Legal Analysis of the Effectiveness of Arbitration Process in Unfair Dismissal Dispute: South African Perspective

By

Memory Machete

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Supervisor: Adv MJ Mangammbi

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PLAGARISM DECLARATION

I declare that the mini-dissertation hereby submitted to University of Limpopo, for the degree of Master of Laws in Labour Law has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

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LIST OF ACRONYMS

ACAS:	Advisory, Conciliation and Arbitration Service
ADR:	Alternative Dispute Resolution
CCMA:	Commission for Conciliation, Mediation and Arbitration
ILO:	International Labour Organisation
LRA:	Labour Relations Act 66 of 1995
UK:	United Kingdom

ABSTRACT

This dissertation presents a legal analysis of the effectiveness of arbitration process in unfair dismissal dispute with a particular emphasis on South Africa. The use of arbitration process in resolving unfair dismissal dispute is influenced by its efficiency, accessibility and flexibility.

In South Africa, arbitration process is employed by the CCMA that was established to encourage effective labour dispute. A central problem that the CCMA encounter which affects its effectiveness is the high number of unfair dismissal disputes referred for arbitration process. According to the legal research offered in this dissertation, the number of unjust dismissal disputes brought to arbitration process continue to rise every year. As a result, the CCMA is swamped by these referrals, which affects its effectiveness.

According to the findings, the arbitration process is now widely used around the world to resolve unfair dismissal disputes. The extent to which the arbitration process is adopted to resolve unfair dismissal dispute varies from country to country and is guided by legislation. As a result, it has been discovered that the CCMA may benefit from the ACAS's arbitration process strengths from the United Kingdom as well as Namibia's arbitration process strengths.

The United Kingdom results show that ACAS is able to resolve a higher proportion of unfair dismissal dispute through conciliation rather than arbitration, which reduces the number of referrals from the arbitration process. In Namibia, if parties to unfair dismissal dispute want to refer an unfair dismissal dispute for arbitration process it must be done by mutual agreement between the parties except in exceptional circumstances. All this mode of operation between United Kingdom and Namibia when resolving unfair dismissal disputes hinder high referral rate from the arbitration process.

This dissertation concludes with recommendations arising from policy making that promotes the effectiveness of the arbitration process and limiting the abuse of the process.

CHAPTER 1
INTRODUCTION AND BACKGROUND OF THE STUDY

1. INTRODUCTION AND HISTORICL BACKGROUND

The *Constitution of the Republic of South Africa* (*Constitution*)[1] asserts that everyone has the right to fair labour practice.[2] The term "everyone" take account of both employers and employees. The right to fair labour practice was given force by acts of parliament, which includes the *Labour Relations Act*[3] (*LRA*).

In relation to the study, the imperative goal of the *LRA* is to encourage effective labour disputes resolution.[4] The Commission for Conciliation, Mediation, and Arbitration (CCMA) was founded in an effort to provide efficient, accessible, and flexible methods for resolving labour disputes through conciliation, mediation, and arbitration, as stated by the *LRA*.[5]

It is an ideal initiative to have an alternative dispute resolution system that will handle disputes that are arising in the workplace. An alternative dispute resolution system in the workplace related disputes provide a relief to overloaded courts and provide more effective dispute resolution. It is mandatory for every dispute in the workplace to be handled effectively to give effect to fair labour practices. Regrettably, not all of these labour disputes are conducted effectively.

The history of industrial relation in South Africa, especially relating to the development of alternative dispute resolution system, has a contemplation of the country's racially divided history of white supremacy.[6] The South African labour society has its roots in a historically divided working class based on race and skills.[7] This working class was

[1] *Constitution of the Republic of South Africa*, 1996.
[2] Section 23 of the *Constitution of the Republic of South Africa*, 1996.
[3] *Labour Relations Act* 66 of 1995.
[4] Section 1(a)(iv) of the *Labour Relation Act* 66 of 1995.
[5] Section 112 of the *Labour Relation Act* 66 of 1995.
[6] Visser 2007 *aksant* 40.
[7] Visser 2007 *aksant* 40.

perpetuated as a tiny, mainly skilled and exclusive white group of trade unionists and a vast disorganized and unskilled proletariat of black workers.[8]

With the discovery of minerals, the demand for specialised labour increased because South Africa lacked the skills and technical expertise required for hard-rock mining. Therefore, skilled experts, especially Cornish hard-rock tin miners and various other types of craftsmen, were employed mainly from the English-speaking industrial world.[9]

As white miners and craftsmen became more radical and began to precipitate in violent strike action, legislation was promulgated by way of the *Industrial Disputes Prevention Act*[10], however, it was unable to achieve its goals.[11] White workers led more extreme strikes in the 1910s, such as the 1913 miners' strike and the 1914 general strike.[12] The greatest and deadliest strike in South African labour history took on the hallmarks of a civil war on the Witwatersrand in 1922.[13]

The 1922 strike marked a watershed moment in South Africa's industrial history. It signalled the separation of black and white workers, as well as the creation of the 'conciliation system' through the *Industrial Conciliation Act*[14].[15] The Act repealed the *Industrial Dispute Prevention Act* and it structured the relations between the employer and unions in South Africa.[16] The *Industrial Conciliation Act* limited the ability to strike by making it illegal to strike unless the statutory criteria of seeking to resolve the disagreement in an industrial commission or conciliation tribunal were satisfied.[17]

Because white and black trade unionism was on the rise between 1931 and 1935, the 1924 *Industrial Conciliation Act* was abolished and replaced with the 1937 *Industrial Conciliation Act*[18].[19] The 1937 Act's goal was to achieve industrial peace between employers and employees through the use of arbitration, conciliation, and mediation.[20]

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[8] Visser 2007 *aksant* 40.
[9] Visser 2007 *aksant* 40.
[10] *Industrial Disputes Prevention Act* 20 of 1909.
[11] Visser 2007 *aksant* 45.
[12] Visser 2007 *aksant* 45.
[13] Visser 2007 *aksant* 45.
[14] *Industrial Conciliation Act* 11 of 1924.
[15] Visser 2007 *aksant* 45.
[16] Visser 2007 *aksant* 45.
[17] Rapatsa and Matloga 2014 *JBM&SSR* 115.
[18] *Industrial Conciliation Act* 36 of 1937.
[19] Visser 2007 *aksant* 46.
[20] Visser 2007 *aksant* 46.

However, the 1937 Act excluded other black employees.[21] This led to the enactment of the *Black Labour Relation Regulation Act*[22], which was intended to protect the interests of black employees when agreements that concerned them were taken.

At the emergence of democracy in 1993, the *interim Constitution*[23] saw the inclusion of labour relations into the final *Constitution* of 1996 to improve the effectiveness of dispute resolution. The *Constitution* gave the current basis of labour laws in South Africa.

The above historical background shows that the problems experienced within the prior apartheid system of labour relations led to the establishment of the CCMA to encourage effective labour dispute resolution. The establishment of the CCMA is recognised as modern example of institutional architecture in the South African state's post-apartheid rehabilitation in labour dispute resolution.

Against this background, the study seeks to address the effectiveness of arbitration as alternative dispute resolution process in South Africa as provided by the CCMA in unfair dismissal dispute. It must be noted that there are advantages and disadvantages that are associated with the arbitration process in dealing with unfair dismissal disputes. The advantage of the arbitration process is that it is quick to handle disputes, less costs, and less formality of the proceedings. Furthermore, the parties have control over their own dispute. The disadvantage part of arbitration process is that arbitrators may exercise their discretion in handling the dispute, and arbitrators' awards are limited to monetary and reinstatement in the case where the employee has been unfairly dismissed.

In addressing the topic, the study focuses on how the CCMA in arbitration process has dealt with issues relating to unfair dismissal dispute. The study identifies the success and shortcomings of the arbitration process. To be able to provide recommendations towards the arbitration process in relation to unfair dismissal disputes, United Kingdom's alternative dispute resolution system will be compared to the one of South

[21] Visser 2007 *aksant* 46.
[22] *Black Labour Relation Regulation Act* 48 of 1953.
[23] *Constitution of the Republic of South Africa*, 1993.

Africa and provide proposed recommendation for South African arbitration process in disputes based on unfair dismissal disputes.

2. STATEMENT OF THE RESEARCH PROBLEM

When the CCMA was established, it was expected that it would handle an average of 30 000 referrals each year across the country.[24] However, the referral of cases exceeded the average of referrals that was expected. According to the CCMA annual reports, during the 1997/1998, 67 319 cases were referred to the CCMA. The trend of referrals continues to grow year after year with 154 279 referrals received in 2010/2011.[25] During the 2015/2016 reporting period, the CCMA reported 179 528 referrals.[26] During the period of 2016/2017, the CCMA reported 188 449 referrals.[27]

The trend continued to rise during the period of 2018/2019 reporting 193 732 referrals. Currently, during the 2019/2020 the trend is at 221 547 referrals.[28] This translates to a 14% year-on-year, or 27 815 more cases referred, and an average of 879 new matters being referred to the CCMA every working day.[29]

In 2019/20, about 59% of all referrals were related to claims of unfair dismissal, compared to 71% in the previous fiscal year.[30] This is the significance that the CCMA is being swamped up by excessive referrals of unfair dismissal disputes and it affects its effectiveness when dealing with the unfair dismissal dispute.

The high increase of referrals is the significance that there are problems in the labour market that needs to be regulated at the ground level to limit disputes arising in the workplace. However, it is noted that the economy of the country is growing slowly in which it is continues to be overpowered by the rise of the unemployment rate. As a result, the legal dispute management instruments like the CCMA are burdened by this situation.

3. SIGNIFICANCE OF THE STUDY

[24] Bhorat H and Pauw K 2007 *DPRU* 12.
[25] Bhorat H and Pauw K 2007 *DPRU* 12.
[26] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 25.
[27] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 25.
[28] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 25.
[29] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 25.
[30] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 25.

Disputes are common in the workplace and are inevitable; which makes it essential for the improvement of our law. Therefore, the study will contribute to the jurisprudence of labour law. The success and shortcomings of arbitration process will be identified when it comes to dealing with unfair dismissal disputes. The study will also contribute to constructive economic development and social fairness.

4. AIMS AND OBJECTIVES OF THE STUDY

The aim of this study is to examine if arbitration as alternative dispute resolution process is promoting fair labour practice, economic development and social justice in matters relating to unfair dismissal. The study seeks to identify challenges or gaps in the CCMA in as far as arbitration process is concerned when dealing with unfair dismissal disputes. Furthermore, to determine whether CCMA is the best dispute management and dispute resolution system when dealing with unfair dismissal disputes. The study also seeks to ascertain whether the CCMA strives for organisational effectiveness.

The objective of the study is to establish a discussion on the importance of promoting an efficient, accessible less and flexible arbitration process in unfair dismissal disputes.

5. RESEARCH METHODOLOGY

In answering the problem statement, the study will adopt a qualitative research methodology. The methodology focuses on desktop literature review of books, journal articles, legislation, case laws, newspaper articles, online articles, and international conventions. To achieve all the aims and objectives of the study, an empirical evidence and critical analysis on the topic will be used to ascertain the effectiveness of arbitration process in unfair dismissal disputes.

Furthermore, to help the study to achieve its objective, a comparative analysis with United Kingdom will be done. It will examine the international position in as far as arbitration process is concerned. The positive and negative that will arise between the two jurisdictions will be highlighted to arrive at a just conclusion of the effectiveness of arbitration process in unfair dismissal disputes.

The proposed research methodology is suitable to determine the effectiveness of arbitration process in unfair dismissal disputes.

6. LITERATURE REVIEW

Since the establishment of the CCMA, its use for arbitrating unfair dismissal dispute has proven to be useful to employers and employees through efficient, accessible and flexible dispute resolution. According to Aisha[31], the arbitration process time limit promotes efficiency as it is quicker to handle and in concluding unfair dismissal disputes when compared to courts.[32] Accessibility of the arbitration process through the CCMA is one of the highlighter that shows the effectiveness of the dispute resolution system. One of the aims of the arbitration process is to provide all employee who has unfair dismissal dispute an opportunity to be able to refer the matter to the CCMA, without incurring costs for legal representation.[33] According to Leeds and Locke[34] the high rate of unfair dismissal disputes referred to arbitration process shows the accessibility to the CCMA.[35] The flexibility of the arbitration process in the CCMA ensures that there are limited barricades to the system.

The *LRA* has brought statutory dispute resolution within the reach of the ordinary worker, but the high referral rate of unfair dismissal cases referred to arbitration process have intensified problems concerning unfair dismissal dispute resolution in the CCMA. Musukubili and van der Walt[36] states that the arbitration process is not as effective as has been imagined; unfair dismissal disputes are not dealt with in an expeditious manner nor in a pleasant environment, and the CCMA subsequently fall short to produce the anticipated speedy outcomes.[37] These problems have created perceptions that the courts are now becoming the effective remedy available to finalise unfair dismissal disputes through urgent applications.

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[31] Aisha *Resolving Dismissal Disputes: A Comparative Analysis of Public Arbitration Bodies in South Africa and England*.
[32]Aisha *Resolving Dismissal Disputes: A Comparative Analysis of Public Arbitration Bodies in South Africa and England* 27.
[33] *CCMA v The Law society of the Northern Provinces (*005/13) ZASCA 118.
[34] Leeds and Wocke 2009 *SAJLR*.
[35] Leeds and Wocke 2009 *SAJLR* 28.
[36] Musukubili and van der Walt 2014 *OBITER*.
[37] Musukubili and van der Walt 2014 *OBITER* 135.

The high referral rate of cases in the CCMA may be caused by employees who resolve to abuse the arbitration processes. Blignaut[38] provides that due to the hesitancy of awarding cost orders against claimants who refer frivolous cases in the CCMA, it has become very enticing for frustrated employees to abuse the arbitration process in the hope of making money through compensation. Such practices are not only clogging the referral roll of the CCMA, but also drains of the CCMA's time and resources.[39] Blignaut further states that to avoid the abuse of the process, there must be consequences in the form of cost orders or fines on the part of employees who have been dismissed fairly.[40]

The commissioners seem to have problems in making informed, reasonable and objective decisions whenever dealing with matters of unfair dismissal looking at how their decisions are reviewed by Labour Court. Fathima[41] states that basis for reviewing an outcome rendered by the commissioner based on unfair dismissal is not related to the merits of the case but to the commissioners' conduct.[42] Fathima further provides that bias is found to be an endemic part of the commissioners' personalities stating that a commissioner who exhibits an authoritarian personality may have a tendency to render an unfavourable decision towards those who don't show respect and compliance in the presence of the commissioner.[43]

In the case of *Nxumalo v CCMA and Others*[44] a commissioner who had dismissed an unfair dismissal matter was found to have acted in gross irregularity in conducting of the proceedings, and committed misconduct in relation to his duties as a commissioner within the meaning of section 145(2)(i) and (ii) of the *LRA*. The ruling of the commissioner was reviewed and set aside. To avoid gross irregularity by the commissioners, in the case of *CUSA v Tao Ying Metal Industries*[45] the court stated that "commissioners are required to deal with the substantial merits of the dispute with

[38] Blingnaut *The effectiveness of conciliation as an alternative dispute resolution process in unfair dismissal disputes*.
[39] Blingnaut *The effectiveness of conciliation as an alternative dispute resolution process in unfair dismissal disputes* 35.
[40] Blingnaut *The effectiveness of conciliation as an alternative dispute resolution process in unfair dismissal disputes* 48.
[41] Fathima *Demographic Variables and Outcomes of Labour Disputes*.
[42] Fathima *Demographic Variables and Outcomes of Labour Disputes* 1.
[43] Fathima *Demographic Variables and Outcomes of Labour Disputes* 1.
[44] *Nxumalo v Commission for Conciliation, Mediation and Arbitration and Others* (not reportable) case number 69/2013 of 17 November 2016 para 32.
[45] *CUSA v Tao Ying Metal Industries and Others* (2008) 29 *ILJ* 2461 (CC) para 65.

the minimum of legal formalities by ensuring that they resolve real dispute between the parties, they must do so expeditiously and act fairly to all the parties as the *LRA* orders them to do". Furthermore, Labuschagne[46] in relation to *Sidumo v Rusternburg Platinum Mines Ltd*[47], in relation to unfair dismissal disputes, states that the commissioner must use his mind to the extent that his decision and grounds for the decision will pass the "reasonable decision maker-test".[48]

On the arbitration process being swamped by excessive referrals of individuals' unfair dismissal disputes, Bendeman[49] confirms that the CCMA is under pressure as it is evident from numerous reports from the CCMA relating to the high level of referrals in the CCMA. He further provides that the arbitration process is not as effective as was anticipated because it is evident that many unfair dismissal disputes are referred to arbitration process because they would have failed to be resolved in conciliation process.[50] Bendeman states that the cause of high referral rate in the arbitration process is the easy access to the CCMA; the high expectations of the applicants that they will be compensated regardless of the merits of the case; the lack of knowledge of applicants about their rights and obligations resulting from the poor advices from trade unions, labour consultant and the Department of Labour; the high unemployment rate and poverty; and the employer's lack of knowledge of labour legislation and disregarding of substantive and procedural requirements for fairness.[51]

Leeds and Wocke states that the prominent suggestion for reducing the problem of high referrals in the arbitration process includes the charging of referral levies, awarding costs against the parties that refer frivolous cases, permitting legal representation, and introducing requirement for referral of unfair dismissal disputes.[52] Bendeman also supports the idea of Leeds and Wocke that there must be a payment of referral fees.[53] However, Bandeman further provides that the solution to reduce the high referral rate is to provide education and training for employees, employers, and

[46] Labuschagne *Sidumo v Rustenburg Platinum: Impact on disciplinary hearings in the workplace*.
[47] *Sidumo v Rusternburg Platinum Mines Ltd and others* (2007) *ZACC* 22.
[48] Labuschagne *Sidumo v Rustenburg Platinum: Impact on disciplinary hearings in the workplace* 5.
[49] Bendeman 2006 *AJCR* 83.
[50] Bendeman 2006 *AJCR* 85.
[51] Bendeman 2006 *AJCR* 87-88.
[52] Leeds and Wocke 2009 *SAJLR* 29.
[53] Bendeman 2006 *AJCR* 89.

trade union representatives; and to involve advisory forums such as Legal Aid Centers where professional advice will be certain with regard to the merits of the case.[54]

7. CHAPTER OUTLINE

7.1 Chapter 1: Introduction

This chapter provides the introduction and overview of the study. It introduces the topic and give a brief introduction of what is to be expected in the study. It further provides a historical background of alternative dispute resolution to the development of the CCMA. Lastly, it indicates the aims and objectives, statement of a researchable problem and literature review.

7.2 Chapter 2: Legislative Framework of the Commission for Conciliation Mediation and Arbitration

This chapter outline the Acts of government, regulations, delegations, policies, procedures, and instructions that establish the mandatory of the arbitration process. Furthermore, it provides the rules of operation for arbitration process in the CCMA together with the commissioners.

7.3 Chapter 3: Analysis of the Arbitration Process

This chapter explain why it is essential to have arbitration as an alternative dispute resolution process. Furthermore, it discusses the conciliation process as a first step in the CCMA of resolving unfair dismissal dispute.

7.4 Chapter 4: Success and Shortcomings of the Commission for Conciliation, Mediation and Arbitration

This chapter provide success and the shortcomings of the arbitration process on its efficiency, accessibility, and flexibility.

7.5 Chapter 5: Comparative study between South Africa, Namibia and United Kingdom

[54] Bendeman 2006 *AJCR* 90.

South Africa has a mixed legal system which includes English common law because of the colonial governance by the English. Therefore, this chapter stipulates how arbitration process in United Kingdom is tackled when dealing with issues of unfair dismissal in comparison to South Africa. Furthermore, it establishes the success and shortcomings of the arbitration process looking at efficiency, accessibility, and flexibility in the United Kingdom. A Namibian alternative dispute resolution will also be considered as a regional comparative country.

7.6 Chapter 6: Conclusion and Recommendation

To address the problems that are encountered by the arbitration process, this chapter will provide recommendations of the approaches that can be taken into considerations to help in resolving the problems. Furthermore, a conclusion will be given on the overview of the study and whether the arbitration process is effective in matters of unfair dismissal.

8. CONCLUSION

The history of unjust dismissal dispute settlement in South Africa was examined in this chapter. From the early nineteenth century to the present day, South Africa has had a significant history in the development of its labour laws and labour dispute settlement processes, beginning with agriculture and ending with industrialisation. This historical development had a great impact on the country's labour law statutes in the struggle of creating appropriate measures to regulate unfair dismissal dispute.

An alternative dispute resolution system on workplace related disputes, it provides a relief to overloaded courts and provide more effective dispute resolution. Even though the literature displays the success of the CCMA, it also display that the CCMA suffers from a high referral rate of unfair dismissal disputes in the arbitration process. This leads to a situation whereby measures to prevent the high referral rate should be enacted and enforced effectively. Some of the measures that can be applied can be through the use of award costs, allowing legal representation, and establishing requirements for referrals of unfair dismissal disputes.

CHAPTER 2
LEGISLATIVE FRAMEWORK OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

1. INTRODUCTION

This chapter seeks to explore legal instruments in the process of establishing the CCMA. To do this, it is important to look at the transition that have taken place in the historic change in South African labour laws of dispute resolution system. The first labour relations statute to regulate disputes arising in the workplace was *Industrial Disputes Prevention Act* of 1909 but it was unsuccessful in achieving its objectives.[55] This led to the promulgation of *Industrial Conciliation Act* of 1924 that developed procedures of industrial action, collective bargaining and dispute resolution.[56] However, the Act prevented black workers from obtaining key qualifications and this became racial discrimination on job reservation.[57]

As a result, the new *Industrial Conciliation Act* of 1937 repealed the *Industrial Conciliation Act* of 1924.[58] The 1937 Act's goal was to achieve industrial peace between employers and employees through the use of arbitration, conciliation, and mediation.[59] However, the 1937 Act excluded other black employees.[60] This led to the enactment of the *Black Labour Relation Regulation Act* of 1953 which was intended to protect the interests of black employees when agreements that concerned them were taken.

At the emergence of democracy in 1993, the *interim Constitution* saw the inclusion of labour relations into the final *Constitution* of 1996 to improve the effectiveness of dispute resolution. The *Constitution* gave the current basis of labour laws in South Africa.

[55] Visser 2007 *aksant* 45.
[56] Arbitration Act 42 of 1965.
[57] Benjamin 2013 *ILO* 2-3.
[58] Visser 2007 *aksant* 46.
[59] Visser 2007 *aksant* 46.
[60] Visser 2007 *aksant* 46.

2. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

The *Constitution* is the supreme law of the Republic, and any law that is inconsistent with it is invalid.[61] The supremacy of the *Constitution* is embodied in its values that promotes human dignity, achievement of equality and advancement of human rights and freedoms.[62] This respect towards human rights it extends to an employee and employer.

The CCMA was founded in accord with Section 23 of the *Constitution*, which provides that everyone has the right to fair working conditions. Employers and employees are both included in the term "everyone." The *Labour Relations Act* 66 of 1995 gave effect to this privilege.

The establishment of the CCMA and referring unfair dismissal disputes to arbitration process gave effect to Section 23 of the *Constitution*. The right to fair labour practice was elevated to the status of fundamental right in the *Constitution* because of protection to job security and other rights associated with employment. The case of *Fedlife Assurance Ltd v Wolfaardt*[63] evoked the right to fair labour practices as follows:[64]

> Section 23(1) of the *Constitution* provides that everyone has the right to fair labour practices. It seems to me almost uncontestable that one of the most important manifestations of the right to fair labour practices that developed in labour relations in this country was the right not to be unfairly dismissed. Had the Act not been enacted with the express object to give effect to the constitution right to fair labour practices (amongst others), the court would have been obliged, in my view to, develop the common law to give expression to this constitutional right in terms of s 39(2) of the *Constitution*. To the extent that the Act might not fully give effect to and regulate that right, that obligation on ordinary civil courts remain.

In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau*[65] the Court reasoned as follows:[66]

> Section 23(1) of the constitution provides that everyone has a right to fair labour practice. This concept is not defined in the constitution but embraces the right to job security. This right should not be terminated except if it is lawful and fair to do so.

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[61] *Constitution of the Republic of South Africa*, 1996.
[62] Section 1(a) of the *Constitution of the Republic of South Africa*, 1996.
[63] *Fedlife Assurance Ltd v Wolfaardt* 2001 21 *ILJ* 2407 (SCA).
[64] *Fedlife Assurance Ltd v Wolfaardt* 2001 21 *ILJ* 2407 (SCA) para 15.
[65] *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2003 24 *ILJ* (LC).
[66] *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2003 24 *ILJ* (LC) 1726D.

The case of *NUMSA v Bader Bop (Pty) Ltd*[67] also addressed the right to fair labour practices, debating whether a minority union and its members had the legal right to pursue valid strike action in order to persuade an employer to recognise its shop stewards in line with section 14 of the *LRA*. Section 14 powers were granted to trade unions that had a majority of employees working in the workplace, and as a result, NUMSA had minority members. The court mentioned the right to fair labour practices and noted that:[68]

> In section 23, the *Constitution* recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employers organizations to engage in collective bargaining, illustrates that the constitution contemplates that collective bargaining between employers and workers is key to a fair industrial environment….In interpreting the rights in s23, therefore, the importance of those rights in promoting a fair working environment must be understood.

As a result, employee protection against unfair dismissal is very important.[69] Although these labour relation rights does not explicitly mention anything related to dispute resolution, they describe the rights to which every employee is entitled to and violation of these rights raise a dispute that will need to go through dispute resolution. Section 33 of the *Constitution*, on the other hand, ensures that everyone has the right to administrative action that is legitimate, reasonable, and procedurally fair. The commissioners of the CCMA when exercising their functions they must ensure that they do so lawfully, reasonably and procedurally fair through public administration.

Furthermore, section 34 provides that:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

This provision stipulates that disputes are not limited to be resolved in courts, however, independent and impartial tribunals or forums may also serve as alternative dispute resolution mechanisms. Therefore, the arbitrator in the CCMA has a duty to be independent and impartial. The employment tribunal must always ensure that the proceedings before it are in line with the provision of section 23.

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[67] *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC).
[68] *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC) para 13.
[69] *Maloka* 2004 *TLR* 109.

In *Mkhize v CCMA*[70], the Court determined that the CCMA is a tribunal under section 39 of the *Constitution*, and that it is also an organ of state under section 239(b)(ii) of the *Constitution* because it wields public authority and executes public functions in line with the law.[71] It is argued that the court's decision in *Mkhize v CCMA* reflects the courts' view that the CCMA's compulsory arbitration function qualifies as administrative action to fulfil that fundamental entitlement.[72]

3. LABOUR RELATIONS ACT

The *LRA* gave force to section 23 of the *Constitution* in terms of the right to fair labour practice. Amongst other purposes of the *LRA*, it promotes the effective labour disputes resolution.[73] This led to the establishment of the CCMA in effort to provide efficient, accessible and flexible procedures for resolution of labour dispute through conciliation, mediation and arbitration.[74] Therefore, section 112 of the *LRA* gave birth to the CCMA.

Every employee has the right not to be wrongfully terminated or exposed to unfair labour practices under Section 185 of the *LRA*. When an employee alleges that he or she was fired unfairly, the matter is referred to arbitration under section 191(5)(a), which can be done before the CCMA or a negotiating council. Section 192 of the *LRA*, titled "Onus in Dismissal Disputes," states that if an employee establishes the facts of a dismissal, the employer must prove that the dismissal was fair.

A commissioner is required by law to decide whether a challenged dismissal was fair. A commissioner must act equitably and swiftly in accordance with section 138 of the *LRA*. First, he must establish whether or not the employer's decision to remove him was based on wrongdoing.[75] This entails looking into whether or not there was a workplace rule in place and whether or not the employee broke it.

[70] *Mkhize v CCMA* 2001 1 SA 338 (LC).
[71] *Mkhize v CCMA* 2001 1 SA 338 (LC) para 17-20.
[72] Botma 2009 *Obiter* 341.
[73] Section 1(a)(iv) of the *Labour Relation Act* 66 of 1995.
[74] Section 112 of the *Labour Relation Act* 66 of 1995.
[75] Item 7 of schedule 8 to the *Labour Relations Act* 66 of 1995.

In *Sidumo v Rustenburg Mines Ltd*[76] the Court declared, in the context of the long-running argument over how arbitrating commissioners should approach an employer's discipline for employee wrongdoing, that:[77]

> The Constitution and the LRA seek to redress the power imbalance between employees and employers. The rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organizations. Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute. Dismissal disputes are often emotionally charged. It is therefore all the more important that a scrupulous even-handedness be maintained. The approach of the Supreme Court of Appeal tilts the balance against employees.

The fact that dismissal has been correctly, if colourfully, described as "the labour relations equivalent of capital punishment" emphasises the fragility of employees.[78] In *Hoffman v South African Airways*[79] the Court made it clear to employers that it will interfere in appropriate circumstances to defend a person's right to work and earn a living.

Prior to the promulgation of the *LRA*, the dispute resolution processes was not effective.[80] The chaotic strikes and inability to resolve unfair dismissal disputes was the significance that effectively proved the collapse in the statutory system of resolving unfair dismissal disputes in the country.[81] The Labour Department released statistics showing that less than 30% of the disputes referred to industrial councils were settled and approximately 20% of the conciliation boards gave rise to settlements.[82]

The statistics indicated that independent mediation services proved to be successful with a success rate of over 70%.[83] However, strikes and the high cost implications rendered the whole statutory regime of resolving unfair dismissal disputes ineffective.[84] As a result, this led to the draft *LRA* bill calling to establish an independent dispute resolution body but funded by the government committed to

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[76] *Sidumo v Rustenburg Mines Ltd* 2007 28 ILJ 2405 (CC).
[77] *Sidumo v Rustenburg Mines Ltd* 2007 28 ILJ 2405 (CC) para 74
[78] *Chemical Workers Industrial Union v Algorax (Pty) Ltd* 2003 24 *ILJ* 1917 (LAC) at para 70.
[79] *Hoffman v South African Airways* 2001 (1) SA 1 (CC).
[80] Aisha *Resolving Dismissal Disputes: A Comparative Analysis of Public Arbitration Bodies in South Africa and England* 17.
[81] Explanatory Memorandum to the *Labour Relations Act* 1995 16 *ILJ* 326.
[82] Explanatory Memorandum to the *Labour Relations Act* 1995 16 *ILJ* 326.
[83] Explanatory Memorandum to the *Labour Relations Act* 1995 16 *ILJ* 326.
[84] Explanatory Memorandum to the *Labour Relations Act* 1995 16 *ILJ* 327.

resolving workplace disputes.[85] The draft bill also provided for the resolution of a range of disputes by arbitration and conciliation, including dismissals.[86] Through section 112 of the *LRA*, this is how the CCMA was established.

The mandatory functions of the CCMA are established in section 115(1) of the *LRA*, which includes resolving dispute through conciliation and arbitration.

Sections 115(2) and (3) of the *LRA* provides discretionary functions that supplement the mandatory functions, such as providing administrative assistance to an employee who earns less than the stipulated threshold, supervising ballots by unions and employer organisations, providing training and information relating to the *LRA* primary objective, advising parties to a dispute about the procedure to follow, and offering to resolve a dispute that has not been resolved.

These functions are there to ensure an effective dispute resolution as prescribed by section 1 of the *LRA*.

3.1 Code of Good Practice

The Code of Good Practice described in Schedule 8 is a projecting feature of the *LRA* when dealing with unfair dismissal disputes.[87] The intention of the Code of Good Practice is to afford "legitimate, coherent, accessible and flexible jurisprudence" in terms of unfair dismissal dispute resolution and lays out the approach to adopt in resolving unfair dismissal disputes.[88] This is suitable given the fact that majority of arbitration cases revolve around unfair dismissal.[89]

In terms of section 138(10) of the *LRA*, commissioners must adhere to these Codes when interpreting the *LRA* in the arbitration process. According to item 7 of the Code, the idea behind executing the Codes within a legislative framework is to educate employers and employees in resolving disciplinary issues that amounts to dismissal.[90]

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[85] Aisha *Resolving Dismissal Disputes: A Comparative Analysis of Public Arbitration Bodies in South Africa and England* 17.
[86] Aisha *Resolving Dismissal Disputes: A Comparative Analysis of Public Arbitration Bodies in South Africa and England* 17.
[87] Section 203 of the *Labour Relations Act* 66 of 1995.
[88] Section 203 of the *Labour Relations Act* 66 of 1995.
[89] Benjamin 2013 *ILO* No 47.
[90] Aisha *Resolving Dismissal Disputes: A Comparative Analysis of Public Arbitration Bodies in South Africa and England* 19.

4. EMPLOYMENT EQUITY ACT

As a result of the *Constitution* giving everyone the right not to be unfairly discriminated[91], the *Employment Equity Act*[92] (*EEA*) gives effect to this right in section 6(1) stating that in any employment policy or practice, no one may discriminate against an employee.

Due to the prohibition of unfair discrimination, section (2)-(6) of the *EEA* states that any party to a dispute may submit the dispute to the CCMA and the CCMA must make an attempt to resolve the dispute through conciliation. If the dispute remains unresolved after conciliation, either party may bring the dispute to the CCMA for arbitration if both parties consent to arbitration process or where employee alleges unfair discrimination on the basis of sexual harassment.

5. INTERNATIONAL FRAMEWORK

The International Labour Organisation (ILO) plays an important function in the development of legal framework for CCMA. Therefore, it is imperative to take into account the international guidelines and standards relevant to the realisation of effective labour dispute resolution. Through a variety of Conventions and Recommendations, the ILO has a long history of aiding its member countries in the areas of dispute prevention and settlement.[93]

The ILO brings together governments, businesses, and employees from 187 member countries (South Africa being a member) to establish labour standards, create regulations, and design programs to promote decent employment for all women and men and effective dispute resolution.[94] As an ILO member, South Africa's labour legislation and regulations must adhere to the ILO Constitution and ratified Conventions in terms of its domestic laws.

South Africa has managed to ratify convention such as:

[91] Section 9 of the *Constitution of the Republic of South Africa*, 1996.
[92] *Employment Equity Act* 55 of 1998.
[93] Rwodzi *The use of alternative dispute resolution mechanisms in labour relations in the workplace in South Africa* 55.
[94] https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm.

5.1 Labour Relations (Public Service) Convention, No. 151 of 1978

This convention promotes public sector employees to engage in collective bargaining as well as other methods that allow representatives of public employees to participate in the decision-making process about their working circumstances.[95] Disputes should be handled by direct dialogue between the parties or through independent and impartial methods such as Mediation, Conciliation, and Arbitration, in a manner that ensures the parties trust.[96] The CCMA as a judicial body enforces this convention at the national level.

In the field of labour, the CCMA's responsibilities comprises of conflict resolution, dispute settlement, and training. It also governs how negotiating councils and private dispute resolution agencies carry out their tasks in the area of dispute settlement.[97] The CCMA's principal duty, according to the Explanatory Memorandum 1995 that accompanied the *LRA*, is to try to resolve conflicts through conciliation in order to limit the incidence of labour unrest and lawsuit.[98]

The South African *Public Service Labour Relations Act*[99] and the *LRA* In the public sector, allow for collective bargaining. According to these statutes, labour disputes are either settled by the CCMA or the relevant bargaining council and their functions relate to the rules of the ILO regarding dispute resolution in South Africa.[100]

5.2 Termination of Employment Convention No. 158 of 1982

This *Convention* establishes uniform criteria for terminating the employment of any worker. Article 4 of *Convention* 158 provides that employment may not be terminated without just cause. The degree or severity of a given behaviour, it is said, may participate in assessing whether it can be classified as genuine grounds for dismissal.[101]

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[95] Article 6 of the *Labour Relations (Public Service) Convention*, No. 151 of 1978.
[96] Article 8 of the *Labour Relations (Public Service) Convention*, No. 151 of 1978.
[97] Benjamin and Cooper 2016 *Swiss Programme for Research on Global Issues for Development* 7.
[98] Benjamin and Cooper 2016 *Swiss Programme for Research on Global Issues for Development* 8.
[99] *Public Service Labour Relations Act* 103 of 1994.
[100] Mboh *The effectiveness of dispute resolution mechanisms within the South African Labour Law System* 76.
[101] Smit and Van Eck 2010 *CILJSA* 49.

The employees must be afforded an opportunity to defend themselves against the allegations before the employer terminate the employment, unless if the employer cannot be reasonably be expected to provide this opportunity.[102] Article 8 of the *Convention* 158 provides for an appeal against unjustified termination of employment to an impartial body such as a court, labour tribunal, arbitration committee or arbitrator.

The CCMA, Bargaining Councils, and Private Agencies are examples of external bodies in the South African setting. When an employee is dissatisfied with internal disciplinary actions, he or she may file a complaint with the CCMA of Bargaining Councils.

5.3 Voluntary Conciliation and Arbitration Recommendation, No. 92 of 1951

This *convention* is the central ILO instrument dealing with dispute deterrence and settlement. It suggest that voluntary conciliation "should be made available to assist in the prevention and settlement of industrial disputes between employers and workers".[103] It goes on to say that such measures should consist of equal representation of employers and employees, be free and quick, and permit the parties to participate into conciliation freely or on the conciliation authority's request.[104]

It also suggests that parties avoid strikes or lockouts while conciliation or arbitration proceedings are underway, without reducing their right to strike.[105] However, the ILO must consider whether the information offered by this Recommendation is sufficient for any member state to build an efficient dispute settlement mechanism.[106] It is critical to define essential terminology connected to dispute resolution, such as conciliation, mediation, and arbitration, which may be regarded generally recognisable but are interpreted differently, in order to develop common criteria for successful and accessible systems around the world.[107]

Although this Recommendation facilitates by setting guiding principles in dispute resolution, South Africa is yet to ratify it.

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[102] Article 7 of the *Termination of Employment Convention* No 158 of 1982.
[103] Article 1 of the *Voluntary Conciliation and Arbitration Recommendation* No 92 of 1951.
[104] Article 2 of the *Voluntary Conciliation and Arbitration Recommendation*, No. 92 of 1951.
[105] Article 4 of the *Voluntary Conciliation and Arbitration Recommendation*, No. 92 of 1951.
[106] Vargha 2014 *international Labour Office* 4.
[107] Vargha 2014 *international Labour Office* 5.

5.4 The incorporation of the International Labour Standards into South African law

Conflict is inevitable in employment relations. What is important is how it is managed. For international law to be applicable in South Africa, it must first be transformed into national law. Section 35 of the *Constitution* gives effect to the right of access to the courts or tribunals with jurisdiction for labour dispute resolution and section 38 of the *Constitution* on the other hand, list people who have *locus standi* to approach the courts with the enforcement of labour rights as spelt out in section 23 of the *Constitution*.

In *S v Makwanyane*[108] the Court saw the importance of making reference to international law. In *NUMSA v Bader Bop*[109] the court made reference to the supervisory structures of the ILO and specially to the Committee of Experts and CFA thereby upholding international law in labour relations and in resolving dispute arising there from.

Therefore, the courts and tribunals such as CCMA as a dispute resolution mechanism need to comply with the *Constitution* and international law status of sections 321 and 232 of the *Constitution.*

6. CONCLUSION

This chapter has outlined how South Africa has developed its labour laws of dispute resolution system from the enactment of *Industrial Disputes Prevention Act* of 1909 until the enactment of the *Constitution* that gave birth to the present labour dispute legislation such as the *LRA*. The *Constitution* is the foundation of all applicable labour dispute resolution Acts that were enacted after 1996. In ensuring that South Africa has an effective dispute resolution labour laws, the *Constitution* provides that when interpreting the Bill of Rights or any legislation, a court, tribunal or forum must consider international law and may consider foreign law.[110]

As a result, South Africa as a constitutional democracy which is still in the process of developing its laws to reach international standards and as a member state of the ILO,

[108] *S v Makwanyane* 1995 (3) SA 391 (CC).
[109] *NUMSA v Bader Bop* 2003 2 BLLR 103 (CC).
[110] Section 39; section 231-233 of the *Constitution of the Republic of South Africa*, 1996.

it has made reference to ILO standards in an effort to boost its dispute resolution system. South Africa has since 1994 when it attained democracy ratified most of the ILO's core labour standards and this has had a great and positive impact on dispute resolution. For instance, the *Constitution* makes reference to international law should the need arise.

In the quest for a new shift in paradigm, one needs to fully understand the extent to which South Africa complies with and incorporate international labour standards in an effort to give substance to the effectiveness of existing dispute resolution mechanisms.

CHAPTER 3
ANALYSIS OF THE ARBITRATION PROCESS

1. INTRODUCTION

The *LRA* requires that any disputes involving unfair dismissal be referred for conciliation to the CCMA, and that any issues that remain unresolved after conciliation be arbitrated. However, a dispute about an automatically unfair dismissal and dismissal based on operational requirements must go for adjudication to the Labour Court after not being conciliated successfully.[111] When a single employee is involved in a dispute over a dismissal for operational reasons, or in the event of a large-scale dismissal under section 189(A) of the *LRA*, there is an exception.[112]

Therefore, to have an effective discussion of the arbitration process, it is in affirmative to have a brief discussion of the Conciliation process.

2. CONCILIATION PROCESS IN THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Conciliation is the first process of dispute resolution in the CCMA as prescribed by the *LRA*. It was envisaged that the inclusion of conciliation as the first process of dispute resolution could resolve most disputes leaving just a small percentage of disputes to be decided by arbitration.[113]

Conciliation is an informal and confidential procedure in which a neutral third person (conciliator) who is not engaged in the disagreement attempts to help the parties in reaching their own resolution of the conflict.[114] The case of *Hofmeyer v Network Healthcare Holdings (Pty) Ltd*[115] affirmed the secrecy of the conciliation process, ruling that neither party to a conciliation process may present testimony by *viva voce* or

[111] Mcgregor, Dekker and Budeli *Labour Law Rules* 222.
[112] Mcgregor, Dekker and Budeli *Labour Law Rules* 222.
[113] Garbers, Le Roux and Strydom *New Essential Labour Law Handbook* 512.
[114] Garbers, Le Roux and Strydom *New Essential Labour Law Handbook* 512.
[115] *Hofmeyer v Network Healthcare Holdings (Pty) Ltd* 2004 3 *BLLR* 232 (LC).

affidavit regarding anything that happened throughout the conciliation process, including information on what was said and what was not stated.

The conciliator guides the process and tries to persuade the parties to resolve the conflict themselves, with the settlement being identified and agreed upon by the parties themselves.[116] In essence, the conciliator does not force the parties to reach an agreement, but rather attempts to persuade them to reach amicable conclusion. In *Kasipersad v CCMA*[117] the Court found that conciliators should exercise extreme caution when giving counsel to parties, as it is detrimental to the goals of conciliation and may excessively affect the parties and create the appearance that the conciliator is not neutral.

According to the *LRA*, conciliation is a compulsory process whereby the complainant must, as a first step, refer the dispute for conciliation process to the CCMA. According to section 191(1)(a) of the *LRA*, in the case of unfair dismissal dispute, the referral must be submitted within 30 days of the date of the dismissal. If a dispute is not referred within the time limit, an application for condonation must first successfully be made before the process may continue.[118]

The conciliation process is regulated by section 135 of the *LRA* read with the Rules adopted by the CCMA for conducting the proceedings issued in accordance with the *LRA*. When a labour dispute is reported to the CCMA, a commissioner is employed to seek conciliation to settle the dispute.[119] The assigned commissioner will try to resolve the conflict through conciliation within 30 days after receiving the referral from the CCMA; however, the parties may agree to extend the 30-day timeframe.[120] The commissioner may employ conciliation, undertake a fact-finding exercise, and provide a recommendation to the parties on how to resolve the conflict to resolve the matter.[121]

If conciliation fails or 30 days has elapsed, the commissioner must provide a certificate declaring whether or not the dispute has been resolved.[122] If a commissioner issues a

[116] Garbers, Le Roux and Strydom *New Essential Labour Law Handbook* 512.
[117] *Kasipersad v CCMA* 2003 2 *BLLR* 187 (LC).
[118] Section 191(2) of the *Labour Relations Act* 66 of 1995.
[119] Section 135(1) of the *Labour Relations Act* 66 of 1995.
[120] Section 135(2) of the *Labour Relations Act* 66 of 1995.
[121] Section 135(3) of the *Labour Relations Act* 66 of 1995.
[122] Section 135(5)(a) of the *Labour Relations Act* 66 of 1995.

certificate recording that the dispute has been resolved, it ends this stage of the proceedings. If the conflict is declared unresolved, it is referred to an arbitration process.

3. ARBITRATION PROCESS IN THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Arbitration is a process whereby a commissioner is appointed to hear all participants' versions of events and then settle the dispute between them.[123] In relation to dispute of unfair dismissal, section 191(5) of the *LRA* provides how the CCMA should proceed with the arbitration process. The CCMA will only arbitrate a dispute if a commissioner has issued a certificate of non-resolution of the conciliation procedure. The applicant party must complete an LRA Form 7.13 and serve it on the CCMA and respondents within 90 days of receiving the certificate of result.[124]

3.1 Referral process

If a dispute is not resolved after conciliation and a certificate of non-resolution is provided, any party to the dispute may request that the case be resolved through arbitration within 90 days of the date of the certificate.[125] A dispute is referred to arbitration process by completing LRA Form 7.13 with the CCMA. The respondent must be provided with a copy of the referral, and the CCMA must acquire delivery proof. Provided a party presents an issue to arbitration after the 90-day deadline has elapsed, the CCMA may overlook the late referral if good cause is shown.[126]

3.2 Appointment of a commissioner

When the CCMA receives a referral for arbitration a commissioner is assigned to conduct the arbitration process.[127] Parties may instruct the CCMA to assign a commissioner of their choice by making a written application with the CCMA within 48 hours of obtaining the results certificate.[128] The request must include the names of not

[123] Garbers, Le Roux and Strydom *New Essential Labour Law Handbook* 518.
[124] Van Niekerk A and Smit *Law @work* 452.
[125] Section 136(1) of the *Labour Relations Act* 66 of 1995.
[126] Section 136(1)(b) of the *Labour Relations Act* 66 of 1995.
[127] Section 136(1) of the *Labour Relations Act* 66 of 1995.
[128] Section 136(5) of the *Labour Relations Act* 66 of 1995.

more than five commissioners and clarify that all parties support the request.[129] The parties to a dispute have a discretion to request the appointment of a senior commissioner from the Director of the CCMA.[130]

3.3 Arbitration hearing

A commissioner has the authority to conduct the arbitration hearing in whatever way he thinks proper in order to resolve the dispute fairly and swiftly.[131] Subject to the commissioner's discretion, the parties to the dispute has the right to give evidence, summon witnesses, cross-examine the opposing party's witnesses, and present concluding remarks to the commissioner.[132] The arbitration may be suspended if the parties agree, and the disagreement will be conciliated again in an attempt to resolve the conflict.[133]

3.4 Legal representation

Disputes related to misconduct and incapacity dismissal, legal representation is not always authorised.[134] However, a party must ask for legal representation under Rule 25(1)(c) of the CCMA. The test to determine whether or not to accept legal council is through the evaluation of complexity of the dispute and legal issues addressed by it, the interest of the public and the opposite parties' or their representatives' comparative competence to cope with the arbitration.[135]

In the case of *Netherburn Engineering v Mudau*[136], in relation to the exclusion of legal representative in misconduct and incapacity dismissal dispute, the court decided that it is not unconstitutional, and that legal representation was left to the commissioner's discretion. However, in *Law Society of the Northern Provinces v Minister of Labour*[137] the court had an opposite view and stated that the limitation on legal representation is unconstitutional and invalid. The CCMA took the court's verdict for appeal, and the Supreme Court of Appeal ruled that living a discretion of allowing a legal

[129] Section 136(5)(b) of the *Labour Relations Act* 66 of 1995.
[130] Section 137(1) of the *Labour Relations Act* 66 of 1995.
[131] Section 138(1) of the *Labour Relations Act* 66 of 1995.
[132] Section 138(2) of the *Labour Relations Act* 66 of 1995.
[133] Section 138(3) of the *Labour Relations Act* 66 of 1995.
[134] Du Plessis and Fouche *A Practical Guide to Labour Law* 411.
[135] Du Plessis and Fouche *A Practical Guide to Labour Law* 411.
[136] *Netherburn Engineering v Mudau* 2003 10 *BLLR* 1034 (LC).
[137] *Law Society of the Northern Provinces v Minister of Labour* 2013 1 SA 468 (GNP).

representative to the commissioner is not unconstitutional according to *CCMA v Law Society of the Northern Provinces*[138].

3.5 Absence of a party in the proceedings

According to section 138(5) of the *LRA*, if the applicant fails to attend in person or be represented at the arbitration procedures, the commissioner may dismiss the case, and if the respondent fails to appear or be represented, the issue may be continued in his absence or postponed.

3.6 Consent to arbitration

In a case scheduled for adjudication by the Labour Court, the parties may agree in writing to have an issue adjudicated by the CCMA.[139] Unless the agreement expressly states differently, such an arrangement may only be terminated with the written approval of all of its parties.[140] Any party to the arbitration agreement may petition the Labour Court to have the agreement varied or overturned, which the Court may do if there is solid reason.[141]

3.7 Arbitration award

Within 14 days after the end of the arbitration procedures, the commissioner must give a signed arbitration award, which must provide clear reasons for the judgment.[142] Any suitable arbitration award, such as an order implementing a collective bargaining agreement or a declaratory judgment, may be made by the commissioner.[143]

In terms of section 138(10), an award may also include an order for costs. The test for awarding costs in an arbitration thus changed from “frivolous or vexatious conduct” to “the requirements of the law and fairness”.[144] Furthermore, an arbitration award can order a party to perform a specific act (e.g. reinstate an employee) or to pay a sum of

[138] *CCMA v Law Society of the Northern Provinces* 2013 11 *BLLR* 1057 (SCA).
[139] Section 141(1) of the *Labour Relations Act* 66 of 1995.
[140] Section 141(3) of the *Labour Relations Act* 66 of 1995.
[141] Section 141(4) of the *Labour Relations Act* 66 of 1995.
[142] Section 138 (7) of the *Labour Relations Act* 66 of 1995.
[143] Section 138 (9) of the *Labour Relations Act* 66 of 1995.
[144] Du Plessis and Fouche *A Practical Guide to Labour* 411.

money (e.g. compensation). An arbitration award is final and enforceable according section 143(1) of the *LRA* only if it has been certified by the CCMA.[145]

As a result, the most common remedy for wrongful dismissal is reinstatement, which must be imposed unless the following circumstances apply, in which case compensation will be awarded instead:[146]

- If the employee prefer does not seek reinstatement as a remedy;
- if the employment relationship irretrievably broke down;
- where it is not reasonable for the employer to reinstate or re-employ the employee; or
- where the dismissal is based solely on the employer's failure to follow a fair procedure.

In *SARS v CCMA*[147] the Court held that in unfair dismissal dispute the arbitrator must take into account the seriousness of the misconduct and its potential impact in the employment relationship when determining whether reinstatement is an appropriate remedy.

The *LRA* sets a limit on the amount of compensation that can be granted in the event of an unjust dismissal.[148] Compensation for an employee whose dismissal is judged to be substantively and/or procedurally unfair is limited to 12 months' salary.[149] In *Kroukam v SA Airlink*[150] the Court handed down conflicting decisions on whether a reinstated employee may also receive back pay in excess of 12 months remuneration. The Court decided that there is no limit beyond the date of dismissal for the period in which a reinstatement order may be made retrospective. However, in *Chemical Workers Industrial Union v Latex Surgical Products*[151] the Court decided that the period must be limited to 12 months.

[145] Du Plessis and Fouche *A Practical Guide to Labour* 412.
[146] Section 193(2) of the *Labour Relations Act* 6 of 1995.
[147] *SARS v CCMA* 2017 38 ILJ 97.
[148] McGregor, Dekker and Budeli-Nemakonde *Labour Law Rules* 224.
[149] Section 194(1) of the *Labour Relations Act* 6 of 1995.
[150] *Kroukam v SA Airlink* 2005 26 ILJ 2153 (LAC).
[151] *Chemical Workers Industrial Union v Latex Surgical Products* 2006 27 ILJ 292 (LAC).

According to section 144 of the *LRA* an arbitration award or ruling may be varied or rescinded.[152] The arbitration award may be rescinded or varied on the following grounds:

- If the award was incorrectly delivered in the absence of a party;[153]
- if there is an uncertainty or clear mistake or omission in the award;[154]
- if the award was made as a consequence of a shared error among the parties to the proceedings;[155] and

Section 144 of the *LRA* is supported by the case of *Shoprite Checkers (Pty) Ltd v CCMA*[156] where the court held that a commissioner could rescind an arbitration award under section 144 if a party could show good cause for its default.

In terms of section 145 of the *LRA* an arbitration award cannot be appealed, but reviewed.[157] Any party to the dispute may apply to the Labour Court for a review of the arbitration award. The grounds for review are as follows:

- If the commissioner committed a misconduct in terms of his duties as an arbitrator;[158]
- if the commissioner committed a gross irregularity during the arbitration process;[159]
- if the commissioner exceeding his powers;[160] and
- an improperly obtained award.[161]

In *Sidumo & another v Rustenburg Platinum Mines*[162], the Court formulated the test for review as, "is the decision reached by the commissioner, one that a reasonable decision maker would not reach on all the material available to him or her?"[163] The test

[152] Du Plessis and Fouche *A Practical Guide to Labour* 412.
[153] Section 144(a) of the *Labour Relations Act* 6 of 1995.
[154] Section 144(b) of the *Labour Relations Act* 6 of 1995.
[155] Section 144(c) of the *Labour Relations Act* 6 of 1995.
[156] *Shoprite Checkers (Pty) Ltd v CCMA* (2007) 28 ILJ 2246 (LAC).
[157] Du Plessis and Fouche *A Practical Guide to Labour* 412.
[158] Section 145(2)(a)(i) of the *Labour Relations Act* 6 of 1995.
[159] Section 145(2)(a)(ii) of the *Labour Relations Act* 6 of 1995.
[160] Section 145(2)(a)(iii) of the *Labour Relations Act* 6 of 1995.
[161] Section 145(2)(b) of the *Labour Relations Act* 6 of 1995.
[162] *Sidumo & another v Rustenburg Platinum Mines Ltd* 2007 12 BLLR 1097 (CC).
[163] *Sidumo & another v Rustenburg Platinum Mines Ltd* 2007 12 BLLR 1097 (CC) para 69.

was confirmed by the court in *Herholdt v Nedbank*[164], which found that the test does not imply a more lenient standard of review. For example, a review will not be sufficient in the absence of a major factual error or if a particular fact was not accorded enough weight or relevance.[165]

4. CONCLUSION

Although the practice of arbitration process is not a new practice in South African labour law, the process of arbitration process under the CCMA has significantly improved to make it less formal and more user-friendly for the parties involved in unfair dismissal disputes.

The CCMA has created a platform for employees to express their grievances with their employers on an equal basis in order to achieve a mutually agreeable arrangement. The CCMA has created an equal-opportunity platform for workers to air their grievances with their employers in order to give effect to constitutional ideas through arbitration and making the dismissal legislation referral procedure available to terminated employees free of charge. Even though the CCMA's noble purposes are to offer and expedite arbitration in situations of alleged unfair dismissal, it is not resistant to abuse by individuals who may not have had the greatest of motives when submitting a dispute to the CCMA in the first instance.

[164] *Herholdt v Nedbank* 2013 34 ILJ 2795 (SCA).
[165] McGregor, Dekker and Budeli-Nemakonde *Labour Law Rules* 223.

CHAPTER 4
SUCCESS AND SHORTCOMINGS OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

1. INTRODUCTION

The CCMA has made a meaningful contribution towards unfair dismissal dispute resolutions since its establishment in 1996. It has forged strategic partnerships with various institutions, which includes the ILO and South African Human Rights Commission, and that share similar mandates and values to develop solutions to existing and future labour disputes challenges in a collaborative manner.

The critical problems and challenges that the CCMA encounters is the high referral rate of disputes and backlog regarding unfair dismissal disputes referred to arbitration process. Despite these issues, the institution has played a key role in altering South Africa's labour relations landscape, particularly in the area of labour dispute settlement. Employers and employees are depending significantly on the arbitration process to resolve their wrongful dismissal claims, according to general data.[166]

One of the four fundamental purposes of the *LRA* was to promote effective conflict resolution, and the arbitration procedure was considered as the core of the new dispute resolution dispensation that had been ushered in by the CCMA through the *LRA.*[167] The key performance indicators that are used in evaluating the arbitration process is the accessibility, efficiency and informality as they are the motivation of the establishment of the CCMA. Accessibility of arbitration process is a critical indicator for determining the success CCMA.[168] Furthermore, efficiency and informality also play a significance role as factors to determine the success of the CCMA.

It has also become clear that the CCMA's arbitration process is not as efficient as envisaged, and that many issues are referred to arbitration rather than being resolved

[166] Ferreira 2004 *Politeia* 83.
[167] Bandeman 2006 *AJCR* 82.
[168] Kwakwala *A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration (CCMA)* 41.

through conciliation, as was intended.[169] Although the CCMA was created to allow anyone to pursue a labour dispute without incurring any expenditures in bringing the wrongful dismissal claim to arbitration and without the need for legal assistance, the question should be posed whether it is truly achieving the above-mentioned goals.[170]

2. SUCCESS OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

2.1 Accessibility

Referring an unfair dismissal dispute for arbitration process in the CCMA has proved to be very cheap and accessible to the workers in resolving their unfair dismissal disputes. Between the opening of the CCMA in November 1996 and 30 April 1999, 175 046 disputes were referred to the CCMA.[171] In 1998 dismissal disputes accounted for 77% of the total case load of which 63% were individual disputes.[172] The trend of referrals continued to rise yearly with 188 449 referrals during the period of 2016/2017.[173] During the period of 2018/2019 reporting 193 732 referrals.

Currently, the 2019/2020 trend is at 221 547 referrals.[174] This translates to a 14% year-on-year increase amounting to 27 815 more cases referred and an average of 879 new matters being referred to the CCMA every working day.[175] Almost 59% of all referrals in 2019/20 related to alleged unfair dismissal compared to 71% in the 2018/2019 financial year.[176]

The large proportion of disputes that are referred to arbitration process arise from Business/Professional services at 29% referral rate.[177] Similarly, safety/security workers in the private sector refer 14% of the CCMA's cases compared with 11% of retail industry, 7% of building/construction industry, and 6% of domestic workers.[178] Notwithstanding very low levels of unionisation, even agricultural workers, at 4%,

[169] Bandeman 2006 *AJCR* 85.
[170] Bandeman 2006 *AJCR* 85.
[171] Brand 2000 *ILJ* 78.
[172] Brand 2000 *ILJ* 78.
[173] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 25.
[174] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 25.
[175] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 25.
[176] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 25.
[177] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 26.
[178] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 26.

make equal use of the CCMA as do highly unionised workers such as those in mining and food/beverage manufacturing.[179]

This indicates that individual workers from industries which were previously unprotected by unfair dismissal regulation have easy access to the arbitration process without significant help from a trade union.

2.2 Efficiency

A system that is efficient at resolving disputes saves valuable resources, particularly time and money.[180] Inefficient systems are those that are slow and take a long time to deliver a resolution; and efficient systems are those that have shorter timeframes and produce a relatively quick resolution.[181] A dispute will be resolved quicker by arbitration than through the courts.[182]

The time it takes the CCMA to refer and conclude actual arbitration procedures is referred to as efficiency in the arbitration process (that is, the duration of the process).[183] Employees who have been fired must file a complaint with the CCMA within 30 days of their dismissal. Employees have 90 days after the end of conciliation to submit problems to arbitration, as opposed to the 30-day timeframe for initial reference.[184] The short referral period encourages quick resolution of disputes and gives employers peace of mind, knowing that they will not be subjected to claims filed years after a dismissal.

The *LRA* requires the CCMA to resolve disputes within 90 days, however the CCMA has set a greater internal efficiency goal of 60 days.[185] As a result, the CCMA is required to complete arbitrations within 60 days of receiving the request for arbitration.

[179] The CCMA Annual Report 2019/2020 http://www.ccma.org.za 26.
[180] Budd and Colvin *Ind.Relat* 463.
[181] Budd and Colvin *Ind.Relat* 463.
[182] Gorley 1988 *De Rebus* 339.
[183] Kwakwala *A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration (CCMA)* 42.
[184] Benjamin 2009 *ILJ* 31.
[185] Kwakwala *A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration (CCMA)* 42.

The CCMA's success rate of dispute resolution is also related to efficiency: that is, the total number of issues referred vs the total number of disputes handled.[186] The *LRA* requires arbitrators to issue arbitration awards, together with brief reasons, within 14 days after the arbitration's conclusion.[187] This provision was added to help parties avoid the negative implications of delays in award issuance.

2.3 Simplicity of process

The absence of formal pleadings and cumbersome referral procedures has proven to be a very successful aspect in enabling access to the arbitration process.[188] It has ensured that the level of education, lack of skills and resources are not a barrier in referring a dispute to the arbitration process in the CCMA.[189] In *Naraindath v CCMA*[190] (*Naraindath*), the Court stated that arbitration proceedings should not be conducted "slavishly in imitation of the procedures used in a court of law and subject to the technical rules of evidence applicable in those courts." There may be times when a more formal approach is required, but this should be the exception rather than the rule.[191] The court recommended that commissioners use the same procedure as small claims court, in which the parties choose the witnesses they want to call, but the commissioner is in charge of questioning them.[192] The approach of the court in *Naraindath* has been endorsed by the Labour Appeal Court.[193]

3. SHORTCOMINGS OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

The *LRA* established a sophisticated system of dispute resolution in which the majority of the players are unable to function.[194] This resulted in an abnormally large number of individual unfair dismissal cases being referred to arbitration, causing the CCMA to

[186] Kwakwala *A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration (CCMA)* 42.
[187] Benjamin 2009 *ILJ* 33.
[188] Brand 2000 *ILJ* 79.
[189] Brand 2000 *ILJ* 79.
[190] *Naraindath v CCMA* 2000 21 *ILJ* 1151 (LC).
[191] *Naraindath v CCMA* 2000 21 *ILJ* 1151 (LC) para 32.
[192] *Naraindath v CCMA* 2000 21 *ILJ* 1151 (LC) para 32.
[193] *Le Monde Luggage CC t/a Pakwells Petje v Dunn* 2007 28 *ILJ* 2238 (LAC).
[194] Bandeman 2006 *AJCR* 85.

become unstable. The ILO stated that unless changes are made to the screening process, the CCMA will be seen as inadequate and inept as a whole.[195]

A new phenomenon evolved to compensate for this volatility, particularly the inability of employers and employees, in the shape of labour consultants and labour lawyers active in dispute settlement.[196] This is important as compared to the stated goal of simplifying the dispute resolution process of the *LRA*.

Labour lawyers and labour consultants have taken on a significant role in South Africa's dispute resolution system, particularly when it comes to individual labour issues.[197] Despite legislative measures to keep them out of the process, their influence in the labour relations system has grown in recent years.

The CCMA has been stretched by problems that have troubled the arbitration process, such as a high referral rate, case overflow, a low resolution rate, resource crises, and inadequate management.[198] The parties' inability to handle conflict inside their businesses has contributed to the high referral rate, putting further strain on the dispute resolution system.[199] Staff members of the CCMA are frequently too busy and under-skilled to handle disputes appropriately and efficiently, resulting in delays, unnecessary duplication, and mistakes.[200]

3.1 Accessibility

Because there are no expenses involved in referring an unfair dismissal issue, there are no sanctions for referring a frivolous disagreement, and unions refer all cases without discriminating between those with merit and those without, the CCMA's arbitration process is relatively accessible.[201] This is consistent with the results of the CCMA, which found that in the past, there was less emphasis on dispute prevention because the primary focus was on dispute resolution.[202]

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[195] Twyman 2001 *CWRJIL* 331.
[196] Bandeman 2006 *AJCR* 85.
[197] Bandeman 2006 *AJCR* 86.
[198] Bandeman 2006 *AJCR* 86.
[199] Bandeman 2006 *AJCR* 86.
[200] Twyman 2001 *CWRJIL* 331.
[201] Bandeman 2006 *AJCR* 87.
[202] The CCMA Annual Report 2001/2002 http://www.ccma.org.za 2.

3.2 High expectations

Applicants have high expectations that, regardless of the merits of the case, they would always be compensated in some form. Some commissioners likened applicants' conceptions of the arbitration procedure to viewing it as a "one arm bandit," "lottery," or "Automated Teller Machine," where they must press the appropriate buttons and money will be flung at them.[203]

3.3 Lack of knowledge

The applicants have little understanding of the system or their rights and obligations, and they have been given bad advice by trade unions, labour consultants, and the Department of Labour, who have led them to believe that they have a strong case and that they should take it to the CCMA.[204]

Employers also lack knowledge in terms of labour legislation. Because it is simple to replace fired workers, companies frequently violate fundamental and procedural standards for fairness.[205] Employers are also said to be unaware of their responsibilities and to lack internal grievance and disciplinary procedures, or to use them ineffectively.[206]

3.4 Efficiency

Inefficient dispute resolution systems are those that are costly.[207] The necessity for high-paid experts or the involvement of several parties can all increase the cost of a conflict resolution system. Legal agents are authorised to issue legal technicalities in ordinary courts, which, however, might cause unnecessary delays in the adjudication and finalization of conflicts.

Both the employer and the employee suffer as a result of the technicality, with the employer having to spend more time on production and the employee having to spend more time at home waiting for the issue to be resolved.[208] Both parties may be

[203] Bandeman 2006 *AJCR* 88.
[204] Bandeman 2006 *AJCR* 88.
[205] Bandeman 2006 *AJCR* 88.
[206] Bandeman 2006 *AJCR* 88.
[207] Budd and Colvin *Ind.Relat* 463.
[208] Noko *Legal Representative at the Commission for Conciliation, Mediation and Arbitration* 16.

financially harmed as a result of the legal representation, which will charge fees for the service performed.

4. CONCLUSION

Since 1994, the labour movement in South Africa has been a key player in establishing a new democratic order. The *LRA* has largely contributed to this situation. Dispute resolution process such as arbitration was meant to be fair, quick and accessible. The question is how effective they have gone. It is critical to address the effectiveness of the arbitration process since it allows the parties to air their grievances in a fair, timely, and cost-effective manner.

In its current form, the arbitration process may lose public confidence in its effectiveness as a form of alternative conflict resolution if it does not evolve with the dynamics of the current labour market or is not adapted to solve the limitations described above.

CHAPTER 5
COMPARATIVE STUDY BETWEEN SOUTH AFRICA, NAMIBIA AND UNITED KINGDOM

1. INTRODUCTION

In different countries, there are diverse causes for the establishment of labour dispute settlement agencies. Furthermore, when it comes to the formation of their conflict resolution systems, different countries have different approaches and reasons. This chapter will compare and contrast the positions of various jurisdictions on the reasons for the development of labour dispute resolution institutions and their structures. Wherever possible, the accomplishments and shortcomings of these institutions will be recognised, and then alternative solutions will be offered.

2. COMPARATIVE ANALYSIS

2.1 Namibia

2.1.1 Historical Background of Namibian dispute resolution

It is imperative to discuss the historical development of Namibian dispute resolution taking into account the similarities and differences that it has with South Africa.

Namibian labour legislation dates back to 1879, when the country was still ruled by the British. The country became a German Protectorate in 1885, and after South African forces defeated the German soldiers, it was given to the Union of South Africa as a C mandate in 1919.[209] Despite international pressure for South Africa to surrender sovereignty of the territory, the mandate was maintained.[210] Namibia became independent on March 21, 1990, under the leadership of Sam Shafishuna Nujoma, the first democratically elected President of the Republic of Namibia.[211]

[209] Fenwick 2007 *Routledge* 319.
[210] Fenwick 2007 *Routledge* 5.
[211] Van Rooyen *Portfolio of Partnership – An Analysis of Labour Relations in a Transitional Society Namibia* 8.

During the apartheid era, Namibia did not have any comprehensive labour legislation in existence. However, there were a number of disparate labour regulations, many of which were based on racial discrimination against black workers, who were primarily exempt from many of these rules.[212] The government created a Commission of Inquiry into Labour Matters in South West Africa in response to rising domestic and international criticism. The Commission suggested, among other things, that when Namibia gained independence, it:[213]

- Join the ILO;
- ratify and accept appropriate international labour standards; and
- combine all the fragmented labour legislation into a unified Namibian Labour Code.

This was realised with the passage of Namibia's first post-independence *Labour Act* in 1992, which was followed by a more progressive *Labour Act* in 2007, which effectively introduced the ADR system and aimed to align Namibia with worldwide standards.[214]

2.1.2 Legal position

Namibia had no comprehensive labour legislation prior to its independence.[215] Most legislation passed in South Africa were either immediately copied in Namibia[45] or resembled those of South African origin because Namibia was the fifth province of the Union of South Africa.[216] The labour regulations in place at the time were specifically designed to administer and control black labourers and their dependents.[217]

South Africa's labour dispute settlement system has influenced Namibian labour legislation, forcing Namibia to borrow the advanced CCMA's Alternative Dispute Resolution (ADR) system. In this way, it is argued that the two systems have basic similarities and differences.

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[212] LaRRi *Labour Rights in Namibia: Promoting Workers Rights and Labour Standards* 4.
[213] Bauer *Labour and Democracy in Namibia* 104.
[214] Musubili *Towards an efficient Namibian labour dispute resolution system: Compliance with International Labour Standards and a comparison with the South African system* 83.
[215] LaRRi *Labour Rights Report in Namibia* 4.
[216] Fenwick 2007 *Routledge* 5.
[217] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 88.

i. Constitution of the Republic of Namibia

The adoption of the democratic *Constitution*[218] following the country's independence in 1990 resulted in substantial alterations to the country's labour sector. The *Constitution* contains measures aimed at protecting basic labour rights, as well as clauses that are important to government policy in terms of labour rights regulation.[219] The State is required by Article 95(c) of the Namibian *Constitution* to promote the welfare of the people by implementing policies that aim at "active encouragement of the formation of independent trade unions to protect workers' rights and interest and to promote sound labour relations and fair employment practices".

This regulation is part of the government's response to Namibia's previous colonial and apartheid labour standards, which were oppressive and unfair toward black people.[220]

ii. Labour Act of 1992

The *Labour Act* of 1992, which was hailed as the most important achievement in Namibian workplace history, was adopted by the government of the Republic of Namibia, according to Article 95 of the Namibian *Constitution*.[221]

The *Labour Act* of 1992 established methods for resolving workplace labour disputes. Conciliation, mediation, and arbitration, as well as adjudication in the District Labour Court, are examples of these methods.[222] The formation of these formal labour dispute resolution mechanisms was an important aspect of the collective bargaining process, as it anticipated the inevitable occurrence of disagreement and the resulting workplace problems.[223]

According to the ILO, ADR bodies and processes aid in the success of collective bargaining. However, the availability of an effective labour dispute resolution system that is meaningful and dedicated to the collective bargaining process is critical to this

[218] *Constitution of the Republic of Namibia*, 1990.
[219] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 107.
[220] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 108.
[221] Government Republic of Namibia Ministry of Labour Annual Report (1997) 57.
[222] Part IX of the *Labour Act* of 1992.
[223] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 109.

accomplishment.[224] Namibia has adopted ADR by enacting the *Labour Act*[225], which shifts the focus away from the District Labour Courts and toward new concepts like as conciliation and arbitration, as well as the establishment of a labour inspectorate with legislative authority to enforce arbitration rulings.[226]

The Labour Commissioner has been entrusted with the powers and functions of conciliating and arbitrating labour disputes in order to put this new scheme of labour dispute settlement into reality. The Labour Commissioner is charged with the duties of conciliate and arbitrate disputes related to the application and enforcement of the *Labour Act* of 2007.

The new labour dispute resolution system is a hybrid system that needs conciliation before proceeding to arbitration ("con-arb").[227] Despite this, the *Labour Act* allows anybody who believes their fundamental rights or protections have been violated under Chapter 2 of the *Labour Act* to go immediately to the Labour Court for enforcement, protection, or other suitable action.[228]

However, the National Union of Namibian Workers (NUNW) pointed out that this Act was ineffective when it comes to labour dispute resolution systems. To support their position, the NUNW presented the following arguments:[229]

- that the labour dispute resolution process took too long to resolve disputes;
- that the system was expensive and inaccessible to those who did not have the financial means to take their complaints to the Labour Court (workers were not exempt);
- that the process was frustrating rather than promoting the resolution of the dispute;
- that the labour dispute resolution system was confrontational and inaccessible to the majority of workers; and

[224] Khabo *Collective Bargaining and Labour Dispute Resolution* 5.
[225] *Labour Act* of 2007.
[226] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 9.
[227] Section 86 of *the Labour Act* 11 of 2007.
[228] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 10.
[229] [229] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 118.

- that the labour dispute settlement system was riddled with loopholes that the parties exploited to pursue their own objectives.

The government recognised that the existing labour dispute prevention and resolution systems were inconvenient for users, and that it was thus required to consider the views and proposals of social partners when creating a new system.[230] The Act was then subjected to revision, which started in January 1998.

iii. Labour Act of 2007

The *Labour Act* of 2007 established a new system of dispute resolution in which the Labour Commissioner rather than the District Labour Courts address labour disputes through mandatory conciliation and arbitration. All labour disputes must be settled before going to arbitration, according to the Act. The conciliation procedure must try to resolve the disagreement within 30 days after the referral date, although the parties may agree to a longer time frame. When conciliation fails to resolve a disagreement and it is a matter of right, the matter is referred to arbitration.[231]

The Labour Commissioner, as well as all conciliators and arbitrators appointed by the office, must be free of any bias and unbiased in carrying out their duties.[232] In any of the regional labour offices, a dispute must be brought to the Labour Commissioner.[233] Unless the Labour Commissioner instructs otherwise, the dispute must be conciliated or arbitrated in the territory where the cause of action occurred.[234]

2.1.3 Arbitration process by the Labour Commissioner

According to Chapter 8, Part C of the *Labour Act* of 2007, the arbitration method is provided for in the Namibian *Constitution*, and arbitration tribunals are established for settling labour disputes.[235] Section 12(1)(a) of the Namibian *Constitution* provides that:

[230] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 119.
[231] Section 86 of *the Labour Act* 11 of 2007.
[232] Section 85(6) of *the Labour Act* 11 of 2007.
[233] Section 86(1)(a) and (b) of *the Labour Act* 11 of 2007.
[234] Rule 24 of the Rules of the Labour Commissioner.
[235] Article 12(1)(a) of the *Constitution of the Republic of Namibian*, 1990.

> in the determination of their civil rights and obligations… against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or tribunal established by law…

To that end, the Act defines "arbitration" as arbitration proceedings conducted before an arbitration tribunal established in accordance with section 85 of the *Labour Act* of 2007. Arbitration, as defined by the Act, offers a framework for widely accessible, publicly supported, and effective means of resolving labour disputes, whether collective or individual.[236]

2.1.4 Arbitration process in terms of the Labour Act, 2007

The *Labour Act* of 1992 established arbitration as a voluntary means of resolving labour disputes. However, the conflicting parties has to agree to this in order for it to happen.[237] By mutual agreement, the parties to the disagreement could send the dispute to arbitration at any moment before or after the initiation of proceedings in the Labour Court.[238] The arbitration is done on a voluntary basis and in accordance with the *Arbitration Act*[239]. The labour commissioner has the authority to appoint an arbitrator in response to a written request from a party to a dispute. He has the authority to decide on the terms and conditions of the arbitration.[240]

Amongst the disputes that can be referred to arbitration in terms of the *Labour Act* of 2007 include:

- disputes about unfair labour practices;[241] and
- unfair dismissal dispute.[242]

The Act further requires that a dispute be referred for arbitration within six months in disputes arising from dismissals from employment,[243] or within one year in other cases.[244] The courts ruled that if a disagreement is referred to the labour Commissioner

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[236] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 134.
[237] Section 79(1)(b) of the *Labour Act* of 1992.
[238] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 114.
[239] *Arbitration Act* 42 of 1965.
[240] Section 79(4)(b) of *Labour Act* of 1992.
[241] Section 51(1) and (3) of *the Labour* Act 11 of 2007.
[242] Section 33 of the *Labour Act* 11 of 2007.
[243] Section 86(1)(a) of the *Labour Act* 11 of 2007.
[244] Section 86(1)(b) of the *Labour Act* 11 of 2007.

after the six-month period has passed, the reference is out of time and in fact prohibited by section 86(2) of the *Labour Act* of 2007. The Labour Commissioner has no jurisdiction at this stage, and if the disagreement is not resolved, the Commissioner acts outside of his authority.[245] This is backed up by the decision of *Nedbank Namibia Limited v Jaqueline Wandi*[246] in which the Court ruled that a dismissal claim filed outside of the necessary time period under section 86(2)(a) of the *Labour Act* of 2007 could not be examined.

The Labour Commissioner must provide the parties at least 14 days' notice of the arbitration hearing once he is satisfied that the previously mentioned requirements have been met.[247] Should conciliation fail to resolve the dispute, the ADR system provided by the *Labour Act* of 2007 compels the arbitrator to seek to resolve the matter through conciliation before proceeding to arbitration.[248]

The *Labour Act* of 2007 grants the arbitrator the authority to conduct the arbitration in any way he or she sees fit in order to resolve the disagreement fairly and swiftly, and to deal with the substantive merits of the dispute with the bare minimum of legal jargon.

2.2 United Kingdom

As a result of colonisation, South Africa consist of mixed legal system influenced by English common law that was introduced during the British colonial period. To promote an effective dispute resolution processes of the workplace disputes, South Africa adopted alternative dispute resolution system of the United Kingdom.[249] Therefore, it makes United Kingdom an appropriate country to compare the South African effectiveness of arbitration process with.

Both countries have developed institutions geared at settling labour disputes in a cost-effective and timely manner. The Advisory, Conciliation, and Arbitration Services (ACAS) oversee the arbitration procedure in the United Kingdom while the CCMA administers the arbitration procedure in South Africa.

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[245] *Standard Bank Namibia v Romeo Mouton* Case No LCA 04/2011 delivered on 29 July 2011 par 9.
[246] *Nedbank Namibia Limited v Jaqueline Wandi* LCA 66/2010.
[247] Rule 15 of the Rules of the Labour Commissioner.
[248] Musukubili *towards an efficient Namibian labour dispute resolution system: compliance with international labour standards and a comparison with the South African system* 136.
[249] Van Niekerk Law@*work* 54.

2.2.1 Historical background of dispute resolution

Prior to the 1970s, the United Kingdom adhered to the collective laissez–faire principle, which stipulated that an employer and employee would enter into a collective agreement to govern their relationship.[250] The laissez-faire principle played a significant role in resolving wrongful dismissal cases. A number of labour laws were implemented after Margaret Thatcher's Conservative government took power in the United Kingdom.[251]

In 1971, the *Industrial Relations Act*[252] was introduced. This enactment empowered the employment tribunals with a jurisdiction to hear disputes of unfair dismissal.[253] The *Industrial Relations Act* was abolished in 1987 and replaced by the *Employment Protection Consolidation Act* of 1987 and the *Trade Union and Labour Relations Consolidation Act* of 1992.[254] In 1999, *Employment Rights Act* of 1999 provided a further recognition and enhancement of power to employment tribunals.[255] This Act regulates collective bargaining, the process of holding disciplinary proceedings, and the processes for resolving disputes.

The *Employment Act* of 2008 clarifies the dispute resolution and disciplinary procedural tribunals.[256] A body known as ACAS handles the matters presented to the tribunal.[257] A judge, who is assisted by two additional members, one of whom has experience as an employer and the other with experience representing employees', leads this body.[258]

2.2.2 Legal position in terms of unfair dismissal

The *Arbitration Act* of 1996 was meant to provide a complete legal statement for England, Wales, and Northern Ireland, establishing a pathway for quick and cost-

[250] Davies and Freedland *Kahn- Freund Labour and the Law* 12.
[251] Davies *Perspective on Labour Law* 4.
[252] *Industrial Relations Act* of 1971.
[253] Bennet *Montana's Employment Protection: A comparative Critique of Montana's Wrongful Discharge from the Employment Act in light of the United Kingdom's Unfair Dismissal Law* 118.
[254] Mphahlele *The Labour Relations Disputes Resolutions system: Is it effective?* 43.
[255] Van Eck 2012 *TSAR* 777.
[256] Mphahlele *The Labour Relations Disputes Resolutions system: Is it effective* 44.
[257] Mphahlele *The Labour Relations Disputes Resolutions system: Is it effective* 44.
[258] VanEck, 2012 TSAR 777.

effective dispute resolution.[259] There has been significant progress in the employment sector since the Act's enactment in terms of the applicability of alternative dispute resolution.[260] As a result of the development in alternative dispute resolution, ACAS proposed that a program specialising in unfair dismissal claims be implemented, which was enacted under the *Employment Rights Act* of 1998.[261]

According to Section 94(1) of the *Employment Rights Ac*t, an employee has the right not to be dismissed unfairly by his or her employer. Furthermore, Section 98(1)(b) stipulates that dismissal must be for a good reason, which can include capabilities or qualifications, behaviour, redundancy, a statutory violation, or any other serious reason.

According to Schedule 2 of *Employment Act* of 2008, disputes involving allegations of unfair dismissal are referred to ACAS. If an employee feels that he has been dismissed unfairly, the employee must make a referral to the Employment Tribunal (ET) and after that, the matter will be referred to ACAS.[262]

2.2.3 The role of ACAS

The major goal of the *Employment Rights Act* of 1998 was to allow ACAS to arbitrate and hear any unfair dismissal issue if all parties agreed.[263] This is backed by section 7 of the *Employment Rights Act*, which encourages ACAS to develop a system that takes a different approach to resolving disputes than the usual employment tribunal process. This Act also allows the Secretary of State to authorise arbitration for additional types of claims, and it intends for ACAS to serve in both the new and old roles of conciliation and settlement.[264]

The use of ACAS is voluntary, and it is entirely up to the parties to decide whether to seek alternative dispute resolution.[265] ACAS continues to be obligated by law to

[259] Aisha *Resolving dismissal disputes: a comparative analysis of public arbitration bodies in South Africa and England* 41.
[260] Aisha *Resolving dismissal disputes: a comparative analysis of public arbitration bodies in South Africa and England* 42.
[261] Aisha *Resolving dismissal disputes: a comparative analysis of public arbitration bodies in South Africa and England* 42.
[262] Zall 1988 *CLLJ* 435.
[263] Earnshaw and Hardy 2001 *ILJ* 291.
[264] Earnshaw and Hardy 2001 *ILJ* 291.
[265] Deakin and Gillian *Labour Law* 69.

encourage consensual settlements of labour disputes, and it offers conciliation, mediation, and arbitration.[266] During the arbitration process, an ACAS officer will present relevant information and solutions to the parties in order to help them resolve lingering concerns. If the dispute is not settled, it will be referred to a tribunal, and ACAS' involvement in the case will come to an end.[267]

2.2.4 Arbitration procedure when dealing with unfair dismissal disputes

In order to employ arbitration as a way of settling a dismissal dispute, the parties must agree in writing.[268] ACAS will send the matter to an arbitrator once this requirement has been met, which is technically known as the arbitration agreement of settlement.[269] It is critical that the agreement be formalised in order to safeguard the parties from being forced into arbitration.[270]

After the arbitrator has completed the hearings and examinations, it is the arbitrator's responsibility to make a decision in accordance with the principles set forth in the ACAS Code and the ACAS Handbook "Discipline at Work".[271] When the decision is ready to be issued, it will be addressed only to the parties to maintain privacy, and the remedies available to the parties will be in accordance with the same tribunal principles and limits as reinstatement, re-engagement, or compensation.[272]

The award is written, signed, final, and binding.[273] The awards are enforceable in the High Court and County Court, despite the fact that the process is voluntary.[274] Any request for review must be made within 28 days of the decision and must be sent as a notice to the parties and ACAS, which the court will consider.[275] Appeals, on the

[266] Aisha *Resolving dismissal disputes: a comparative analysis of public arbitration bodies in South Africa and England* 44.
[267] Aisha *Resolving dismissal disputes: a comparative analysis of public arbitration bodies in South Africa and England* 45.
[268] Aisha *Resolving dismissal disputes: a comparative analysis of public arbitration bodies in South Africa and England* 48.
[269] Hardy *ADR in Employment Law* 7.
[270] Hardy *ADR in Employment Law* 6 and 7.
[271] ACAS Arbitration Scheme 2001, part IV, 10.
[272] Hardy *ADR in Employment Law* 7.
[273] ACAS Arbitration Scheme 2001 23.
[274] ACAS Arbitration Scheme 2001 23.
[275] Hardy *ADR in Employment Law* 7.

other hand, are limited because they can only be lodged in exceptional circumstances.[276]

2.2.5 Success and shortcomings of ACAS

i. Success of ACAS

ACAS has a track record of successfully resolving unfair dismissal cases through expedited resolution. Despite the fact that ACAS's results show that it has been able to resolve a higher proportion of conflicts through conciliation rather than arbitration, there may be some cases when arbitration is a more appropriate means to resolve a disagreement.[277] After clearer terms of reference have been agreed, ACAS can arrange for arbitration to take place within three weeks.[278] An unfair dismissal hearing should take half the time, according to the ACAS Arbitration Scheme. In reality, after an arbitrator has completed an award, it is required that the award be issued to both parties concurrently within three weeks of the arbitrator's signature.[279] If there are any complaints or inquiries about the arbitration award, ACAS ensures that the complaints or inquiries do not interfere with the award, preserving the arbitrators' independence from the institution.[280]

Before going to a tribunal, ACAS can help you resolve your dispute. ACAS arbitration is free for its users, and the CCMA offers a similar service at a low cost.[281] Employees are more likely to use ACAS because it offers a free alternative dispute resolution option before the claim goes to a tribunal. Parties are able to engage legal representation to help them convey their argument.[282] Legal representation is permissible under Rule 25 of the CCMA in cases when the parties have consented or the commissioner determines that dealing with the dispute without representation is inappropriate.

[276] Hardy *ADR in Employment Law* 7.
[277] ACAS 2016/2017 Annual Report 24.
[278] Amit *The role of ACAS in dispute resolution* 8.
[279] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 22.
[280] Amit *The role of ACAS in dispute resolution* 17-18.
[281] Amit *The role of ACAS in dispute resolution* 17-18.
[282] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 17.

The ACAS process, like the CCMA, is flexible since the arbitration is conducted utilizing a combination of combative and inquisitive approaches.[283] The arbitration procedure's informality allows the parties to express themselves without the complexity that come with tribunals.[284] The arbitrator is free to ask questions, and the parties are not required to question or present. Arbitration through ACAS is intended to be a last resort and to eliminate any possibility of the parties contesting the result.[285] As a result, the arbitrator must be able to examine the matter objectively and have substantial experience and understanding in the field of employment dispute settlement.[286]

ii. Shortcomings of ACAS

ACAS has shown to be a successful institution, although its structure still has flaws. ACAS attempts to hold hearings within four weeks following the referral, but no later than eight weeks.[287] Although the arbitrator can choose the location and date, it can only happen when ACSA has been notified of the arbitration agreements for eight weeks.[288] Due to the goal of "finality," appeals are only permitted in cases involving Human Rights or European Union law.[289]

Although arbitration through ACAS looks to be a less expensive option than going through a tribunal, the requirement of tribunal fees has recently been invalidated by the courts. In the case of *R v Lord Chancellor*[290] referral fees are illegal, according to the court, because they obstruct access to justice and violate the rule of law.[291] Employees may not feel compelled to go through arbitration because they may readily seek justice through the tribunals.

[283] Amit *The role of ACAS in dispute resolution* 17-18.
[284] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 17.
[285] Amit *The role of ACAS in dispute resolution* 17-18.
[286] Amit *The role of ACAS in dispute resolution* 17-18.
[287] Hardy *ADR in Employment Law* 58.
[288] Hardy *ADR in Employment Law* 58.
[289] ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 6.
[290] *R v Lord Chancellor* [2017] UKSC.
[291] *R v Lord Chancellor* [2017] UKSC 51.

2.2.6 Alternative Dispute Resolution in South Africa compared to the one used in the United Kingdom

The United Kingdom alternative dispute resolution has been adopted by South Africa, which, through the LRA established CCMA. The United Kingdom prohibits most workplace disputes, which includes unfair dismissal disputes, through arbitration. Despite the fact that ACAS was created specifically for workplace related disputes such as unfair dismissal dispute, it handles fewer cases. Disputes, on the other hand, are generally referred to the Employment Tribunal. The Employment Tribunal will then decide on the best course of action to take.

The ACAS process is comparable to CCMA proceedings in a sense that it follows a similar path. ACAS arbitration decisions cannot be appealed and judicial review of ACAS decisions is limited. Referring conflicts to the employment tribunal, however, has expenses. The United Kingdom's Parliament saw the necessity to create legislation requiring a referral fee for a dispute to be referred to the Employment Tribunal.

The primary purpose of a referral fee was to assist shift some of the financial burden from ordinary taxpayers to those who utilized or caused the system to be used. Furthermore, it has the potential to de-incentivise irrational behaviour, such as pursuing frivolous or vexatious claims.[292] However, the Supreme Court in the case of *R v Lord Chancellor*[293], court ruled that the exceptionally high fees involved with referring a case to the Employment Tribunal violated the right to access to justice guaranteed by the constitution.

3. CONCLUSION

As a result of the United Kingdom colonising South Africa and South Africa colonising Namibia, a political umbilical cord connects the three countries. As a result, the three countries' legal systems are nearly identical.

The three countries implemented legislation that prioritized job security, as well as legislation that established structures for resolving employment disputes that were

[292] Doyle 2015 *WESTLAW* 20-24.
[293] *R v Lord Chancellor* [2017] UKSC 51.

designed to protect employees while also being quick and efficient. They comply with the ILO's requirements in governing the dismissal of employees because they are members of the organisation. They have separate structures in place to deal with issues about dismissal.

Certain features of the United Kingdom and Namibia have been highlighted in the comparison between the three countries that can be beneficial to South Africa, which will be examined in the next chapter.

CHAPTER 6
CONCLUSION AND RECOMMENDATIONS

1. CONCLUSION

This dissertation has examined the effectiveness of the arbitration process in unfair dismissal disputes by undertaking a comparative analysis of the United Kingdom and Namibian labour dispute resolution system.

The first chapter put the dissertation topic in context by providing a basic summary of the research. It includes information about the study's background, problem statement, goals and objectives, research methods, and literature review. It outlines the CCMA institution's approach to arbitration, which includes elements of informality, accessibility, and the prompt resolution of labour disputes, in particular, unfair dismissal dispute.

The second chapter looked into the legislative framework that led to the formation of the CCMA as well as the implementation of international labour standards in member states, with a special focus on South Africa. In addition, the chapter discusses the ILO's proposed alternative dispute settlement system, member states' obligations stemming from the ratification of labour standards, and labour standard supervision, enforcement, and compliance.

Chapters three and four look at the nature of arbitration and the laws that govern it. In addition, Chapter 5 illustrated Namibia's and the United Kingdom's usage of alternative dispute resolution procedures. The basic idea presented in these chapters is that Namibia transitioned from an old labour regime marked by high legal expenses, lengthy legal proceedings, and poor settlement rates to a relatively modern ILO alternative dispute resolution system marked by conciliation and arbitration procedures. Furthermore, the United Kingdom has a dispute settlement system that South Africa has embraced. As a result, both countries have established organisations aimed at resolving labour disputes in a cost-effective and timely manner.

Closing these shortcomings and proposing methods to improve the provision of an effective and efficient labour dispute settlement system are the important issues addressed in this concluding chapter. The chapter offers suggestions and recommendations for improving the efficiency and efficacy of South Africa's labour dispute resolution system.

The goal of the dissertation was to see if the CCMA's use of arbitration accomplishes its goals of delivering quick and easy dismissal dispute settlement. These performance metrics were used to assess the CCMA's progress in resolving dismissal claims. Due to their similar methods to employing public arbitration to address dismissal issues, this topic was investigated through a comparative research between South Africa, Namibia, and the United Kingdom. These countries' major contrasts and similarities in alternative conflict resolution were discussed.

The literature revealed that while the CCMA has a high percentage of case referrals, it functions with a high degree of success in general. It has been demonstrated that in order to avoid frivolous cases, special attention must be devoted to interventions and adjustments that are not exclusionary and should enhance rather than limit rights.

Several projects have been identified as having the potential to eliminate spurious cases. The introduction of an administration fee, cost awards to encourage private agency accreditation, training and education for employers, employees, trade union representatives, and presiding commissioners, increasing the number of commissioners by training or recruiting LLB graduates, and introducing pre-dismissal alternatives such as review committees or review panels in the organisation were all part of this plan.

2. RECOMMENDATIONS

The effectiveness of dispute settlement methods has caused a lot of debate in South Africa's labour law system. The CCMA's performance, particularly the arbitration procedure, has been questioned due to an increase in case load, high referrals, and the still high cost of conflict settlement. Given the difficulties that conflict settlement procedures encounter, logic dictates that certain recommendations for legislative reform be made.

To promote the effectiveness of the CCMA in arbitration process, the following recommendations may be helpful for policy makers, government as well as other stakeholders dealing with the disputes to go back to the drawing board and review the issues affecting labour disputes in particular, unfair dismissal disputes.

It is common knowledge that the CCMA receives far more referrals than expected. For certain cases, a filing fee or the production of security for costs should be implemented to decrease the number of referrals. The hope is that this will limit access to the CCMA, allowing spurious cases to be sifted out.[294] However, this may have an impact on the number of legitimate cases referred to the CCMA, particularly those involving underprivileged employees who cannot afford to pay such a cost. To prevent having a detrimental impact on vulnerable employees, it is recommended that all employees pay a referral fee, but that employees earning more than R8 000.00 per month should be charged a fee to use the CCMA's services.[295]

To deter false claims and abuse of the system, the referral cost might be enforced by giving each referral an R20.00 revenue stamp, akin to a Magistrate's Court summons, and having it evaluated on a similar basis.[296] Another possibility is for both parties to pay an upfront fee based on a proportion of the employee's compensation. If the parties reach an agreement at conciliation, they each receive a refund of their fee. If this is not the case, the party who is the subject of the arbitration award forfeits his or her portion of the fee.[297]

Cost awards may also be the most equitable means to punish those who misuse the system while not infringing on the rights of those who do not, and that increasing the frequency of cost awards will reduce the number of frivolous cases referred to the courts.[298] Only in frivolous cases can cost awards be imposed. Fear of receiving a cost award against those who refer frivolous cases may cause them to be more hesitant to recommend a case. This strategy penalises those who abuse the system without disqualifying people who have legitimate cases, as may be the case with administrative fees or other qualification conditions.

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[294] Bendeman 2006 *AJCR* 89.
[295] Bendeman 2006 *AJCR* 89.
[296] Bendeman 2006 *AJCR* 89.
[297] Bendeman 2006 *AJCR* 89.
[298] Leeds and Wocke 2009 *SAJLR* 36.

Apart from enacting referral fee and costs awards to avoid increased referrals in the CCMA, accreditation of private agencies, as well as support for bargaining councils' conflict resolution activities, should be encouraged, with a greater usage of private dispute settlement. As a result, if the parties are knowledgeable enough, as in the case of professional and high-level workers, as well as unionized industries, private dispute settlement should be used. The CCMA should thus be saved for parties that are inexperienced and adversarial, as is the situation in the vast majority of individual wrongful dismissal cases involving small to medium-sized businesses.

Training and education of employers, employees, and trade union representatives is another significant answer to the problem of a high referral rate. Increased awareness is needed, and problem areas should be targeted for information sharing and training. This training should include standards for substantive and procedural fairness in internal systems and processes, as well as teaching on employers', employees', and trade unions' rights and obligations.[299]

The training must also be delivered on a regular basis to presiding commissioners in order to keep them up to date on the law. In addition, the number of commissioners is insufficient. As a result, it may be prudent to increase the number of commissioners by training or recruiting LLB graduates to cope with the current surge in referrals at the CCMA, as well as to create jobs in order to alleviate poverty in South Africa.

Employers must consider more alternatives measures before dismissal to reduce the CCMA's workload. The establishment of review committees or review panels in the organisation, comprised of management and trade union representatives, may be one of the pre-dismissal possibilities. Even after an appeal, this committee reviews a case, and the dismissal is only carried out if the committee agrees. If the workers appreciate the committee's credibility and the union advises the employee that they will not defend him or her before the CCMA because they are confident that justice has been served, the likelihood of this employee sending the case to the CCMA is reduced. ‘Such a council has the potential to bring management and labour together.' This option is best

[299] Bendeman 2006 *AJCR* 89.

suited to larger organisations with a long-standing connection between the employer and the union.[300]

[300] Bendeman 2006 *AJCR* 89.

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