently the case. These restrictions hamper the workings of the bargaining councils.

- The bargaining council system may be fine in concept; the problem might be in the restrictions and changes brought about by legislation. These needs to be examined in order to provide a solution.

- It is recommended that the law should stipulate and force parties to legally find solutions themselves and that only serious disagreements are passed on to the CCMA. Otherwise the CCMA will be permanently saddled with a significant case backlog.

- It is suggested that the bargaining councils should not be used just as a stop-gap otherwise their effectiveness will be hampered;

- It is recommended that bargaining councils should be empowered to select the types of disputes they will handle based on seriousness of the dispute and not handle any dispute which otherwise could be resolved at site level.

- The CCMA jurisdiction under the mutual interest framework should be limited and it should defer to the agencies with enforcement jurisdiction over labour law.

- Laws dealing with deferring jurisdiction to other forums should be properly implemented.

- Reviews of CCMA arbitration awards should be dealt with in terms of the particular legislation that is s145 of the Labour Relations Act, and not under any other legislation.

BIBLIOGRAPHY

Albertyn S "The New CCMA Rules" (2002) *Industrial Law Journal* 1715.

Anstey M in Van Rensburg R "The Workplace Revolution: Are dispute resolution mechanisms keeping pace?" (1998) Issue 2 *Labour Relations in SA.*

Anderson F and Van Wyk J *Labour Law in action*: A Hands-on Guide to Labour Relations (1997) First Edition, Mascow Miller Longman.

Aaron "Settlement of Disputes over Rights" in Aaron and Wedderburn (Eds) (1992) *Comparative Labour Law and Labour Relations,* Weddernburn

Baskin J "The need for centralized (but flexible) bargaining" (1995) 19 *South African Labour Bulletin.*

Baskin J & Sargar S *Discussion Paper: South Africa's new Labour Relations Act (*1995).

Basson AC, Christianson MA, Garbers C, Le Roux PAK, Mischke C, Strydom EML *Essential Labour Law*, (2002) Third Edition, Volume 2 Labour Law Publications.

Basson AC, Christianson MA, Garbers C, Le Roux PAK, Mischke C, Strydom EML *Essential Labour Law* (2005) Forth Edition Labour Law Publications

Bendix S *Industrial Relations in South Africa*, (1996) Third Edition, Juta & co, Ltd.

Bendix S *Industrial Relations in South Africa*, (2001) Forth Edition, Juta & co, Ltd.

Benjamin P "Industrial Council Dispute procedure: Another view" (1981) 2 *Industrial Law journal*

Benjamin P and Thompson C *South African Labour Law* (1999) Volume 1, Service 40, AAA18.

Brand J.A Labour Relations Outcomes in 1997 and Prospects for 1998: "Evaluating Dispute Resolution Institutions" (1997) *South African Law Journal of Labour Relations.*

Brand J Lotter C Steadman F and Mischke C *Labour Dispute Resolution* (1997) Second Edition Juta & Co, Ltd.

Brand J and Cassim NA "Duty to Disclose – A Pivoral Aspect of Collective Bargaining" (1980) 1 *Industrial Law Journal.*

Brassey MSM, Cameron E, Cheadle MN & Olivier M.R. *The New Labour Law, Strikes, Dismissals and the Unfair labour practice,* (1999) First Edition, Juta & Co, Ltd.

CCMA *Annual Report 2003/2004* (2004) www.ccma.org.za

CCMA *Annual Report 2000/2001.* www.ccma.org.za

Cheadle S, Le Roux PAK, Thompson C and Van Niekerk *Current Labour Law:* An annual review of key areas of labour law (1998) Juta & Co, Ltd.

Cheadle S, Le Roux PAK, Thompson C. and Van Niekerk *Current Labour Law* (2000) Juta & Co, Ltd.

Cheadle H and Mureinik E 'Works Committees and Trade Unions (1980) 1 *Industrial Law Journal*

Christie S & Madhuku L *Labour Dispute Resolution in Southern Africa: "The Case study of Southern Africa"* (1996) First Edition Fredrich Ebert Stiftung and Institute of Development and Labour Law.

Cunningham PW & Slabert JA *Industrial Relations Handbook: Historical Development of Industrial Relations* (1989) Issue 1 Juta & Co, Ltd.

Coetzee JAG *Industrial Relations in South Africa* (1976) Juta & Co, Ltd.

Davis D, Cheadle H, Haysom N *Fundamental rights in the Constitution: commentary and Cases: a commentary on chapter 3 on the fundamental rights of the 1993 Constitution and chapter 2 of the 1996 Constitution* (1997) Juta & Co Kenwyn.

De Gichr J 'A Prevention and Settlement of Labour Disputes other than Conflicts of Rights in Labour Law' (1978) Volume 4 *International encyclopaedia of Comparative Law*

De Kock A "Industrial Council Dispute Procedure" (1981) 2 *Industrial Law Journal*

Department of Labour *Annual Report* 1996 (RP 83 /1997)

Department of Labour *Annual Report* 1998 (RP 65 / 1999).

Department of Labour *Preliminary Annual Report 2004/2005* (2005) www.labour.gov.za

De Waal J Currie I & Erasmus G *The Bill of Rights Handbook* (2001) Forth Edition Juta & Co, Ltd Western Cape.

Du Plessis V Fouche MA and Van Wyk M.V J *A practical Guide to labour law* (1998) Second Edition and supplement Butterworths.

Du Plessis J V, Fouche MA, & Van Wyk MV *A Practical Guide to Labour Law* (2002) Reprinted in 2004 Butterworths Durban

Du Toit D, Bosch D, Woolfrey D, Godfrey S, Rossouw J, Christie S, Cooper C Giles G, & Bosch C *Labour Relations Act*, 1995 Second Edition (1998) Butterworth's, Durban.

Du Toit D, Bosch D, Woolfrey D, Godfrey S, Rossouw J, Christie S, Cooper C Giles G, with Bosch C *Labour Relations Law* (1999) Second Edition, Butterworths.

Du Toit D, Bosch D, Woolfrey D, Godfrey S, Rossouw J, Christie S, Cooper C Giles G, with Bosch C *Labour Relations Law: A comprehensive Guide,* (2001) Third Edition Butterworths.

Du Toit D, Bosch D, Woolfrey D, Godfrey S, Rossouw J, Christie S, Cooper C Giles G, with Bosch C *Labour Relations Law: A comprehensive Guide* (2003) Forth Edition Butterworths.

Du Toit D, Godfrey S, Goldberg, Maree & Theron *Protecting Workers or Stifling Enterprise? Industrial Council and Small Business* (1995).

Eddie Webster *Work and Industrialization in South Africa: An Introductory Reader* (1994) Juta & Co, Ltd.

Ehlers DB "Dispute Settling and Unfair Labour Practices: The Role of the Industrial Court vis-à-vis the Industrial Council" (1982) 3 *Industrial Law Journal*

Elaine Milton 'Bargaining Councils and the Dispute Resolution System' (17 July 2000) summary of a research project, CCMA. www.ccma.co.za

Elaine Milton 'Bargaining Council and the Dispute Resolution System' (2002) www.ccma.org.za

Finnemore, M. and Van Der Merwe, R*Introduction to Labour Relations in South Africa*, (1997) Forth Edition Butterworths.

Finnemore, M. and van Rensburg, R. *Contemporary Labour Relations,* (2002) Second Edition Butterworths.

Friedman S"Building Tomorrow Today: African Workers in Trade Unions" 1970-1984 (1997)18 *Industrial Law Journal.*

Goldberg J "Clarity at last on when review okay" *Daily Dispatch*, Thursday, November 22, 2001.

Government Notice: Labour Relations Act 66 of 1995 Rules Regulating the Practice and Procedure for resolving disputes through conciliation and at Arbitration Proceedings (2000) 21 *Industrial Law Journal* 866.

Grant B "The Reviw of Arbitrtion Awards in terms of the Labour Relations Act" (1999) *Stellenbosch Law Reviw* 251.

Griffiths HR and Jones RA *South African Labour Economic* (1980) Juta & Co, Ltd.

Grogan J *Workplace Law* (1997) Second Edition Juta & Co, Ltd.

Grogan J *Workplace Law* (2005) Eighth Edition Juta & Co, Ltd.

Grogan J "Justifiability is the key: Review judgment reviewed" (1998) 14 *Employment Law* 4.

Grogan J, 'Defective decisions' (1998) 14 *Employment Law* 4.

Ichharam Meera 'South Africa's Bargaining Council and their role in Dispute Resolution' (2002) MA thesis

Jeremy Daphne "CCMA user forums: Objectives and Outcomes of the CCMA Dispute Prevention Unit" 17 May 200?

Joubert WA 'Labour Law and Social Security' (2001) Vol 13 part 1 *LAWSA*

Kritzinger A.S. (1991) "The Nature and Role of Local Bargaining in South African Industrial Relations: A Comparative view on structures and mechanisms", Volume 1 *SAJLR*

Landman AA 'Collective Agreements: Which Judicial Pigeon hole for new bargaining Agreements?' (1996) 5 *Contemporary Labour Law* 71.

Landman Adolph & Chantal Constable "Enforcing CCMA awards" (2000) *Industrial Law Journal*

Landman AA & Van Niekerk A *Practice in the Labour Courts* (1998) Juta & Co. Ltd.

Leedy, P.D. Practical Research: Planning and Design, (1980) First Edition Juta & Co, Ltd.

Le Roux PAK 'Collective Agreements: their role and status' (2003) 12 *Contemporary Labour Law* 92.

Le Roux PAK "Arbitrations under Barganing Councils: The test for review" (2000) *Contemporary Labour Law* 11.

Le Roux PAK "The CCMA reviewed: the Labour Court Lays down the law for commissioners" (1998) *Contemporary Labour Law* 61.

Le Roux PAK "The right to legal representation at the CCMA: The LRA, the CCMA Rules and the Labour Court" (2003) 13 *Contemporary Labour Law*11

Meyer N "Private Arbitrations: The test for review" 11:9 (2002) *Contemporary Labour Law*

Meyer N 'The jurisdiction of the CCMA Commissioners at conciliation proceedings' (2002) 12 *Contemporary Labour Law* 31.

Mischke C 'Getting foot at the door: Organizational Rights and Collective Bargaining in terms of LRA' 13: 6 (2003) 13 *Contemporary Labour Law* 16.

Molahlehi E 'CCMA Developments: Review of Operations during 2004/2005 www.lexisnexis.co.za/ServicesProducts/presentations/18/EdwinMolahlehi.doc.html

Nicholson "The Challenge of the New Industrial Relations Dispensation in SA" (1979)

Oberts, S.: An alternative Dispute Resolution and Civil Justice (1996) Volume 56 *The Modern Law Review,*

O'Regan C "Reflecting on 18 years of Labour Law in South Africa" 1979 – 1997 (1997) *18 Industrial Law Journal*

O'Regan C (1991) "Possibilities for Worker Participation in Corporate Decision-making" 12 ILJ

O' Regan 'The Development of private Labour Arbitration in South Africa – A review of the Arbitration awards' (1989) *Industrial Law Journal.*

Perrott, Van Niekerk & Woodhouse Inc. 'Case Law and legislation Review: Recent Labour Court rulings that affect the employment relationship' (2001) *Employment Law notes*. www.elaw.co.za

Pons A. *Industrial Relations Handbook,* (1996) Service 5, Juta & Co. Ltd

Pons A. (1996) Annual Report.

Pretorius P Dispute Resolution, (1993)1st edition, Juta & Co, Ltd.

Ray and Jack Simons *Class and Colour in South Africa 1850-1950,* (1968) Juta & Co, Ltd.

Rycroft, A. (1990) "The private regulation on industrial conflict: Proceedings of the labour law conference" (1989), Second Edition Juta & Co, Ltd.

Rycroft and Jordan *A Guide to South African Labour Law,* (1992) Juta & Co, Ltd.

Sarah Christie and Isabel Manley "Soft Law or rough justice? Employment Dispute Resolution for Unfair dismissal in the UK and South Africa" (2002) Industrial *Law Society* www.industriallawsociety.org.uk/papers/edr.htm

Schooling H 'Certification of CCMA awards' (2004) 13 *Contemporary Labour Law*

Slabbert, J.A. & Swanepoel B.J. *Introduction to Employment Relations Management,* (1998) second edition, Butterworths, Durban.

Sibiya, B. A Key conflict resolution strategy for negotiators: 'The Devil in the Detail in Van Rensberg', R.: (1998) Volume 7(2) *Track Two.*

Smythe N 'Legal Representation at the CCMA – Latest Developments' (2003) 24 *Industrial Law Journal*

Shauna Olney "Social dialogue and Conflict Resolution: Dispute Prevention and Resolution: An ILO Perspective" (2004) www.eurofound.eu.int

Sharpe CW "Reviewing CCMA Arbitration Awards: Towards Clarity in the Labour Courts" (2000) *Industrial Law Journal* 2160.

Steadman F "The Experience of Workplace mediation in South Africa – lessons for the UK? www.cedr.co.uk/inde/library/articles/workplace_mediation_in_SA.htm

Steenkamp et al 'The Right to Bargain Collectively' (2004) 25 *Industrial Law Journal*

Summers 'Collective Agreements and the Law of Contracts' (1969) 78 *Yale Law Journal*, cited by O'Regan

Theron J and Godfrey S 'The Labour Dispute Resolution System and the Quest for Social Justice: A case Study on the CCMA. Unfair Dismissals and Small Businesses (2001) Institute of Development and Labour Law University of Cape Town

Thompson, C and Benjamin, P *South African Labour Law (formerly De Kock's Industrial Laws of South Africa* (1997) A1-9. Butterworths, Durban.

Umilla Patel 'The CCMA perspective on the competing jurisdiction of the High Court, Labour Court and the CCMA – Forum Shopping' 27 June 2002. http://www.ccma.org.za/DisplayNews1.asp?ID=8

Uytrecht, PV "Dispute settlement by Industrial Councils" (1983) 4 *Industrial Law Journal*

Van Eck BPS & Van Jaarsveld SR *Principles of labour law* (1998) Butterworths.

Van Eck BPS & Van Jaarsveld SR P*rinciples of Labour Law* (2002) Butterworths.

Van Renburg, R.: Labour Relations in South Africa: 'Participation and Progress', (1998) *issue 2*, Butterworths, Durban.

Van Rensberg, R. 'External Structured for Resolving Disputes': Participation and Progress (1998) *Issue 2 Labour relations in South Africa*, Butterworths, 10-16.

Van Zyl, E Schlesinger & F Brand *CCMA Rules* (2003) Van Zyl, Rudd & Associates (Pty) Ltd, Port Elzabeth.

Venter, R. *Labour Relations in South Africa,* (2003) 2nd edition, Oxford University Press Southern Africa, Cape Town.

Weddenbunn, L. 'A Labour law and Labour Courts': The social charter in Britain (1991) Volume 54 The *Modern Law Review*, London.

Wesley M'Review of CCMA Arbitration Awards: *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 *Industrial Law Journal*

TABLE OF STATUTES

The Constitution of the Republic of South Africa, Act No 108 of 1996.

The Labour Relations Act 66 of 1995

Labour Relations Amendment Act No 12 of 2002

Labour Relations Amendment Act 9 of 1991

Labour Relations Amendment Act 83 of 1988.

Labour Relations Amendment Act 2 of 1983.

Industrial Conciliation Act Act 51 of 1982

Labour Relations Amendment Act 57 of 1981

Industrial Conciliation Amendment Act 95 of 1980

Industrial Conciliation Act 94 of 1979

Wage Act 5 of 1957.

Labour Relations Act No. 28 of 1956

The Bantu Labour (Settlement of Disputes) Act, No. 48 of 1953

Industrial Conciliation Act 11 of 1924.

TABLE OF CASES

Constitutional Court

ACTWUSA v Veldspun (Pty) Ltd 1994 (1) SA 162 (A); (1993) 14 *ILJ* 1431 (A)

Bato Star v Minister of Environmental Affairs and tourism, the chief Director Marine and Coastal Management Department of Environmental Affairs and Tourism Rights Holders, Unreported case no CCT/03.

Ex parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC)

Larbi Odam v MEC for Education 1998 (3) 102 BCLR (CC)

National Union of Metal Workers of SA & other v Bader Bop (Pty) Ltd & another 2003 (3) SA 513 (CC),

Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA 2000 (2) SA 674 (CC); 2000 (3) BCLR 241.

Labour Appeal Court

Best Boland Motors C v Dispute Resolution Centre & others: Unreported case (CA 12/02) delivered 12 /11/03.

Carephone (Pty) Ltd v Marcus (1998) 19 *ILJ* 1425 (LAC)

Fidelity Guards Holdings (Pty) Ltd v Epstein NO, [2000] 12 BLLR 1389 (LAC)

Genrec Mei (Pty) Ltd v Industrial Council Iron and Steel Engineering & Metallurgical Industry, (1995) 16 *ILJ* 51 (A).*Kem-Lin Fashions CC v Brunton,* [2001] 1 BLLR 25 (LAC)

MCC Contracts (Pty) ltd v National Union of Mineworkers & others (2000) 5 LCD [Part 8] (LAC).

Mzeku & others v Volkswagen of SA (Pty) Ltd, (2001) 22 *ILJ* 1575 (LAC)

SACCAWU v *Specialty Stores Ltd* 1998 *ILJ* 557 (LAC) at 560D.

Shorprite Checkers (Pty) ltd v Ramdaw NO & others (2001) 22 *ILJ* 1603 (LAC).

Stocks Civil Engineering (Pty) Ltd v Rip NO. (2002) 23 ILJ 358 (LAC) .

Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 *ILJ* 340 (LAC);

Supreme Court of Appeal

Amalgamated Engineering Union v Minister of Labour, 1949 (4) SA (A)

SASBO v Standard Bank [1998] 2 BLLR 208 (A),

S v Prefabricated housing Corporation (Pty) Ltd & Another, 1974 (1) SA 535 (A)

*Prefabricated Housing Corporation (Pty) Ltd & Another*1974 (1) SA 535 (A) at 539.

Labour Court

AA Ball (Pty) Ltd v Kolisi & another, (1998) 19 ILJ 795 (LC); [1998] 6 BLLR 560 (LC).

Abdull & another v Cloete NO & others, (1998) 19 *ILJ* 799 (LC); [1998] 3 BLLR 264 (LC).

*Afrox Ltd v Laka*1999 *ILJ* 1732 (LC); [1999] 5 BLLR 467 (LC

AVBOB Mutual Assurance Society v CCMA, Bloemfontein & others, (2003) 24 *ILJ* 535 (LC).

Avroy Shlain Cosmetics (Pty) Ltd v Kok & another, (1998) 19 *ILJ* 336 (LC); [1997] 12 BLLR 1556 (LC).

BHT Water Treatment (a division of Afchem (Pty) Ltd incorporating PWTSA) v CCMA & others, [2002] 2 BLLR 173 (LC).

Ceramic Industries v NCBAWU, [1998] 11 BLLR 1120 (LC).

Ceramic Industries Ltd t/a Betta Sanitaryware v NACBAWU (1999) 20 *ILJ* 123 (LC).

Cox v CCMA & others, [2001] 2 BLLR 141 (LC).

Coetzee v Lebea NO & Another, (1999) 20 ILJ 129 (LC).

Coyler v Essack NO & others, (1997) 18 *ILJ* 1381 (LC).

Department of Justice v CCMA & others, [2001] 11BLLR 1229 (LC)

De Vries v Lienel Murray Schwormstedt & Louw, (2001) 8 DLLR 902 (LC).

DB Thermal (Pty) Ltd v CCMA & other [2000] 10 BLLR 1163 (LC)

ECCAWUSA & others v Southern Sun Hotel Interest (Pty) Ltd, (2000) 21 *ILJ* 1090 (LC)

Ensign Brickford SA (Pty) Ltd v Shongwe NO and others, [2001) 22 *ILJ* 146 (LC); [2000] 12 BLLR 1421 (LC)

Eskom v Hiemstra, 1999 *ILJ* 2362 (LC); [1999] 10 BLLR 1041 (LC)

Faure v Marais (1999) 20 *ILJ* 1794 (LC).

Fuel Retailers Association of SA v Motor Industry bargaining Council, {2001] 6 BLLR 605 (LC).

Hotel Liquor Catering Commercial & Allied Workers Union & Others v Glamorock North (Pty) Ltd. (1999) 20 ILJ (LC).

JJ van der Westhuizen v RJJ van vuuren t/a Mathabo Real Estate, [2003] 6 BLLR 573 (LC).

Keerom Casa Hotel v Heinricks [1999] 1 BLLR 27 (LC)

Legal Aid Board v John & another, (1998) 19 *ILJ* 851 (LC); [1998] 4 BLLR 400 (LC).

Magic Company v CCMA & others, [2005] 4 BLLR 349 (LC).

Meyer v CCMA & another, [2002] 2 BLLR 186 (LC).

Maglies Water Board v La Grange NO & others, (2002) 23 *ILJ* 1055 (LC); [2002] 1 BLLR 48,

Mandla v Belling & another, [1997] 12 BLLR 1605 (LC).

Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & others 1998] 19 *ILJ* (LC); [1998] 11 BLLR 1136 (LC).

MIT Tissue v Theron and others. [2000] 8 BLLR 947 (LC)

Moloi v Euijen & another, (1997) 18 *ILJ* 1372 (LC); [1997] 8 BLLR 1022 (LC).

Moses v Roopa NO, [2001] 2 BLLR 174 (LC).

Mthembu v Mahomed Attorneys v CCMA, (1998) 19 *ILJ* 144 (LC); [1998] 2 BLLR 150 (LC).

Mutual and Federal Insurance Co Ltd v CCMA & another, [1997] 12 BLLR 1610 (LC).

National Entitlement Workers Union v John NO & another, [1997] 12 BLLR 1623 (LC)

National Bargaining Council for the Road Freight Industry v Meyer t/a Oakley Carriers, (2000) 21 *ILJ* 1391 (LC).

Ndlovu v Mullins NO & another (1999) 20 *ILJ* 177 (LC); [1999] 3 BLLR 231 (LC).

Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudau & others (2003) 23 *ILJ* 1712 (LC);

NEWU v John & another, [1997]12 BLLR 1610 (LC).

NUM v Elandsfontein Colliery (Pty) Ltd, (1999) 20 *ILJ* 2656 (LC).

NUMSA v Cementation Africa Contracts (Pty) Ltd, (1998) 19 ILJ 1208 (LC).

Ntshangane v Special Metals (1998) *ILJ* 584 (LC); [1998] 3 BLLR 805 (LC).

PSA obo Haschke v MEC for Agriculture & others. [2004] 8 BLLR 822 (LC).

Pep Stores (Pty) Ltd v Laka No & Others (1998) 19 *ILJ* 1534 (LC); [1998] 9 BLLR 952 (LC)

Edgars Stores (Pty) Ltd v Director CCMA (1998) 19 *ILJ* 350 (LC); [1998] 1 BLLR 34.(LC)

Pornet v La Grange & others, (1999) 20 ILJ 916 (LC).

Reddy v KwaZulu-Natal Department of Education & Culture & Others, (2003) 24 *ILJ* 1358 (LC).

Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker 1997 *ILJ* 1393 (LC); [1997] 12 BLLR 1632 (LC).

Richards Bay Iron & Titanium (Pty) Ltd t/a Richards Bay Minerals & another v Jones & another, (1998) 19 *ILJ* 627 (LC).

Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and others, (1998) 19 *ILJ* 327 (LC).

SA Breweries v Commission for Conciliation, Mediation and Arbitration & others (2002) 23 ILJ 1467 (LC); [2002] 9 BLLR 894

SA Post Office v Govender & others, [2003] 8 BLLR 818 (LC)

Secunda Supermarket CC trading as Secunda Spar & ASAMBO v Dreyer & others, (1998) 19 *ILJ* 1584 (LC); [1998] 10 BLLR 1062 (LC).

Shoprite Checkers (Pty) Ltd v CCMA & others, (1998) 19 *ILJ* 892 (LC)

Spilhaus & Co (WP) Ltd v CCMA, [1997] 8 BLLR 1116 (LC) at 1119.

Standard Bank of South Africa Ltd v CCMA, 1998 *ILJ* 903 (LC) 909I-J; [1998] 6 BLLR 622 (LC)

Broadcasting Corporation v CCMA & others, (2003) 24 *ILJ* 211 (LC); [2003] 5 BLLR 497 (LC).

Transnet Ltd v Hospersa and another (1999) 20 *ILJ* 1293 (LC) at 1297D-I; [1999] 7 BLLR 732 (LC).

Wanenburg v Motor Industry bargaining Council, (2001) 22 *ILJ* 242 (LC).

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

Volkswagen SA (Pty) Ltd v Brand No & others [2001] 5 BLLR 558 (LC).

High Court

Goldfields Investment Limited & another v City Council Johannesburg & another, 1938 TPD 551 at 560.

Hyperchemichals Internations (Pty) Ltd & another v Maybaker Agrichem (Pty) Ltd & another, 1992 (1) SA 89 (W).

National Industrial Council of the Printing and Newspaper Industry v Copystat Services (Pty) Ltd 1980 (3) SA 631 (W).

South Africa Association of Municipal Employees (Pretoria Branch) & Another v Pretoria City Council, 1947 (1) SA 138 (T).

Ngcobo v Associated Engineering Ltd t/a Glacier Bearings (1980) 1 *ILJ* 126 (D); 1980 (3) SA 646 (D)

Piet Bosman Transport Works Committee v P E Bosman Transport (Pty) Ltd (1980) 1 *ILJ* 66; 1979 (1) SA 389 (T).

SA National Defence Union v Minister of Defence & others, 2003 24 *ILJ* 1495 (T)

SANDU & another v Minister of Defence & others. (2003) 3 SA 239 (T); [2003] 9 BLLR 932 (T)

Industrial Court

Black Allied Workers union & others v Umngeni Iron Works (1990) 11 *ILJ* 589 (IC)
BTR Industries SA (Pty) Ltd v MAMU & Others, (1992) 13 *ILJ* 803 (IC).

FAMU v Spekennham Supreme (1988) 9 ILJ 628 (IC).

Industrial Council for the Motor Transport Undertaking (Goods) v Bothma & Sons (Pty) Ltd, [1997] 2 BLLR 140 (IC).

MAMU v A Mauchle (Pty) Ltd t/p Precision Tools (1980) 1 ILJ 227 (IC).

MAMU v Hart Ltd 1985 (6) *ILJ* 478 (IC).

Moses Nkadimeng v Raleigh Cycles (SA) Ltd (1981) 2 *ILJ* 34 (IC).

CCMA

CEPPWAWU obo Nyanga v Mondipak, [2003] 7 BALR 807 (CCMA).

Communication Workers Union v Telkom SA Ltd, (1998) 19 *ILJ* 389 (CCMA)

Naidoo v JNP Development CC t/a Constantia Construction. (1999) 20 *ILJ* 3026 (CCMA).

SACCAWU v Bredasdorp Spar [1998] 4 BLLR 406 (CCMA)

SACCAWU v Crown Furnitures (1998) 19 *ILJ* 663 (CCMA)

*SAMWU v Western Cape Local Government Organisation, [*2000] 10 BALR 1160 (CCMA).

*SA Municipal Workers Union v Western Cape Local Government Organisation,[*2000] 10 BLLR 1160 (CCMA).