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**Assessing
South Africa's Commission
for Conciliation, Mediation
and Arbitration (CCMA)**

Paul Benjamin

April 2013

Governance
and Tripartism
Department

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Foreword

Conflict is inevitable in workplace relations. Establishing institutions and practices that are able to manage workplace conflict effectively is therefore an integral dimension of any workplace relations system. However, the nature of workplace relations and workplace conflict is changing. For example, as trade union density has declined, work-related disputes have become increasingly individualised, rendering institutions built on the expectation of collective disputes struggling under the resulting workload. Broader legislative and economic developments have also affected the nature of disputes, with many countries reporting a sharp increase in the number of rights disputes (and termination-related rights disputes in particular) proportionate to the number of interest disputes. Such changes can pose significant challenges to those charged with managing workplace disputes, and may demand a range of policy adjustments at an institutional or legislative level.

This paper is one in a series of national studies that examine how certain high-performing dispute resolution institutions have responded to the changing nature of workplace disputes with a view to informing future developments in dispute resolution policy. Undertaken on behalf of the ILO by leading regional experts, each paper in the series looks at the evolution of a national dispute resolution institution. Highlighting the key challenges the institution has faced and the ways in which it has responded, the papers offer a critical insight into the achievements and continued weaknesses of the system in question.

In this paper, Professor Paul Benjamin¹ examines the evolution of South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA). After setting the historical, regulatory and socio-economic context in which it operates, Professor Benjamin considers the particular challenges the CCMA has faced since it was established in 1995. These include unanticipated levels of individual cases, increasing adversarialism and violence in collective bargaining, extreme social inequality and extensive job losses following the financial crisis. This is followed by a nuanced critique of the CCMA's responses to these challenges, in which Professor Benjamin identifies several initiatives as being critical to the CCMA's success in exceptionally difficult circumstances. These include procedures for the expeditious conciliation and arbitration of individual disputes, innovative and proactive approaches to collective dispute resolution, the adoption of modern telecommunications and information technology and a holistic strategy concerning job retention. While areas of further development are also identified, this paper offers a rich resource for institutions, policymakers and other stakeholders looking to establish or improve dispute resolution services in the face of under-resourcing, unemployment and broader social division.

The working papers of the Governance and Tripartism Department are intended to encourage an exchange of ideas and are not final documents. The views expressed are the responsibility of the author and do not necessarily represent those of the ILO. I am grateful to Professor Benjamin for undertaking the study and commend it to all readers interested in labour dispute resolution.

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Abbreviations

BC	Bargaining Council
BCEA	Basic Conditions of Employment Act
CMS	Case Management System
CCMA	Commission for Conciliation, Mediation and Arbitration
DTI	Department of Trade and Industry
EDD	Economic Development Department
EPP	Employment Promotion Programme
HC	High Court
IDC	Industrial Development Corporation
LC	Labour Court
LRA	Labour Relations Act
NEDLAC	National Economic, Development and Labour Council
NSF	National Skills Fund
PFMA	Public Finance Management Act, 2000
PSA	Productivity South Africa
SAT	Screening and Allocation Team
TDU	Training Development Unit
TLS	Training Layoff Scheme
SETA	Sectoral Education and Training Authorities
UIF	Unemployment Insurance Fund)

Introduction

The post-apartheid restructuring of labour law in South Africa is characterised by both legislative amendments and institutional reorganization. The transition to democracy was regulated by a 1993 Interim Constitution that entrenched a number of labour rights such as protection against unfair labour practices, rights of freedom of association and collective bargaining, and rights to strike and lockout. Hailed by many as the first major legislative achievement of the transition, a new Labour Relations Act (enacted in late 1995) sought to establish a labour law regime that complied with international standards whilst, at the same time, codifying and simplifying the body of jurisprudence that had been established by the industrial courts since 1980. It introduced, for instance, a reworking of unfair dismissal law that sought to reduce the time and costs involved in resolving dismissal disputes that were, at the time, responsible for major backlogs in the industrial courts and contributed significantly to strike action.

A central feature of the new Act was the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA) as the entity responsible for dispute resolution (other than formal litigation) in certain categories of disputes. Since South African labour relations are subject to a complex legacy of political marginalisation and systemic inequality, legal reforms in both individual and collective dispute resolution have sought to address not only pragmatic concerns such as the accessibility and efficiency of processes, but also to encourage opportunities for more harmonious and constructive labour relations by promoting the role of consensus-seeking processes such as conciliation and forums for worker participation. This is also reflected in the mandate of the CCMA. The Explanatory Memorandum accompanying the Labour Relations Act (LRA) describes its 'main function' as the 'attempt to resolve disputes by conciliation so as to reduce the incidence of industrial action and litigation'.

The CCMA's mandate to conciliate all disputes referred to it poses two distinct sets of challenges for the organization. On the one hand, it is required to provide expeditious conciliation in a very large number (currently in excess of 100 000 annually) of "rights" disputes that may be referred to arbitration or adjudication. The overwhelming majority of these cases are claims of unfair dismissal. On the other hand, the CCMA is required to mediate unresolved collective bargaining disputes ranging from disputes involving single employers to disputes arising out of sectoral bargaining in major sectors of the economy.

This paper examines the evolution of the CCMA's approach to the conciliation and arbitration of individual and collective disputes during its life span. It does so in the context of a brief discussion of the historical evolution of South African labour legislation as well as the very pressing challenges that confront the South African labour market: high levels of unemployment and massive economic and social inequality.

The paper identifies key institutional aspects of the CCMA which have contributed to its effective operation and which offer useful examples to dispute resolution institutions in other countries. The paper examines how the procedures for expeditiously conciliating and arbitrating individual disputes have allowed the CCMA to accommodate an extremely high caseload of individual cases. It also examines the adaptation of its collective dispute resolution strategies aimed at the re-emergence of a high level of adversarialism in the collective bargaining arena. In addition, the adoption of a holistic strategy to deal with job loss and job retention, which evolved after the 2008 recession, is examined.

1. The South African labour market

South African labour law operates within a context characterised by high levels of unemployment and inequality, and the fact that many of those who work received inferior schooling under apartheid's 'Bantu education' system. The difficulties that have been encountered in turning around the education and training system mean that the vast majority of new entrants in the labour market continue to lack the skills needed for employment. There continues to be an oversupply of low-skilled workers and a shortage of critical skills.

According to 2012 statistics,² South Africa has a workforce of roughly 13.1 million, of whom 9.1 million are employed in the formal sector while an estimated 4 million are employed in the informal sector. Although recent reports indicate an unemployment rate of 23.9 per cent among the 4.4 million jobseekers in the fourth quarter of 2011, it is important to bear in mind that this figure excludes the 2.2 million 'discouraged workers' who have ceased to actively pursue employment or have been unable to find employment for a year or longer. Unemployment statistics vary significantly among different race and age groups. It is estimated that the unemployment rate among job seekers aged 15 to 24 is about 51 per cent.³ Youth unemployment also varies greatly between different racial groups, with 57 per cent of black youth, 47 per cent of coloured (mixed descent) youth, 23 per cent of youth of Indian descent and 21 per cent of white youth being unemployed.

Despite substantial gains in political equality, income inequality in South Africa increased between 1993 and 2008.⁴ There has been an exponential increase in the incomes of the wealthy whilst the vast majority of the population either earn minimum wages or are informally employed or unemployed.⁵ The poorest sectors of society have benefited from the massive extension of social grants, which are received by some 13 million individuals.⁶ The earnings of those in the middle-income brackets (lower white-collar and blue collar workers) have decreased in real terms and the gap between this group and high earners has increased, largely because of the premium paid for scarce skills. As with unemployment, income varies greatly among different race groups. It is estimated that 32.5 per cent of all wage-earning workers can be regarded as receiving 'low pay'.⁷ This includes 41.9 per cent of black workers and 1.8 per cent of white workers.⁸

2. History of labour legislation in South Africa

The Union of South Africa was established in 1910 and its first labour relations statute of national application, the Industrial Conciliation Act of 1924, excluded most black workers (defined as "pass-bearing Africans") from its application. The Act provided for the registration of trade unions and employers' organizations and established a framework to regulate collective bargaining, dispute resolution and industrial action. Employers and

² Stats SA 2012 Quarterly Labour Force Survey.

³ South African Institute of Race Relations, 2011.

⁴ Leibbrandt et al, 2010.

⁵ One measure of this growing inequality is that in 2005 adjustments in executive directors' packages were 278 times greater than that for minimum wage earners. See Crotty and Bonorchis, 2006.

⁶ Expenditure on welfare and social assistance increased from R30.1 billion (3.2 per cent of GDP) in 2000/01 to R101.4 billion (4.4 per cent of GDP) in 2008/09. In April 2009, 13.4 million people were benefiting from social grants. Of these, 2.3 million were receiving old age pensions, 1.4 million were receiving disability grants and 9.1 million children were benefiting from Child Support Grants.

⁷ Defined by the ILO as hourly wages of less than two-thirds of the median across all jobs.

⁸ ILO Global Wage Report, *Africa Brief*, 2010/11.

trade unions were empowered to voluntarily establish industrial councils in their industries as permanent structures for 'industrial self-government'. The 1924 Industrial Conciliation Act entrenched racial separation as the dominant feature of South African labour relations. The exclusion of black workers from the mainstream of industrial relations was accompanied by racially based job reservation, which prevented African workers from obtaining key qualifications, particularly in the mining industry, which was the backbone of the South African economy.

The Nationalist Party government, which came to power in 1948, enforced its apartheid ideology in the labour arena. In 1953, the Native Labour (Settlement of Disputes Act) established plant-based works committees as a means of undercutting the trade unions that were organizing black workers. Registered trade unions were encouraged to form apolitical 'parallel' unions for black workers in their sectors and workplace liaison committees were promoted as an alternative to trade unions. The nominally 'independent' homelands established by the apartheid government from 1960 onwards were given the power to enact labour legislation. This exacerbated the fragmentation of labour law and separate labour administrations bureaucracies were established in the homelands. In certain instances, these homelands prohibited South African trade unions from operating within their areas.

Trade unions organizing African workers faced intense repression in the 1950s and early 1960s, an era that saw the banning of the organizations representing the political aspirations of black South Africans. However, a wave of strike action in 1973 foreshadowed the re-emergence of an independent trade union movement organizing predominantly black workers. These unions grew rapidly and in 1977 the Nationalist Government responded by appointing a Commission of Inquiry headed by Professor Nic Wiehahn to investigate labour law reform. The Commission concluded that black workers should be accorded rights of freedom of association and be entitled to participate in voluntary collective bargaining. It therefore recommended that the formal industrial relations system should be opened to all trade unions. At the same time, it proposed the creation of an industrial court with unfair labour practice jurisdiction. These changes were enacted into law in 1979 and 1980.

While the Wiehahn Commission had recommended the introduction of the unfair labour practice jurisdiction as a means of protecting the job security of white workers in the face of the abolition of racial job reservation, the industrial court used its unfair labour practice powers to fashion a modern labour law for all employees. It articulated an unfair dismissal jurisprudence that required employers to comply with standards of procedural and substantive fairness. This placed unprecedented curbs on the exercise of managerial prerogative and introduced security of employment on an unprecedented level. The court also evolved the beginnings of an unfair discrimination jurisdiction. The court held that its unfair labour practice powers covered both individual and collective disputes and established rules concerning trade union recognition and the conduct of collective bargaining.

In the early 1990s, under intense pressure from the independent trade union movement, labour legislation was enacted to extend the labour relations system to public servants, educators and agricultural workers. However, the statutory dispute resolution procedures that were introduced have been described as 'lengthy, complex and pitted with technicalities'.⁹ Instead of reducing the number of disputes, it caused a proliferation of disputes and intensified industrial action. The industrial courts were understaffed throughout its existence – leading to lengthy delays in the resolution of disputes. By 1994, it was estimated that some 3000 unfair labour practice cases were referred to the court annually and that these cases took an average of three years to complete.

⁹ Memorandum accompanying the Labour Relations Act 66 of 1995.

Statutory conciliation was provided by conciliation boards appointed by the Department of Labour and by industrial councils. The appointment of a conciliation board was a precondition to referring an unfair labour practice dispute to the Industrial Court. The discretion to establish conciliation boards rested with the Minister of Labour and this gave rise to extensive review litigation contesting the Minister's refusal to appoint conciliation boards, especially as refusals frequently appeared to be politically motivated. Parties all too often regarded conciliation boards as 'an unwelcome hurdle to litigation',¹⁰ rather than a viable means of resolving disputes, and negotiation was often perfunctory. It has been estimated that less than 30 per cent of disputes referred to industrial councils and only some 20 per cent of referrals to establish conciliation boards resulted in settlement.

The shortcomings of the statutory dispute resolution system led to the growth of independent dispute resolution. It became a widespread practice for employers and trade unions to agree, through a collective agreement, to refer contested dismissal cases and sometimes other categories of grievances to expedited arbitration. The evolution of 'just cause' dismissal protection predates the establishment of Industrial Court, being included in key plant-level collective agreements in the 1970s. The model of 'just cause' arbitration owes much to the American approach. In addition, widespread use was made of conciliators to assist parties to resolve collective bargaining disputes and to improve relationships in the workplace. The Independent Mediation Service of South Africa emerged as the major private dispute resolution agency, establishing and training panels of mediators and arbitrators. This development has been credited with establishing formal mediation in South Africa.

Post-apartheid labour law reform

After the adoption of an Interim Constitution and the introduction of a democratic political dispensation in 1994, the current Labour Relations Act (66 of 1995 – LRA) resulted from negotiations between organized labour, employers' organizations and the State. By 1994, the legislative framework for regulating labour relations was widely regarded as contradictory, chaotic and casuistic. Within two months of taking office (and before it had appointed a labour market commission), the new government appointed a ministerial drafting committee to develop draft legislation to regulate labour relations. The committee included lawyers linked to the powerful trade union movement, as well as a number representing the country's major employers. The committee, assisted by a team of international experts, prepared a draft bill that served as the text for tripartite negotiations between government, organized labour and the major trade union federations, conducted under the auspices of the newly established National Economic Development and Labour Council (NEDLAC).

The LRA comprehensively restructured the legal and institutional basis of collective labour law and unfair dismissal law. The Act also created, for the first time, a single legal framework for labour relations applicable to all sectors of the economy, including the public service.¹¹ By the second democratic elections in 1999, it had been joined on the statute book by the Basic Conditions of Employment Act (75 of 1997), the Employment Equity Act (55 of 1998) and the Skills Development Act (97 of 1998). In many ways the LRA sought to reconcile practices (concurrently developed in different sectors) with international labour standards prescribed by, for instance, the International Labour Organization, which South Africa rejoined in 1994. A new Constitution was adopted in 1996, which entrenches fundamental rights such as the right to strike, the right to fair labour practices and freedom of association.

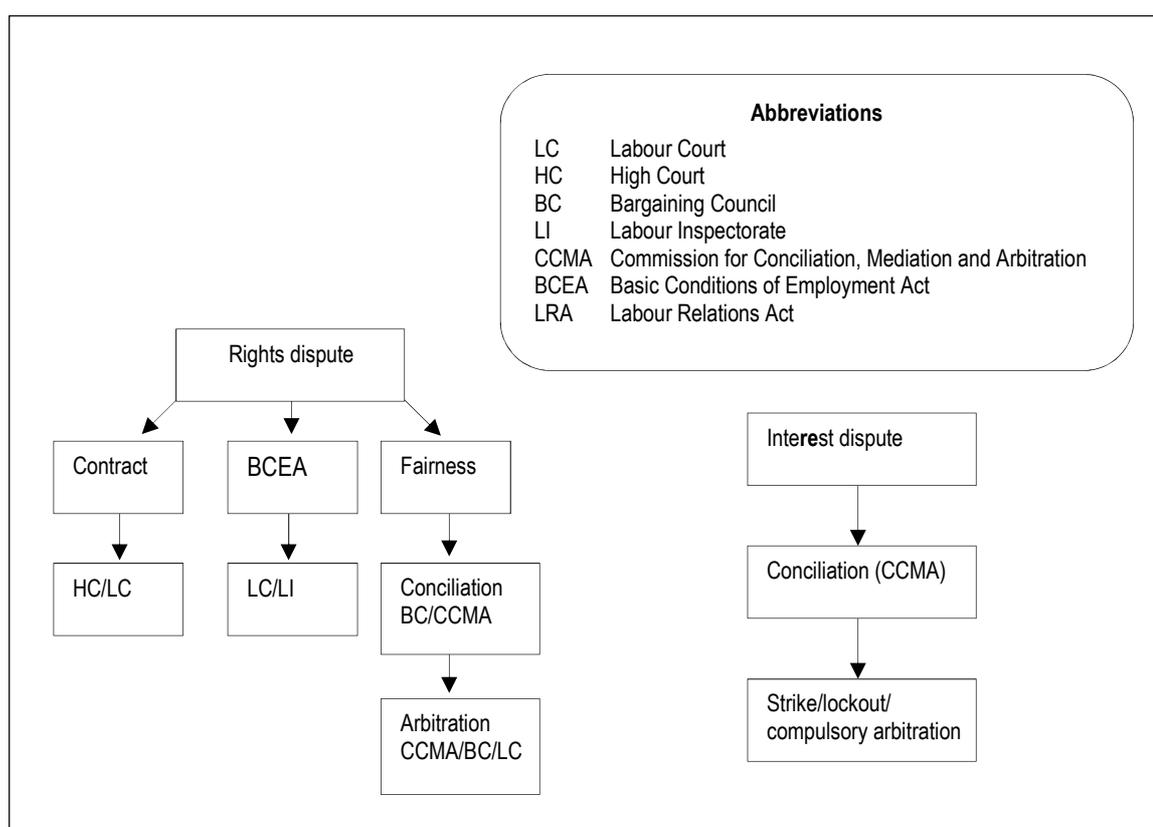
¹⁰ Ibid.

¹¹ The Act does exclude certain 'essential services'.

3. Dispute resolution: The CCMA and the labour courts

The Labour Relations Act created two new institutions for dispute resolution and adjudication: a parastatal Commission for Conciliation, Mediation and Arbitration (CCMA) and a specialist system of labour courts with an exclusive labour law jurisdiction. In addition, sectoral bargaining councils perform collective bargaining and dispute resolution functions in many economic sectors. The labour inspectorate, located in the Department of Labour, is responsible for the monitoring and enforcement of basic conditions of employment, including minimum wages established under sectoral determinations. Figure 1 shows the interrelated functions of these institutions.

Figure 1
Legislative framework for dispute resolution



Type of dispute	Misconduct, incapacity dismissals, severance pay unfair labour practice	Operational requirements, strikes, automatically unfair dismissal	Organizational rights, collective agreements	Discrimination, Employment Equity Act	Basic Conditions of Employment (including sectoral determination)
1. Conciliation	BC/CCMA	BC/CCMA	CCMA	CCMA	CCMA (only severance pay; underpayment claims if employee dismissed)
2. Adjudication	BC/CCMA	LC	CCMA	LC	LC; civil courts

The CCMA

The CCMA is independent and governed by a tripartite Governing Body. The CCMA's functions include dispute resolution, dispute management, and institution-building within the labour arena and the provision of education, training and information to employers and employees and their organizations. The CCMA may accredit bargaining councils (sectoral bargaining institutions jointly established by employers' organizations and trade unions) to conduct conciliations and arbitration within their sector. The CCMA is funded by the national government; there are no charges for referring disputes to it. Employees referring cases to the CCMA or the labour court may do so themselves or may be assisted by their trade union or in some cases by lawyers.

All disputes about unfair dismissals, trade union organizational rights, the interpretation of collective agreements and certain individual unfair labour practices, as well as interest disputes arising from collective bargaining, must be referred to conciliation. There is a statutory obligation on the CCMA to hold the initial conciliation hearing within 30 days. Unresolved rights disputes may be referred either to arbitration or to adjudication by the Labour Court. Arbitration may be conducted under the auspices of the CCMA, an accredited bargaining council or, by agreement, a private arbitrator appointed by collective or other agreement. CCMA arbitrations are conducted either by full-time Commissioners who are employees of the CCMA or by part-time commissioners.

Arbitration is the route for adjudicating disputes about dismissals for a reason related to the employee's conduct or capacity, as well as disputes concerning trade union organizational rights, the interpretation of collective agreements and certain individual unfair labour practices. Other dismissal cases (operational requirements, strike dismissals and cases in which discrimination is alleged) must be referred to the Labour Court. In 2002, the LRA was amended to allow employees to refer individual operational requirements dismissals to arbitration.

Arbitration was intended to provide 'cheap, accessible, quick and informal' dispute resolution. The CCMA's powers and procedures emphasise the expeditious resolution of disputes in a non-technical and non-legalistic manner. The arbitrator has the discretion to determine a dispute fairly and quickly while dealing with the substantial merits of the dispute. The right to legal representation in arbitration is restricted and the majority of employees who bring claims are represented by trade union officials or represent themselves. There is no appeal against arbitrators' decisions, although decisions are subject to judicial review by the Labour Court.

The Labour Court

The LRA created the Labour Court as a specialist court with national jurisdiction, with the same status as a division of the High Court of South Africa. As indicated above, the Court has exclusive jurisdiction over cases concerning dismissals for operational requirements, strike dismissals and other cases in which the dismissal is alleged to involve discrimination. The Court also hears unfair discrimination cases. While parties may apply for more complex cases falling within the CCMA's arbitration jurisdiction to be referred to the Labour Court, this is rarely done in practice. NEDLAC plays a significant role in the appointment of Labour Court judges, enabling the social partners to play an active role in determining the composition of the Court.

The review of arbitration awards issued by CCMA commissioners falls within the exclusive jurisdiction of the Labour Court, which is able to supervise the manner in which the CCMA fulfils its statutory dispute resolution mandate through the exercise of these review powers. Reviews have come to occupy a major portion of the Labour Court's workload. The Labour Court has the exclusive jurisdiction to interpret the Labour

Relations Act and other labour legislation. This includes an exclusive jurisdiction to interdict industrial action that does not comply with statutory requirements, as well as other unlawful conduct arising from a strike or lockout. This exclusive jurisdiction of the specialist labour court does not extend to all employment matters, and claims arising out of employment contracts may be brought to a number of different forums, including the civil courts.

The Labour Appeal Court (LAC) was established as the court of final instance in matters concerning the interpretation of the LRA and other matters within the exclusive jurisdiction of the Labour Court. It was anticipated that this would promote consistent interpretation and application of labour legislation. When the LRA was enacted in 1995, it was envisaged that the only appeals from the Labour Appeal Court would be to the Constitutional Court on constitutional issues. However, the 1996 Constitution has been interpreted to permit an intermediate level of appeal of all matters within the jurisdiction of the labour courts to the Supreme Court of Appeal (SCA). While the SCA has articulated the view that the primary responsibility for developing labour law jurisprudence lies with the LAC and that it will only be appropriate for it to intervene if “there are special considerations relating to issues of constitutional or legislative construction or important issues of principle”, the SCA has frequently overturned LAC decisions.¹² An increasing number of contentious issues involving the interpretation of labour legislation have been resolved by the Constitutional Court.

In 2003, as part of a wide-ranging plan to restructure the courts, the Government published proposals to abolish the specialist labour courts and transfer their jurisdiction to the High Court and the Supreme Court of Appeal. These proposals proved to be highly controversial and were subsequently withdrawn. Due to several years of uncertainty concerning the future of the Labour Court, a significant number of its judges were appointed on a part-time or short-term basis. In the last few years, however, many highly regarded labour law specialists have taken permanent appointments to the Labour Court bench.

Bargaining councils

The introduction of the LRA and the subsequent establishment of institutions such as the CCMA were based on the idea that ‘the promotion of social dialogue [is] the most appropriate way of managing not only the transition to democracy but also the changes which were unfolding in the workplace’.¹³ This emphasis on self-regulation is reflected in both the composition and processes of various bargaining structures. Aside from bargaining councils, collective bargaining also takes place at statutory councils (a new structure with limited impact), centralised non-statutory structures and plant/enterprise level structures accounting for nuanced formal and informal arrangements. As the ‘custodian of social dialogue’¹⁴ the CCMA is largely responsible for offering assistance and facilitation.

Bargaining councils are joint employer and union bargaining institutions whose functions and powers are set out in the LRA. As noted earlier, bargaining councils (previously known as industrial councils) have been a central institution of South African labour law since 1924. Traditionally, the core function of bargaining councils has been to negotiate collective agreements that regulate terms and conditions of employment in the sectors in which they operate. Typically these agreements deal with issues such as minimum wages, hours of work, overtime, leave pay, notice periods and retrenchment pay. Many bargaining council agreements also establish “social wage” funds, such as pension

¹² *National Union of Mineworkers v Mazista Tiles (Pty) Ltd* (2006) 27 ILJ 471 (SCA); [2003] 7 BLLR 631 (SCA) at para 12.

¹³ Grawitzky, 2011.

¹⁴ *Ibid.*

or provident funds, and medical aid schemes that are administered by the councils. Bargaining councils are authorized to appoint designated agents who have powers similar to those of labour inspectors to enforce compliance with collective agreements. These collective agreements are negotiated by the trade unions and employers' organizations that are parties to the bargaining council. Bargaining councils may apply to the Minister of Labour to have their collective agreements extended to apply to employers and employees in their sector who are not members of the trade unions and employers' organizations that constitute the bargaining council. The Minister has an extremely limited discretion concerning extensions if the trade union and employer parties to the bargaining council are representative.

There are currently 47 bargaining councils covering an estimated 2.5 million workers in both the private and public sector.¹⁵ The public sector bargaining councils established after 1995, cover some 1.3 million workers in the three tiers of government (national, provincial and local). The LRA envisaged a significantly expanded role for bargaining councils by extending their functions to include the responsibility for dispute resolution.

Disputes between parties to a bargaining council must be resolved in accordance with the constitution of the council. A council is not required to obtain accreditation to resolve these disputes but once accredited, it may apply for and obtain a subsidy for performing these dispute resolution functions.¹⁶ However, a bargaining council may only deal with disputes involving either an employer or an employee that has elected not to be a member of a party to the bargaining council if it has been accredited for this purpose by the CCMA.¹⁷ Once accredited, the council may obtain subsidies from the CCMA for performing these functions. Councils must either apply for accreditation to perform these functions or refer these disputes to an accredited private dispute resolution agency.¹⁸ However, no private agencies have been granted accreditation.

Labour inspectorate

The Basic Conditions of Employment Act (BCEA) provides for the Minister of Labour to appoint labour inspectors to promote, monitor and enforce compliance with the BCEA as well as other employment laws.¹⁹ Labour inspectors are appointed by the Minister of Labour. Labour inspectors have extensive powers to enter workplaces, question persons and inspect documents in order to monitor and enforce compliance with labour laws. Their powers are consistent with ILO Convention No. 81 of 1947 (Convention concerning Labour Inspection in Industry or Commerce). The operation of the inspectorate was the subject of several recent reports. A technical investigation by the International Labour Organization (ILO) noted that the head office was significantly understaffed, which constrained the Department's ability in respect of policy-making, collecting and analysing data, and in giving direction for labour inspections in occupational safety and health.²⁰

Post-apartheid labour legislation places a considerable burden on the inspectorate since the responsibility for enforcement rests directly with the Department of Labour. There has also been a massive increase in the number of workers covered by minimum standards, in particular minimum wages under sectoral determinations. The rise of non-standard work has also meant that a declining proportion of private sector employees fall under the scope of collective bargaining agreements. There is consensus that the capacity

¹⁵ LEP and NALEDI, 2010. Support for bargaining councils and centralised bargaining. About 50 per cent of bargaining council coverage is in the public sector.

¹⁶ Section 132(1) of the LRA.

¹⁷ Section 51(3) of the LRA.

¹⁸ Section 52(1) of the LRA.

¹⁹ Section 64(1) of the LRA.

²⁰ See ILO *Technical Memorandum*, unpublished, 2010.

of the labour inspectorate to enforce and promote compliance requires significant strengthening and the need for a significant overhaul and upgrading of enforcement institutions and procedures has been placed on the agenda by South Africa's Decent Work Programme. While the social partners have played an active role in governing the CCMA, they have not equally engaged with the inspectorate. Both organized business and labour significantly favour the establishment of an "oversight" structure within NEDLAC to monitor and evaluate the activities of the inspectorate and interact with the inspectorate regarding the enhancement of capacity and resources.²¹

4. Overview of the CCMA

This section contains descriptions of some key operational and institutional features of the CCMA. These are its electronic case management system, the tripartite Governing Body and the full-time and part-time Commissioners who conduct conciliations and arbitrations.

Case management system

Since its inception, the CCMA has operated an electronic case management system (CMS) to track disputes referred to it. A mandatory referral form is the primary source of data; it includes details about the dispute and the result required by the party referring the dispute. As cases progress through the dispute resolution process, a further range of data is captured in the CMS. The CMS allows for the scheduling and tracking of the progress of disputes. A significant recent innovation is that the CMS can be accessed from terminals at 25 labour centres operated by the Department of Labour. This enables officials at these labour centres to advise employees on the progress of their disputes through the CCMA.

The data captured in the CMS covers both the administration of cases as well as their contents. The data derived from the CMS is circulated within the CCMA in a monthly cumulative report, which is consolidated into an annual review of operations at the end of each financial year.²² The circulation of CMS data on a monthly basis enables the performance of each office to be monitored against performance targets. Administrative data recorded in the CMS includes the manner in which the case was referred, the case creation, activation and expiry dates, the number of days within which the case must be heard (as determined by the LRA), the commissioner assigned to the case and information on scheduling and other logistical arrangements (such as the date, time and venue where a case will be heard). The data also includes the names and details of all relevant parties, the nature of the dispute, the sector within which the dispute arose and the outcome of processes.

In the process of tracking cases, a rich collection of case-related, administrative and outcome data is recorded on the CMS. A number of academic research papers on the operation of the CCMA have been written using CMS data. The initial decision as to which data should be recorded in the CMS was driven by the CCMA's operational requirements. A number of commentators proposed that the CMS should be revised to record a wider range of information that, although not required for the administrative functioning of the CCMA, would make it a more valuable source of labour market data. After consultation with various stakeholders, the CCMA embarked on a project to, firstly, analyse the data currently collected and captured in the CMS and identify areas for improvement and, secondly, to identify additional data which could be collected and added

²¹ Benjamin, 2011.

²² The Annual Review of Operations is not published or placed on the CCMA's web-site but is available on request from the organization.

to the CMS that could possibly improve the functioning of the CCMA, as well as enhance research in the area of dispute resolution in the country.²³

As of 1 January 2012, the following additional information is recorded in the CMS:

- a) the manner in which the dispute was referred (e.g. fax, walk in, registered mail etc.);
- b) details about the employee making an individual referral (gender, identity number, length of service, monthly earnings, age, race and whether the employee is employed through a labour broker/temporary employment service);²⁴
- c) if the employer is an individual, the gender;
- d) if the employer is an organization, its size by number of employees;
- e) whether the parties are represented and, if so, the type of representation (lawyer, trade union official, etc.);
- f) the outcome of cases that are settled, including the amount of compensation;
- g) the outcome of cases in which an arbitration award is made, including the amount of compensation.

It is anticipated that the additional information recorded in the CMS will enhance evidence-based policy-making on the operation of the CCMA and labour law generally. For instance, the operation of labour brokers (temporary employment services) is a highly contentious subject on which the Government is proposing stricter regulation. However, as previously the CMS did not include information on whether the employer in a dispute was a labour broker or not, there is no reliable data on the number of disputes before the CCMA that involve labour brokers. Another high profile issue is the proposal that a qualifying period (most commonly suggested to be six months) be enacted into legislation during which employees would not have “ordinary” unfair dismissal or unfair labour practice protection (although they would continue to be protected against unfair discrimination by an employer). It is argued that this would promote the hiring of new employees and reduce the CCMA’s caseload. Again, because the CMS did not heretofore record the employee’s length of service, there is no data for evaluating the likely impact of such a proposal.

Governing Body²⁵

The CCMA Governing Body is appointed by the Minister of Labour and exercises significant executive and oversight function over the management and operations of the CCMA. The Governing Body has extensive executive responsibilities and is not merely an advisory structure, as is the case with many other tripartite boards. The Governing Body consists of an independent chairperson, three representatives each from the Government, organized business and organized labour, as well as the CCMA Director. The members of the Governing Body (including the independent chairperson) are nominated by NEDLAC.

The primary functions of the Governing Body include appointing the Director, appointing and terminating the appointment of commissioners, and accrediting and subsidising bargaining councils and private dispute resolution agencies. The Governing Body has established several subcommittees (Human Resources, Audit, Finance and Risk,

²³ For a complete account of recommendations see Goga and van der Westhuizen, 2010. The current discussion summarises only a few of the most relevant suggestions.

²⁴ For reasons of practicality, this will not be recorded for mass dismissals (most commonly strike and retrenchment cases).

²⁵ This Section is based on interviews with, and written comments by, the following Governing Body members: T. Cohen, I. Macun, B. Ntshalintshali, E. Monage and L. Burger.

Accreditation and Subsidy, and Governance) to assist with its work and to facilitate good governance. The Governing Body conducts itself in accordance with a charter that is reviewed annually.

The Governing Body has remained an effective institution for social dialogue. A number of factors contribute to this. Senior representatives appointed by the social partners serve as members of the Governing Body. In many instances, the members show willingness to divorce themselves from the interests of their constituencies and act in the CCMA's organizational interest.

Labour and business representatives in the Governing Body play a significant role in representing the CCMA in hearings before the Parliamentary Portfolio Committee and in dealings with the Department of Labour and the Auditor-General (who has oversight of the CCMA's financial management). In these forums, the role of the constituency representatives has been to promote the purpose of the CCMA and jointly argue for its continued relevance and funding. This occurred during the financial crisis, when the increased caseload created a significant funding challenge for the CCMA, and again when a senior public official criticized the operation of the CCMA. In these instances, constituency members on the Governing Body played an active role in galvanising support for the CCMA from their constituencies and responding publicly to the criticism.

The Governing Body operates by consensus. While this has prevented decisions that may have been strongly opposed by any of the constituencies, it has had a limiting effect on certain policy decisions. For instance, the CCMA has not to date accredited any private dispute resolution agencies, although this is a significant aspect of the approach to dispute resolution articulated in the LRA. This occurred due to opposition from representatives of organized labour who feared that this might result in a decrease of funding for the CCMA. This issue is currently being addressed.

The Governing Body members and nominated regional social partners interview and recommend candidates for appointment as commissioners. The human resources subcommittee interviews candidates and deals with decisions to suspend or terminate the employment of commissioners, with the full Governing Body having final decision-making power on these issues. The subcommittee also works by consensus, and commissioners are not appointed if any one constituency opposes their appointment. The representatives of business and labour strongly favour the involvement of the constituency representatives in appointments and view it as part of the Governing Body's express statutory mandate. They share the view that participation in the appointment and the making of appointments by consensus enhances the legitimacy of the CCMA.

An unresolved concern is the lack of clarity over whether the CCMA should be allowed to play a meaningful role in policy formulation on matters of labour market regulation, particularly where these directly affect its operation. The CCMA has not participated directly in negotiations over the reform of labour legislation at NEDLAC, even though these have a direct and significant impact on its operation. This means that the CCMA has not been able to debate proposed draft legislation regarding its operation; its involvement has been confined to making written submissions. A related concern is that proposals that might enhance the efficacy of the CCMA may be opposed by both organized business and labour constituencies in NEDLAC, leading to their removal from draft legislation.

Commissioners

Arbitrations and conciliations are conducted by Commissioners. There are full-time Commissioners who are employees of the Commission, and part-time Commissioners employed on three-year renewable fixed term contracts who are classified as independent contractors. There is a code of practice applicable to both full-time and part-time Commissioners. Initially, full-time Commissioners were employed on an indefinite basis

but more recently have been employed on renewable six-year contracts without any guarantee of reemployment. Although part-time Commissioners are not classified as employees, the CCMA has established procedures to ensure that decisions about their appointment and renewal of contracts are made in a fair manner.

The responsibility for appointing Commissioners rests with the Governing Body.²⁶ Interviews are conducted by panels on which the social partners are represented. The panels then make recommendations to the Governing Body for its consideration. Decision-making is by consensus and disagreements between the representatives of the social partners are referred to the Human Resources Sub-Committee of the Governing Body. The general approach is that the absence of consensus over a candidate is considered a recommendation to decline to appoint unless the Governing Body decides otherwise. The active participation of the social partners in the appointment of Commissioners is an important guarantor of the legitimacy of the CCMA as a dispute resolution institution and contributes significantly to its legitimacy and credibility.

The utilization of part-time Commissioners is a distinctive feature of the operation of the CCMA. The current operational plan is drawn up on the assumption that 60 per cent of the caseload will be handled by part-time Commissioners. The use of part-time Commissioners enables the CCMA to draw on the services of experienced conciliators and mediators who may be reluctant to work full-time in the CCMA; it also enables young practitioners the opportunity to gain experience and exposure.

All Commissioners undergo rigorous training. The introduction of mentoring for entry-level Commissioners has been an important initiative. The primary objective of the Training Development Unit (TDU), which has been in existence for two years and forms part of the CCMA Capacity Building and Outreach Cluster, is to 'provide design and developmental support for the CCMA's capacity building and qualifications development activities'.²⁷ The TDU does this by designing and updating training material both for internal and external use, as well as assisting in the development and assessment of training methods. The impact of the training goes beyond the immediate function of ensuring skilled mediators and arbitrators, serving also to enhance the body of dispute resolution skills available in the labour market as a whole.

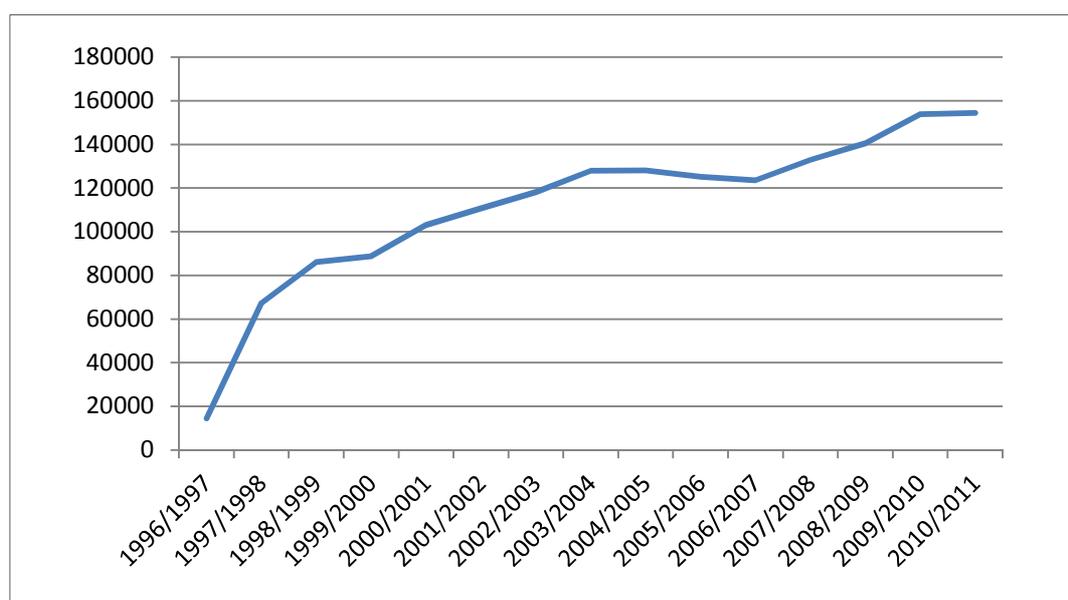
5. Resolution of individual disputes

One of the key innovations introduced by the 1995 LRA was the requirement that the parties to all disputes within the jurisdiction of the CCMA engage in conciliation. An initial projection that the CCMA's annual caseload would be approximately 40,000 has proved to be a massive underestimate. Disputes referrals (59 222) in its first full year of operation (1996-7) were 50 per cent higher than initial estimates. Subsequently, there has been an increase in disputes referred each year, except for the period between 2003-4 and 2006-7 when the disputes referred were at a steady level. Figure 2 shows the CCMA's caseload since its establishment. In addition, the CCMA receives a large number of disputes that are outside of its jurisdiction, and this requires it to devote resources to ensuring that the applicants are referred to the appropriate institution.

²⁶ Section 117 of the LRA.

²⁷ TDU Annual Report ,2012.

Figure 2
Total national CCMA referrals, 1996–2011



As Table 1 shows, the vast majority of disputes referred to the CCMA are individual cases. Throughout its existence, roughly 80 per cent of referrals each year have been dismissal cases. The large caseload and the statutory obligations to provide expeditious individual dispute resolution have led to the adoption of a range of innovative techniques and strategies to process the CCMA’s caseload expeditiously within the constraints of the available resources.

Table 1
Principal categories of disputes referred

Referrals	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12
Total referrals	118126	127886	128162	125145	123578	132992	140504	153825	154415	161674
Jurisdictional cases	76547	83049	83880	85546	85213	91393	106893	119038	120035	126090
Referrals by issue category										
Capacity building/dispute management								147	744	1414
Collective bargaining	3028	2814	3153	3381	3335	3214	3461	3408	3371	3807
Mutual interest	3273	3371	3812	4053	3615	3981	4091	4794	5222	5341
Non jurisdiction	17688	18378	20113	19058	18657	12839	4668	4715	7291	5701
Unfair dismissals	82411	89896	87745	85078	85033	99207	110988	121317	117711	123458
Unfair labour practices	7821	7564	7970	7093	7311	8409	9620	10785	11182	12394
Processes heard										
In limines heard	11176	13414	15027	15298	13305	12199	13117	15318	13659	13933
Condonations heard	243	366	712	1578	7242	7745	10137	11879	10890	12299
Pre-conciliations heard	9144	6500	5178	12966	13476	12257	14083	16287	16989	20585

Referrals	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12
Con/arbs heard	3342	28990	37804	34469	32059	40647	45954	47353	50142	51697
Conciliations heard	58895	42347	34941	34894	35821	37712	41593	52420	48134	51925
189A Facilitations heard	38	179	182	197	102	180	379	808	699	728
Average turnaround times										
Turnaround time – conciliation	50.12	56.04	60.91	54.19	31.3	27.99	27.36	28.56	26.67	23.7
Settlement rate										
Cases heard and closed	56684	58618	58511	67116	59921	64494	74514	107968	107928	113076
Cases settled	28659	31473	33152	36817	42882	48944	57039	65169	70749	79260
Settlement rate	51%	54%	57%	55%	72%	76%	77%	60%	66%	70%

6. Conciliation

Referral

An employee is able to refer a dispute for conciliation by submitting a referral form to the CCMA and delivering a copy of the form to the employer. The employee or trade union referring a claim must identify the nature of the dispute but is not required to submit a detailed statement. Each of the CCMA’s regional offices has a referral office whose staff members are able to guide employees in completing a referral form. Approximately 60 per cent of individual disputes are referred as “walk in” disputes. Once the form is completed, the employee is required to serve it on the employer and provide proof of service to the CCMA.

An important innovation which commenced in 2012 is that employees are able to lodge disputes with bargaining councils at CCMA offices. The completed referral form is then electronically transmitted to the bargaining council with jurisdiction. In addition, employees will be able to make CCMA (and bargaining council) referrals at 25 labour advice centres operated by the Department of Labour. These innovations will greatly enhance access to dispute resolution.

The majority of cases are referred by low-paid workers. According to data for the period between 2003 and 2005, 31 per cent of dismissal or unfair labour practices cases were referred by low-paid employees earning less than R1,000, whilst 90 per cent of employees who referred cases to the CCMA earned less than R5,000 per month.²⁸ Similarly, 52 per cent of referrals were by employees classified as low-skilled, 35 per cent by semi-skilled workers and only 11 per cent by skilled workers.²⁹

“Out of jurisdiction” referrals

The number of “out of jurisdiction” referrals received by the CCMA since its establishment has consistently been around 20-25 per cent of total referrals. In 2011-12, 35,084 cases were screened as being outside the CCMA’s jurisdiction, amounting to 22 per cent of total referrals in that period. Members of the CCMA’s front office staff direct individuals with claims or grievances that are within the jurisdiction of other institutions to

²⁸ Benjamin, 2009.

²⁹ Ibid.

the appropriate forum. The most common categories of cases that need to be referred elsewhere are cases falling within the jurisdiction of bargaining councils, grievances arising under the Basic Conditions of Employment Act, and sectoral determinations that fall within the jurisdiction of the labour inspectorate housed in the Department of Labour.

Not all jurisdictional issues can be resolved through a screening process. There are cases in which the employer may subsequently raise a jurisdictional issue by claiming, for example, that the applicant is an independent contractor rather than an employee, or that the applicant resigned and was not dismissed. These issues are dealt with at the commencement of the arbitration process.

Period for referrals

Employees who refer claims more than 30 days after a dismissal (or 90 days after an unfair labour practice dispute) can request the CCMA to condone their late referral if there is good cause for the delay.³⁰ Condonation is applied for in less than 10 per cent of cases and approximately 75 per cent of condonation applications are successful. This means that between 2 per cent and 3 per cent of cases referred to the CCMA are rejected because they are brought after the prescribed referral periods.

The low incidence of condonation claims is an indication that the CCMA's procedures are now extremely well known among the South African workforce. The short referral period promotes the swift resolution of disputes and provides considerable certainty to employers who know that they will not face claims instituted several years after a dismissal. In comparison, civil claims based on contract, including contracts of employment, can be brought to court within three years of the claim arising.

The CCMA's facilities for "walk in" referrals and the simplicity of referrals forms facilitate the swift referrals of disputes. Dismissed employees, who are by far the major category of referring parties, need not consult with a trade union official or a lawyer before making a referral. The proportion of cases that are referred by trade unions on behalf of employees has declined significantly over the life of the CCMA.

The mandatory conciliation of all disputes imposes an enormous workload on the CCMA. The statutory obligation on the CCMA to conduct conciliations within 30 days of the referral adds urgency to the process. In the 2010-11 financial year, 1 per cent of conciliations were heard after the statutory 30 day period,³¹ and in 2011-12 this was figure was further reduced to a mere 0.002 per cent. This means that of a total of 124,192 disputes referred to the CCMA, conciliation commenced after the 30-day period in only 277 cases.

In order to cope with its large caseload, the CCMA initially allocated two hours for the conciliation of an individual dismissal dispute. This has subsequently been reduced, first to 90 minutes and then to 60 minutes. As a result of the huge caseload of referrals to conciliation, the CCMA has developed protocols to identify cases that may have a significant impact on the labour market. Accordingly, there are procedures to enrol cases that involvelarge-scale retrenchment, whether that dispute is referred as a section 189A facilitation, as an unfair dismissal case or a dispute about severance benefits. A similar protocol exists for conciliation hearings in discrimination cases. Collective bargaining disputes that involve key employers or may impact on more than one province are also prioritized. These cases are allocated to Commissioners with appropriate training and expertise and their progress is closely monitored so that interventions to prevent the dispute from escalating can be made if necessary.

³⁰ Tokiso, 2011.

³¹ CCMA Operational Review 2011. Figures contained in the review represent data captured between 1 April 2010 and 31 March 2011.

Pre-conciliation

A key mechanism developed to deal with its large conciliation caseload is the use of telephonic ‘pre-conciliation’ as a technique for resolving disputes. While the statute makes no reference to such a procedure, the CCMA’s rules authorize the Commission to seek to resolve disputes before the commencement of statutory conciliation.³² The Governing Body has issued a Practice Note to identify cases that are appropriate for “pre-conciliation”. The guideline suggests that pre-conciliation is suitable in unfair dismissal and unfair labour practice cases and severance pay claims involving a single employee, in which there is no representation by employers’ organizations, trade unions or lawyers and in which the legal issues are clearly defined.³³

Pre-conciliation has been extensively used in cases involving the dismissal of domestic workers as well as in sectors such as the private security industry. A settlement is concluded in roughly 50 per cent of cases in which pre-conciliation is utilized. In 2011-12 a total of 20,578 pre-conciliations were initiated, of which 10,699 were settled, thus reducing the conciliation caseload by roughly 8 per cent. The experience of the CCMA is that the prospects of a pre-conciliation process succeeding is greatest if the employee refers the dispute on the day of dismissal or very shortly afterwards. The high rate of settlement can also be attributed to the fact that these disputes are not complex and are most commonly settled on a financial basis.³⁴

Measuring the settlement rate

The rate of settlement for disputes in which ‘con-arb’ (where conciliation and arbitration are conducted in a single sitting) is utilized is significantly higher than for those in which a party has objected to its use. The settlement rate for cases enrolled for con-arb is 85 per cent, while cases in which there has been an objection has a settlement rate of 40 per cent. A number of factors contribute to this marked difference in settlement rates. Many employers do not attend conciliations and there is not the same level of commitment to settle if the conciliation is held separately from the arbitration. The vast majority of cases are resolved through a financial settlement, with employees only being re-employed or reinstated in work in 13 per cent of cases. However, the proportion of settlement agreements providing for re-employment or reinstatement has improved as a result of this remedy being highlighted as part of the CCMA’s job retention strategies.

Measuring the efficacy of conciliation processes has been a matter of some controversy and debate. The CCMA sets itself a target of settling 70 per cent of disputes referred to it. In 2011-12, this target was achieved, whilst the previous year saw 69 per cent of disputes settled. In some years the settlement rate was as low as 47 per cent (2001-2) and 51 per cent (2002-3). Disputes that are settled by the parties themselves, settled during arbitration proceedings or are withdrawn are all classified as ‘settled’. For this reason, some commentators have pointed out that the settlement rate is potentially misleading and may overstate the efficacy of conciliation processes. Such critics have argued that if statistics are to be used as an indicator of effectiveness, ‘a fair measure would take into account the nature of the settlements achieved, rather than the number of settlements’.³⁵ However, the CCMA’s view is that its approach is in line with the ‘best practice’ approach of dispute resolution agencies internationally.

The settlement rate is also used as a performance indicator for individual commissioners and is one of a range of factors that can be taken into account by the

³² Rule 12 of CCMA Rules.

³³ Practice Note 1/2012: Pre-Conciliations.

³⁴ Interview: A Soobedar.

³⁵ Tokiso , 2012.

Commission in deciding whether or not to renew the contracts of both full-time and part-time commissioners. It has been argued that this may result in applicants being unduly encouraged to settle when a referral to arbitration may be more appropriate,³⁶ and that it may lead to the ‘hasty settling of disputes and possibly also superficial settlements which fail to address the underlying causes of conflict or the real needs of the parties’,³⁷ resulting in Commissioners having too great an interest in the outcome of the conciliation process because their future prospects as a Commissioner may depend on the settlement rate that they achieve.³⁸ Thus, unassisted and inexperienced parties could be unduly pressured to settle. The danger of this occurring is exacerbated by the huge caseload and the short time period that is allocated for the conciliation of unfair dismissal cases.³⁹

The assessment of conciliation and settlement agreements

To address these concerns, the CCMA has adopted mechanisms to measure the quality of conciliation and the quality of settlement agreements. The Conciliation Quality Assessment process seeks to have one conciliation session assessed daily in each region. The goal is for all commissioners to be assessed annually, with commissioners who have low settlement rates or who have been the subjects of complaints being prioritized. The assessment involves observation of a conciliation hearing and the completion of a questionnaire. The conciliation is evaluated in the light of ten key components of the conciliation process.⁴⁰ Commissioners are de-briefed on the assessment of the performance and those who receive low scores may be required to undergo twinning with a more experienced conciliator, attend coaching or further training, or repeat their initial training.

A particular concern has been that employees may feel pressured during conciliation to accept a financial settlement rather than seeking reinstatement or re-employment through arbitration. For this purpose, the CCMA has developed a ‘return to work’ index to measure the extent to which settlements in unfair dismissal cases result in the employee either being reinstated or re-employed. This index indicates that in 13 per cent of settled disputes, the employee is either reinstated or returned to employment. This is consistent

³⁶ Bosch and Steenkamp 2012.

³⁷ Bhorat, Pauw and Mncube 2009.

³⁸ Bosch and Steenkamp 2012.

³⁹ A report commissioned by the ILO in 1999 articulated the dangers of short periods of time being allocated: ‘The merits of the dispute can seldom be effectively canvassed in the [then] two hours set aside for conciliation. This leads to an approach being adopted by commissioners which amounts to an attempt to persuade the employer party to pay an agreed sum to avoid the uncertainty and inconvenience of arbitration proceedings, whilst employees trade off their right to have the case judged, with the uncertainty of outcome that entails, for the certainty of an agreed sum of money. The merits of the dispute receive scant attention in this approach. If this trade-off cannot be achieved the matter is signed off as unsettled and invariably will proceed to arbitration, usually adding no more detail to the information about the dispute in the file than which was provided in the referral form’.

⁴⁰ The components measured by the Conciliation index are whether the Commissioner –

- (i) introduced himself and established the capacity of parties;
- (ii) explained the Conciliation process (that is off the record and without prejudice and that parties will be given the opportunity to state their cases in plenary and if needs be in separate caucuses);
- (iii) provided parties with the opportunity to explain their side of the story;
- (iv) suggested topics that parties should cover and minimised interruptions;
- (v) listened attentively, actively paraphrased to test understanding and asked questions for clarity;
- (vi) conducted reality testing with parties to ascertain the strengths and weaknesses of both parties case;
- (vii) ascertained each party’s bottom line, assisted to generate alternatives and made recommendations;
- (viii) made parties aware of the consequences of not settling and the risks of proceeding to the next stage;
- (ix) If the dispute remained unresolved, explained the applicable next step to both parties;
- (x) If the dispute is resolved, read out and explained the terms of the agreement to both parties, and emphasised their respective obligations and the consequence of non-compliance.

with the proportion of employees who succeed in arbitration and receive an award of re-employment or reinstatement in their favour.

All settlement agreements are scrutinised daily by the Senior Mediation Commissioner in each regional office. Agreements are assessed to ascertain whether they are legible, clear, unambiguous, legal, enforceable and sustainable, and whether they settle the dispute. This scrutiny is not directed at interrogating the rationale for settlements, but rather to ensure that the agreements provide an effective mechanism for resolving disputes. In the CCMA's view, the introduction of this process has led to a substantial improvement in the quality of settlement agreements.

Non-attendance at conciliation meetings

Non-attendance of parties at conciliation proceedings is a major concern for the CCMA. Although it is a process often described as mandatory, a commissioner may not dismiss a case due to non-attendance at the conciliation stage.⁴¹ Many employers therefore deliberately refrain from attending conciliation. In 2010/2011, the total non-attendance amounted to 15 per cent of conciliations, of which the absence of the employer accounted for 75 per cent.⁴²

The consequences of non-attendance by the parties differ. The CCMA Rules provide for the referral to be postponed or dismissed if the applicant employee is not present at a conciliation or con-arb hearing. However, the LAC has ruled that the CCMA's governing body was not authorized to make this rule as it limits an employee's statutory right to refer a dispute to arbitration. In consequence, an employee's failure to attend conciliation proceedings does not prevent the employee referring the dispute to arbitration. If the initial event is a con-arb, an employer who is present in the absence of the employee is entitled to request that the commissioner start the arbitration phase immediately and dismiss the application. If that happens, the employee will be required to apply for the decision to dismiss the claim to be rescinded in order to have the dispute processed. The level of non-attendance by employee parties has reduced significantly since the CCMA has made use of SMS text messaging to notify parties of the dates of conciliation and arbitration hearings.⁴³

If the employer does not attend the conciliation, the employee will be entitled to refer the dispute to arbitration. If an employer fails to attend a con-arb or arbitration hearing, the arbitrator is entitled to determine the matter on a default basis in the absence of the employer. The arbitrator is required by CCMA practice to ascertain whether the employer received proper notification of the hearing. An arbitrator must also be satisfied that the employee has a good case before granting this relief. The arbitrator is therefore required to test the employee's case to ensure that the employee is entitled to an award in his or her favour. In the vast majority of arbitrations conducted in the absence of an employer, an award is made in favour of the employee.

Table 2
Non-attendance at conciliation

Non- attendance at conciliation	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12
Total conciliations heard	70105	77834	77923	82329	81356	90616	101631	116062	115267	124208
Non-attendance at conciliation – all	4147	5360	5578	4660	3324	3104	3047	3182	3586	3465

⁴¹ Ibid. See *Premier of Gauteng & Another v Ramabulana NO & Others* 2008 29 ILJ 1099 (LAC).

⁴² CCMA Annual Review, 2011.

⁴³ According to the CCMA the use of SMS notifications has improved attendance by 35 per cent.

Non- attendance at conciliation	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12
Non-attendance at conciliation – applicant (employee)	3288	5024	6296	5473	4950	5345	3696	4090	4231	4940
Non-attendance at conciliation – respondent (employer)	6040	6287	3494	1807	5140	7151	9317	8650	9296	10914
Total non-attendance at conciliation	13475	16671	15368	11940	13414	15600	16060	15922	17113	19319
% non-attendance	19	21	20	15	16	17	16	14	15	16

The CCMA has taken extensive steps to ensure effective service of case documents. One step that has been taken is to reach agreements with large employers as to the electronic address to which documents will be sent. However, many employers only examine CCMA documentation when they receive a copy of the award directing them to reinstate or compensate a dismissed employee.

As the figure above indicates, employee non-attendance at conciliation hearings has declined as a proportion of the overall caseload. This is attributable to the use of new technologies such as SMS text messaging to contact parties. The increased incidence of employer non-attendance at conciliations (as opposed to con-arb) would appear to be indicative of a trend among employers who object to con-arb hearings not to attend conciliation hearings, because no adverse consequences flow from their absence.

7. Arbitration

The arbitration process

An employee may refer a dispute of rights that is not resolved at conciliation to arbitration or to adjudication at the Labour Court. As previously noted, 41 per cent of cases in which arbitration is required are dealt with in “con-arb” process in which the arbitration commences as soon as the conciliation has failed. If either party objects to a merged “con-arb” process, the employee has 90 days after the issue of the certificate of non-resolution to refer the dispute to arbitration. There is no requirement for a detailed case statement to be filed. While this avoids technical disputes over the manner in which a case is pleaded, it does have the consequence that an arbitrator only becomes aware of the nature of the case at the commencement of the arbitration hearing.

The CCMA’s arbitration caseload

Over the past decade, the number of disputes enrolled for arbitration has remained relatively constant, ranging between 38,319 (2007-8) and 49,799 (2010-2011). As the number of disputes referred to the CCMA has increased dramatically during this period, the proportion of jurisdictional referrals resulting in arbitration has declined significantly. This is attributed to the enhanced efficacy of conciliation processes. In the first decade of the CCMA’s existence, roughly 50 per cent of jurisdictional disputes referred to the CCMA were enrolled for an arbitration hearing. In 2011-12, this figure has dropped to 35 per cent. The table below gives an overview of arbitration cases since 2002-2003.

Table 3
Arbitration statistics

Arbitration statistics	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12
Jurisdictional cases	76547	83049	83880	85546	85213	91393	106893	119038	120035	126090
Pre-dismissal arbitrations	12	92	81	53	66	50	49	99	105	131
Arbitrations heard	40752	39544	40626	47681	46390	38319	40096	48092	49776	46779
Average turnaround times										
Turnaround time – conciliation	50.12	56.04	60.91	54.19	31.3	27.99	27.36	28.56	26.67	23.7
Turnaround time – arbitration	278.10	297.11	251.51	195.87	143.53	131.67	126.09	126.75	96.78	70.01
Awards										
Awards rendered	16146	20974	23527	27088	24909	23171	24391	25010	25138	24037
Awards in favour of (excludes default awards)										
Employee	2803	8382	9333	10848	8441	5344	4697	5507	5303	5058
Employer	1279	6405	7312	8876	9476	8581	8713	9630	9175	9065
Awards for employee										
Re-employed							53	46	47	42
Reinstated		1	5	1467	1263	1261	1575	1546	1826	1804
Only compensated	6525	11601	13653	14611	12419	11851	12762	12317	12611	11741
Enforcement										
Rescissions	3086	6228	7989	8823	8125	6714	6327	5749	6733	6210
Reviews		117	371	878	1628	4831	2086	2042	2230	2164
CCMA award certifications	2	21	1716	4865	7165	5167	6300	6839	7582	6721
BC award certifications		1508	1869	3283	2582	1937	3454	3518	4123	8065

The structure of the arbitration process seeks to ensure that arbitration hearings are conducted more swiftly than conventional litigation and in accordance with the goal of providing dispute resolution that is ‘simple, quick, cheap and non-legalistic’. In addition, the arbitrator is required to make an award, briefly citing the reasons, within 14 days of completion of the arbitration. Despite the enormous caseload of cases referred to the CCMA, the goal of holding arbitrations quickly has been achieved. The average time taken to conclude an arbitration hearing is currently 70 days from the date the dispute was first referred for conciliation.

The arbitration format

The genesis of the approach to arbitration lay in the practice of private arbitration that developed from the early 1980s onwards. This is reflected in the following passage in a judgment of the Labour Court:

Private labour arbitration in this country has obtained a well-deserved reputation for informality and speed without sacrificing the basic formalities required in legal proceedings. This has been achieved largely through a process of an initial inquisitorial approach to narrow the issues which allows the arbitrator substantial opportunity to equate himself or herself with the issues. This is followed by the more formal adversarial process which follows the basic tenets of court procedure and the rules of evidence without becoming unduly bogged down by unnecessary technicalities.⁴⁴

However, this observation was made at a time when the number of private arbitrations was considerably smaller than is currently the case and involved, to a large extent, the country's major employers and trade unions. One of the challenges the CCMA now faces is that much of its caseload involves unrepresented employers and employees who have little knowledge of the arbitration process.

The LRA does not prescribe a basic format or procedure for an arbitration hearing and Commissioners have a wide discretion as to how to conduct arbitration proceedings. The law requires a commissioner to determine a dispute "fairly and quickly" and "to deal with the substantial merits of the dispute with a minimum of legal formalities". In order to determine disputes, arbitrators are trained to limit the issues in dispute between the parties through a technique generally referred to as "narrowing the issues". However, a Commissioner cannot treat a party unfairly in order to conclude the dispute expeditiously⁴⁵ and the 'rules of natural justice' must be followed. A party is entitled to 'give evidence, call witnesses, question the witnesses of any other party and address concluding remarks to the commissioner'.⁴⁶

While the initial design of the arbitration system envisaged a significant role for more inquisitorial processes, their use has been rare. The significance of the arbitrator's discretion has tended to be misunderstood by Labour Court judges and in the broader labour relations community. While some judgments reflect a view that arbitrations should be conducted as a less formal version of a civil trial, others emphasise that an arbitrator must at the outset of proceedings decide whether the arbitration will be conducted on an "adversarial" or "inquisitorial" basis.⁴⁷ In response, the Governing Body of the CCMA has set out in its Guidelines for Dismissal Arbitrations an approach that it considers accords with the purpose of the law:

When an arbitrator adopts the role of finding the facts and determining the probabilities by questioning witnesses and requiring the parties to produce documentary and other forms of evidence, this approach is generally described as being investigative or "inquisitorial". When the parties are primarily responsible for calling witnesses and presenting their evidence and cross-examining the witnesses of the other parties this is generally described as being "adversarial". An inquisitorial approach will often be appropriate if one or both parties is unrepresented, or where a representative is not experienced. Arbitrators adopting an inquisitorial approach must be careful to ensure that the parties are aware of, and have the opportunity to exercise, their rights under section 138(2). An arbitrator may conduct an arbitration in a form that combines these two approaches provided this is done in a manner that is fair to both parties.

⁴⁴ *Dimbaza Foundaries Limited v CCMA and Others* [1999] ZALC 76.

⁴⁵ *Northern Training Trust v Maake & others* (2006) 27 ILJ 828 (LC) at para 29; *Foschini Group (Pty) Ltd v CCMA & others* (2002) 23 ILJ 1597 (LC); (2002) 7 BLLR 619 (LC); *Halcyon Hotel (Pty) Ltd t/a Baraza v CCMA & others* (2001) 8 BLLR 911 (LC).

⁴⁶ Section 138(2) of the LRA.

⁴⁷ A Discussion Paper by the Australian Law Reform Commission points out that: "The terms 'adversarial' and 'inquisitorial' have no precise or simple meaning and to a significant extent reflect particular historical developments rather than the practices of modern legal systems. No country now operates strictly within the prototype models of an adversarial or inquisitorial system. The originators of those systems, England, France and Germany have modified their own, and exported different versions of their respective systems. In broad terms, an adversarial system refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the dispute. The term 'inquisitorial' refers to civil code systems in which the judge has such primary responsibility. 'Inquisitorial' also connotes an inquiry where the decision maker investigates a matter. Civil code proceedings represent, in procedural theory, 'judicial prosecution' of the parties' dispute, as opposed to 'party prosecution' of the dispute under the common law system."

From an institutional perspective, the adoption of inquisitorial processes such as calling vital witnesses or asking important questions not raised by the parties ‘places great demands on the competence and impartiality of arbitrators because they are required to dominate the hearing’.⁴⁸

Arbitrators may conduct proceedings in a manner that differs from a court of law, provided this does not cause an injustice to a party. For instance, a prominent labour lawyer sitting as an acting judge of the Labour Court has held that an arbitrator could allow a party to lead hearsay evidence (which would not be permitted in a Court) if satisfied on proper grounds that the evidence is reliable.⁴⁹

The arbitrator’s obligation to uncover the substantial merits of a dispute has been interpreted as requiring an arbitrator to intervene in proceedings if, for instance, an unrepresented or inexperienced party is unable to present their case adequately. This is sometimes described as the ‘helping hand’ role. For instance, an arbitrator should advise a party to lead particular evidence if this is necessary to obtain a full factual picture of the dispute. Labour Court decisions have stressed the need for a Commissioner conducting an arbitration to give clear directions to the parties at the outset of proceedings as to how those proceedings will be conducted, particularly if the parties are not experienced, in order to prevent the perception of bias:

Commissioners of the CCMA are instructed during their training to conduct arbitration proceedings. They are aware, therefore, that after they introduce themselves to the parties at arbitration they should outline the process to them. The detail of the outline will depend on the level of experience of the parties. The Commissioner should, therefore, ascertain the experience of the parties at the outset. At their training arbitrators are briefed to ensure that the parties are aware *inter alia* of the format of the proceedings and of their rights to call and cross-examine witnesses. The commissioners should also make the parties aware of the consequences of their failure to do so and ensure that they are aware of how documentary evidence should be dealt with. Lay people often assume that documents are automatically admissible as evidence of the truth of their contents.⁵⁰

I appreciate it is no easy task for commissioners dealing with laypersons to conduct hearings. The levels of skills differ considerably and language can present a problem. However, it is precisely because commissioners are dealing with laypersons that they need to give clear directions and assist the parties every step of the way. They need to explain what is required in an opening statement and what the purpose of an opening statement is. The commissioner needs to explain what he does when he narrows the issues and what defining the issues in dispute means. He needs to tell the parties briefly what is required in leading evidence, dealing with documents, how the admission of documents is to be dealt with and how examination and cross-examination is to be dealt with. He needs to stress the importance of putting a version where a version differs.⁵¹

Representation

Restrictions on the right of legal representation are also important in reducing both time and costs. Legal representation is not permitted in dismissal arbitrations unless the parties consent to it, or the arbitrator permits it due to ‘the nature of the questions of law raised by the dispute, its complexity, the public interest and the comparative ability of the opposing parties to deal with the arbitration’.⁵² Instead of an absolute prohibition, the legislation therefore affords the arbitrator discretion to permit legal representation and introduces factors relevant to the decision.

⁴⁸ Brand 2000.

⁴⁹ Benjamin 2007.

⁵⁰ *CharTechnology (Pty) Ltd v Mnisi & others* [2000] 7 BLLR 778 (LC) at par 1; *East Cape Agricultural Cooperative v Du Plessis & others* (2000) 21 ILJ 1335 (LC); [2000] 9 BLLR 1027 (LC).

⁵¹ *Eastern Cape Agricultural Cooperative v Du Plessis & others* (2000) 21 ILJ 1335 (LC); [2000] 9 BLLR 1027 (LC) at paras 31 – 32.

⁵² Rule 25(1)(c) of CCMA Rules.

Both the Labour Appeal Court and the Constitutional Court have rejected challenge to the constitutionality of the restriction on legal representation. The restriction on legal representation remains a highly contested issue and an application by the Law Society has resulted in a ruling in 2012 that the current rule violates the Constitutional guarantee of fair administrative action.⁵³ In addition, there are a number of strategies that have been used to allow legal representatives to appear in hearings on the basis that they are members of an employers' organization. The issue of representation is now dealt with in the CCMA's rules with the result that any decision to revise the rules rests with the Governing Body.

One or both parties use some form of representation in roughly 40 per cent of arbitration hearings. Employers and employees have legal representation in only 15 per cent of dismissal arbitrations, while employees are represented by union officials in roughly 34 per cent of such cases and employers are represented by in-house human resources personnel in 35 per cent and by officials from employer organizations in 20 per cent.⁵⁴ The CCMA clearly distinguishes between legal representation, which risks the procedure becoming drawn out and formal, and other representatives such as union officials, human resource personnel and officials from employer organization who, because of their experience and understanding of a particular industry, are often capable of effectively negotiating or suggesting feasible alternatives.

Outcome

There are a number of ways to measure the outcome of arbitrations. The CCMA maintains records of whether an arbitration award is "in favour" of an employee (i.e. there is a finding that a dismissal was unfair or an unfair labour practice was committed). Up until 2005-6, employees succeeded more often than employers. From 2007-8 onwards, the figures have been relatively steady with employers succeeding in roughly 60 per cent of contested arbitration hearings.⁵⁵ The increasing proportion of awards made in favour of employers can be attributed to employers becoming more conversant with the substantive and procedural requirements of a fair dismissal. These figures are for arbitration hearings in which both parties present their case and test the evidence of the other party. In addition, a large number of arbitrations are conducted on a default basis because the employer party has not attended. While the arbitrator is required to interrogate the evidence presented by the employee, the absence of the employer has the result that these hearings result in an award in favour of the employee in the vast majority of cases. Typically, it is only in some 4-5 per cent of default hearings that the arbitrator dismisses the employee's claim and decides the case in favour of the employer. If the employer has a valid reason for not being present at the arbitration hearing, it can apply for the award to be rescinded. Most commonly, rescission is sought on the basis that the employer did not receive notification of the hearing. The CCMA conducts a substantial number of rescission hearings each year, although these have declined as a proportion of the CCMA's caseload.⁵⁶ In 2006-7, 10 per cent of jurisdictional cases led to a rescission application. This figure has dropped to 5 per cent in 2011-12.

A striking characteristic of arbitration awards is the relatively small number of employees who are reinstated in their previous job. According to the Explanatory Memorandum of the LRA, the main objective of the system is to achieve 'reinstatement as the primary remedy'. An arbitrator may reinstate an employee whose dismissal is found to be substantively unfair. If the only finding is that the employer did not follow a fair

⁵³ *The Law Society of the Northern Provinces v Minister of Labour & others* (Case No. 61197/11).

⁵⁴ Benjamin, 2009.

⁵⁵ Despite these figures, it is a common criticism, particularly among small employers, that Commissioners favour employees. See, for instance, Small Business Project 2011.

⁵⁶ Factors contributing to the reduction include agreements with major employer (in the retail sector in particular) as to the addresses to which CCMA notices will be sent.

dismissal procedure, the employee is limited to a claim for compensation. According to the latest CCMA statistics, however, only 13 per cent of awards in favour of the applicant ordered reinstatement.⁵⁷ As a result, the majority of unfair dismissal applicants who succeed at arbitration receive an award of financial compensation - the average award being equivalent to four months' earnings.

A number of factors contribute to the low incidence of reinstatement. One reason is that many employees do not seek to be reinstated. While definitive statistics are not available on this point, one survey indicated that only 30 per cent of employees who contest the substantive fairness of their dismissal seek reinstatement.⁵⁸ A second reason is that a significant proportion of CCMA cases involve domestic employment or very small businesses where reinstatement is unlikely to be appropriate, even if the employee requests it. There appear to be significant sectoral variations in the rate of reinstatement. For instance, only 6 per cent of farm-workers who succeed with claims receive reinstatement orders in their favour.⁵⁹ A third contributing factor could be a tendency among many arbitrators to accept the employer's assertion that reinstatement is not appropriate because it will not be possible for the employer and employee to resume a constructive working relationship. The CCMA has, however, emphasised the fact that reinstatement remains the primary remedy both in its Job Retention Strategy and in the Guideline for Misconduct Arbitrations.

Reviews

Appeals against the decisions of arbitrators are not allowed, but they are subject to judicial review by the Labour Court. The decision of Labour Court is, in turn, subject to an appeal to the Labour Appeal Court, the Supreme Court of Appeal and (if it raises a constitutional issue) the Constitutional Court. To prevent unnecessary delay, a tight time frame is set for review applications: a review application must be filed within six weeks after the award or, if corruption is alleged, six weeks from when the applicant became aware of it.

It was initially envisaged that arbitration hearings would not be recorded and reviews would be based on the arbitrator's notes plus the parties' submissions. This was a significant aspect of the rationale for favouring a review jurisdiction over appeals.⁶⁰ However, the courts have insisted that a full record be maintained of arbitration hearings. This has greatly increased the costs of the arbitration system and has delayed and complicated review hearings.

Review proceedings are instituted in respect of 10 per cent to 15 per cent of arbitration awards.⁶¹ During the first decade of the CCMA's existence, a lack of rules and practices in the Labour Court has enabled employers to use these proceedings as a delaying technique.⁶² In 2007, only 20 per cent of the reviews submitted to the Labour Court in the preceding decade had been finalised by that stage.⁶³ Statistics for 2006 show that it took approximately 23 months from the date of the arbitration award for the review to be heard,

⁵⁷ CCMA Review of Operations, 2011.

⁵⁸ Ibid.

⁵⁹ Cormack, 2010.

⁶⁰ The Explanatory Memorandum sets out the case for review in the following terms: "The absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter... However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business."

⁶¹ A total of 2189 reviews were brought in 2010-11 representing an increase of 7 per cent on the previous year despite a 1 per cent decrease in total awards rendered. See CCMA Review of Operations 2011.

⁶² Benjamin, 2009.

⁶³ Benjamin, 2007.

and a further 3 months for judgment to be given.⁶⁴ However, a subsequent streamlining of Labour Court processes has significantly reduced these delays.

According to section 145(2) of the LRA, an arbitration award may be reviewed if the arbitrator commits misconduct in relation to his or her duties, has committed a gross irregularity in conducting the arbitration, exceeded his or her powers or if the award was improperly obtained. An award may also be reviewed if it is not reasonable: 'if the reasoning of the commissioner, based on the material before him or her, results in a conclusion that a reasonable decision-maker could not reach'.⁶⁵

While general principles require that the focus of a judicial review be the manner in which the arbitration decision was made, rather than the merits of the dispute, this line is hard to draw in practice and many judges do engage the merits in review cases. In a recent judgment, the Labour Appeal Court has suggested that the policy decision to permit reviews rather than appeals has not succeeded in promoting expedited dispute resolution.⁶⁶ It argues that the issue at stake in an appeal (i.e. whether the arbitrator's decision is correct) may often be less complex than determining the issue at stake in a review (i.e. whether the arbitrator exercised his statutory discretion to evaluate the fairness of the employer's decision in a fair manner). It may therefore be appropriate for the social partners to consider replacing the review jurisdiction with an appeal. A further benefit of an appeal jurisdiction is that it would give rise to a clearer body of precedent to guide arbitrators, as the court's judgment would focus on the correctness of the arbitrator's decision rather than the manner in which it was made.

The CCMA has in the past been criticised for the inconsistency in its decision-making, particularly regarding the approach to the procedural fairness of a dismissal. It was initially envisaged that the Code of Good Practice on Dismissal, which was published together with the LRA, would be regularly updated by NEDLAC to reflect judicial decisions. This, however, has not happened. As a result, the CCMA's Governing Body published guidelines (which came into force at the start of 2012) for arbitrators dealing with dismissal cases. There have been widespread calls for the Code of Good Practice on Dismissal to be updated and clarified, particularly with regard to the obligations of small employers when dismissing employees.

Enforcement

As previously indicated, the majority of employees found to have been unfairly dismissed receive awards in their favour requiring the employer to compensate them. If the employer does not pay this money, the employee is required to have the award certified by the CCMA under section 143 of the LRA and have a writ (warrant of execution) issued by the Registrar of the Labour Court. Thereafter, the award can be presented to the Sheriff of the Court who may seize and auction the employer's property to obtain the money owed to the employee. However, it is the Sheriff's practice to require employees to pay a deposit to cover its costs. Many (if not most) employees, who have been out of work for a lengthy period by this stage, are not able to do this and are therefore compelled to either abandon or settle their compensation claim on unfavourable terms.

The extent of the problem of enforcement is indicated by the fact that some 50 per cent of employees who receive arbitration awards in their favour are required to have the award certified by the CCMA.⁶⁷ Various suggestions have been put forward in this regard.

⁶⁴ Ibid.

⁶⁵ Garbers, 2008.

⁶⁶ *Herholdt v Nedbank* (2012) ILJ 1789 (LAC)

⁶⁷ In 2010/11 a total of 7725 CCMA awards were certified (11 per cent more than the previous year), representing a little more than 50 per cent of the awards in favour of employees. Certification takes place on average seven months (215 days) after the award is granted.

These include introducing an employment clearance certificate (similar to a tax certificate), designed to ensure that ‘those companies tendering for government work are not flagrantly disregarding labour legislation and basic principles of fairness’.⁶⁸ Other suggestions include the establishment of a CCMA enforcement unit with legislative powers and the provision of financial assistance to needy parties to enforce awards.

Assessment

The design of the LRA reflects a commitment to address the implications of inequality between employers and employees. It seeks to insulate the arbitration system from many of the institutional practices and attitudes that load litigation in favour of employers as the stronger and better-resourced party. The institutionalisation of dismissal dispute resolution through the CCMA was followed by a very substantial decline in industrial action over dismissal and disciplinary issues.

The ease with which a dispute can be referred coupled with the CCMA’s high profile referral has contributed to the CCMA’s large caseload. This includes a high level of referrals by employees who are dismissed for good reason but refer disputes in the hope of a cash settlement. From this perspective, the CCMA represents a cost free opportunity at receiving some form of compensation.⁶⁹

The current caseload places great strain on the resources of the CCMA. This is reflected in the short period allocated for conciliations. A range of suggestions have been made to address concerns about the high level of referrals to the CCMA, including stricter rules on costs for unsuccessful parties, clearer and less stringent rules on the employer’s obligations during probationary periods and the introduction of a qualifying period before an employee receives full protection against unfair dismissal. As yet, none have been incorporated into the law and all have been strenuously resisted by organized labour.

A distinguishing feature of the South African approach is the mandatory requirement for the conciliation of certain categories of disputes of right, notably unfair dismissal and unfair labour practice cases. While this has placed considerable strain on the resources of the CCMA, it has led to the settlement of 60 per cent of these disputes without these disputes being referred for arbitration. While there is a significant level of non-attendance at conciliation meetings, indicating a reluctance to seek to settle, it is suggested that, in the light of the settlement rate, this does not outweigh the benefits of mandatory mediation.

Two key reforms that have contributed to the achievement of expedited dispute resolution are the short referral period (30 days) and a statutory requirement that the first conciliation meeting be held within 30 days of the dispute being referred. The short referral period was one of the reforms most favoured by organized business because of the certainty that it offers in comparison to the period usually allowed for civil claims.

The system of conciliation and arbitration does succeed in achieving its goal of swift dispute resolution in some 80 per cent of cases within the jurisdiction of the CCMA. These are those cases that are settled at conciliation (or subsequently) and those cases in which the arbitration award is accepted and complied with by both parties. However, the remaining 20 per cent of cases take considerably longer to resolve, particular those cases in which the arbitrator’s award is taken on review to the Labour Court or cases in which an employer does not voluntarily comply with an arbitrator’s award to compensate or reinstate an employee. In respect of the former, the Labour Court has taken significant steps to reduce the time taken for reviews to be processes but the role of reviews in the dispute resolution architecture does require re-evaluation. In respect of the latter, vulnerable employees are required to navigate the judicial enforcement system without any

⁶⁸ Tokiso , 2011.

⁶⁹ See Leeds and Wöcke,2009.

assistance or resources from public agencies. It is now recognised that remedying this is essential to maintaining the credibility and efficacy of the expedited dispute resolution system.

8. Collective dispute resolution

Industrial action that is staged after compliance with all the legal requirements is protected. Employees cannot be dismissed on account of participation in a protected strike and participation in a protected strike or lockout does not amount to a breach of contract or delict (tort). The Labour Relations Act requires that all disputes of interest be referred to conciliation prior to any party giving notice of a strike or lockout. Conciliation may take place at the CCMA, a bargaining council or in accordance with a collective agreement. No industrial action may take place in sectors that are defined or classified as essential services and unresolved disputes in these sectors may be referred to compulsory arbitration.

The CCMA's Mediation and Collective Bargaining Department was established in 2007. It has two main functions: to assist, support and promote collective bargaining and to provide guidance to commissioners on all aspects of conciliation and facilitation processes. The National Mediation Centre, which is located in the Johannesburg head office, deals with major disputes that could impact adversely on the public interest.

The major trigger for strike action remains wages (77 per cent)⁷⁰ and has resulted in strike action being concentrated in the middle of the year when the most important wage negotiations (particularly in the metals and mining industries and the public sector) take place, setting a trend for settlements in other sectors.⁷¹ This is often referred to as the collective bargaining "season", with the highest number of strikes tends to occur in July to September.

The National Mediation Centre is responsible for preparing for the annual round of collective bargaining by ensuring that teams of mediators are in place at each of the regional offices and that they are briefed on the labour market climate. The briefing received by mediators includes background on the labour economic environment as well as the perspectives of important stakeholders.

As Table 4 indicates, there has been a significant growth in the number collective bargaining disputes referred for conciliation over the last decade. Between 50 per cent and 60 per cent of disputes are resolved during the statutory conciliation period.

⁷⁰ Tokiso, 2011.

⁷¹ These periods are colloquially referred to as 'strike season' or 'annual wage rounds'.

Table 4
Settlement rate for collective bargaining disputes

Collective disputes	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12
Referrals	3273	3371	3812	4053	3615	3981	4091	4794	5222	5341
Conciliations heard	2889	2933	3088	3665	3442	3849	3869	4523	5100	5295
Cases heard and closed	2070	2161	2427	2897	2865	3218	3431	4015	4577	4798
Cases settled	1245	1250	1264	1412	1564	1799	2038	2155	2618	2925
Settlement rate (mutual interest cases)	60%	58%	52%	49%	55%	56%	59%	54%	57%	61%

However, there is a noticeable tendency for the certification of a dispute (after the mandatory conciliation period) to be regarded as a ‘tactical measure’, since many parties believe that obtaining a certificate and being able to threaten industrial action will strengthen their bargaining position. Roughly 72 per cent of disputes in which certificates are issued at the end of the statutory conciliation period culminate in settlements without strike action. In some disputes the CCMA may continue to conciliate between the parties in terms of section 150 (an offer of assistance accepted by both parties). Although strikes did decline in the immediate aftermath of the enactment of the LRA, they have gradually increased in frequency since 2003. Major public service strikes in 2007 and 2010 resulted in exceptionally high levels of strike action in those years.⁷² While only employing approximately 10 per cent of all employees, the public sector was the source of 90 per cent of working days lost due to strikes in those two years. The CCMA does not have jurisdiction to conciliate in these disputes, as the entire public service is covered by bargaining councils.

Collective bargaining trends

In 2004, the South African government undertook a review of the first ten years of democracy. Its report noted that a “huge fall in person-strike-days per year bears testimony to the success of the policy” of introducing new labour laws such as the Labour Relations Act.⁷³ However, the collective bargaining climate has subsequently, particularly since 2007, become increasingly adversarial. This shift is reflected in the 2012 report of the National Planning Commission, which describes labour relations as having become “increasingly fraught in the past few years”.⁷⁴ The report cites “a decline in negotiating capacity, the re-emergence of non-workplace issues in negotiations, and the rise of general mistrust between the parties” as the key factors contributing to the worsening of the collective bargaining climate.

The increasing inequality of earnings within the working population has undoubtedly contributed to a worsening of the industrial relations climate. Income inequality has increased between 1993 and 2008.⁷⁵ The Department of Labour gives the following overview of the reasons for strike action in 2011:

⁷² A total of 14.6 million individual working days were lost to strike action in 2010 – Tokiso, 2011. Wage disputes accounted for 99.6 per cent of these working days lost.

⁷³ Presidency, 2003.

⁷⁴ National Planning Commission, 2012 at 34.

⁷⁵ Leibbrandt et al, 2010.

Workers were mostly striking for better wages, though they also advanced other demands, such as the banning of labour brokers as they are perceived to be exploiting worker's rights and perpetuating casualisation in the labour market. The workers were seen demanding increases well above the consumer inflation rate prompted mostly by the rise in foodstuffs, transport and electricity prices. The widening gap between the workers' wages and that of their bosses also led to the double-digit demands that workers were advancing during negotiations. The volatile economic climate within which these negotiations took place dictated the final agreements that were reached between the parties.⁷⁶

There has been an increasing demand for social benefits, such as medical aid schemes and the payment of transport and housing allowances, to be included in remuneration packages. These demands are in respect of employees who may formerly have belonged to such schemes but have been excluded because their employment was 'casualised'. This can be seen as a response to the poor service delivery in communities in which workers reside. The increasing demand for inclusion in medical aid, for instance, is in part a response to the poor state of public health institutions. The high cost of transport which drives many wage demands is a part of the apartheid inheritance with many workers living considerable distances from their workplaces.

Trade unions have responded in the collective bargaining arena to the increased use of non-standard employment by South African employers. This has included a demand by COSATU, the country's largest trade union federation, for a prohibition on labour brokers (temporary employment services). This demand has been pursued at a national level, with calls for a legislative ban on labour brokers, as well as in plant-level and sectoral collective bargaining. In 2009, for example, all issues in dispute in collective bargaining in the private security industry were resolved, except the demand for a ban of labour brokers. This issue gave rise to a lengthy strike.⁷⁷ The incidence of disputes over the issue of "labour broking" peaked in 2011. The publication of draft legislation addressing many of the abuses associated with labour broking has resulted in a decline in the number of related disputes in 2012.

Another factor contributing to a worsening of the industrial relations climate is the raised expectations of workers in both the public and private sectors, due to the double-digit wage increases following the public sector strikes in 2009 and South Africa's hosting of the World Cup in 2010.⁷⁸ It has been suggested that the World Cup raised expectations in a number of ways.⁷⁹ High profile assertions that the World Cup would result in extensive economic benefits for the country translated into demands for improved working conditions by workers in the soccer stadiums and other World Cup projects. The absence of any role designated for trade unions meant that worker demands were initially articulated through wildcat strikes in the stadiums.

An analysis of the labour disputes in the run-up to the World Cup labour suggests that:

The industrial action in the 2010 stadiums and Gautrain was not simply about opportunism. Certainly these projects presented an opportunity for collective action unlike in the past, but the strike action could have been averted had there been better industrial relations planning and management. It is evident that the industrial relations environment in most construction sites was complex, irrational and in most cases poorly managed. This stemmed from the way in which the projects were procured and classified – building as opposed to civil engineering projects – to the role played by government, the failure to involve unions in the 2010 projects as a whole and provide workers with a meaningful voice, the failure to

⁷⁶ Department of Labour, 2012.

⁷⁷ Interview: A Soobedaal.

⁷⁸ For a comprehensive discussion regarding industrial action leading up to the World Cup, particularly in the construction industry, see Roskam 2009. According to a survey conducted by the Human Science Research Council in 2007 regarding expectations of South Africans with regards to the World Cup, 50 per cent of people believed economic growth and job creation to be the two main benefits of hosting the tournament. Similarly, 50 per cent believed the economic benefits would be lasting and about one third believed that they would personally benefit through job opportunities.

⁷⁹ Roskam, 2009.

implement Project Labour Agreements and the resulting sense of unfairness that therefore prevailed, the lack of unionization, the recruitment of labour brokers and collective bargaining.⁸⁰

In the immediate run-up to the World Cup and during its course, disputes in two key state-owned enterprises, Transnet and the power utility Eskom, led to large settlements in these two key sectors. These settlements are seen as having had a significant knock-on impact on the public service dispute that began during the course of the World Cup and led to a major strike later that year. The CCMA played a very significant role in ensuring that the World Cup was not disrupted by industrial action.

Commentators have also pointed to a ‘hollowing out’ of collective bargaining, with experienced trade unionists leaving for employment in the public or private sector and employers investing less in human resources and labour relations departments. A former Director General of the Labour Department⁸¹ has described this tendency in the following terms:

These developments result from a number of challenges that have been surfacing over time which have not been dealt with properly. There is evidence that negotiators are sometimes inexperienced and inadequately trained in collective bargaining. Sometimes aspirational posturing which may be linked to succession politics either in unions, federations or in the broader political environment drives behaviour. This results in hardening of positions. Some employers negotiate by proxy using consultants who have no vested interest in securing sustainable solutions. In some instances leaders fail to be decisive even in the face of blatantly wrong conduct.

This has prompted some employers’ associations to restrict the role of consultants in the collective bargaining process and ensure that employer representatives are present at all negotiations.⁸² The inexperience of labour market participants is also reflected in negotiators not taking the lead in the negotiating process and waiting for conciliators to come up with proposals.

A survey of collective bargaining during 2010 also concluded that there is an increasing lack of trust in the workplace in both the public and private sector “with no real dialogue happening on the shop-floor between line management and employee on how to influence business outcomes.”⁸³ The LRA’s vision was that workplace forums would serve as vehicle for developing long-term co-operative dialogue between employers and trade unions, thus reducing the level of adversarialism in collective bargaining.⁸⁴ This has not materialised; trade unions have rejected the workplace forum route and distributive collective bargaining remains the primary mode of interaction. However, one commentator has suggested that the combination of high expectations and extreme inequality has inevitably caused the focus on distributive bargaining, which holds out the prospects of short-term gains.⁸⁵

A further factor contributing to the difficulty in resolving wage disputes is the absence of mutually acceptable benchmark to target wage increase. While the Consumer Price Index is the “official” measure of consumer inflation used to quantify the increase in the costs of living, trade unions argue that this does not fully account for the increase in the cost of living for low-paid workers who spend the substantial portion of their earning on food and transport.⁸⁶ Thus, even though employers may seek to make lower wage offers in years in which inflation is lower, trade unions argue that this masks the full extent of the

⁸⁰ Roskam, 2009. The first strike directly related to the World Cup broke out at the Green Point Stadium in Cape Town on 27 August 2007.

⁸¹ Siphon Pityana, Speech to CCMA 15th Anniversary Think-Tank, October 2011.

⁸² Interview: A. Soobedaar.

⁸³ Grawitzky, 2011.

⁸⁴ The legislative formulation effectively permits trade unions to veto an application to establish a workplace forum, has been the primary reason for such forums not taking off. By 2004 only 25 workplace forums had been set up and the numbers have not increased significantly in recent years.

⁸⁵ Grawitzky, 2011.

⁸⁶ Interview: A. Soobedaar

rise in cost of living for low-paid workers. The consequence of high incidence of HIV and unemployment is that many unionised workers have to support an increasing number of dependants.

A trend that contributed to a more stable bargaining climate is the negotiation of multi-year (often up to three years) collective agreements that have become increasingly prevalent in many sectors. Employers – most notably in the steel and engineering, mining and automobile sectors – have preferred longer-term agreements to ‘ensure labour stability in the short/medium term’.⁸⁷ However, the rising rate of inflation in 2008 made trade unions increasingly reluctant to enter into these arrangements.⁸⁸ Alternatively, trade unions have made attempts to re-open negotiations during the period of these agreements. For instance, the 2011 local government strike was triggered by trade unions utilizing a technicality in the interpretation of the collective agreement to re-open negotiations.

Rivalries within and between trade unions have exacerbated dispute resolution in many sectors. Trade unions leaders facing a challenge to their position may be pressured to be less conciliatory in negotiations to ward off any criticism that they are insufficiently militant. There are instances in which a “successful” strike has assisted a union leader to win re-election. A further issue leading to an exacerbation of strikes has been ideological rivalry between trade unions representing black and white workers. This has been particularly prevalent in the chemical sector between Solidarity and UASA, on the one hand, and CEPPAWU on the other.

⁸⁷ Tokiso , 2011.

⁸⁸ Grawitzky, 2011.

Industrial action in the build up to the World Cup

South Africa committed R 27,4 billion on an infrastructure overhaul in the build-up to the FIFA 2010 World Cup. This included expenditure on stadiums, the Gautrain, highways and airports. From 2007 onwards, the CCMA, in conjunction with the Sports Ministry, engaged with stakeholders through a structured process to achieve improved workplace relations and enhanced collective bargaining stability in World Cup-related projects. An Accord was concluded in June 2008 in which the stakeholders (Government, major construction companies and trade unions) committed themselves to meet their respective responsibilities to ensure the success of the World Cup and to deliver the stadiums and other projects on time. However, strikes (particularly in the stadiums) continued and the completion times were coming under strain.

The low union density (9 per cent) among construction workers was largely due to the extensive use of labour brokers and undoubtedly contributed to workers resorting to wildcat strike action. The majority (20 of the 26) of these strikes were unlawful. However, two of the established trade unions in sector National Union of Mine Workers (NUM) and the Building Construction and Allied Workers Union (BCAWU) were able to “capture the militancy” of these workers.

A key contributing factor that has been identified was the ‘failure of the industrial relations system to cater for new conditions’ that might be expected to arise during the life of the projects. These included, most notably, not including labour organizations in the construction plans and neglecting to put in place systems and procedures for foreseeable industrial relations issues, even though these had occurred in other countries, preparing for mega-events.

The civil engineering sector wage negotiations, which would impact on the wages paid to stadium workers, began in April 2009. Unions demanded a wage increase of 13 per cent and employers offered 10 per cent when going into dispute. Conciliation proved unsuccessful and the strike action commenced in July 2009, less than a year before the start of the World Cup. Attempts at additional facilitation also proved unsuccessful. Eventually, an eight day strike by 70 000 stadium workers ensued which was resolved by a settlement, mediated by the CCMA.

In response to the strike, the CCMA’s team of conciliators re-analysed the underlying issues giving rise to the strike classifying them as either ‘critical’ or ‘transformational’ and developed a framework for settlement. They then approached the leadership of all parties and lobbied actively for the parties to adopt the framework as a basis for settlement. The Minister of Labour convened a stakeholders’ process that lasted 17 hours and culminated in settlement. Participation extended beyond the immediate employer and trade union parties to include the organizations responsible for hosting the World Cup. A range of techniques was adopted to achieve the settlement including advocacy mediation, mediating in a reduced plenary, lobbying during the process and mediating within caucuses. The settlement included a wage increase (of 12 per cent), the payment of a project bonus of R 6000, no loss of pay for inclement weather and transport allowances. Transformational issues were delegated to a task team to resolve.

Offers to assist in collective bargaining

Section 150 of the LRA enables the Commission to offer to conciliate disputes that have not been referred to it, provided that resolving the dispute involves, in the view of the Commission, a matter of public interest. The Commission may only intervene in a dispute and conciliate if all the parties to the dispute consent. Any offer of assistance by the CCMA must be made in writing and be authorized by the National Mediation Office.

Rigorous criteria have been developed for determining whether the statutory requirement that the resolution of a dispute is in the public interest is met. Firstly, the offer of assistance must have the potential to have a high impact. The following criteria are also considered when making offers of assistance:

- a) The dispute could lead to industrial action, or industrial action is already in process;
- b) A sizeable bargaining unit exists;
- c) The employer provides important or strategic services;
- d) The dispute involves high profile individuals;
- e) The dispute has received press coverage.

These criteria aim to ensure that offers of assistance under section 150 are not perceived to be arbitrary. The National Mediation Office monitors the collective

bargaining arena and obtains intelligence in order to identify disputes that meet the “public interest” criterion for making an offer of assistance.

The CCMA utilizes the provisions of section 150 to offer to conciliate in a wide category of disputes. These include disputes in sectors of the economy that are outside of the ordinary dispute resolution jurisdiction of the CCMA because they are covered a bargaining council. Section 150 can also be used to provide conciliation or facilitation at an early stage of collective bargaining when the parties are, for instance, still engaged in negotiations at plant-level or in non-statutory sectoral bargaining arrangements. Section 150 also permits the provision of further conciliation by consensus in disputes where a certificate of non-resolution has already been issued by either the CCMA or a bargaining council. This enables the CCMA to offer assistance in industrial action that is about to (or already has) commenced, especially when there is a public interest in its resolution because of violence or the threat of violence or because of the impact that specific industrial action may have on the public. Participation in conciliation under section 150 does not affect the right to stage protected industrial action.

There has also been a considerable growth in the acceptance within the labour community of the CCMA’s role in assisting with the resolution of collective bargaining disputes. The CCMA has made increasing use of its Section 150 powers to intervene proactively in both the national disputes and regional disputes that could have a significant impact on the labour relation climate.

In 2007 the CCMA made 16 offers of assistance under section 150 and there was a 50 per cent acceptance rate by parties to disputes. By 2011-12 the use of the section 150 powers had increased significantly and the CCMA offered to assist in 204 disputes with an acceptance rate of 98 per cent. In the CCMA’s view this is indicative of high social partner support for the structured use of section 150.⁸⁹ The CCMA has utilized its section 150 powers in a range of high level bargaining council disputes involving the chemical sector, the motor industry, the road freight and logistics sector, local government and the clothing manufacturing industry. Section 150 has been utilized to allow the CCMA to play a facilitating role in a number of significant economic sectors in which sectoral bargaining occurs but in which the parties are not sufficiently representative to establish a bargaining council. Sectors where this has occurred include the private security, contract cleaning and civil engineering sectors, all of which are typified by large numbers of low-skilled workers, high levels of non-standard employment, considerable job insecurity and significant rates of non-compliance with labour legislation, particularly among smaller employers. These factors have often translated into extended strike action. The CCMA has facilitated negotiations in these sectors both before and after referrals to the CCMA. It has also played a significant role in assisting parties in these sectors to establish non-statutory bargaining structures.

The most significant initiative of this type is in the private security sector where, in the aftermath of a violent industry-wide strike, the CCMA facilitated the negotiation of a framework agreement to regulate sectoral negotiations. Seven employers’ associations and thirteen trade unions are party to the framework agreement and sectoral negotiations were conducted under the framework agreement in 2009 and 2012. A settlement was reached in 2009 on the terms and conditions of employment, although a strike ensued on the issue of the supply of employees by labour brokers. An agreement was concluded in 2012. The agreement on terms and conditions of employment was submitted to the Minister of Labour for publication as a sectoral determination application to the entire security sector under the BCEA. The framework agreement provides for the CCMA to verify the membership of employers’ organizations and trade unions in order to determine their entitlement to participate in collective bargaining and provides for a commissioner to

⁸⁹ Two high profile instances in which the CCMA’s offer of assistance have been rejected have been in public service wage bargaining and during disputes at the Impala Platinum mine which triggered wide industrial unrest in the platinum mining sector.

facilitate negotiations and mediate disputes that arise. The CCMA is currently assisting the parties in the sector to establish a bargaining council.

The establishment of the Mediation Centre at the head office has enabled the CCMA to provide on-going assistance to parties in collective bargaining processes. One form that this assistance takes is to assist parties who are undertaking the process of moving from ‘agreements in principle’ to detailed settlements. A technique adopted by the CCMA in this regard is to facilitate joint employer and trade unions work groups. The CCMA assisted the members of the Pulp and Paper Bargaining Council to establish methodologies to reduce working hours. In this case, an agreement in principle was reached to reduce working hours over a three-year period. A joint employer-trade union work group was established to implement the agreement in principle. This was facilitated by the CCMA. At the outset of this process, the CCMA facilitated a plenary level meeting of the parties at which terms of reference, time horizons and deliverables (such as reports or recommendations) were agreed upon.

The CCMA is currently developing a Collective Bargaining Improvement Process. This is a structured approach in which individual wage negotiations are analyzed with the parties to increase effectiveness of negotiation. The process seeks to enable the parties to identify those elements that affect the effectiveness of collective bargaining and then to develop and implement action plans to address these issues. The Process also seeks to introduce parties to the concept of interest-based negotiation. The 2012 Report of the National Planning Commission emphasises the importance of developing negotiation training forums and mediation capacity building in order to enhance the quality of collective bargaining in the South African labour market.⁹⁰

Assessment

There has been a significant evolution in the role that the CCMA plays in dealing with the collective bargaining. This has involved a marked shift towards a more ‘activist’ or ‘interventionist’ approach, in which its role is not confined to mediating unresolved disputes referred to it. It now takes on a wider range of activities to promote and facilitate effective collective bargaining processes. As the preceding discussion indicates, these include facilitating negotiations, assisting with the establishment of sectoral bargaining institutions and aiding employers and trade unions to enhance the calibre of their collective bargaining processes. While this expanded role is consistent with its overall mandate to promote effective dispute resolution and prevention, the power to offer assistance in terms of section 150 has provided the statutory basis for this approach. That these activities occur with the consent of parties is indicative of a widespread acceptance by labour market stakeholders of the CCMA assuming an extended range of functions. This broader role for the CCMA has been necessitated by the declining bargaining capacity of many employers and trade unions.

⁹⁰ National Planning Commission, 2012 at 136.

The 2011 agreement in the clothing manufacturing sector

An agreement – which has widely been referred to as a ‘landmark agreement’ – serves as an example of the kinds of initiatives encouraged during negotiations. In a process facilitated by CCMA Commissioners, the trade union and employer parties to the National Bargaining Council for the Clothing Manufacturing Industry signed an agreement on 5 October 2011 ‘aimed at promoting job opportunities for first time entrants and creating jobs while protecting the wages and employment conditions of current and qualified employees and offering employers protection against retrenchment and preferential reemployment in the event of retrenchment’. The importance of the agreement lies in the extent and innovation of the agreed terms. It is also due to the fact that it has come in a sector that has been subject to major retrenchments and stiff international competition in recent years. From 2002 to 2011, employment in the industry dropped from 120 000 to 52, 400. The negotiations resulted from both employers and unions realising that cooperation was necessary to avoid the industry relocating its employment to beyond South African borders. The involvement of CCMA facilitators with in depth knowledge of the industry enabled the parties to explore their common interests resulting in the conclusion of an innovative agreement.

The new wage agreement (which provides for a 6.5 per cent wage increase for existing employees) creates an incentive for employers to create jobs by allowing for the employment of new workers at wages that are 30 per cent and 20 per cent lower than the current legally published wage rates in metro and non-metro areas, respectively. The parties have also agreed to jointly approach the Minister of Labour to seek Ministerial extension of the full agreement to non-parties within the entire country, as provided for in the LRA. The agreement has been described as ‘the first of its kind wherein organized labour and business has seen the necessity and importance to use a facilitated collective bargaining process to reach a settlement’.

With the target of generating a 3 per cent job growth rate for each six month period (culminating in a 15 per cent increase by March 2014), the agreement seeks to halt further jobs losses and allows for the entry of untrained first time entrants at lower entry level wage. Parties have also agreed to a bi-annual process of benchmark monitoring and provision has been made for new entry wage dispensation to fall away in 2014 if job creation targets are not met and if the parties do not agree on other alternatives to create jobs by then. The parties are currently in the process of establishing an entity responsible for training new entrants. Initial indications are that there has been a significant decline in the loss of jobs in the sector.

One of the difficult issues raised by the agreement is how to promote employment of new entrants into the sector at lower rates without decreasing the employment security of existing employees. The agreement specifically provides that employee may not be retrenched to allow for the hiring of new employees at a lesser cost. However, the agreement defines a “new entrant” to include former employees in the sector who have been out of employment for more than three years. The concern has been expressed that this could result in former employees who have been out of employment for less than three years being “frozen” out of the sector.

Strike violence

Although violent strikes were frequent during the 1980s, most labour analysts ‘ascribed the high levels of worker violence to the conditions under which trade unions organized and engaged in collective-bargaining during the apartheid era – in particular the failure to fully institutionalise industrial conflict and, more broadly, the absence of political rights which imbued industrial action with a strongly political dimension’.⁹¹ Many believed that political equality, coupled with a legally entrenched right to strike, would result in a decrease in strike action and violence in the post-apartheid democracy.

Industrial action in recent years has been characterised by violent and destructive behaviour, as well as ‘an observable contempt for the LRA and court orders’.⁹² The use of collective violence – aimed at the employer, non-striking workers or the general public - to strengthen a bargaining position relative to the employer has been normalised to such an extent that one commentator regards it as having ‘been established as a tradition’.⁹³

The same commentator summarises the main causes for strike related violence as follows:

Firstly, a common thread that runs through the apartheid and post-apartheid period is that the degree of institutionalisation of industrial relations is dependent on broader political and social factors beyond the

⁹¹ Von Holdt 1989, 2003; Webster and Simpson, 1990.

⁹² Tokiso , 2011. The 2010 Transnet strike, in which screws were taken out of the railway sleepers leading to the derailment of a diesel tender, is an example of calculated sabotage.

⁹³ Van Holdt, 2010.

field of industrial relations itself. Secondly, the question of the industrial and social order in post-apartheid South Africa is not a settled matter: the authority of the state and of the law have a limited reach, and social hierarchy and the balance of power between social forces that underpins it remains contested. This explains the high levels of conflict and violence not only in industrial relations, but also in many spheres of South African society.⁹⁴

In other words, the lack of social transformation coupled with perceptions of social and economic injustice and inequality have resulted in the institutions of collective bargaining being only 'partly institutionalised'. In this context, the resort to violence, which was a dominant mode in the struggle against apartheid, retains significance both as a tactic to achieve demands and as a form of protest action.

Legislation does not require trade unions to conduct strike ballots before giving notice of protected industrial action. Many unions do retain balloting requirements in their constitution but a failure to comply with these is not a basis for interdicting strike action. Balloting requirements were removed from legislation in 1995 due to concerns that it had provided 'fertile soil for employers to interdict strikes and to justify the dismissal of strikers in strikes that are technically irregular but otherwise functional to collective bargaining'.⁹⁵ However, the absence of a requirement to ballot is viewed as contributing to situations in which strikes with little support have been called, leading to violence directed at non-strikers. Although this argument has been advanced by a wide range of commentators, there is as yet no empirical evidence correlating the level of strike-related violence with the level of worker support for a demand.

Draft amendments to the LRA in early 2012 proposed a reintroduction of the requirement for strike ballots, coupled with a provision to allow the CCMA, bargaining councils and private agencies to verify ballots. Related amendments proposed included adjusting the picketing rules to allow the CCMA to permit pickets on property owned by third parties (such as shopping malls) and limiting the right to picket to employees (instead of extending it to trade union supporters). At the same time, it was proposed that the Labour Court should be able to suspend strikes and lockouts as a result of violence or breaches of picketing rules. These proposed amendments have been vehemently opposed by COSATU, which in turn proposed that the use of replacement labour should be prohibited in protected strikes. This has led to a bilateral accord being concluded between the COSATU and the ANC that these provisions are to be withdrawn during the Parliamentary process.⁹⁶

Picketing and demonstrations

The Labour Relations Act accords a right to trade unions to organize peaceful pickets involving their members and supporters in support of a protected strike and in opposition to a lockout. The picketing provisions are consistent with section 17 of the Constitution, which provides that "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

A peaceful picket forms part of a strike and therefore no civil or criminal liability attaches to pickets that do not involve a criminal offence. The protection against civil liability does not attach to criminal acts of violence committed during a strike, such as vandalism. However, employers seldom, if ever, pursue action against individual employees for strike-related damages because individual employees will not have the resources to satisfy any judgment against them. Accordingly, the liability of trade unions for damages caused during strikes that they have called is a matter of considerable debate and controversy.

⁹⁴ Von Holdt, 2010.

⁹⁵ LRA Explanatory Memo.

⁹⁶ See <http://mg.co.za/article/2012-04-05-cosatou-doubts-effectiveness-of-strike-ballots>.

The Labour Relations Act encourages the parties in a dispute that is headed towards industrial action to conclude a picketing agreement before a strike starts. If an agreement cannot be concluded, either party may approach the CCMA on an urgent basis to determine picketing rules.

One controversial issue has been the role of police during industrial action. During the apartheid era, the police frequently broke up gatherings and pickets held during strikers. As a result, the Code of Good Practice specifically deals with the role of the police during strikes in the following terms:

7. Role of the police

(1) It is not the function of the police to take any view of the merits in particular of the dispute giving rise to a strike or a *lockout*. They have a general duty to uphold the law and may take reasonable measures to keep the peace whether on the picket line or elsewhere.

(2) The police have no responsibility for enforcing the Labour Relations Act. An employer cannot require the police to help in identifying pickets against whom it wishes to seek an order from the Labour Court. Nor is it the job of the police to enforce the terms of an order of the Labour Court. Enforcement of an order on the application of an employer is a matter for the courts and its officers, although the police may assist officers of the court when there is a breach of the peace.

(3) The police have the responsibility to enforce the criminal law. They may arrest picketers for participation in violent conduct or attending a picket armed with dangerous weapons. They may take steps to protect the public if they are of the view that the picket is not peaceful and is likely to lead to violence.

At face value, this carefully crafted passage appears to strike an appropriate balance between the need for the police to exercise restraint in respect of conduct linked to strikes while retaining their responsibility to intervene in response to criminal conduct, including acts of violence. Nevertheless, the police are reluctant to intervene in strike situations, even when these escalate into violence, unless the employer has obtained a court order. It is not an uncommon practice for employers to bring applications in the Labour Court during strikes to obtain an order directing the police to intervene to prevent strike-related violence.

Where strike-violence does occur the CCMA can intervene in these circumstances by offering to assist the parties in terms of further mediation conducted under section 150. Once the CCMA has succeeded in securing the attendance of the parties at a further conciliation meeting, this frequently serves as a mechanism for re-opening negotiations on the dispute that gave rise to the strike. Picketing rules and agreements are only effective in regulating picketing on or near the employer's premises. Broader actions such as protest marches and gatherings are regulated by the Public Gatherings Act. This Act places a significant onus on the organizers of public gatherings and demonstrations to ensure they do not lead to violence and damage to property. The organizer of such a gathering, including a trade union, may be liable for damage caused during a demonstration or gathering strike unless it can show that:

- a) it did not permit or connive at the conduct which caused the damage; and
- b) the conduct did not fall within the scope of the objectives of the gathering or demonstration and was not reasonably foreseeable; and
- c) it took all reasonable steps within its power (such as arranging marshals etc.) to prevent the conduct in question.

In litigation arising out of a national security industry strike in 2006, the South African Transport and Allied Workers Union was held liable for damage caused during a march through the city centre that, in the words of the union, "descended into chaos". Trade unions and other organizations that hold marches or demonstrations are liable for resulting damage to property unless they can show that the damage "was not reasonably foreseeable". An argument that this provision places too great a burden on trade unions and other organizations and that the extensive statutory liability for riot damage will have a

chilling effect on a fundamental right of assembly was rejected by the country's highest court, the Constitutional Court.⁹⁷

Essential services

The LRA establishes an Essential Services Committee (ESC), which operates under the auspices of the CCMA. The primary functions of the ESC are to conduct investigation and make determinations as to which services (or parts of services) should be declared as essential services. The Committee may also determine that a service can be classified as a maintenance service.⁹⁸ The Essential Services Committee includes representatives of the social partners. However, the employer representatives have been appointed from the private sector even though the majority of determinations impact the public sector.

In the absence of a minimum service agreement ratified by the ESC, workers employed in an essential service are prohibited from striking. In September 1997, the ESC declared a large part of local government and the health sectors to be essential services. There are very few minimum service agreements in the public sector, including the local government sector, and where minimum service agreements have been concluded they have proved to be problematic.⁹⁹

During the 2007 public sector strike many employees who worked in essential services went out on strike, forcing government to bring in the army to assist in the running of some institutions and facilities.¹⁰⁰ It is also alleged that large numbers of essential service workers had gone out on strike in the two national municipal workers' strikes. The large number of employees involved has had the result that public employers have not taken disciplinary action against any employees for participating in unprotected strikes.

Public sector trade unions have complained that the employers refused to negotiate minimum service agreements, thereby denying many employees a right to strike and unfairly weakening their collective bargaining power. At the same time, there was a disregard by many essential service employees of the prohibition to strike. The employers pointed to the devastating effects of not being able to provide essential services and argued that the unions tacitly or explicitly encouraged these illegal strikes.

A leading labour lawyer has argued that the current model is dysfunctional as, on the one hand, it does not discourage strikes taking place in essential services, and, on the other hand, employees in those services do not have confidence in other ways of remedying their disputes and grievances.¹⁰¹ Although employers and employees in essential service sectors are entitled to refer unresolved disputes of interest to arbitration, the CCMA is infrequently called upon to conduct compulsory arbitration in essential services. Arbitrations have been limited to Eskom, the power utility, and institutions providing care for the elderly. This reflects a lack of confidence in wage arbitrations as a technique for resolving in public sector collective bargaining disputes.

⁹⁷ *SATAWU & Another v Garvas & Others* [2012] ZACC 13. (Accessible on <http://www.saflii.org.za>).

⁹⁸ A maintenance service is one that, if interrupted, would lead to the material physical destruction of a working area, plant or machinery.

⁹⁹ Roskam and Howard, 2011.

¹⁰⁰ Grawitzky, 2011.

¹⁰¹ Roskam and Howard, 2011.

9. Job retention strategies

The CCMA job saving and training lay-off project

The global financial crisis that commenced in 2008 slowed the South African economy into a recession for the first time since 1992, resulting in roughly 1 million jobs being lost.¹⁰² In response to the recession, the tripartite social dialogue forum NEDLAC developed a Framework for South Africa's Response to the International Economic Crisis in February 2009 aimed at mitigating the adverse effects of the global economic crisis. The Framework provided for the introduction of a training lay-off scheme (TLS) as an additional measure to avoid retrenchment and enhance productivity by offering employers incentives to engage in skills training initiatives. The CCMA has played a central role in developing and administering the TLS and its participation in the TLS has triggered it to develop an integrated strategy to deal with business distress and job security.

The role of the CCMA in retrenchment disputes

Before examining the operation of the TLS in detail, it is necessary to look at the legislative provisions dealing with dismissals by employers on account of their operational requirements (retrenchments) and the role accorded to the CCMA to resolve these disputes.

Section 189 of the LRA requires employers to consult with trade unions (or, in their absence, other representatives or the employees directly) over retrenchment. The law requires that the parties undertake a "meaningful joint consensus-seeking process" to explore alternatives to retrenchment and, if it cannot be avoided, to minimise the number of dismissals and ameliorate the consequences for employees. The consultation process must also cover the method used to select which employees are retrenched and the severance pay they will receive. The dismissal of employees on account of the employer's operational requirements can, like other dismissals, be challenged on grounds of both procedural and substantive fairness. However, there is a marked reluctance by many judges to "second guess" the rationale given by an employer. Under section 189, retrenchment disputes are only referred to the CCMA once the employer has given the employees notice of dismissal.

The facilitation procedure introduced in 2002 by the insertion of section 189A into the LRA re-orientates the approach to large-scale retrenchments in a number of significant ways. Firstly, once an employer of more than 50 employees has notified employees (or their representatives) of the possibility of a large-scale retrenchment, either the employer or the employees can refer the retrenchment to the CCMA for facilitation. Generally, the employer will make the referral as this expedites the process. The parties are then required to participate in at least four facilitation meetings over a period of 60 days. After this period, the employer may issue notices of retrenchment and the employees can elect to challenge the termination as being substantively unfair in the Labour Court or embark on strike action. The capacity to stage a strike over retrenchments was the major motivation that led trade unions to propose the changes to the law that led to the adoption of section 189A.

The introduction of section 189A was controversial. On the one hand, it has made the law on retrenchment considerably more complex and the process of implementing large-scale retrenchments significantly more time-consuming. The reintroduction of a right to strike over retrenchments has not been the boon that trade unions had assumed it would be and there are continued complaints that employers are able to satisfy the requirements of the facilitation procedure by simply going through the motions of a consultation process.

¹⁰² IMF, 2010.

On the other hand, it has significantly enhanced the potential for the CCMA to play a constructive role in combating job losses because it is able to facilitate consultations at an earlier stage of the retrenchment process prior to dismissal notices having been issued.

It is not uncommon for employers to use the threat of retrenchments to trigger negotiations on the introduction of more flexible working arrangements. During 2011, a major supermarket chain referred a proposal to retrench 3000 workers for facilitation under section 189A. The proposed retrenchment was triggered by a demand that employees accept more flexible working conditions. These issues were not resolved in a facilitation process. However, both parties accepted a proposal from the CCMA to offer further assistance and this led to an agreement on a broad range of issues including the averaging of working hours, compressed work weeks, variable workers and casual workers and the gradual reduction of the use of labour brokers.

Implementation of the training lay-off scheme (TLS)

The TLS became operational on 20 September 2009 and involves several government agencies and institutions. These include the CCMA and the Sectoral Education and Training Authority (SETA) in whose jurisdiction the employer falls. An initial amount of R2.4 billion was made available from the National Skills Fund (NSF) and the same amount by the Unemployment Insurance Fund (UIF) to fund the costs of the training allowances. The TLS was initially specifically directed at companies experiencing a weakening demand for their products as a result of the recessionary economic climate. However, in order to increase eligibility for the Scheme, the concept of “economic distress” has been expanded to include any ‘financial and/or operational difficulty which may result in the employer contemplating retrenchment of workers’.¹⁰³

The scheme aims at encouraging employers to take advantage of training allowances and training facilitated through the Sectoral Education and Training Authorities (SETAs) to avoid permanent lay-offs. Employer participation in the scheme is voluntary. Employees’ contracts of employment remain intact, with the objective that affected workers return to their jobs once the training lay-off is completed. The key terms of the scheme are:

- a temporary suspension of work by employees to be used for training (limited to six months’ worth of training allowances¹⁰⁴ and subject to the continued availability of funds);
- the retention of the employment contract;
- training to be flexible, but linked to the needs of the employer;
- a training allowance to be paid to the worker (a maximum of 75 per cent of their basic salary subject to a maximum allowance of R9358 per month);¹⁰⁵
- the employer carries the employer and employee cost of a basic package of social benefits, including medical aid and provident fund contributions, but does not pay any wages to employees.

The scheme can be viewed as remedying one of the shortcomings of South Africa’s Unemployment Insurance Act, which does not provide for the payment of unemployment benefits to employees who are partially employed or laid off because of an economic

¹⁰³ Department of Labour ‘Revised Guide to the Training Layoff Scheme’ (internal memo). The rules of the TLS were amended in February 2011.

¹⁰⁴ Amended February 2011. Initially allowances were limited to 3 months.

¹⁰⁵ Amendments in February 2011 to the TLS rules has resulted in the training allowance being increased from 50 per cent of the salary (with a maximum of R6239) to 75 per cent of the salary up to a maximum of R9 358.

down-turn. Access to the scheme may be raised as an alternative to retrenchments that have already been referred to the CCMA for conciliation or where the employer has proposed large-scale redundancies that have been referred to the CCMA for facilitation in terms of section 189A. The process can also be initiated by an employer, trade union or employee requesting the CCMA to facilitate the conclusion of a training lay-off agreement. Alternatively, the parties can independently conclude a training lay-off agreement and submit it to the CCMA for confirmation that it complies with the agreed rules and procedures.

The CCMA describes the process of facilitated retrenchment consultations in the following terms:

At all stages of the (facilitation) process interventions are explored to meet the CCMA objective (of avoiding or minimising dismissals). This starts with the initial stage, where the alleviation of the business distress is explored. Depending on the circumstances, this may include the involvement of Productivity South Africa (PSA) or the Industrial Development Corporation (IDC). If the situation does not lend itself to a business improvement / rescue intervention, then a wide array of alternatives to job loss are explored, prioritising alternatives that do not entail income loss. This includes application of the Training Layoff Scheme. It is envisaged that, more and more, the TLS may be utilized alongside a turn-around strategy. If retrenchment is inevitable, the process then involves the facilitation of access to survival and support services and mechanisms for retrenched workers, in line with the CCMA resolution [including] assisting to link workers and their trade unions to support services offered by SETAs and the Department of Labour Public Employment Services, as well as debt counselling, and assistance to expedite processing of pension or provident fund monies. Engagement with the UIF to streamline the claiming of benefits is also carried out.¹⁰⁶

In order to determine whether the short term financial relief could assist to alleviate business distress, a CCMA Advisory Committee ‘examines the labour expense of the business in relation to the total operating expenses’, generally accepting that ‘a proportion of 25 per cent or higher could make a material difference and assist recovery for the period of participation in the scheme’.¹⁰⁷

The relevant SETA advises employers and employees on the training options, carries the cost of the training (except in certain cases) and applies to the National Skills Fund for training allowances. An inter-ministerial Project Evaluation Committee chaired by the Department of Higher Education and Training, considers the CCMA Advisory Committee recommendation and, if approved, pays the training allowances to the SETA, after which the SETA pays the allowances to the employers, who in turn pay them to the employees on training. Training may be provided by service providers or, in the case of larger employers, by the employer.

Initial participation in the scheme was limited.¹⁰⁸ By March 2012, 11,489 workers employed in 83 companies had benefited from the scheme.¹⁰⁹ Significantly, the largest amount of applications received in a single month was in October 2011 when 13 applications were filed. By 31 March 2011, there were only six cases where the training had been fully completed, involving 1,243 workers. However, by 31 March 2012 this had increased to 28 cases involving 6,811 workers. As yet there has been no analysis of the quality and impact of the training provided under the TLS and, in the CCMA’s view, this constitutes a significant omission in the overall analysis of the scheme’s impact.

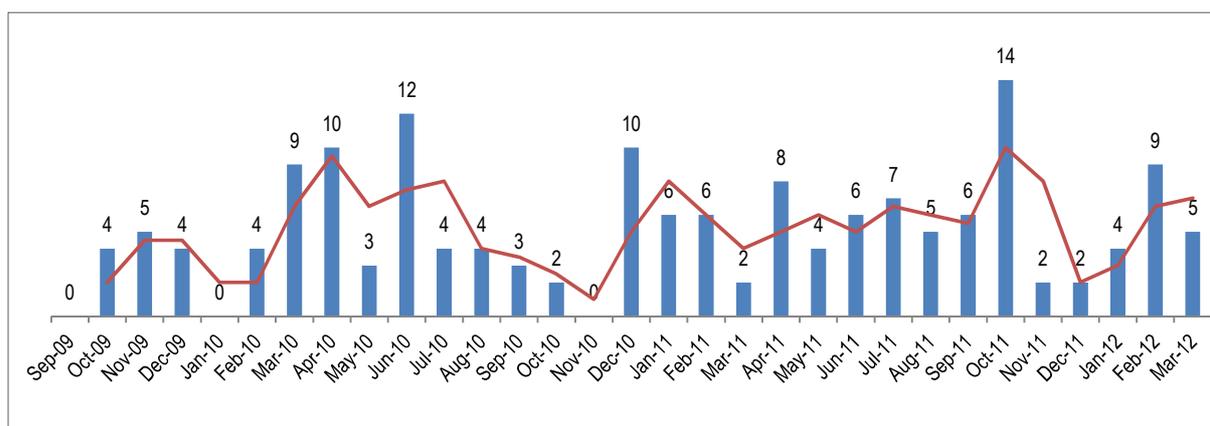
¹⁰⁶ CCMA Internal Memo.

¹⁰⁷ Ibid

¹⁰⁸ Ibid.

¹⁰⁹ CCMA Annual Report, 2011-2012. By July 2011 the CCMA had recommended 42 companies employing 8217 workers for participation in the TLS.

Figure 7
TLS monthly uptake from inception to March 2012



Although role-players have admitted that the initial uptake fell well short of expectations and is small in comparison to the roughly one million jobs shed during the recession,¹¹⁰ the scheme's implementation is regarded as 'a useful beginning and a tremendous opportunity to build mechanisms for preventing potential job losses, while also addressing businesses' future productivity and competitiveness through skills development'.¹¹¹ The CCMA also stresses that the TLS is merely 'one mechanism within a broader, multifaceted job saving strategy' and that 'case studies have proved the mechanism to be highly effective when used as part of a holistic approach'.¹¹²

The CCMA is responsible for promoting the TLS as an effective mechanism for preventing job losses. Its participation also includes facilitating, overseeing or verifying all TLS consultations and agreements. The goal of this involvement is to avoid as many retrenchments as possible by encouraging 'employers and labour [...] to explore all possible alternatives to retrenchments'.¹¹³ The CCMA is also required to keep a detailed record of all TLS agreements, the parties, the sectors and the process required to reach the agreements.¹¹⁴ The CCMA, with the assistance of funding from the Employment Promotion Programme (EPP) for two full time staff members, established a Retrenchment Support and Training Layoff Project Office (the TLS Project Office) to facilitate the implementation of the Scheme.

There are differing views on the effectiveness of the publicity campaign accompanying the scheme. Some stakeholders believe that the publicity focussed too much on generating awareness of the existence of the scheme, rather than explaining its actual processes.¹¹⁵ Many of the initial applications were rejected on the basis that the company could not demonstrate a clear link to the global economic crisis, leading to a debate about whether a lay-off scheme should not be more generally applicable to enterprises in

¹¹⁰ It is important to bear in mind that most of the job-losses associated with the recession had already occurred prior to the Scheme coming into operation.

¹¹¹ CCMA Annual Report, 2011-2012.

¹¹² CCMA Annual Report, 2011-2012.

¹¹³ NEDLAC Framework Agreement. The promotion of employment security is also a key objective of the CCMA's five-year *Siyaphambili* strategy.

¹¹⁴ For a full discussion, see Goga and van der Westhuizen, 2010.

¹¹⁵ Since the launch of the scheme in September 2009, the CCMA has embarked on an extensive and intensive publicity campaign to publicise the Scheme. The CCMA reported that they conducted more than 200 workshops and presentations in every region in South Africa during 2010. The presentations have been made to, among others, the CCMA commissioners internally, SETAs, trade unions, business organizations, individual businesses, community organizations, radio stations and CCMA user forums.

economic distress irrespective of whether this is causally linked to the recession.¹¹⁶ As indicated, this issue has been resolved by making the scheme applicable to all businesses in economic distress who are considering retrenching employees. Other issues causing disagreement include the duration of training, limits on allowances and the exclusion of higher income employees. Applying the TLS to non-standard employment relationships – including employees supplied by a labour broker (temporary employment service) – is also an area of concern. The fact that employees who are employed on, for instance, fixed-term contracts on construction projects fall outside of the TLS has been a constant source of misunderstanding.

The participating institutions have had to adapt to new functions and build the capacity and expertise to understand, promote and facilitate the implementation of a novel scheme. The lengthy period taken to determine applications can also be attributed to the large number of institutions involved in running the scheme. As a result, some prospective participants ‘lacked confidence’¹¹⁷ in the scheme’s ability to deliver, especially when considering that it is meant for businesses in immediate distress and unlikely to unnecessarily risk time and resources. Some of the delays in evaluating applications were, however, caused by factors largely out of the hands of the CCMA, including difficulties in obtaining the necessary information from the business in order to evaluate whether there was economic distress and whether it was linked to the economic crisis. A study of the scheme records a general consensus among stakeholders that the CCMA was responsive and diligent in trying to improve the time periods for facilitating and processing the TLS agreements’.¹¹⁸

Suggestions regarding the improvement of the scheme have come from both NEDLAC and the CCMA and have largely sought to address an increase in the period of training, reducing the number of documents and processes required, earmarking resources to allow employers and labour to assess eligibility more quickly, easing the terms of eligibility (by, for instance, determining whether a sector, rather than an individual employer, is in distress) and increased publicity. Ultimately, the experience of implementing the TLS should place labour relations institutions in a position to respond more creatively and effectively when encountering future business distress and job insecurity challenges.

Developing a job saving strategy

The CCMA’s participation in the TLS has led it to develop a broader approach towards addressing job insecurity and business distress. The Job Saving and Promotion of Employment Security Strategy is now fully integrated into the CCMA’s structures and budget and forms part of its daily operations. The overall objective of the project is to contribute to the stability of businesses and sectors, and to enhance the employment security and employability of workers. The main functions of the project are identified as raising awareness and capacity building; facilitation of dialogue and partnership formation; continuous improvement of approaches to address job insecurity and business distress; and the practical application of job saving mechanisms, including the TLS.

Great emphasis has also been placed on building the capacity of CCMA commissioners in facilitating business distress and job insecurity situations. Part of the CCMA’s job-saving strategy has been to establish and capacitate a team of Commissioners in each regional office who are able to deal with large-scale retrenchment facilitations in the context of the Training Lay-Off Scheme and who are knowledgeable about the

¹¹⁶ The amendment of the Scheme’s rules in February 2011 included the de-linking of the Scheme from the global economic crisis, significantly increasing successful training lay-off applications.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

possibility of business rescue interventions and the institutions that have the capacity to introduce these procedures as a mechanism for avoiding job-loss. A key aspect of the strategy has been building partnerships and collaborative relationships with other institutions including the Industrial Development Corporation, the Economic Development Department and Productivity SA.

Assessment

The development of its integrated job saving strategy is further indication of how the CCMA has evolved beyond the confines of conventional dispute resolution. It is worth tracing how this evolution occurred. Initially, its role in retrenchment was largely confined to conciliating disputes where employees had already been retrenched. Although the introduction of the facilitation process for large-scale retrenchments in 2002 allowed the CCMA to play a mediatory role prior to notices of termination being issued, the process of exploring alternatives to retrenchments remained to a large extent an activity driven by the parties. With the establishment of the training lay-off scheme in 2009, the CCMA was provided with a direct opportunity to play a role in offering substantive alternatives to retrenchment. In particular, the TLS has enabled the CCMA to co-ordinate the participation of public agencies that possess the resources and capacity to assist the parties to rescue businesses that are in distress. In this sense, referral to the CCMA has become an entry point through which parties are able to access the full range of assistance provided by public agencies. While co-ordinating the response of the various public institutions still presents significant challenges, there have been concrete achievements in saving jobs.

A recent paper by two senior CCMA officials summarizes the challenge facing the scheme in the following terms:

Various instruments and significant funding are currently available for business recovery and job saving. With the requisite political will, along with a focus on harnessing and synergising the available resources, it will be possible to make a significant impact on the ever-increasing job and employment insecurity trend. Resources are not necessarily the issue; it is more the effective coordination, promotion and utilization of current resources.¹¹⁹

The first application to use the TLS was from Atlantis Foundries and the National Union of Metalworkers of South Africa (NUMSA). Atlantis Foundries is a wholly owned subsidiary of Mercedes-Benz South Africa that produces automotive castings for passenger and commercial vehicles. It was established in 1979 and is located in Atlantis, a satellite town, approximately 50 km north of Cape Town. It is the only major employer located in Atlantis, an area with exceptionally high levels of unemployment. A total of 567 employees underwent training programmes run by the company in areas such as communications, safety, problem-solving, team-building and engineering skills. Ultimately, the company was able to reabsorb all these employees prior to the completion of training as orders had begun to pick up. Participation in the TLS enabled the company to weather the economic down-turn without having to retrench.

A particularly successful case involved a partnership with DTI and EDD to save 793 jobs at SAPPI (Pty) Ltd. The company had issued retrenchment notices to employees and their unions, CEPPWAWU, UASA and SOLIDARITY. The Company highlighted difficulties experienced in paper-manufacturing in South Africa (in particular that paper can be produced cheaper in other countries) and it intended making major structural and operational changes which would lead to job reductions. In the course of the facilitation, the DTI and EDD proposed a package of possible incentives and initiatives to boost the South African paper industry, including ways to improve competitiveness, protection against imports through tariffs; and government procurement policies. There even exists a possibility of job creation as government agreed to assist SAPPI in obtaining thousands of acres in Maputaland to grow trees on condition that it creates 30 000 to 40 000 jobs. As these initiatives would take time to materialise, the TLS was used to save jobs and assist the employer financially in the short term and effectively buy time for government to agree on new tariffs and formulate other incentives, whilst also improving the skills of workers. At Pasdec, an automotive component manufacturer, situated in Brits, a total of 143 jobs (which were at risk) were saved with 372 workers completing training under the TLS. In addition,

¹¹⁹ Everett and Daphne, 2012.

125 young matriculants, all of whom are children of existing workers, went on training initiatives which resulted in the creation of 117 new jobs.

The CCMA views the agreement as a major achievement as it has contributed to saving all the jobs at stake and benefitted the sector as a whole. Moreover the collective involvement of the CCMA and other key government agencies/departments has provided a template for future facilitations and delivery of the CCMA's job saving strategy. This intervention clearly demonstrates the value of an integrated and holistic approach to job saving and employment security.

A further successful instance of the use of TLS is the Cape Town-based towelling manufacturers Colibri and union SACTWU. The company was experiencing severe financial difficulties as a result of poor management as well as cheaper or illegal imports. The company avoided liquidation by entering into a business rescue process, which involved the IDC making cash injections to pay debts to other creditors. The company has also engaged in a program with the South African Revenue Service to assist the industry by stemming the influx of illegal towelling products. The training lay-off was explored as an option to relieve worker distress while the IDC acquired the company and business rescue measures were implemented. The parties agreed that 125 Colibri workers would participate in the training lay-off scheme, which started after the factory had been closed and workers had been without jobs for a period of 10 months. At the time of writing, employees are receiving training on improved productivity and quality, as well as how to work with different types of products and the impact of absenteeism. In addition, workers have had life skills training on, for example, goal-setting, budgeting and HIV/AIDS awareness.

Conclusion

This paper has presented a detailed picture of the establishment and evolution of South Africa's CCMA. The paper has highlighted many of the institutional innovation reflected in its structure. In conclusion, it is worth dwelling on the significance of the CCMA's experience for an international audience, particularly those engaging in policy debates about labour dispute resolution.

From an institutional perspective, the design of the CCMA reflects a "mainstreaming" of techniques associated with Alternative Dispute Resolution (ADR) such as the use of conciliation and arbitration as core techniques. Its institutional architecture has already had a significant impact on labour law reforms in the Southern African region with countries such as Lesotho (2000), Swaziland (2000), Botswana (2004), Tanzania (2004) and Namibia (2007) establishing specialist labour dispute resolution institutions that promote the role of mediation and arbitration as the primary mechanism for the prevention and settlement of labour disputes. While the model of the CCMA has played a prominent role in these reform processes, the variety of institutions that have been established show the extent to which the innovations in the South African experience can be adapted to the circumstances of other countries.¹²⁰

The design of the CCMA can be seen as moving beyond the conventional debate on the establishment of specialist labour tribunals, which has been so prominent in labour law, and raises the question of how labour dispute resolution processes can be made accessible and effective. When compared to conventional courts, whether civil courts with general jurisdiction or specialised labour courts, the CCMA has proved highly successful. Specifically, it has succeeded in providing enhanced and expedited access to dispute resolution to employees who generally would not otherwise have had the resources to bring legal challenges against decisions by their employers in conventional litigation proceedings. This success can be attributed to a range of factors, including simplified

¹²⁰ Lesotho and Swaziland follow the South African model of creating independent dispute resolution bodies governed by tripartite boards. The Tanzanian Commission for Mediation and Arbitration has the status of an independent government department and in Namibia dispute resolution is to be located under the control of the labour Commissioner. In Botswana these functions are performed by a panel of mediators and arbitrators that is appointed by the Minister and chaired by the commissioner. A number of these countries follow the South African approach of placing an obligation on the agency to conciliate disputes referred to it within 30 days. Arbitrator's decisions are not subject to appeal in Lesotho but may be reviewed by the Labour Court. In addition, there has been a significant move towards establishing specialist labour courts including labour appeal courts as the final arbiters in labour law matters

referral forms, the absence of formal legal pleadings and restrictions on legal representation in certain categories of disputes. However, the CCMA's success in lowering the barriers for access to dispute resolution has had the consequence that the CCMA is required to deal with a caseload considerably larger than had been anticipated. This in turn has required it to develop a range of streamlining techniques to ensure that the volume of its caseload does not result in delaying the resolution of disputes.

The CCMA was established to provide social justice in the employment arena through the accessible and expeditious conciliation and arbitration of disputes. Given the CCMA's enormous (and in all likelihood increasing) caseload, its achievements in conciliating and arbitrating cases, particularly dismissal cases, within relatively short periods of time have been impressive. The economic benefits of its success include a very significant decrease in the rate of industrial action over dismissal disputes in the post-1996 period. The development and tailoring of an electronic Case Management System has enabled it to enhance the efficiency of its processes, while at the same time being a source of key labour market information. The CCMA has embraced technology in a number of aspects of its operation, for instance, by using SMSes to notify parties of hearings. The effective use of technology may require that rules on issues such as the service of documents be revised. However, the experience of the CCMA does show the potential for reforms that seek to overcome the bottlenecks and delays typically associated with conventional litigation. Despite the considerable achievements in this area, the enforcement of awards remains a significant ongoing challenge.

In the collective dispute resolution arena, the initial vision was for the CCMA to conciliate unresolved disputes arising from negotiations, once referred by a party to the dispute. In this regard, the original CCMA model reflected the conventional wisdom about the autonomy of collective bargaining and dispute resolution. Increasingly, however, the need to intervene at an earlier stage in key disputes that could have disruptive consequences for the labour market has been identified as a significant priority. This reflects the emergence of a more 'active' approach to conciliation, pursuant to which the CCMA offers to facilitate collective bargaining at an early stage and seeks to prevent disputes spiraling into disruption and violence. However, criteria have been developed to ensure that an appropriate balance is struck between the public interest in dispute prevention and the autonomy of collective bargaining.

As noted above, collective bargaining in South Africa has become increasingly adversarial in the last five years, and has been accompanied by significant levels of violence. This may seem to be a reason to disregard the dispute resolution innovations that are a feature of South African law. However, the author is of the view that the nature of collective bargaining is a reflection of the broader social and economic realities in South Africa, in particular the apartheid inheritance and the high levels of inequality. The establishment of the CCMA has served to mitigate the potential negative impact of these disputes on the economy. A 2011 survey by the OECD captures the CCMA's contribution to the South African labour market in the following terms:

As one of the great post-apartheid institutions set up in the early phase of building a national system of regulated flexibility, the commission acts as a social safety valve, dealing with numerous individual disputes between employers and employees as well as "interest" cases, and acting as a conciliator and eventually arbitrator between employer bodies and unions. Despite its budgetary limitations, it has played a very positive role in limiting social tensions and in creating and preserving a deliberative labour policy. It now performs functions that go well beyond the terms of reference one would expect from its name.¹²¹

The CCMA plays a diverse range of roles in the South African labour market and has repeatedly reshaped its capacities in response to changing labour market realities. Its credibility and legitimacy as an institution charged with dispute prevention and dispute resolution have enabled the CCMA to respond to the fallout of high levels of inequality

¹²¹ OECD, 2011.

and unemployment by playing an increasingly active role in facilitating consensus-seeking processes, both in the collective bargaining arena and in situations where there are potential job losses. In part, this flows from the active tripartite participation of the social partners in its governance. This has enabled the CCMA to offer its services to parties to facilitate complex negotiations and increasingly improve the calibre of collective bargaining. Its development of an integrated job saving strategy has resulted in the CCMA playing an innovative role in coordinating the responses of a wide range of public institutions with the capacity to assist to enterprises in distress and their employers. These initiatives point to the further contribution it will make in the years to come.

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