

NORTH WEST UNIVERSITY- FACULTY OF LAW

MAFIKENG CAMPUS

SCHOOL OF POSTGRADUATE STUDIES

TOPIC: THE EFFECTIVENESS OF DISPUTE RESOLUTION MECHANISMS
WITHIN THE SOUTH AFRICAN LABOUR LAW SYSTEM: A CRITICAL
ANALYSIS

By

MBOH L. N.

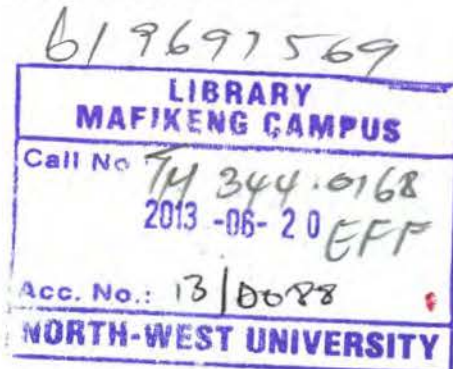
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MINI-DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE AWARD OF THE LL.M DEGREE IN LABOUR AND
SOCIAL SECURITY LAW.

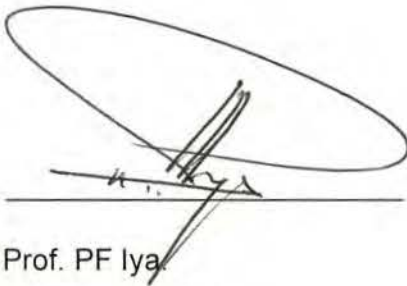
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NOVEMBER 2012

DECLARATION BY SUPERVISOR

I hereby recommend that the following dissertation by MBOH LOVELYNE NGONG, student number 23267143 entitled "The effectiveness of dispute resolution mechanisms within the South African labour law system: A critical analysis", for the degree of Masters of Laws in Labour and Social Security Law, be accepted for examination.

A handwritten signature in black ink, consisting of a large, loopy 'P' followed by 'F Iya', written over a horizontal line.

Prof. PF Iya

SUPERVISOR.

November 2012.

DECLARATION BY CANDIDATE

I, the undersigned, hereby declare that the entirety of this Minor Dissertation is my original work, that I am the owner of the copyright thereof and that I have not previously in its entirety or in part submitted it for obtaining any qualification, and that, I accept sole responsibility for any defects contained herein.

Mboh Lovelyne Ngong.
CANDIDATE

November 2012.

ACKNOWLEDGEMENTS

First and foremost, I praise and thank God for all the blessings that He bestows upon me.

Secondly, my special thanks goes to my supervisor Professor Philip F. Iya, for his professional guidance and his readiness to assist throughout the study. If it were not for him stimulating me intellectually beyond the limits, the output would have been non-existent.

Thirdly, I thank the Dean of the Faculty of Law, Professor MLM Mbao, for his assistance to begin this study and to the entire staff of the faculty.

Lastly, I thank my family for their love and support. My most warm appreciation goes to my brothers Ngwa Eric, Awah Blaise, Kabah Remy and my mother Mbanga Scholastica and sister Kussia Cynthia, not forgetting my uncle and his wife; Mr and Mrs Nji Genesis. To all my friends especially Ekobi Gabriel, Mbeng John, Nasako Pauline and Chia Josephine, all of whom stood foursquare by my side during my studies. Thanks very much for being there for me through thick and thin. God Bless.

Mboh Lovelyne Ngong.

DEDICATION

I dedicate this mini dissertation to my brother, Ngwa Eric for his continuous unfailing love and support throughout this study.

LIST OF ACRONYMS

1. ADR: Alternative Dispute Resolution.
2. BCEA: Basic Conditions of Employment Act.
3. CCMA: Commission for Conciliation, Mediation and Arbitration.
4. COSATU: Congress of South African Trade Unions.
5. CFA: Committee on Freedom of Association.
6. COFESA: Confederation of Employers of South Africa.
7. Co: Company.
8. EEA: Employment Equity Act.
9. Ed(s): Editions.
10. FN: Footnote.
11. FOSATU: Federation of South African Trade Unions.
12. ILO: International Labour Organization.
13. IMSSA: Independent Mediation Service of South Africa.
14. LRA: Labour Relations Act.
15. NEDLAC: National Economic, Development and Labour Council.
16. NASASA: National Stokvel Association of South Africa.
17. PSBC: Public Service Bargaining Council.
18. Pg. (s): Page.
19. RSA: Republic of South Africa.
20. SCA: Supreme Court of Appeal.
21. SDA: Skills Development Act.
22. SARHA: South African Rail Hawkers Association.
23. SADC: Southern African Development Communities.
24. SMME: Small, Medium and Micro Enterprises.
25. SEWA: Self-Employed Women's Association.
26. SABTA: South African Black Taxi Association.
27. SADSAWU: South African Domestic, Service and Allied Workers' Union
28. UIA: Unemployment Insurance Act.

TABLE OF STATUTES

1. Constitution of the Republic of South Africa, Act 200 of 1993.
2. Constitution of the Republic of South Africa, Act 108 of 1996.
3. ILO Constitution.
4. Labour Relations Act 66 of 1995.
5. Employment Equity Act 55 of 1998.
6. South African Public Service Labour Relations Act 1994.
7. Basic Conditions of Employment Act 75 of 1997.
8. Social Assistance Act 13 of 2004.
9. Employment Equity Act 55 of 1998.
10. Arbitration Act 42 of 1965.
11. Skills Development Act. (No. 97 of 1998).
12. Labour Relations Amendment Act 12 of 2002
13. Promotion of Administrative Justice Act 3 of 2000.
14. The Master and Servant Act 15 of 1856.
15. Industrial Conciliation Act of 1924.
16. Industrial Conciliation Act of 1956.
17. Industrial Conciliation Act of 1937.
18. Labour Relations Amendments Act 57 of 1981, 51 of 1982 and 2 of 1983.
19. Civil Service Reform Act of 1978.

TABLE OF CASES

1. *Boxers Superstores Mmatha & another v Mbenya* [2007] BLLR 693 8 (SCA)
2. *County Fair Foods (Pty) Ltd v CC* [1999] 11 BLLR 1117 (LAC) at par 11.
3. *Chirwa v Transnet Ltd & others* [2008] 2 BLLR 97 (CC).
4. *Durban City Council v Minister of Labour* 1953 (3) SA 708 (LAC).
5. *Edgar's Stores (Pty) Ltd v SACCAWU* (1998) 5 BLLR 447 LAC: (1998) 19 ILJ 771 LAC
6. *Fienberg v African Bank Ltd* (2004) 21 ILJ 217 (LC).
7. *Gcaba v Minister of Safety and Security & Others* [2009] 12 BLLR 1145 (CC).
8. *Hoffman v South African Airways* (2001) 1 SA 1 (CC).
9. *NUMSA v Baderpop (Pty) Ltd & another* 2003 vol. 2 BLLR 103 (CC).
10. *Old Mutual Life Assurance Co Ltd v Gumbi* [2007] 8 BLLR 699 (SCA).
11. *Photo Circuit SA Ltd v De Klerk No & others* (1991) 12 ILJ 289 (A).
12. *Pep Stores (Pty) Ltd v Laka*. BLLR 952 at Para's 23 ff. (CC).
13. *SANDU v Minister of Defence*. 1994 (4) SA 469 (CC).
14. *SAPU & another v National Commissioner of the South African Police Service* [2006] 1 BLLR 42 (LC).
15. *S v Makwanyane* 1995 (3) SA 391 (CC).
16. *Sidumo & another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC).
17. *United African Motors Allied Workers Union v Fondens SA Pty Ltd*. (1983) 41 ILJ 212 (IC).
18. *3M SA (Pty) Ltd v SACCAWU* (2001) 5 BLLR 483 (LCA).

ABSTRACT

Dispute resolution mechanisms in South Africa remain an important part of labour relations. These mechanisms provide structures whereby disputes are resolved in both the formal and informal sectors of the economy. Despite the importance of these mechanisms, the structures have to an extent failed to provide sufficient policies needed to make these mechanisms effective. Delays and high cost, for instance, still plaques labour dispute resolution in South Africa. The Labour Relations Act has limited access to dispute resolution mechanisms only to those workers in the formal sector although section 23 of the Constitution provides labour rights for everyone involved in employment relationship.

In this paper, we seek to explore dispute resolution mechanisms in South Africa, with emphasis on their effectiveness in resolving dispute arising from employment relationships. This will be achieved by first looking at the historical development of dispute resolution mechanisms in the country. We shall, thereafter, proceed to analyze the current dispute resolution mechanisms in South Africa with emphasis on their existing structures, mechanisms and their effectiveness. The compliance of dispute resolution mechanisms with International Minimum Standards will further assess the effectiveness of these mechanisms in the country. However, we shall also acknowledge the fact that due to the nature of this paper, want of time and financial constraints; the depth of this paper is by no way exhaustive especially as aforementioned limitation makes it difficult for any form of empirical research. The use of extensive and available literature to strengthen our arguments will, however, guide in achieving the aims and objectives of the study.

TABLE OF CONTENTS

DECLARATION BY SUPERVISOR	i
DECLARATION BY CANDIDATE.	ii
ACKNOWLEDGMENTS	iii
DEDICATION	iv
LIST OF ACRONYMS	v
TABLE OF STATUTES	vi
TABLE OF CASES	vii
ABSTRACT	viii

CHAPTER ONE: INTRODUCTION

1.1. Background to the study	1
1.2. Problem statement	2
1.3. Aims and Objectives	5
1.4. Hypothesis and Research Questions	6
1.5. Methodology	7
1.6. Literature Review	9
1.7. Scope and Limitations	13
1.8. Conceptual Issues	14
1.8.1. Dispute Resolution	14
1.8.2. Dispute resolution mechanisms	14
1.8.3. Effectiveness	15
1.8.4. Labour Relations	15
1.8.5 Labour Law	16
1.8.6. Labour Law System	17
1.9. Summary	17

CHAPTER TWO: DISPUTE RESOLUTION MECHANISMS IN SOUTH AFRICA: HISTORICAL PERSPECTIVES.

2.1. Introduction	19
2.2. Historical Perspectives	20

2.2.1. The Pre 1924 Era	20
2.2.2 The period from 1924-1979	22
2.2.3. The Period from 1979-1993	26
2.2.4. The Transition 1993 to 1996	30
2.2.5. The 1996 Constitutional imperatives as a basis for labour law and dispute resolution: Outline of Relevant Provisions.	32
2.3. Classification of Labour Disputes and their methods of Resolution	34
2.3.1. Dispute Types	36
2.3.2. Causes of Labour Disputes	37
2.4. Summary	37

CHAPTER THREE: CURRENT DISPUTE RESOLUTION MECHANISMS IN SOUTH AFRICA: ANALYSIS OF STRUCTURES, MECHANISMS AND THEIR EFFECTIVENESS.

3.1. Introduction	39
3.2. Understanding Structures, Mechanisms and Effectiveness in the Labour Dispute Resolution System in South Africa	40
3.2.1. Understanding the Structures for Labour Dispute Resolution	40
3.2.2. Understanding the Mechanisms for Labour Dispute Resolution	41
3.2.3. Understanding the Effectiveness of the Labour Dispute Resolution System	41
3.3. Analysis of structures for Labour dispute resolution in South Africa: Formal versus Informal structures	42
3.3.1. Formal Structures (Bargaining Structures)	42
3.3.2. Informal Sector Structures	45
3.4. Analysis of Mechanisms of Labour Dispute Resolution in South Africa	46
3.4.1. The Formal Sector	46
3.4.1.1. Commission for Conciliation, Mediation and Arbitration. (CCMA)	46
3.4.1.2. Labour Court and Labour Court of Appeal	49
3.4.1.3. Bargaining Councils	50
3.4.1.4. Private Dispute Resolution as part of the formal sector	51
3.4.2. The Informal Sector	52
3.4.3. Conciliation-Arbitration	55
3.5. Effectiveness of formal structures and mechanisms	61

3.5.1. Mediation and Arbitration	61
3.5.2. Special Conflicting Issues	62
3.6. Summary	65

CHAPTER FOUR: SOUTH AFRICAN DISPUTE RESOLUTION MECHANISMS: COMPLIANCE WITH INTERNATIONAL MINIMUM STANDARDS.

4.1. Introduction	67
4.2. The International Labour Organization	68
4.3. International Labour standards relating to Dispute Resolution: Conventions and Recommendations	69
4.3.1. Right to Organize and Collective Bargaining Convention, No 98 of 1949	70
4.3.1.1. The existence of an enabling environment	71
4.3.1.2 Duty to bargain	72
4.3.2. Freedom of Association and the Protection of the Right to Organize Convention 1948 (No 87)	73
4.3.2.1. Strike as a means to resolving Labour Disputes and the ILO	74
4.3.3. Labour Relations (Public Service) Convention, 1978 (No. 151)	75
4.3.4. Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)	76
4.3.5. Examination of Grievances Recommendation, 1967 (No. 130)	77
4.4. Incorporating International Minimum Standards in South Africa	77
4.4.1. Transforming international to national law	77
4.4.2. The role of Courts	78
4.4.3. Trade Unions	79
4.4.4. Other Legislations	79
4.5. South Africa's compliance with minimum standards relating to Dispute Resolution	80
4.5.1. Tripartism in Context	81
4.6. Summary	82

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction	84
5.2. Conclusions and Emerging Challenges	84

5.3. Recommendations	88
5.4. Concluding Remarks	92
Bibliography	94

CHAPTER ONE: INTRODUCTION

1.1. BACKGROUND TO THE STUDY

Generally, labour disputes demand a means of prevention because disputes are inevitable which entails identifying dispute-causing factors in all the employment sections, with the view of providing interventions and initiatives to remedy the causes.¹ In the last resort, it also demands a means of resolution so as to maintain labour peace which differs from case to case, as the labour dispute prevention mechanisms cannot prevent all disputes. Interests, rights and power are three basic elements of sources of disputes.² Hence, Labour dispute resolution is an inherent (for purpose of this discussion inherent means inescapable and inevitable) part of employment relationships.³ For that reason, the South African labour law system has greatly evolved to present day and has been of great assistance to resolving labour related disputes and creating industrial peace in the workplace.⁴

In South Africa, effective dispute resolution of labour disputes is one of the pivotal aims of the Labour Relations Act⁵ (thereafter, referred to as, LRA). The LRA seeks to achieve this aim by encouraging voluntary and orderly collective bargaining between labour and management with a view to reaching collective agreements; by democratizing the workplace to infuse policy decisions with greater legitimacy; and by conferring rights which ensure individual and collective justice.⁶ Most of the provisions in the LRA describe the rights of employees and employers and how disputes arising from this relationship can be dealt with. The interim Constitution⁷

¹ Ury W, Brett J.M, & Goldberg S.B, (1988), "Three approaches to resolving disputes: "Interests, rights and power". In: Lewicki, R.J., Barry, B. & Saunder, D.M. Ed. (2007).

Negotiation: readings, exercises and cases. 5th ed. Boston: McGraw-Hill/Irwin. Pg.42.

² *Ibid.*

³ Blanpain R, (2005), "Comparative Labour Law and Industrial Relations". Pg.89.

⁴ Daphne J, (2001), "The role of dispute prevention in meeting challenges facing the CCMA". Input paper for the CCMA Annual Commissioner Convention. 'The CCMA five years on: Facing the challenges of Globalisation'. 11-13 November 2001, Johannesburg. Johannesburg: CCMA.

⁵ 66 of 1995.

⁶ Grogan J, (2007), *Workplace Law*, 9th Ed, Juta & Co. Pg.437.

⁷ Act 200 of 1993.

and the final Constitution⁸ of the Republic of South Africa also contain sections dealing with both individual and collective employment relationships.⁹ It is also important to note that various structures,¹⁰ set up by the LRA in accordance with the Constitution, have greatly assisted in the objective of resolving disputes in the workplace, between the state, trade unions, employers and employees.

In view of the above, the present study seeks to establish and explore the different mechanisms which are provided for by law and which have evolved with time to assist in peaceful resolution of disputes in the workplace in South Africa. Questions of importance to most stakeholders and the present researcher are what mechanisms they are; what role they play; and how effective they have fulfilled their mandate within the South African labour law system. The study also explores international trends so as to establish the challenges that have plagued these mechanisms nationally and internationally over time with a view to providing relevant lessons to South Africa. Besides, a critical analysis of International Minimum Standards will help with a better understanding of the effectiveness of these mechanisms in South Africa. Therefore, the above discussions go to justify the choice of the topic for the study.

1.2. Problem Statement and Substantiation.

The above background sheds some light on the evolution of disputes in labour relations, their challenges and how they can be tackled as laid down by South African law (including case law). The questions that immediately spring to mind is how have the laws succeeded in accomplishing their objectives of maintaining a stable working environment? Are workers and employer/employees, at the end of most labour disputes, contented with the outcome? If not, what has to be done to improve this outcome? These questions consequently raise a number of problems which need substantiation. However, the most serious challenge that has tasked the minds of all stakeholders is the issue of the effectiveness of the dispute resolution mechanisms within the South African labour law system of South Africa.

⁸ Act 108 of 1996.

⁹ Section 27 of the Interim Constitution and section 23 of the Final Constitution.

¹⁰ Set up by the LRA in accordance with the Constitution.

- 1.2.1. Why have industrial actions increased over the years? The main objective of the CCMA is to provide a cost effective dispute resolution service to the labour relations community. It was foreseen that the CCMA should also play a role in dispute prevention.¹¹ Is it the costly nature that affects the effectiveness of the CCMA? As a dispute resolution mechanism there has been an increase in the number of cases referred to this body. Why increase in industrial action over the years with all the dispute resolution mechanisms in place? Where have they fallen short? What could be the cause of increased disputes in relation to the functions of the statutory and private dispute resolution mechanisms will be assessed in the course of this research.
- 1.2.2. Why have dispute resolution processes failed to achieve their objectives? Although a system was created where anybody can pursue a labour dispute without any costs involved in bringing the dispute to the CCMA and without the necessity of legal representation, the question should, however, be asked if it is really achieving the above-mentioned objectives.¹² This objective has failed and it has once again become expensive as the precedents before the LRA.¹³ This study will look at the alternative means of dispute resolution such as, conciliation and mediation which are less costly and time effective and will thus be of assistance to those involved in the resolution of labour disputes.
- 1.2.3. Why are industrial disputes taken to court? Although one of the mechanisms for dispute resolution, the court has its own shortcomings as a dispute resolution mechanism. Disputes are still taken to court when litigation is almost prohibitively expensive, and financially well out of reach for most dismissed employees? Besides, parties involved in litigation play a largely passive role in the dispute resolution when such dispute is taken to court, and

¹¹ Hobo N, (1999), "The resolution of labour disputes in South Africa: A study of the Commission for Conciliation Mediation and Arbitration" Dissertation submitted for the M. Pub. Admin. Degree. University of the Western Cape. Pg.28.

¹² Healy T, (2002), "Hearings riddled with complexities. Workplace supplement to The Star", 4 September 2002, p. 4.

¹³ 66 of 1996.

the person adjudicating the dispute may not have the expertise in dispute resolution.¹⁴ In trying to design a perfect system for labour dispute resolution therefore, certain attributes need to be related to litigation such as; efficiency, affordability, accessibility and informality. This research will thus, recommend solutions to this defect of courts in dispute resolution.

1.2.4. Why are courts having the issue of over-lapping jurisdiction when handling industrial disputes? This is a serious problem in South Africa in that disputes tend to take a very long time if they are not channeled to the right court and also if the employment contract at the start does not cover the issue of dispute resolution when it consequently arises. That is, the labour court or court of Appeal? Which court has jurisdiction over what kind of disputes? The present study will point out that should employment contracts cover how disputes are to be resolved the working and labour relationship in general will become peaceful and fruitful.

2.5. Why are court procedures slow, expensive and complex? The dispute resolution system is based on the acceptance of conflict and the utilization of mechanisms and processes to deal with the conflict as soon as possible. However, the parties still view conflict as negative and attempt to avoid conflict rather than to deal with it as soon as possible. This belief makes the application of the statutory dispute resolution mechanisms and procedures very difficult. What therefore can be done to make this procedures fast and effective will be dealt with in the course of this work.

2.6. Why are labour lawyers involved? Labour lawyers and labour consultants have assumed a very important position in the dispute resolution system of South Africa, especially where individual labour disputes are concerned. This aspect is topical as these role players are more market inclined, thus much cost involved. It is therefore important that, each body knows what role to play. Their importance in the labour relations system has increased over the past few years despite legislative attempts to keep them out of the processes.

¹⁴ Brand J et al, (2008), *Labour Dispute Resolution*, 2nd Ed, Juta & Co. Pg 15.

This discussion wishes to recommend what role these parties can play in dispute resolution.

1.3 AIMS AND OBJECTIVES

1.3.1 Broad Aims

It needs to be emphasized that the South African labour law system has greatly evolved to present day and has been of great assistance to resolving labour related disputes.¹⁵ This is so because in every environment where people meet, personal interests and attitudes are always different and there is, therefore, need to set up legal mechanisms (laws and procedures) for dealing with such conflicts as it is also the case of the workplace. The purpose of all these is to maintain labour peace, economic development and better life for all.¹⁶ The broad aim of this discussion is, therefore:

- (a). To establish and analyse the effectiveness of dispute resolution mechanisms within the South African labour law system. The laws regulating employment have been greatly transformed from one of adversarialism to that of collective bargaining. And this has been achieved through the LRA stemming from the Constitution and many other statutes regulating the employment domain as a whole.
- (b). To establish international instruments with a view to harmonise labour laws of South Africa with that of the international community.
- (c). To identify challenges or gaps in the system, with a view to transform labour relations; and
- (d). To promote and maintain peace through effective dispute resolution mechanisms at workplace.

1.3.2 Specific Objectives

It is also the specific objectives of this study to achieve a number of the following, including;

¹⁵ Fn 4 above.

¹⁶ Bhoola U, (1994). "National Labour Law Profile: South Africa". International Labour Organization Constitution, Section 24. Available on line at <http://www.org/public/english/dialogue/ifpdial/info/national/sa.htm>

Firstly, to identify and assess the role of the LRA provisions relevant to the development of labour relations and how effective it has achieved its goal.

Secondly, to establish need for courts as better mechanism as opposed to alternative dispute resolution (ADR) processes in handling labour dispute.

Thirdly, there is need to identify areas of conflicting and overlapping jurisdiction when labour dispute arise. Where should what dispute actually go?

Furthermore, to organise a consistent framework to cover those workers not covered by statute, most especially informal sector workers (ADR).

Besides, the research seeks to provoke a discussion on the importance of promoting a fast, less costly and efficient dispute resolution mechanism on the economy of South Africa.

The study will go further to draw a clear line to demarcate what are dispute of rights and disputes of interest.

1.4. Hypothesis and Research Questions

The hypothesis on which this research is based is that the LRA and case law have had an important impact on the development of labour law and labour relations in South Africa. The central question, however, which this study seeks to address include: why with all the various mechanisms put in place to maintain labour peace, there is still an increase in disputes in employment relationships? Why this persistent increase? Where have these mechanisms failed and what can be done to eradicate or minimise them? Are there any sanctions for those involved in these processes so they can be more effective? And what are the effects of this delay (that is, slow outcomes from courts when dealing with a dispute and its effect on productivity) on the economy?

According to the researcher, this ineffectiveness of the available mechanisms may be as a result of a number of reasons. Possible justifications include the following:

- 1.4.1. Ignorance on the part of employees in a labour relationship of their labour and constitutional rights in relation to disputes.
 - 1.4.2. Ineffectiveness of the enforcement mechanisms in place to check the applicability of labour rights in the country.
 - 1.4.3. Duties of courts have not been well demarcated and as such, conflict of courts?
 - 1.4.4. Not all workers belong to trade unions and thus they are not equally represented and therefore cannot afford some dispute resolution procedures (statutory) individually.
 - 1.4.5. Also, what happens to those in the informal sector and who do not fall within the definition of the term employee in the LRA?
 - 1.4.6. Besides, not all workers are able to afford the cost for these procedures.
 - 1.4.7. Also, statutory dispute resolution processes have become burdensome and entails long processes. Most people involved in dispute thus, turn elsewhere.
- In the course of this discussion, the overall goal is that in the final analysis the hypothesis, questions and possible justifications will eventually be proved.

1.5 Methodology

There are basically two methods of research, which include the qualitative and quantitative methods and they influence the methodology used in the study. According to Mbao, 'a research methodology on its part is a plan or strategy that links the method or methods chosen to the outcome'.¹⁷ A methodology also refers to the rationale and/or the philosophical assumptions that under-lie a particular method. Qualitative method, on the one hand, is a method that cuts across disciplines or subject matter. It has, as its main objective, to establish an in-depth understanding of human behaviour and the reason behind such behaviours. It also investigates not only the where, what and when but also the why and how.¹⁸ It has, as its advantage, the fact that it produces an in depth understanding of information and also uses subjective information participatory observation to describe the context or natural setting of variables under consideration, as well as how the various variables interact

¹⁷ Prof. ML Mbao, (2007), "Guidelines to Research Students", Published by North West University, Faculty of Law at Mafikeng. Pg.7.

¹⁸ Althea Povey, (2005), Journal of the South African Institution of Civil engineering, vol 47 No 1, 2005, Pages 2–7, Paper 562 available at <http://en.wikipedia.org/wiki/Qualitative-research>.

in the context in which there are used.¹⁹ With these advantages, the method still has its own loopholes. For example, its subjective nature may lead the research to be biased or on sided conclusion. Also, it requires an in depth comprehensive data gathering approach which exist as a limitation to this method.

The present study will, accordingly, be based on the desk-bound method of research based on the qualitative method. In this light, the researcher is going to use mainly primary sources of research tools which include statutes and different forms of court decisions (precedents), secondary sources, which entails books of learned scholars put in text books and journals. Of course, neglect cannot be used as an excuse towards internet sources as the world has become a technological global village. For these reasons the qualitative method of research has been chosen for this present study and will be desk-bound.

1.6 Literature Review

The understanding of a literature review is that it serves the purpose of reviewing literature with the aim of finding out if there are gaps within the labour dispute resolution mechanism analysed by various authors. Any failure to undertake and apply such a review would limit the research as contributions to new knowledge on the theme of the discussion. It will consist of reviewing articles from journals, policy documents, case law and other secondary sources not leaving out legislation.

Dispute resolution is a very broad and critical phenomenon in any employment domain.²⁰ Given the controversy of the subject matter, many writers have tended to explore and research on it. For instance, Plessis and Fouche gave the opinion that 'the nature of the employment relationship is such that disputes between employers and employees occur frequently.'²¹ They argue that it is, therefore, important that structures be put in place through which these disputes should be channelled when

¹⁹ Walcott HR, (1990), "Qualitative Inquiry in Education": The Continuing Debate. Development Policy Research Unit, University of Cape Town. Pg.11.

²⁰ Hanneli Bendeman, (2004) 'Alternative Dispute Resolution (ADR) in the Workplace – The South African Experience'. Department of Sociology at the University of Pretoria, South Africa. Pg.137.

²¹ JV du Plessis and MA Fouche, (2006), *A Practical Guide to labour Law*, 6th Ed. Lexis Nexis. Pg. 319.

they do arise as they are seemingly inevitable. Are there no disputes arising from their work relationship because they are in the informal sector? Do they have adequate and effective dispute resolution mechanisms should disputes arise? If a negative answer is given to the above assertions, then it will be of sound reason to say that informal sector employees have been neglected and denied most of their constitutional rights to fair labour practice and access to dispute resolution mechanisms and that it is time they were included under the same umbrella like formal workers. This is to say mechanisms for resolving disputes should be extended to them as well, a recommendation to be made by the present study.

While Du Plessis and Fouche are of the opinion that²² dispute resolution is a controversial term, when dealing with the scope of the labour statute, Grogan on the other hand, states that, "only persons defined as employees have recourse to the dispute resolution provision of the LRA".²³ This research will make a new contribution by asserting that the statutory definition of employee is narrow as there are other categories of workers who equally qualify as workers given the relationship in which they are engaged in.

It is generally accepted that a dispute of interest arises when one party (the employee) claims a benefit to which he/she is not entitled in law which the other party (the employer) is not prepared to grant, while a dispute of right arises when parties cannot agree whether one of them is legally entitled to the benefit claimed as a matter of the right²⁴ Grogan²⁵ elucidates the distinction between the two disputes further by stating that disputes of right are those arising from breaches of rights or failure to discharge duties expressly conferred or imposed by the Act²⁶ or other statutes, by collective agreement or by individual contracts of service. Furthermore, disputes of right are justiciable in terms of the Act,²⁷ by either arbitration or adjudication, and that all other disputes are matters of interest and therefore non-

²² JV du Plessis and MA Fouche, (2006), *A Practical Guide to labour Law*, 6th Ed. Lexis Nexis. Pg.319.

²³ Grogan J, (2007), *Workplace Law*, 9th Ed, Juta & Co. Pg 346.

²⁴ Grogan J, (2005), *Workplace Law*, 8th Ed, Juta & Co, Pg. 341.

²⁵ Grogan J. *Op.cit.*

²⁶ 66 of 1995.

²⁷ *Ibid.*

justiciable and of necessity to be resolved by industrial action if parties cannot come to a negotiated settlement.

Van Niekerk²⁸ in the case of *De Beers Consolidated Mines Ltd v CCMA & others*²⁹ argued that, disputes about “matters of mutual interest” include disputes of right as well as disputes of interest. Matter of mutual interest disputes was defined by the court in the case of *Rand Tyres & Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Tvl), Minister for Labour and Minister for Justice*³⁰ as a matter that arises in the context of an employment relationship.³¹

The above authors did not look at how these disputes can be resolved should they arise; instead they tried to draw a line between types of disputes. The researcher is of the opinion that the extension of this definition to how disputes arising from either rights or interest will be very critical in an employment relationship. The present study will seek to provide the extension of that definition.

According to Gon,³² the importance of the promotion of effective dispute resolution was emphasised as one of the four primary objectives of the LRA.³³ The problem is that the CCMA is so overburdened with cases that its effective functioning has become questionable.³⁴ The LRA has put in place the CCMA to be the pillar of the new dispute resolution dispensation that had been ushered in by the LRA.³⁵ According to other authors such as Le Roux, even though the LRA has brought statutory dispute resolution within reach of the ordinary worker, it might actually have compounded the problems relating to dispute resolution in the country.³⁶ These authors have not actually given a solution to these ordinary workers regarding their

²⁸ Van Niekerk *et al*, (2012), *Law at work*, 2nd Ed, LexisNexis, Pg. 431.

²⁹ 2000 (5) BCLR 578 (LC).

³⁰ 1941 TPD 108.

³¹ Van Niekerk. *Op.cit*.

³² Gon S, (1997). “The CCMA to Date” in: *Industrial Democracy Review*. Johannesburg: Faculty of Management, University of the Witwatersrand, Vol. 6, No. 3, Aug-Sept, Pg. 23-28.

³³ These objectives can be found in Section 1 (d) (IV).

³⁴ Fn 32 above. Pg.25.

³⁵ 66 of 1995.

³⁶ Le Roux P *et al*, (1997), “Under strain... but coping so far”: The first four months of the CCMA. *Contemporary Labour Law*, Vol. 6, No. 7. Rivonia: Gavin Brown & Associates.

problem of exclusion from dispute resolution processes and the ordinary workers ought to be given a place in this process.

Whereas Le Roux indicated that the ordinary workers should be given access to dispute resolution under the LRA,³⁷ such workers will hardly enjoy the right as they can barely take recourse to industrial action where the need arises and must be covered by the LRA. This paper will make contribution by arguing that these ordinary workers need a place and should be covered by labour legislations within the ambit of dispute resolution mechanisms.

According to Hay *et al*,³⁸ in an interventionist industrial relations system, the state establishes statutory dispute resolution institutions as a first port of call in labour disputes before recourse to either adjudication or industrial action. Where statutory dispute resolution institutions exist, the efficiency, accessibility and quality of dispute resolution of the institutions become critical success factors of statutory dispute resolution. The rationale is that (with their inevitable need for urgency) the disputing parties must be able to refer disputes to the dispute resolution institution at any time, and that the institution must be able to render rapid response.³⁹

There is need to see into this aspect in order to maintain a stable work milieu.⁴⁰ Stated alternatively, the longer disputes fester between parties, the slimmer the chances that a resolution to the dispute can be found and as the conflict inevitably escalates, the application of economic power becomes the only solution, according to the disputing parties.⁴¹ This can be seen today in the increase number of strikes and it thus tends to reduce outputs at the workplace. The above authors; Hay and Brand *et al*, failed to discuss the mechanisms which can be use in resolving disputes in order to avoid strikes. The researcher will throw more light in respect to how the existing mechanisms have played their role in labour resolving disputes.

³⁷ Section 213.

³⁸ Hay J, *et al*, (1996), "Toward a theory of legal reform". *European Economic Review*, 40(3-5), 559-567.

³⁹ Brand J, (2008), *Labour dispute resolution*. 2nd Ed. Juta & Co, Cape Town. Pg.81.

⁴⁰ *Ibid*.

⁴¹ Brand *et al*. *Op.cit*.

Gebken⁴² and Al-Tabtabai⁴³ pointed out to the fact that, there is an obvious need for consistency in terminology irrespective of whether words and phrases associated with dispute avoidance and resolution are framed in an industry, legal or academic context. Achieving this consistency is a considerable challenge particularly when subtle nuances are introduced such as "disagreements are not disputes".⁴⁴ Thus, in this paper an attempt will be made to draw a line between these terms which accrue in dispute resolution and labour relations as whole.

From the above literature review, it is apparent that authors have made attempts in filling in the loopholes existing within the dispute resolution mechanism in South Africa but, much still has to be done. This study will attempt to fill in the gaps in the above literature.

1.7. SCOPE AND LIMITATIONS

1.7.1. Scope

The present study deals with the effectiveness of dispute resolution mechanisms existing within the South African labour law system. For the goals set out in the introduction of this research to be achieved, the current discussion will be divided into five chapters, namely:

The first chapter will establish the background on which the study is based and will constitute the introductory chapter. It will include a background to the study, the research problem, objectives, and methodology among others. Reason being that, a work well structured facilitates and makes comprehension easy.

The second chapter will concentrate on the evolution of labour relations and labour law, focusing on issues of dispute resolution. It will investigate, among other things, the status of the previous law, its application and how it regulated dispute resolution in South Africa before 1995. This is will assist the researcher to know where and how the law pertaining to dispute resolution evolved and its present state.

⁴² Gebken R, (2006), "Qualification of costs for dispute resolution procedures in the construction industry, Journal of Professional Issues in Engineering Education and Practice", vol. 132, no. 3, Pg. 264-271.

⁴³ Al-Tabtabai H, (2004), "Negotiation and resolution of conflict using AHP: an application to project management, Engineering, Construction and Architectural Management. vol. 11, no. 2, pp. 90-100.

⁴⁴ Al-Tabtabai H. *Op.cit.*

Chapter three will examine and analyse different existing dispute resolution mechanisms in South Africa as provided for currently.

The fourth chapter on the other hand, will look at the mechanisms of dispute resolution in relation to international minimum standards of the ILO and the extent to which South Africa complies with such standards with the aim of assessing the efficiency of such mechanisms

The fifth and last chapter will establish research conclusions, analyse the possible challenges that have been identified from the investigation and use of the analysis will help to make possible recommendations for law reforms in dispute resolution. The final remark on the whole research will also be looked at.

1.7.2. Limitations

Due to the nature of this topic, it is submitted that the scope of this dissertation is by no means exhaustive as there are some limitations that have hindered any form of empirical research which should have been carried out. Time and financial difficulties are among those factors which did not permit the researcher to go to the field for empirical research. The limitation of the work to South Africa is also due to the factors above like financial constraint, which made it difficult for the researcher to do a comparative study.

1.8 DEFINITION OF IMPORTANT TERMS/ CONCEPTUAL ISSUES

1.8.1. Dispute Resolution

Dispute resolution forms an integral part of labour relations, and one of the primary objectives of the Act is to achieve labour peace by providing framework for the effective and expeditious resolution of labour disputes. According to Section 213 of the LRA, the term "dispute" includes an alleged dispute but surprisingly, it is not defined. A dispute is said to exist when a party maintains one point of view and the

other a different one. Furthermore, for a dispute to exist at the very least; a demand should be communicated to another party and that party should be given an opportunity to comply.⁴⁵

Dispute resolution is the process of resolving a dispute or a conflict by meeting at least some of each side's needs and addressing their interests. Dispute resolution for purposes of this discussion, therefore, refers to one of several different processes used to resolve disputes between parties, including negotiation, mediation, arbitration, collaborative law, and litigation.⁴⁶

1.8.2. Dispute Resolution Mechanisms

The concept of dispute resolution is one of the bases for the existence of labour law with its aim, to provide simplified procedures for the resolution of disputes between employers and trade unions and employer organizations, by means of Conciliation, Mediation and Arbitration.⁴⁷ The need for new institutions to resolve disputes in the workplace was as a result of the failure of previous systems which existed before the LRA⁴⁸ such as Industrial Councils and Conciliation Boards. The new system put in place by the LRA thus, had to be fast, accessible and efficient. The body in charge of dispute resolution was the Commission for Conciliation, Mediation and Arbitration.⁴⁹ This and other mechanisms were put in place to assist with a peaceful working environment.

A mechanism is a process, technique, or system for achieving a result.⁵⁰ Dispute resolution mechanisms for purpose of this present study; will be adopted to mean the various processes and techniques put in place by the LRA and other statutes in order to resolve labour disputes effectively.

⁴⁵ Bosch *et al*, (2003), *Labour Relations Law: A Comprehensive Guide*, 4th Ed. LexisNexis. Pg.92.

⁴⁶ Fn 18 above.

⁴⁷ Hanneli B, (2006), 'Alternative Dispute Resolution (ADR) in the Workplace – The South African Experience', *African Journal on Conflict Resolution* 6(1).Pg.12.

⁴⁸ Labour Relations Act 66 of 1995.

⁴⁹ Section 112 of the LRA.

⁵⁰ Fn 47 above.

1.8.3. Effectiveness

Effectiveness within the legal system has a number of meanings. They include: the extent to which an issue can be dealt with by the law i.e. if an issue is dealt with by the law, how well it is dealt with.⁵¹ In terms of ease of access, simplicity, consistency, predictability and delivery of just outcomes and the capacity of a law to stop or change human behaviour,⁵² effectiveness for the purpose of this discussion means not only the extent to which disputes can be resolved by the law but also, ease of access, simplicity, consistency, predictability and delivery of just outcomes to parties involved in labour disputes by the mechanisms in place.

1.8.4. Labour Relations

Labour relations are the study of and practice of managing unionized employment situations. Bendix⁵³ defines labour relations as a relationship between people who work and those for whom they work. In practice, labour relations are frequently a sub-area within human resource management. Courses in labour relations typically cover labour history, labour law, union organizing, bargaining, contract administration, and important contemporary topics.⁵⁴

In the United States, labour relations in the private sector is regulated by the National Labour Relations Act, public Sector labour relations is regulated by Civil Service Reform Act of 1978 and various pieces of state legislation. In South Africa, it is regulated by the LRA and other pieces of legislations such as the Employment Equity Act⁵⁵ and the Basic Conditions of Employment Act⁵⁶ all regulating labour relations in South Africa. For the purpose of this study, labour relations will entail the relationship existing between the state, labour and capital who are parties to an employment contract.

⁵¹ Ferreira G, (2004), "The Commission for Conciliation, Mediation and Arbitration: its effectiveness in dispute resolution in labour Relations. Department of Public Administration and Management University of South Africa". Politeia Vol 23. No 2, Unisa Press.

⁵² Brian Elliott *et al* (2004). "Encouraging Achievement - Gifted Education Resources". Pg.1.

⁵³ Bendix S, (1996), *Industrial Relations in the New South Africa*, 3rd ed, Kenwyn: Juta. Pg. 3

⁵⁴ John W. Budd, (2010), *Labour Relations: Striking a Balance*, 3rd ed, (Boston: McGraw-Hill/Irwin).

⁵⁵ Act 55 of 1998.

⁵⁶ Act 75 of 1997.

1.8.5. Labour Law

Labour law is the law that governs the relationship between employers and employees.⁵⁷ It concerns the inequality of bargaining power between employers and workers.⁵⁸ From a legal point of view however, it is necessary that one draws a line between individual and collective labour law. Individual labour law refers to the law governing the relationship between employers and individual employees, while the latter deals with legal rules governing the relationship between employers and employee collectivities, or between management and organized labour.⁵⁹

Although there is a line between both labour law types, they still overlap both conceptually and in principle.⁶⁰ The rules of individual labour law are concerned with the rights and duties of the individual parties in a contract of employment, with the aim of achieving and maintaining justice and peace in the workplace. Meanwhile, rules of collective labour law recognizes that in modern society, both employers and employees constitutes distinct and supposing groups, which tend to promote and protect their respective interests. The rule of collective labour law thus aims at organizing orderly collective bargaining. For the purpose of this present work, the definition put forward by Grogan shall be adopted.⁶¹ Labour law relates to the rules and regulation governing the employment relationship as a whole.

1.8.6. Labour Law System

A system is a set of interacting or interdependent components forming an integrated whole.⁶² Systems have structures, a common behaviour and interconnectivity.⁶³ The various parts of a system have functional as well as structural relationships to each

⁵⁷ Yarn D, (1999), 'the dictionary of conflict resolution'. San Francisco: Jossey-Bass.

⁵⁸ *Ibid.*

⁵⁹ Grogan J, (2007), *Workplace Law*, 9th Ed, Juta & Co .Pg. 315.

⁶⁰ Benjamin P, (2009), 'Conciliation, Arbitration and enforcement: The CCMA's Achievements and Challenges'. *Industrial Law Journal*, Vol 30, Pg.26-48.

⁶¹ Webster (1978), *Essays in South African Labour History*, SA Publication. Pg.70.

⁶² Hanneli B, (2006), 'Alternative Dispute Resolution (ADR) in the Workplace – The South African Experience'. *African Journal on Conflict Resolution* 6(1). Pg.12.

⁶³ Bhorat, H et al, (2007). 'Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data'. Development Policy Research Unit: University of Cape Town.

other.⁶⁴ These systems are not without boundaries. Systems may have some functions or groups of functions. A system is set of things working together as parts of a mechanism or an interconnecting network.⁶⁵ This is the case of labour law where the LRA has set up structures like the CCMA and bargaining councils to deal with labour disputes; and such structures are limited within the boundaries of labour matters. This definition will therefore entail a labour law system in the course of this paper to be a set of parts of a mechanism working together to maintain labour peace.

Therefore, a labour law system for purpose of this study will mean the mechanisms put in place by the LRA to resolve disputes arising from the labour relations in general.

1.9 SUMMARY

The relationship between state, labour and capital was supposed to be one where clear and unambiguous rules did exist so as to maintain a stable working environment for those caught up in this web. The effectiveness of dispute resolution mechanisms has tended to be very critical for the existence of the nation as a whole. This is because, the LRA evolving from the Constitution which included labour rights was considered in an attempt to set equilibrium between these parties. The goal of dispute resolution was to maintain a peaceful relationship altogether for parties in an employment contract. Dispute resolution is one of the major reasons for the existence of the present LRA, which aims at providing simplified procedures for resolving disputes by means of Conciliation, Mediation and Arbitration. Therefore, there are mechanisms which have been put in place to play this role of resolving disputes and will be analysed in previous chapters of this research.

The background of the study, as well as some of the problems plaguing this area of labour was examined. Besides, the objectives of which this discussion in chapter one seeks to achieve were not left out. Literature and some conceptual issues were dealt with to give an insight of the work. The details of the issues which have been raised

⁶⁴ *Ibid.* Pg. 12.

⁶⁵ Yarn D, (1999), 'The dictionary of conflict resolution'. San Francisco: Jossey-Bass.

above will be critically analysed as the work unfolds. The first such issue relates to the historical evaluation of labour relations in relation to dispute resolution and its Constitutional imperatives on labour law, the details of which are discussed in the following chapter.

CHAPTER TWO

DISPUTE RESOLUTION MECHANISMS IN SOUTH AFRICA: HISTORICAL PERSPECTIVES

2.1. INTRODUCTION

Historical perspectives are vital in a study of this nature because it enables one to discover the past and to use such past to interpret the present as well as use the present to map the way forward. The importance of legal history cannot therefore, be overemphasized.⁶⁶ This assertion has been amplified by Rossouw GJ and Carabine D who hold the view that "wisdom sometimes looks to the past for guidance in the future".⁶⁷

This chapter seeks to explore labour law in South Africa in its development of dispute resolution. A handful of transitions have taken place in the historical evolution and development of South African's labour law and labour relations as a whole. Dispute resolution is one of the major reasons for the existence of the present *Labour Relation Act*⁶⁸ whose main objective is to provide simplified procedures for the resolution of disputes by means of Conciliation, Mediation and Arbitration⁶⁹ and to make such procedures more simplified. However, knowledge about the history of any phenomenon contributes to a greater understanding of the present by placing the phenomenon in context and showing how it has evolved. This applies to labour relations in general and to labour dispute resolution in particular in South Africa. Dispute resolution in South Africa has always been regulated by Labour Relations statutes (both before and after the democratization of the country in 1994). The process started with the Labour Relations Act No 11 of 1924, followed finally by the Labour Relations Act No 66 of 1995 which is the legislation that has regulated dispute resolution in the country since 1995. This chapter presents an overview of both pieces of legislation, with specific reference to their dispute resolution provisions.

⁶⁶ Duard Kleyn and Francis Viljeon, (1998), *Beginners Guide for Students*, 2nd Ed, Juta & Co Ltd. Pg.29.

⁶⁷ Rossouw GJ & Carabine, (1999), "Introduction in Fraud and the African Renaissance", Uganda Martyrs University Press. Pg 23.

⁶⁸ 66 of 1995.

⁶⁹ Basson AC et al, (2005), *Essential Labour Law*, 4th Ed, Juta & Co. Pg 225 and 335.

The Constitution, on its part, came with a bundle of rights in chapter 2 which have resulted in pieces of legislations such as the LRA and the Basic Conditions of Employment Act,⁷⁰ all in an attempt to remedy the failures of the previous legislations which failed to set a strong basis for the resolution of disputes in labour relations. The Constitution has not been silent as it has greatly impacted upon labour law in various fields such as the relationship between the state, labour and capital; and how this relationship has impacted upon dispute resolution will be discussed in the course of this work.⁷¹

It is within this context that the historical perspectives of the present study of labour in South Africa will be situated. It is a shared premise that, any attempt to outline a brief history of labour law of South Africa is an uphill task. This is the view shared by Fennimore who holds that, "any attempt to give a brief history of labour relations in South Africa is difficult".⁷² An explanation can thus be deduced from the difficult path treaded by South Africa to democracy and its impact on labour relations as a whole, more so for today's understanding of the topic. For purposes of the current analysis, the historical perspective of labour law in South Africa will be mapped out into five main phases, to wit, the pre-1924 era, the 1924 to 1979 period, the 1979 to 1993 era, 1993 to 1996 being the transition era and the present labour dispensation. The emphasis in each phase is to establish the evolution and development of labour relation mechanisms for dispute resolution for a better understanding of today's context and analysis.

2.2. HISTORICAL PERSPECTIVES OF MECHANISMS FOR DISPUTE RESOLUTION IN SOUTH AFRICA

2.2.1. The pre 1924 era

Prior to the period 1924, a lot had transpired which was not without effects on the subsequent settlement of labour disputes in the workplace. The economy of South Africa could be described as mainly agrarian during this period, with agriculture as the main activity. The employment relationship was governed by various master and

⁷⁰ Thereafter known as the (BCEA).

⁷¹ Haroon Bhorat and Carlene van der Westhuizen, (2008), 'A Synthesis of Current Issues in the Labour Regulatory Environment'. Development Policy Research Unit (DPRU). June 2008. Pg .2.

⁷² Fennimore *et al*, (2002), *Contemporary Labour Relations*. 2nd ed. Durban: LexisNexis, Butterworth. Pg. 51

servants Acts, including the Master and Servant Act of 1856.⁷³ Although this period was characterised by mainly agricultural activities, it would be wrong to rule out the existence of labour chaos.

The discovery of gold and diamond in South Africa led to an influx of labour and workers in the mines. This culminated in the formation of South Africa's first trade union, the Carpenters' and Joiners' Union in 1881.⁷⁴ The aim of this union was to protect the interest of skilled foreign workers working in the mines. The first legislative provision in South Africa, the Industrial Dispute Prevention Act was promulgated in 1909,⁷⁵ to establish mechanisms for the resolution of labour disputes. The boom experienced then in the mining industry soon developed into political differences between the whites and blacks as trade unions operated strictly along racial lines. This gave birth to the Mine and Works in Acts in 1911 which reserved various types of work for White workers only. This era was very turbulent and a number of strikes, with the aim of securing the position of White workers on the mines took place. The employment relationship continued to worsen as more strikes disrupted the normal trend of things in labour relations. The union of South Africa formed in 1913, failed to resolve uprisings in the workplace.

The general strike of 1914 brought about the Martial Law which saw leaders of trade unions deportation from South Africa. Due to the frequent strikes, output dropped significantly, causing many workers to be retrenched. This had a serious and negative effect on the employment relationship. Poverty and unemployment were some of these effects of retrenchment. There was therefore, need for a mechanism to be put in place to resolve and settle such disputes. As a result, discontent among the workers finally resulted in the 1922 strike, the worst in South African labour history. The outcome of this was the passing of the 1924 Industrial Conciliation Act⁷⁶ which is the beginning of the second phase of South African labour law and dispute resolution evolution. This Act provided for Industrial councils, conciliation boards, the

⁷³ Act 15 of 1856.

⁷⁴ National labour profile of South Africa, (2002), accessed at <http://www.ilo/pub/english/dialogue/ofpdial/info/national/sa.htm>.

⁷⁵ Van Jaarsveld et al, (2002), *Principles and practice of Labour Law*, 2nd Ed, Durban: LexisNexis Butterworth, Pg 415.

⁷⁶ 11 of 1924

Industrial Court and the Labour Appeal Court as dispute resolution mechanisms.⁷⁷ This phase is therefore significant in that it sets the foundation for new a new phase in dispute resolution with the development of the Industrial Council.

2.2.2 The period from 1924-1979

The second phase is equally important because of the avalanches of legislations which were enacted to resolve disputes during this period. The aim of the legislation is to try and contain the growing influence of trade unions and introduction of unbalanced labour relations. To this effect, the Industrial Conciliation Act of 1924, 1937 and that of 1956 will be examined to ascertain with a view to establishing their impact on the development of labour law and dispute resolution in South Africa.

2.2.2.1. Industrial Conciliation Act of 1924

This Act was a direct response to the 1922 miners' strike at the Rand. The promulgation of the Act may be regarded as the point at which the South African labour law broke away from the traditional British pattern and began to develop its own lines, acquiring a strong character for effective dispute resolution. The response of the government from the strike was the introduction of South Africa's first comprehensive piece of legislation (the Industrial Conciliation Act of 1924),⁷⁸ whose main aim was to maintain peaceful employment relations. Besides, it laid down the foundations, principles and structures for the development of labour law in terms of finding solution for dispute resolution at the workplace in industries in South Africa.

The Act⁷⁹ contained some outstanding features. Prominent among these is the fact that it introduced a dual labour law system in South Africa. There were different rules regulating employment relationships of the different population groups living in the country. In addition to the above, whites trade unions were given statutory recognition with limited right to strike. Pass-bearing Blacks were excluded from the definition of "employee". The introduction of the Act made 1924 notable in the industrial relations sphere for two reasons according to Ringrose.⁸⁰ Firstly, the trade unions of South Africa acquired a status equivalent to that which the British trade

⁷⁷ Rycroft et al, (1992), *A Guide to South African Labour Law*. 2nd ed. Cape Town: Juta & Co. Pg 74.

⁷⁸ *Ibid.*

⁷⁹ 1924.

⁸⁰ Rose Ring HG (1983), *The Law and Practice of Employment*, 2nd Ed, Juta & Co, Cape Town. Pg 7

unions had attained in 1872 and secondly, the introduction of a comprehensive arrangement for dispute resolution by voluntary or compulsory conciliation indicated recognition by the South African labour law system that, industrial disputes could not be eliminated by simply declaring strikes illegal.

The exclusion of African workers from the definition of employee was going to have negative effects on the labour relations. This means they could be employed on terms inferior to those set by the industrial council or The Conciliation Board agreement.⁸¹ The minister was tasked by an amendment of 1930 to clearly specify in the recommendations of the Industrial Council minimum wages for those not included in the definition of employee. The idea behind this was to protect white workers from being dominated by cheap African labour and as such, reduce disputes arising from discrimination in industrial relations.

The mechanisms of the 1924 Act such as industrial courts were primarily suited to resolve disputes of interest. Interest disputes were referred to industrial councils or conciliation boards (where no industrial council existed) for conciliation. If the dispute remained unresolved, employees were able to strike and employers to lock workers out after a cooling off period of 30 days. Strikes and lockouts were prohibited until the issue in dispute had been conciliated. Although the Act⁸² introduced the dual labour system, it was discriminatory against black employees and therefore, necessitating amendment.

2.2.2.2. Industrial Conciliation Act of 1937

The amended Act⁸³ was replaced by the new consolidated Act in 1937.⁸⁴ However, the introduction of the new Act was not of much help to the problems that plagued the employment domain and most particularly dispute resolution. Both the Van Reenen Commission in 1935⁸⁵ and the Botha Commission in 1951⁸⁶ had pointed that craft unions insist on control ratios of semi-skilled labour employees thereby

⁸¹ Webster (1978), *Essays in South African Labour History*, SA Publication. Pg.68.

⁸² 1924.

⁸³ 1924.

⁸⁴ Industrial Conciliation Act 36 of 1937.

⁸⁵ Report of Industrial Legislation of Enquiry (UG 37-1951) at Para 267-270.

⁸⁶ Report of Industrial Legislation of Enquiry (UG 62-1951) at Para 340-342.

limiting the growth of economic activities dependent on semi-skilled labour. The result of this was intense competition for unskilled jobs and high wage gap between organised skilled workers and semi-skilled or unskilled workers whose wages were described by the Van Reenan Commission as "inadequate to maintain a decent standard of living".⁸⁷ The 1937 Act brought further improvement by allowing indirect representation of black workers' interests on industrial councils by representatives of the Department of Labour. However, the representation of black worker interests remained poor. This is one of the factors that gave rise to disputes and necessitated resolution.

From the provisions of the statutes examined above, there seem to bear some semblance as to who qualifies as an employee with what is obtained today. Although the LRA has added some meaning from the previous position, that which is certain is that, the labour legislation in South Africa is still reluctant to qualify the informal worker as an employee. Besides, the Act⁸⁸ did not provide a solution for the segregation existing between Black and White workers. The 1953 Act was thus, drawn to remedy the situation. Disputes were therefore in the increase and new mechanisms were needed. It is in the light of the above that a review of these statutes has been undertaken to give insight to this research as they are important to the present study.

2.2.2.3. Industrial Conciliation Act of 1956

The Industrial Conciliation Amendment Act⁸⁹ created a separate official collective bargaining and dispute resolution machinery for black workers in the form of plant based works committees, regional native labour committees and a Central Native Labour Board.⁹⁰ Besides these bodies, African workers still could not form or join trade unions and were prohibited from striking. The functions of these workers committees were confined to reporting and dispute resolution and operated under strict government control. The 1956 Act was enacted with the purpose of filling the

⁸⁷ Du Toit et al, (2000), *Labour Relations Law: A Comprehensive Guide*. 5th Ed, LexisNexis, Butterworth, Durban. Pg.67.

⁸⁸ 1937.

⁸⁹ 1953.

⁹⁰ Sections 3, 4 and 7 of the 1953 Amendment Act.

loopholes that plaque its predecessors (i.e. the 1924, 1937 and 1953 Acts). By 1956, it was evident that the 1924 Act could not accommodate the changes that had occurred in the labour law system of South Africa in respect to dispute resolution. The 1956 Act⁹¹ had some important features among which are the following: the exclusion of Blacks from its scope of application, the refusal to register the so-called mixed unions; the introduction of statutory collective bargaining and the introduction of job reservation policy. Low wages, poor working conditions and as such strikes were the order of the day. The 1956 Act, in a nut shell, completed the construction of a racially segregated labour law system in South Africa and the increase of disputes in the employment domain, both at an individual and collective level.

Viewed in its own terms, the 1956 Act was seemingly successful to a large extent. This is explained by the fact that under this period, there was a global economic explosion which resulted in stability in the labour domain. Skilled (mainly white workers) reaped significant benefits and employers faced little or no challenges from their employees unlike today. However, this was not going to last as the Act had to face the reality of the day. Its success owed much to an unjust political dispensation which relied on much force to maintain stability. By the 1970's, the dual labour law system had become practically unworkable. Statutory structures for African workers were largely ignored while plant level bargaining by the new unregistered unions was regulated. This sowed the seed for disputes and there was need for new mechanisms of resolving them. In 1977, the government appointed the Wiehahn Commission on Inquiry into labour legislation which in 1979 recommended a number of reforms that would fundamentally change the system.⁹² The appointment of the Wiehahn Commission ushered in a new phase in the historical calendar of labour law in South Africa and dispute resolution.

The appointment of this commission was very critical to the dispute resolution system of South Africa at the time. The Commission was entrusted with the task of overhauling the labour laws of South Africa. It was realized that the dual system of industrial relations had become crippled by the late 1970's. The structures regulating

⁹¹ Act 28 of 1956.

⁹² Report of the Commission of Inquiry into Labour Legislation (RP47/1979). Pg 81.

the activities of African workers were unregulated. All these were as a consequence of the Constitution and the labour law statutes governing the country. It is important to mention here that by this period, the 1961 Constitution had completed a racially segregated system of government with negative impacts on labour relations as a whole.

The Industrial Conciliation Amendment Act,⁹³ which later became known as the Labour Relations Act of 1956 created an industrial tribunal to arbitrate disputes on a voluntary basis in non-essential services when requested to do so by parties to industrial councils or conciliation boards and to arbitrate disputes on a compulsory basis in essential services. Thus, it could be said that the injustice of exclusion witnessed by the informal sector workers were a result of the developments of labour law under the apartheid regime and thus, increased labour disputes necessitating mechanisms for effective resolution of disputes.

2.2.3. The Period from 1979-1993

The third phase of labour relations experienced a relative stability in terms of labour disputes in the 1950's but was short lived. It became clear that the system could not longer contain the labour issues of the day. The apartheid policies of the National Party made Black employees aware of their rights. Furthermore, the booming economy continued to absorb more Black employees, as a result, increasing their numbers in the employment domain. These are some of the reasons that accounted for the strain in the labour law system of South Africa at the time. The committee system remained the only legitimized form of black worker representation until 1979. Very few black workers took the initiative to form these committees which they considered to be a manipulative strategy by the government because: The black members of the committee were appointed by the Minister of Labour – a white. The chairperson was a white and the Black Labour board to which the regional committees were to report had an all white membership.

The spontaneous outbreak of numerous illegal strikes by large numbers of unorganized black workers in Durban and later in Cape Town and the Transvaal in

⁹³ 1956.

1972 and 1973 challenged the dual industrial relations system and the apartheid regime. The government responded extremely rapidly to the 1973 strike wave of Black workers by passing the Black Labour Relations Regulation Act⁹⁴ which established liaison committees at plant level as an alternative to the already existing workers committees. Liaison committees were to consist of representatives of employers and employees elected on a parity basis. Liaison Committees and not workers committees could send representatives to industrial councils for collective bargaining and dispute resolution.

The Black Labour Relations Regulations Act⁹⁵ also gave black workers limited freedom to strike by setting up disputes resolution machinery for blacks. Before black workers could legally strike a dispute was first of all to be sent to the Black Labour Officer responsible for that area and from there to the Regional Labour Commissioner and from there to the Divisional Inspector and finally to the Black Labour Board. Many black unions and employees did not favor this very long procedure which they saw as an attempt by the Apartheid government to break the power of black trade unionism.

As a result of the practical unworkability of the dual system of labour relations, the threat of sanctions and disinvestment by overseas countries, protest action by black workers and some white workers in the form of political and industrial unrest such as the 1976 riots needed attention. This being the case, the Wiehahn Commission into labour legislation was appointed with the hope of providing a lasting solution to the problem infested labour relations system. It had to inquire into acceptable labour legislation and make recommendations in that regard.

The Wiehahn Commission made the following Recommendations:

- (a). The industrial tribunal was replaced with an industrial court that had an extensive unfair labour practice jurisdiction. Because of the open-ended nature of the unfair labour practice definition, the Industrial Court was in essence law making in nature.
- (b). Disputes other than unfair labour practice disputes could still be resolved through conciliation by the industrial council or conciliation board and could then be referred

⁹⁴ 1973.

⁹⁵ 1973.

to voluntary arbitration or compulsory arbitration in terms of the Arbitration Act⁹⁶ or the parties could strike or lockout if the dispute was an interest dispute in non-essential services;

(c). Works councils replaced workers committees;

(d). The statutory term employee was redefined to include black workers. Black workers and their unions were allowed for the first time to join registered trade unions and be directly represented on industrial councils or conciliation boards, thus ending the dual system of labour relations.⁹⁷

The upsurge of the Wiehahn commission was as a result of the failure of previous Acts to resolve labour disputes satisfactorily among those in the employment domain. In the face of all these recommendations advanced by the commission, one is tempted to ask what the governments' response was to the recommendations of the Commission. The government gave recognition to most of the recommendations with the hope of repeating the success of the 1924 Act by incorporating the activities of the new militant unions in the labour law system with the view of appeasing them. It clearly hoped that it would achieve success in the resolution of disputes in industrial relationships. The Industrial Court, industrial councils and conciliation boards which were the mechanisms for dispute resolution at the time had cumbersome, slow and overly technical procedures that called for an overhaul of labour legislation and this resulted in enactment of the Labour Relations Act.⁹⁸ These changes were enacted in a number of statutes over the years and thus, the statute was changed to the LRA.⁹⁹

Equally important under this period was the development of the unfair labour practice jurisdiction of the Industrial Court which was granted a wide discretion in interpreting the concept. The functioning of the court was based on the distinction between

⁹⁶ 42 of 1965.

⁹⁷ Bendix S, (2005). *Industrial Relations in South Africa*. Kluwer Law and Taxation Publishers: Cape Town. Pg 415.

⁹⁸ The Amendments were contained in the Industrial Conciliation Acts 94 of 1979 and 95 of 1980, and the Labour Relations Amendments Act 57 of 1981, 51 of 1982 and 2 of 1983.

⁹⁹ 66 of 1995.

'dispute of right and dispute of interest'.¹⁰⁰ Dispute of interest was considered to be unsuitable for adjudication. However, in relation to disputes of right, the court used the unfair labour practice concept to fashion an extensive, although uneven and sometimes contradicting body of case law on individual employment as well as collective labour law. In this way, the 1980's at least saw the emergence of a coherent labour law in South Africa all in an effort to maintain a stable employment relationship with effective mechanisms for dispute resolution. Towards the end of 1982, there was a shift in the policy of the Industrial Council which pointed towards the direction of new unions. The Federation of South African Trade Unions (FOSATU), while it was critical of the industrial council system that affiliates could join councils as long as participation was not going to be detrimental to them and did not disrupt the continuation of plant level bargaining.¹⁰¹

The push towards centralised collective bargaining gained more grounds with the creation of the Congress of South African Trade Union (COSATU) in 1985. The position of COSATU was the establishment of one union per industry and within a few years of its existence, called for the formation of national industry wide councils in all sectors.¹⁰² Remarkable success was gained by new unions' from the employers through strong resistance. On the other hand, the success achieved by workers and unions on issues of individual and collective dismissals, bargaining right and strike actions on introduced a degree of legalism into the industrial relations which marked a departure from exclusive reliance on collective power.¹⁰³

The above period is significant in the development of the labour relations and dispute resolution mechanisms in South Africa in that it radically departed from the adversarialism and exclusion that characterised the labour relations to one of inclusion and orderly collective bargaining. Under this period, the employer/employee relationship could be said to be somehow stable. Although this was achieved, not all employees were covered by the statutes regulating the

¹⁰⁰ For a discussion of this distinction, see Cameron & Cheadle & Thompson, (1989), *The New Labour Relations Act*, Butterworth. Pg 96-106.

¹⁰¹ FOSATU Central Committee principle of collective bargaining (1982), *South African Labour Bulletin*, vol 8(i) 83.

¹⁰² Du Toit *et al*, (2003), *Labour Relations Law; A Comprehensive Guide*. 4th Ed, LexisNexis, Pg. 63.

¹⁰³ *United African Motors Allied Workers Union v Fondens SA Pty Ltd.* (1983) 41 ILJ 212 (IC).

employment domain. An example are the atypically employed as they did not exercise the Constitutional labour rights¹⁰⁴ of freedom of association, the right to strike and that of collective bargaining. From its inception, COSATU defined its socio-economic and political role. Through its network, it was able to exert pressure on the government from both the national and international front. The continued international isolation coupled with economic crisis of the 1990, saw the government going back to the drawing board in relation to its policies. The unbanning of political parties in 1990, together with the release of Nelson Mandela saw a new political era in South Africa which culminated in the making of the interim Constitution in 1993 to the final Constitution.

2.2.4. The Transition 1993 to 1996

The fourth phase also known as the period from the interim to the final Constitution saw the inclusion of labour relations into the new Constitution of South Africa which has gone a long way to improve the effectiveness of dispute resolution. However, the state and employment had underestimated the strength of unions who were out to protect worker's rights. The gradual development of collective labour law over the years saw the rise of many and different statutes whereby, the weaknesses of an Act gave birth to another in an effort to strengthen the previous loopholes of such Acts. The emergence of numerous trade unions and employer's organizations working together with the state, seen as the highest employer, has greatly affected dispute resolution. The government in drawing the Constitution took into consideration all these bodies involved in labour relations in an effort to resolve disputes amicably.

By the early 1990's, trade unions and collective bargaining councils were established and protected. The focus now shifts to those areas where trade unionism and collective bargaining were growing but which remained excluded from the scope of labour relations. As such, three statutes were adopted: Education, Public Service and the Agricultural Labour Relations Act. The domestic sector was excluded. These statutes were used to extend the benefits of trade unions to those in these sectors. As a result of the 1993 Act, the protection of trade unions and statutory collective bargaining was completed in all sectors except for the domestic sector. As such,

¹⁰⁴ Section 23 of the Constitution of 1996

there was hardly ever the effective resolution of disputes throughout this period and there was therefore, need for more to be done.

This regulation in its effort to resolve disputes was not all effective as domestic workers were still excluded from the definition of workers and as such from access to such dispute resolution mechanisms. Besides, it was not as fast and efficient, as such it led to the introduction of a new political era and the adoption of the 'New Constitution' in 1994 (the Interim Constitution of 1993). At the same time, South Africa joined International bodies such as the International Labour Organisation,¹⁰⁵ which started the process for the adoption of the Labour Relations Act¹⁰⁶(LRA) wherein dispute resolution mechanisms were defined such as the CCMA.

In 1994, the Department of Labour appointed a ministerial legal task team to draft new labour legislation, and a draft negotiation document was tabled in 1995. A further negotiation between the State, Organized labour and Capital, the LRA was published in December 1995. The Act was amended and thus, became operational in November 1996. The new Constitution was also adopted in 1996, which provided for certain fundamental rights especially, the Bill of Rights and also protected the labour relationships.¹⁰⁷ The Constitution further provided for the enactment of national legislation to give effect to and to regulate this right, hence the promulgation of the LRA. It was thus, with the aid of the Constitution that the LRA has as one of its main objectives the resolution of disputes in labour relations.

Amongst the ILO Conventions that South Africa ratified was Convention 87¹⁰⁸ and 98.¹⁰⁹ Since then, other pieces of legislation have been added to the statute books including, the Employment Equity Act¹¹⁰ (EEA) and the Basic Conditions of Employment Act¹¹¹ (BCEA). The above statutes all gave birth to the present system

¹⁰⁵ Hereafter referred to as ILO.

¹⁰⁶ *Ibid.*

¹⁰⁷ Section 23 of the Constitution.

¹⁰⁸ Convention on, "Freedom of Association and the Protection of the Right to Organize".

¹⁰⁹ Convention on, "The Right to Organize and Collective Bargaining".

¹¹⁰ Act 55 of 1998.

¹¹¹ Act 75 of 1997.

of labour law, with one of its pivotal aims to resolve disputes in the workplace.¹¹² It also aimed at providing simplified procedures for the resolution of disputes by means of Conciliation, Mediation and Arbitration.¹¹³ The Constitution of South Africa has also played a great role in labour law and labour relations generally and within the republic in particular.

2.2.5. The 1996 Constitutional imperatives as a basis for labour law and dispute resolution: Outline of Relevant Provisions

The 1996 Constitution is the basis on which labour law operates in South Africa today. Chapter 2 of the Constitution contains a number of provisions relevant to employment and labour law as a whole. The fundamental rights entrenched in this Constitution has an enormous effect on all branches of the law, with respect to labour law and labour relations. Section 23 (1) to (6) deals with labour relations in particular; providing everyone with the right to fair labour practice, protecting the rights of workers, organized labour and employer (state). This is regulated by section 23 of the LRA, which provides that a collective agreement is binding on all parties to a collective agreement. Section 24 of the LRA provides that every collective must provide for procedures to resolve disputes about the interpretation or application of collective agreement. Organized labour, capital, the state and civic organizations are represented by the National Economic Development and Labour Council (NEDLAC), where they put up different mechanisms for resolving labour disputes.

The fundamental rights set out in the Constitution are the basis on which labour law statutes are founded so as to protect everyone's right and not leaving out that of those in the legal system, especially labour disputes. The state, also known as the government has three major spheres through which it functions; the executive, the legislature and judiciary. It is in this tripartite alliance that the state affects the Constitution in the regulation of disputes as it is engaged in the making of laws. Section 23 of the Constitution entrenches labour law into the Constitution, protecting in general, the rights of all workers, section 16 giving them the right to freely

¹¹² Section (1) (d) of the LRA.

¹¹³ *Pep Stores (Pty) Ltd v Laka*. BLLR 952 at Para 23 ff.

associate, get access to information and to strike. The governments' social and economic policy informs the labour law dispensation,¹¹⁴ with one of its main objectives to maintain peace in the sphere of labour.¹¹⁵

The Constitution also entrenches the right of freedom of association in section 18, most especially to those in the organized labour sector. Associational rights are given to trade unions by the Constitution as in its s.23 whereby, workers are given the right to form and join unions in order so as to bargain collectively. Although rights are given trade unions, there are as well limited in the case of closed shops where, an agreement is reached between an employer and a majority representative trade union (or 2 or more unions acting jointly and represents a majority) in which all employees at a particular workplace are obliged to become union members. Thus, no freedom is given such workers and thereby limiting the Constitutions' objective of freedom of association.

Furthermore, the Constitution has also impacted positively on capital. It gives employers the right to form employer's organizations. This sets the pace for employers to collectively protect their rights, especially from workers unions. They can also set minimum wages, working conditions and hours of work for their employees. This right is not also without its own loopholes as seen in agency agreement; this is an agreement between an employer and a majority representative trade union or member of trade unions acting jointly which together represents a majority, in terms of which all employees at a workplace are obliged to pay a union fees irrespective of whether they are union members. Lots of issues have been raised in the case of *SANDU v Minister of Defence*¹¹⁶ for instance, the Constitutional Court drew on ILO conventions and members of the defence force were given the right to join trade unions. It also looked at questions like who is an employee, how can they claim their rights and do they even exercise these rights? Who claims which organizational rights? These are some of the areas where labour disputes

¹¹⁴ Grogan J, (2005), *Workplace Law*. 9th Ed, Juta & Co. Pg. 14

¹¹⁵ Van Jaarsveld, (2004), *Principles and Practice of Labour Law*. 2nd Ed. Juta & Co. Pg. 11.

¹¹⁶ 1994 (4) SA 469 CC.

tend to arise. Both the Constitution and the LRA are aimed at protecting these rights although it is not wholly enjoyed due to some limitations as seen above.

On the other hand, section 39 of the Constitution provides that when a court is interpreting chapter of the Constitution, it must consider international law. The court held: "In my view, the conventions and recommendations of the ILO, one of the oldest existing international organizations, are important resources for considering the meaning and scope of 'worker' as used in section 23 of our Constitution" which will assist in resolving disputes of such a nature. It held further that, article 2 of the Freedom of Association and Protection of the Right to Organize,¹¹⁷ the first major convention of the ILO concerning freedom of association, which South Africa ratified in 1995 provides that; "workers and employers, without distinction whatsoever, shall have the right to establish and, subject to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.

Besides, labour relations are provided for in the Constitution and other statutes looking at various measures by which labour related disputes can be resolved, with international promoters on the scene. The ILO for instance is aimed at maintaining peace in global labour related matters. After world war two, there was a stipulated growth in trade unions and thus, increased responsibility. In 1948, the International Labour Conference adopted on Freedom of Association and the Right to Organize, and in 1949, it adopted the convention on the Right to Organize and Collective Bargaining. These conventions in relation to labour law have greatly assisted South Africa in resolving labour disputes within the employment domain as it has ratified most of them.

2.3. CLASSIFICATION OF LABOUR DISPUTES AND THEIR METHODS OF RESOLUTION

Nel *et al*¹¹⁸ state that conflict in employment relations may be regarded as an inherent part of the interaction between the parties in a labour relationship. That such conflict is usually caused by such factors to include:

¹¹⁷ Convention No.87 of 1948.

¹¹⁸ Nel, Swanepoel, Kirsten, Erasmus, Tsabandi, (2005), *South African Employment Relations: Theory and Practice*. 5th Ed. Van Schaik Publishers. Pg.43.

- ❑ Different values or attitudes or perceptions;
- ❑ Different objectives or methods of achieving objectives;
- ❑ Differences in information or communication blockages;
- ❑ Lack of resources;
- ❑ Skew distribution of resources (structural imbalances); and
- ❑ Personality differences.

In the final analysis, the same writer state that because conflict lies at the very root of employment relations, it is important for the parties thereto to have knowledge about it and how to manage it constructively through the processes such as collective bargaining, negotiations and / or third-parties intervention.

However, Burton¹¹⁹ states that in disputes situations issues are open to negotiations and settlement through compromise and through the award of an arbitrator - tension can thus be contained or suppressed and managed. Whereas in conflict situations, it is perceived that tension cannot be dealt with in a way disputes are dealt with. The LRA requires that before a matter can be referred to an external dispute resolution body, a dispute must first exist in the workplace. Thus, *Bosch et al*¹²⁰ argues that for a dispute to exist, at the very least a demand should be made and communicated to the other party and that party be given an opportunity to settle the matter.

It was held in *SAPU & another v National Commissioner of the South African Police Service*¹²¹ that while a mere demand form the subject matter of a dispute, it is only once a demand has been rejected that a dispute arises and that such a dispute rather than the original demand, becomes the issue in dispute. Where an agreed dispute resolution procedure exists, it could be argued that a dispute does not arise until the procedure has been exhausted.¹²² To this end, in the matter of *Durban City Council v Minister of Labour*,¹²³ the court held that a dispute must at a minimum

¹¹⁹ Burton J, (1990), "Conflict: Resolution and Prevention". New York St Martins Press. Pg.88.

¹²⁰ Bosch et al, (2004), "Conciliation and Arbitration Handbook. A Comprehensive Guide to Labour Dispute Resolution Procedure". 4th Ed, LexisNexis. Durban. Pg 92-93.

¹²¹ [2006] 1 BLLR 42 (LC).

¹²² See fn. 39 above.

¹²³ 1953 (3) SA 708 D cited with approval in *Edgar's Stores (Pty) Ltd v SACCAWU* (1998) 5 BLLR 447 LAC: (1998) 19 ILJ 771 LAC.

postulate the notion of the expression by the parties opposing each other in controversy of conflicting views, claims and contention.

2.3.1. Dispute Types

Labour law distinguishes between disputes of right and of interest. In practice the distinction between the two is said not to be always an easy one.¹²⁴ It is very interesting to note that the Act does not expressly distinguish between disputes of interest (matters of mutual interest) and disputes of right. This is very unfortunate because the Act is supposed to offer some guidance in terms of matters pertaining to employment relations.

Generally, it is accepted that a dispute of interest arises when one party claims a benefit to which it is not entitled in law which the other party is not prepared to grant, while a right dispute arises when parties cannot agree whether one of them is legally entitled to the benefit claimed.¹²⁵ Grogan¹²⁶ elucidate the distinction between the two further by stating that rights disputes are those arising from breaches of rights or failure to discharge duties expressly conferred or imposed by the Act or other statutes, by collective agreement or by individual contracts of service. Furthermore, rights disputes are justiciable in terms of the Act, by either arbitration or adjudication, and that all other disputes are matters of interest and therefore non-justiciable and of necessity to be resolved by industrial action if parties cannot come to a negotiated settlement.

Right disputes of are also defined as concerning those disputes that emanate from an infringement of an existing right which has been obtained by virtue of an employment contract, legal provision, collective agreement and so forth, and a dispute of interest generally arises when a party seeks to have employment conditions changed, such as an increase in wages.¹²⁷

¹²⁴ Bosch *et al.* *The Conciliation and Arbitration Workbook*. Pg. 6.

¹²⁵ Grogan J, (2005), *Workplace Law*, Juta & Co, 8th Ed Pg 341.

¹²⁶ See footnote 42 above.

¹²⁷ Bosch *et al.*, (2003), "The Conciliation and Arbitration Handbook". Lexis Nexis. Pg. 26.

It is evident from the explanations reflecting above that a dispute of right pertains to a right that is provided for somewhere (legislation, collective agreement, contract, etc), and interest dispute emanate from something that is not provided for anywhere (wage increase, etc) but relate to “acknowledged rights”.

2.3.2. Causes of Labour Disputes

Several causes of labour disputes do exist. Unresolved grievances are common source of these disputes. Aggrieved employees lodge their grievances at their workplaces through acceptable and set procedures. If this does not yield desired or acceptable outcome, disputes are declared against employers. A dispute is said to be a highly formalized manifestation of conflict in relation to workplace related matters which may include a failure to address a grievance. Most grievances lodged in the public service for example, are in respect of alleged unfair labour practices.¹²⁸

Another common cause of labour disputes are unfavorable outcomes of disciplinary actions instituted against employees. If found guilty and a sanction is imposed, an official appeals and if this is unsuccessful, a dispute is declared. This is emphasized in Slabbert,¹²⁹ where it is stated that when an employee is not happy about a disciplinary process being instituted against him/her, and after an appeal is unsuccessful, such an employee declares a dispute.

Demands on matters of mutual interest by employees are another common cause of labour disputes. An example is a demand of wage increment or unhappiness with an increment offer. If parties do not agree, a dispute is then declared and therefore needs resolution.

2.4.SUMMARY

This chapter looked at the historical evolution of labour dispute resolution mechanisms in South Africa. How South Africa went through a remarkable history in its labour laws and labour relations from early 19th century to present day, starting

¹²⁸ Brand et al, (1997), *Labour Dispute Resolution*. 2nd Ed, Juta & Co. Pg. 11.

¹²⁹ Slabbert J et al, (1998), *Introduction to Employment Relations Management*. Butterworth. Pg.23.

from the period where life was based on agriculture to industrialisation. This has had a lot of impact on the country's labour law statutes as through their struggle to regulate and make level the playing ground for labour relations, many laws have come into the limelight, with the failure of one leading to the creation of another for better labour relations and dispute resolution. This development has also left foot prints on the existing mechanisms for the resolution of labour disputes in the country as the discussion in this chapter has shown.

The Constitution has been a background or foundation for the creation of such a solid labour statute in South Africa. Certain parts of the law in south Africa, for instance, and in particular, the resolution of labour disputes has not been left out by the Constitution involving the relationship between the state, organized labour and capital as laid down in section 23 of the Constitution. The Constitution also provides for the interpretation and applications of foreign law in the courts were it is consistence with national law.¹³⁰ However, these bodies have both correlated with the Constitution and as such have greatly affected labour relations as foreign law can be used as a mechanism in resolving labour disputes.

The historical perspectives in all four phases pertaining to the evolution of labour relations and most precisely dispute resolution have been examined. Besides, the impact of the Constitution on labour relations and dispute resolution in South Africa were dealt with not forgetting how these disputes are classified, the various types and their and sources. In a nutshell, from the beginning of labour law, there have been struggles for effective resolution of disputes in the workplace and this is still a continuous process. The mechanisms put in place for the resolution of these disputes arising in labour relations in South Africa will be discussed in the following chapter to enhance a broader understanding of its effectiveness.

¹³⁰ Sections 39 and 231 to 233 of the Constitution.

CHAPTER THREE

CURRENT DISPUTE RESOLUTION MECHANISMS IN SOUTH AFRICA: ANALYSIS OF STRUCTURES, MECHANISMS AND THEIR EFFECTIVENESS

3.1. INTRODUCTION

In terms of the Labour Relations Act,¹³¹ the functions of the CCMA include the resolution of disputes by way of conciliation and where conciliation fails, and a request in this regard is made by the parties who referred the dispute for conciliation, by way of arbitration. The CCMA had to replace the previous system of statutory conciliatory bodies that had proved ineffective, costly and complicated.¹³² The court system becomes the final option when all other attempts at resolution have failed. A discussion on the existing dispute resolution mechanisms will facilitate the understanding of their effectiveness. Those who benefit from these mechanisms are those defined by the Act as employees and the definition is limited to formal sector employees. This aspect poses a great defect to informal sector workers who do not enjoy statutory benefits of dispute resolution mechanisms.

A structure is a complex system considered from the point of view of the whole rather than of any single part.¹³³ A structure for the purpose of this research will mean the organizational system put in place by the LRA to make dispute resolution effective. This chapter considers whether the structures and mechanisms for labour dispute resolution in South Africa are effective in creating a less adversarial labour relationship between all parties and whether there are more appropriate methods to reconcile employer requirements and workers' aspirations. Also, the various dispute mechanisms in both the formal and informal sector will be tackled such as conciliation and mediation. An analysis of structures, mechanisms and their effectiveness will be dealt with in both the formal and informal sectors of the economy. Besides, the critical aspect of overlapping jurisdiction will not be left un-discussed.

¹³¹Section 115.

¹³²Venter *et al*, (2003), *Labour Relations in South Africa*, Revised Edition. Cape Town: Oxford. Pg.522.

¹³³Slabbert J *et al*, (1998), *Introduction to Employment Relations Management*. Butterworth. Pg.23. Accessed at <http://dictionary.reference.com/browse/Structure>.

3.2. UNDERSTANDING STRUCTURES, MECHANISMS AND EFFECTIVENESS IN THE LABOUR DISPUTE RESOLUTION SYSTEM OF SOUTH AFRICA

3.2.1. Understanding the Structures for Labour Dispute Resolution

The 1995 LRA regulates individual and collective employment relations. It creates the institutions and processes for dispute resolution. These institutions include the Commission for Conciliation, Mediation and Arbitration (the CCMA) and the Labour Courts (the Labour Court and the Labour Appeal Court). The CCMA has the power to licence Private Agencies and Bargaining Councils to perform any or all of its functions. This allows parties in dispute the choice of which institutions to assist them although the Bargaining Council where it exists for parties is always the first institution of engagement and if there is no Bargaining council then the CCMA has jurisdiction. If there is a deadlock in a dispute at the firm level, the parties to a dispute must refer their dispute to conciliation.

The event of processing disputes takes into account the different kinds of labour disputes. The process makes a specific distinction between disputes of interests and disputes of rights. This classification of labour disputes is important because it determines which resolution technique to use in resolving the dispute. The use of industrial action in relation to interest disputes is considered appropriate as a method of last resort.¹³⁴

The structure of dispute settlement systems is normally designed to promote collective bargaining, for example by requiring the parties to exhaust all the possibilities of reaching a negotiated solution or to exhaust the dispute settlement procedures provided for by their collective agreement before having access to State provided procedures.¹³⁵ In all cases, disputes have to be conciliated before they can proceed to arbitration or adjudication. After conciliation disputes of right are normally referred to arbitration on the request of the referring party, only in certain cases, such as unfair discrimination and automatically unfair disputes that a dispute be referred to the Labour Court.¹³⁶ Those in the informal sector not recognized by the Act as

¹³⁴Bhorat *et al*, (2007), "Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa". An Analysis of CCMA Data in Development Policy Research Unit .University of Cape Town. Pg.3.

¹³⁵Supra fn 3.

¹³⁶Supra fn 4.

employees do not fall within this structure. Where should they go when disputes arise in their labour relationships? This question will be dealt with in due course of this chapter.

3.2.2. Understanding the Mechanisms for Labour Dispute Resolution

A mechanism for purpose of this discussion is a process, technique, or system for achieving a result.¹³⁷ Dispute resolution mechanisms for purpose of this present study; will be adopted to mean the various processes and techniques put in place by the LRA and other statutes in order to resolve labour disputes effectively. They include mechanisms in both the formal and informal sector.

Mechanisms in the formal sector includes the CCMA's Conciliation, Mediation and Arbitration mechanisms, bargaining councils, Labour courts and Labour court of Appeal, private dispute resolution mechanisms and those existing from other legislations which have an impact on resolving disputes arising from labour relations. In the informal sector on the other hand, mechanisms such as the South African Black Taxi Association (SABTA), the Self-Employed Women's Association (SEWA) and National Stokvel Association of South Africa (NASASA). These organizations through disputes in this sector are resolved.¹³⁸

3.2.3. Understanding the Effectiveness of the Labour Dispute Resolution System

Effectiveness for the purpose of this discussion means not only the extent to which disputes can be resolved by the law but also, ease of access, simplicity, consistency, predictability and delivery of just outcomes to parties involved in labour disputes by the mechanisms in place. An efficient dispute resolution system is one that is expeditious in resolving disputes with high settlement rates in a minimum of time.¹³⁹ Systems that are slow and that take a long time to produce a resolution are inefficient; systems with shorter timeframes that produce a relatively quick resolution

¹³⁷Fn 118 above.

¹³⁸ Bendix S, (2005). *Industrial Relations in South Africa*. Kluwer Law and Taxation Publishers: Cape Town. Pg 417.

¹³⁹Budd J. & Colvin A (2008, ".Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice". *Industrial Relations*, 47(3), 460-479.

are efficient.¹⁴⁰ An analysis of the effectiveness and efficiency of the dispute resolution system is therefore important. It is estimated that some 72 per cent of the employed in South Africa fall under jurisdiction of the CCMA.¹⁴¹

Efficiency in respect of conciliations and arbitrations relates to the time it takes the CCMA to conclude the actual conciliation, con-arb or arbitration proceedings (that is, the duration of the process). The Labour Relations Act, 1995, requires conciliations to be concluded within 30 days of the date of referral. Although the Labour Relations Act, 1995 prescribes that the CCMA should arbitrate disputes in 90 days, the CCMA sets a higher internal efficiency target of 60 days.¹⁴² The CCMA therefore has to conclude arbitrations in 60 days of the date of the request for arbitration. Efficiency also relates to the CCMA's success or settlement rate of dispute resolution: that is, total disputes referred versus total disputes resolved.¹⁴³

3.3. ANALYSIS OF STRUCTURES FOR LABOUR DISPUTE RESOLUTION IN SOUTH AFRICA: FORMAL VERSUS INFORMAL STRUCTURES

3.3.1. Formal Structures (Bargaining Structures)

The LRA has put in place mechanisms for the regulation and promotion of collective bargaining. It is imperative at this point to examine how some of these structures enhance the collective bargaining process in resolving labour disputes.

(a) Workplace Forum

Workplace forums are not trade unions but in-house institutions operating within a particular company or division. Trade unions select their members from employees of the establishment of particular employer, excluding those involved in senior management. Workplace forums are designed to facilitate a shift from adversarial collective bargaining in all matters to joint consultation in problem solving. Workplace forums are instrumental in promoting participative management through information sharing, consultation and joint decision making.

¹⁴⁰Fn 3.

¹⁴¹Van Niekerk *et al*, (2012), *Law at Work*, 2nd Ed, LexisNexis. Pg.75.

¹⁴²Bhorat *et al*, (2007), "Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa" An Analysis of CCMA Data in Development Policy Research Unit: University of Cape Town. Pg.23.

¹⁴³Supra fn 6.

Section 79¹⁴⁴ sets out the functions of workplace forums and they include among others; the promotion of employees interest in the workplace irrespective of the fact they are members or not, enhance efficiency in the workplace and joint consultation with employer, with the view to reaching consensus about matters referred to in section 84.

(b) Bargaining Council

Section 27 of the LRA provides for the establishment of a bargaining council. From its inception, bargaining councils are voluntary. One or more trade unions and one or more employers' organization may establish a bargaining council for a sector or area by adopting a constitution that meets the requirements of section 30 of the LRA and by obtaining a registration of the bargaining council. The state may be a party to the council if it is an employer in the arena in respect of which the bargaining council is established. The powers and functions of a bargaining council are spelt out in section 28 of the LRA, including the resolution of certain disputes. In *Photo Circuit SA Ltd v De Klerk No & others*,¹⁴⁵ it was held that the bargaining council has jurisdiction only over employers and employees in the sector and industry for which it is registered and its agreements binds only parties to such an agreement. The minister of Labour in accordance with the provisions of section 32 can however, extend such an agreement to non-parties.

(c) Statutory Councils

Statutory councils are weaker bargaining councils. They are as a result of compromise between government and big unions to satisfy the latter's fear that the bargaining council system will not do enough to promote centralized bargaining.¹⁴⁶ Section 39(2)¹⁴⁷ provides that a representative trade union or representative employer's organization may apply to the registrar for the establishment of a statutory council in a sector or area in respect of which no council has been registered. Their functions are spelt out in section 43 of the LRA.

¹⁴⁴ LRA 1995.

¹⁴⁵ (1991) 12 ILJ 289 (A).

¹⁴⁶ Grogan J. *Opcit.* Pg 263.

¹⁴⁷ LRA 1996.

(d) Commission for Conciliation, Mediation and Arbitration (CCMA)

The CCMA has been introduced together with the labour court system to replace the former Conciliation Boards and Industrial Court. The CCMA is the centrepiece of the statutory dispute resolution system. It performs a key role in the overall dispute resolution system and more than 150 000 disputes are referred each year.¹⁴⁸ The CCMA is a tripartite body directed by an eleven person governing body¹⁴⁹ and operates independently from the state.¹⁵⁰ Each member is nominated by the National Economic, Development and Labour Council (NEDLAC) itself a representative body, and appointed by the Minister of Labour for three years. Its establishment, structure, and governance are regulated by the LRA.¹⁵¹ Although independent from the state, it is funded by the state and its services are generally free to users but according to the LRA, the CCMA may charge a fee to parties if dispute resolution services are absent.¹⁵² Dispute resolution work of the CCMA is performed by the Commissioners who are appointed by the governing body. The LRA does not stipulate what qualifications the commissioners should have except that they should be highly qualified persons. The CCMA has the power to licence Private Agencies and Bargaining Councils to perform any or all of its functions.

e) Courts as Part of Dispute Resolution Structure

The discussion on the structure of courts begins with the Labour Court and not the CCMA due to the fact that the latter is an administrative tribunal and not a Court (just like its predecessor, the Industrial Court). Sections 151 and 167 of the Act¹⁵³ established new Courts, the Labour Court and Labour Appeal Court respectively, as the only Courts which could hear and decide on labour disputes.

If there is dissatisfaction with the outcome at the Labour Court in terms of any matter referred to it, the matter can be referred to the Labour Appeal Court in terms of

¹⁴⁸The CCMA Annual Report 2009/2010. Available at http://www.ccma.org.za/uploaded_media/ccma-2010_Annual_Report.pdf at 18 records that 153 657 were referred to the CCMA for the corresponding period.

¹⁴⁹Brand J *et al*, (2008), *Labour Dispute Resolution*, 2nd Ed, Juta and Co. Pg 45.

¹⁵⁰Sections 112 to 113 of the LRA.

¹⁵¹Ss 112, 113, 116, 118, 119 and 121.

¹⁵²Sections 24, 51 and 147 of the LRA.

¹⁵³66 of 1995.

section 173 of the Act.¹⁵⁴ If there is still unhappiness with the outcome of the Labour Appeal Court, the matter can be referred to the Supreme Court of Appeal. There has been indecisiveness as to whether the Supreme Court of Appeal should entertain appeals from the Labour Appeal Court when that court has decided appeals from the Labour Court. The constitution also arranged the hierarchy of courts in the country in such a manner that the Supreme Court of Appeal is the court of highest instance in all matters (including labour matters), apart from constitutional matters. These different courts form a structure whereby hierarchy prevails in labour dispute resolution.

3.3.2. Informal Sector Structures

Informal means structures which are not provided for by law and has no legal requirements, standards and procedures that the formal sector follows. E.g. they are covered by dispute resolution mechanisms established by the LRA unlike informal sector workers. Non-Governmental Organization and Small businesses include some of the structures in the informal sector. Besides, these structures contain internal mechanisms for the resolution of disputes arising there from with informal procedures such as how the structures do function.

3.3.2.1. The South African Domestic, Services and Allied Workers Union (SADSAWU)

The South African Domestic, Service and Allied Workers' Union (SADSAWU) has successfully used the dispute procedures to take up cases of dismissal and abuse. Direct negotiation is done between parties to a dispute.

3.3.2.2. National Small Business Development¹⁵⁵

Small business development, as part of the development process in South Africa, is managed in accordance with the policy principles contained in the Growth, Employment and Redistribution Programme (GEAR), the National Small Business Support Strategy and the National Small Business Development Act 102 of 1996.

¹⁵⁴ *Ibid.*

¹⁵⁵ Act 102 of 1996.

Businesses can be divided into categories of medium, small, very small and micro enterprises. The Act established the National Small Business Council and the Ntsika Enterprise Promotion Agency. This council handles and resolves disputes arising from such relationship. Municipalities must adhere to the guidelines published by the minister for the promotion and development of small business in South Africa.

3.3.2.3. The Confederation of Employers of South Africa (COFESA)

The above organization advises employers on restructuring their production such that employment contracts are converted into service contracts, and employees becoming independent contractors. The firm is then run as a network of contractors. COFESA's activities have been concentrated largely, though not exclusively, in the clothing industry. The activities of COFESA and similar organizations are aimed mainly at bypassing minimum standards labour legislation and collective bargaining agreements.¹⁵⁶ Whereby, it is through these collective bargaining agreements that disputes are dealt.

3.4. ANALYSIS OF MECHANISMS OF LABOUR DISPUTE RESOLUTION IN SOUTH AFRICA

3.4.1. The Formal Sector

It must be noted that the mechanisms for dispute resolution in the formal sector is a complex and highly well regulated process. This analysis merely focuses on important specific processes.

3. 4.1.1. Commission for Conciliation, Mediation and Arbitration (CCMA)

(a) Conciliation

Conciliation means an act of procuring goodwill or inducing a friendly feeling.¹⁵⁷ When it comes to dispute resolution, renewed goodwill has to be procured through the conciliation process. The conciliation process focuses on consensus or agreement: the conciliator has no decision-making powers to determine and impose the final agreement on the parties.¹⁵⁸ A conciliator assists parties to reach their own

¹⁵⁶Imraan Valodia (2009), "Economic Policy and Women's Informal and Flexible Work in South Africa". University Natal, Durban. Pg. 11.

¹⁵⁷Bendix, S, (2001), *Industrial relations in South Africa*. 4th Ed, Cape Town: Juta & Co. Pg 556.

¹⁵⁸Venter R, (2007), *Labour relations in South Africa*. Oxford University Press: Cape Town. Pg.128.

agreements and makes no binding determination on them. Section 135¹⁵⁹ requires a commissioner to conciliate disputes referred to the CCMA.¹⁶⁰ According to CCMA rule 16, proceedings are confidential and conducted on a without prejudice basis. Conciliation although not defined by the Act, a commissioner can determine the process to be used in resolving disputes which may be mediation, conducting a fact-finding exercise and make recommendations to the parties in a dispute.

A forum has to be established where parties in a conflict or dispute can come together and attempt to settle their differences. A third party may be present during this meeting, not to take part in the negotiation process, but to act as chairperson during the conduct of meetings. The conciliation process gives the parties another opportunity to continue with their negotiations as part of the dispute settlement procedure. Failure to conciliate may lead to industrial action or to further steps in the dispute settlement process. This gives the parties an opportunity to settle their differences without the interference of external agents or for arbitration.¹⁶¹ This can be a process to restore a relationship that might have been destroyed or harmed by industrial actions. If a dispute is submitted for conciliation by the CCMA, there are procedures to be followed, such as a restriction of 30 days after referral within which the dispute should be settled.¹⁶² If the dispute is resolved, the agreement may be made an arbitration award¹⁶³ or an order of court.¹⁶⁴ After this period, the commissioner must issue a certificate of outcome declaring that the dispute is not resolved.

(b) Mediation

Mediation is the active intervention of a third party, or third parties for the purpose of inducing settlement. Mediation involves an attempt at conciliation, but, in this instance, a third party, in the person of the mediator, is present at and pivotal to the conciliation process.¹⁶⁵ The mediator is actively involved in the dispute settlement

¹⁵⁹Of the LRA.

¹⁶⁰Van Niekerk *Ibid*.

¹⁶¹The CCMA Annual Report 2009 to 2010. http://www.ccma.org.za/uploaded_media/ccma-2010_Annual_Report.pdf) at 21 records that 59% of labour disputes referred to the CCMA were settled through conciliation.

¹⁶²Section 191 (1) (b) (i) of the LRA.

¹⁶³Section 142 A of the LRA.

¹⁶⁴Section 158 (1) (c) of the LRA.

¹⁶⁵Bendix S. *Fn7*.

process to bring about a settlement. He or she advises both sides, acts as intermediary and suggests possible solutions. This takes place only in an advisory and conciliatory capacity. The mediator has no decision-making powers and cannot impose a settlement on either party. The negotiation process should only be facilitated through mediation. In a process where the participants in the negotiation process are incapable of continuing negotiations on their own, or they are inexperienced and no progress is made, a neutral person is introduced to diffuse tension and to induce progress towards a settlement. The mediator should persuade the opposing parties to move closer to settlement or could promote a trade-off and a possible settlement. He or she can bring new perspectives to the table.

Mediation is less successful where conflict has reached a high level of intensity and where matters of principle are at stake.¹⁶⁶ Disputes about procedures or issues such as dismissals tend to lend themselves more easily to mediation than disputes arising from economic issues. Successful mediation depends as much on the commitment of both parties to a peaceful settlement as on the skills of the mediator.

(c) Arbitration

The CCMA's arbitration jurisdiction is to arbitrate disputes on topics including unfair labour practice, unfair dismissal, interest disputes in essential service and entitlement to severance pay.¹⁶⁷ The Unemployment Insurance Act (UIA) states that decisions from the employment insurance appeals committee can be referred to the CCMA for arbitration.¹⁶⁸ Besides, the Skills Development Act (SDA) also provides that disputes about the interpretation or application of any of the provisions of a learner ship agreement must be referred to the CCMA for conciliation and arbitration.¹⁶⁹ A dispute can only be arbitrated by the CCMA if a commissioner issues a certificate stating that the dispute remains unresolved after conciliation. The commissioner has the discretion regarding the form of proceedings and a party to the dispute may give evidence and call witnesses.¹⁷⁰ Arbitration is hearing *denovo* on merits of the dispute as was held in the case of *County Fair Foods (Pty) Ltd v*

¹⁶⁶Bendix S, (2001), *Industrial relations in South Africa*. 4th Ed. Cape Town: Juta & Co. Pg.560.

¹⁶⁷Brand J *et al. Ibid.*

¹⁶⁸Section 37 of the UIA.

¹⁶⁹Section 19 of the SDA.

¹⁷⁰Section 138 of the LRA.

CC.¹⁷¹ Reasons must be provided for the arbitrator's decision *MA* and awards as was in the case of *Sidumo & Another v Rustenburg Platinum Mines Ltd and Others*.¹⁷²

This process differs from the mediation and conciliation processes in that it does not promote the continuation of collective bargaining. During the arbitration process, the third party actively intervenes in the dispute and takes over the role of decision maker. The arbitrator acts as a judge in the dispute settlement. He or she listens to the arguments and demands of both parties, and even to their proposals for settlement. The settlement imposed by the arbitrator is final and binding on both parties.

3.4.1.2. Labour Court and Labour Court of Appeal

The final option available to parties in dispute is to refer the matter to a court of law for litigation. The Labour Court is established as a superior court, with the powers and status of a provincial division of the Supreme Court of South Africa.¹⁷³ It has jurisdiction in all provinces. The Labour Court can hear contractual or BCEA or EEA disputes without first going through conciliation. It can interdict strikes and lockouts without prior conciliation. If there is perfect conciliation, then not many cases will actually be referred to the Labour Court. Although created as a court of law and equity, doubts have been raised as to whether the term "equity" adds meaning to the court's substantive jurisdiction as was held in the case of *3M SA (Pty) Ltd v SACCAWU*.¹⁷⁴

The court has exclusive jurisdiction in respect of all matters that are to be determined by the court, either in terms of the LRA or in terms of any other law.¹⁷⁵ The Labour Court's primary tasks are to: adjudicate disputes relating to freedom of association (union- and employer- organization membership); adjudicate automatically unfair dismissals including dismissals arising out of operation

¹⁷¹ [1999] 11 BLLR 1117 (LAC) at par 11.

¹⁷² [2007] 12 BLLR 1097 (CC).

¹⁷³ According to Chapter 7, section D of the LRA 66 of 1995.

¹⁷⁴ (2001) 5 BLLR 483 (LCA).

¹⁷⁵ Section 157 (1) of the LRA.

requirements (i.e. redundancy/retrenchment matters) as well as strike disputes.¹⁷⁶ The LRA created the Labour Courts to deal with complex labour issues. The Labour Courts have found it difficult to attract sufficient judges of high caliber in the field of labour law. This has resulted in the over-reliance on acting judges, some of whom have little experience in labour law.¹⁷⁷ In addition, it was thought that the Labour Courts would exercise a supervisory authority over the CCMA.¹⁷⁸ However, this has not occurred given that both the CCMA and Labour Courts have had huge case loads and that the Labour Courts suffer from significant levels of inefficiency due to their human resource constraints.¹⁷⁹ Besides, access is limited to those in the formal sector.

The Labour Court of Appeal is established according to Chapter 7, Section E of the same Act as the final court of appeal in respect of labour disputes with the same powers and status as the Appellate Division of the Supreme Court.¹⁸⁰ Subject to the Constitution the court may hear or determine all appeals against the final decisions and orders of the Labour court, and may decide any question of law that is reserved for it to decide.¹⁸¹ Judgments of the Labour Court of Appeal are binding on the Labour Court.¹⁸²

3.4.1.3. Bargaining Councils

Section 23(5) of the Constitution recognises the right to engage in collective bargaining. The courts have to interpret the meaning of this section and the extent to which the LRA is constitutionally aligned therewith. One of the LRA's main objectives is to promote collective bargaining as a means of regulating relations between management and labour and as a means of settling disputes between them. A Bargaining Council has the responsibility to resolve disputes between parties that

¹⁷⁶Bhoola, U. (2002). "National Labour Law Profile: South Africa." International Labour Organization. Available online at <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm>.

¹⁷⁷Roskam, A. (2006). "An Exploratory Look into Labour Market Regulation." Development Policy Research Unit, University of Cape Town. Pg 221.

¹⁷⁸Benjamin P. (2006). "The impact of the decisions of the labour courts on the operation of the CCMA," Development Policy Research Unit, Draft Paper, November 2006.

¹⁷⁹Benjamin P. *Ibid*.

¹⁸⁰According to chapter 7, section E of the LRA 66 of 1995.

¹⁸¹Section 173(1) of the LRA.

¹⁸²Section 182 of the LRA.

arise from the collective agreements concluded in the council and other statutory instruments.

Bargaining Council agreements deal with issues such as minimum wages, hours of work, overtime, leave pay, notice periods, and retrenchment pay. A bargaining council does not need to be accredited with the CCMA to perform dispute resolution services regarding parties to that council. If a bargaining council applies to the CCMA for accreditation the CCMA may, as a term of accreditation, give council conciliators similar powers to CCMA conciliators.¹⁸³ Their jurisdiction may be sectoral, regional or industry-wide and hence they vary in size and quality of dispute resolution. One of the main criticisms aimed at bargaining councils is that they are fragmented in nature and are poorly resourced. However, this generalization may not apply to all Bargaining Councils, and for example the Motor, Metal and Public Sector Bargaining Councils would not necessarily fit this description.

3.4.1.4. Private Dispute Resolution as part of the Formal Sector

The LRA, 1995¹⁸⁴ also vests the CCMA with powers to licence private agencies to attempt to resolve disputes through conciliation and arbitration if the disputes remain unresolved after conciliation and if the LRA, 1995 requires arbitration. Thus, any organization can perform dispute resolution functions with the blessing of the LRA as long as it is accredited by the CCMA. According to the LRA, 1995,¹⁸⁵ an accredited council or accredited agency may charge a fee for performing dispute resolution functions. Fees charged must be in accordance with tariffs or fees determined by the CCMA. A council's ability to charge fees for its dispute resolution depends on whether the parties to disputes are parties or non-parties to the council. Where no accreditation is required, there is no limitation on a council's ability to charge the parties to the dispute a fee. Bargaining councils and private agencies may apply to the CCMA for subsidies for performing dispute resolution functions in terms of the LRA, 1995 for which the accredited agency is accredited and for training persons to perform those functions.¹⁸⁶

¹⁸³ Brand J, *fn* 16.

¹⁸⁴ RSA, 1995b, Section 127.

¹⁸⁵ Section 128 LRA.

¹⁸⁶ RSA, 1995b, Section 132.

The Independent Mediation Service of South Africa (IMSSA) was the first private dispute resolution agency that specialized in resolving labour disputes. It was formed in 1984 and set out to provide mediation and arbitration services that were more expeditious, informal and less adversarial in nature than the courts.¹⁸⁷ Trained persons drawn from its panel conducted these processes.¹⁸⁸

In 2000, IMSSA closed down and Tokiso Dispute Settlement was formed to fill the gap. Since then, Tokiso has grown to be the largest and most active private dispute resolution service in South Africa. The CCMA has however, not accredited private agencies, despite the demand for private dispute resolution services by agencies such as Tokiso. There is an urgent need therefore, to accredit private dispute resolution agencies in order to afford parties to a dispute the choice of which institutions to assist them. Although meant to be less cost effective, the charging of fees may impair access by the poor to this mechanism of resolving labour disputes thereby making it less effective.

3.4.2. The Informal Sector

(a) The Laws of Natural Justice

"Justice should be done and be seen to be done".¹⁸⁹ This saying captures the concept of natural justice. Natural justice is about fairness. It is about legal principles that are so obvious that they should be applied to everyone without needing to make them into law. There are two main rules of natural justice among others:

- A person/group whose interests will be affected by the decision should be given a hearing before that decision is made.
- The decision maker should be unbiased. From these rules come guidelines for fair procedures (procedural fairness) to follow during disputes, grievances and complaints:

¹⁸⁷ Bosch et al, (2004), *The conciliation and Arbitration Handbook: A comprehensive guide to labour dispute resolution procedures*. LexisNexis Butterworth's, Durban. Pg.271.

¹⁸⁸ Anstey M. (1991). "Negotiating Conflict: Insights and skills for negotiators and peacemakers". Kenwyn: Juta & Co. Pg.252.

¹⁸⁹ Supra fn 87.

- Give adequate notice of a hearing or meeting to the person/group affected so there is time to prepare. State the time and place. Make sure there is no undue delay.

(b) Negotiating a “Private” Dispute Procedure

When alternative or internal mechanism have failed (such as recording the dispute in writing, calling for a dispute meeting, agreeing on an outside intervention) recourse may be made to formally agreed procedure.¹⁹⁰ In Durban for example, when making use of the private dispute resolution procedure the following stages were involved;

Firstly, the dispute must be declared in writing. Such notice shall set out the nature of the dispute and the proposed terms of settlement. Also, parties to such dispute must be served with a statement to answer to the dispute. Next, the parties meet with the NEDLAC on their request. Failure to reach an agreement to resolve the dispute, the meeting shall endeavour to agree on a mutually acceptable procedure for the resolution of the dispute, such as mediation, arbitration or any other agreed procedure. Failure to agree will lead the parties to submit the dispute for mediation or arbitration whereby the arbitrator or the mediator shall be mutually acceptable to both parties. The terms of reference of the dispute to be referred to such person, as well as who will pay any costs incurred, shall be mutually agreed by both parties prior to the commencement of the arbitration or mediation exercise.¹⁹¹ Go-betweens can also be used to mediate in South Africa was the case with the South African Rail Hawkers Association (SARHA).¹⁹²

In the last quarter of 2012, South Africa's informal sector grew at an annual rate of 7.7% making it the fastest-growing segment of South African economic activity as it relates to individuals, according to new data from Adcorp,¹⁹³ the country's largest diversified employment services company. The unofficial part of the economy, which saw people evading income taxes and circumventing labour laws, represented

¹⁹⁰ Supra fn 23.

¹⁹¹ Christine Bonner, (1996), “Handling Disputes between Informal Workers and Those In Power”. *Self-Employed Women's Union, South Africa*, Street Net International. Pg. 7.

¹⁹² Supra, Interview with vendor at FNB stadium, Johannesburg; and Cheche Selepe, activist and go-between, July 2007.

¹⁹³ Alternative Dispute Resolution Corporation.

32.8% of South Africa's potential workforce, or 6.2 million people, making it the second-largest sector of the labour market after officially recorded employment.¹⁹⁴

The informal sector can be defined as all those economic activities that take place outside the regulation of the state. Thus the informal sector does not pay tax, is not registered for UIF or Workers Compensation, amongst others. The informal sector is growing in South Africa, and is likely to remain large for the foreseeable future. In some sectors, formal sector activity is being 'in formalised'. For example, clothing factories are outsourcing production to 'home-workers'. Parts of the retail sector are being taken over by informal traders. The informal sector therefore affects the jobs of formal sector workers. Large numbers of workers are employed in the informal sector, without adherence to labour standards and without collective bargaining rights. Others are self-employed and appear to be independent, but are at the mercy of oppressive relations with suppliers, town authorities, and others.¹⁹⁵ The need therefore arises for mechanisms to be put in place whereby informal employees can turn to for resolution of disputes.

Income insecurity, lack of social protection, job security and lack of the right to associate and organize tend to limit informal sector employees unlike those in the formal sector who are covered by these labour rights constitutionally.¹⁹⁶ Although they are not covered by legislation, certain benefits accrue to them such as the fact that it is easy to start a business with no overheads or rents to pay. Reduces unemployment and poverty since entrepreneurs are able to support themselves and besides, they contribute to the South African economy.¹⁹⁷ On the other hand, this sector pays no tax and government loses out on revenue and also the lack of control by the state can lead to illegal and unsafe activities with high crime rates.¹⁹⁸

¹⁹⁴ "Informal jobs sector soars", Herald News Paper accessed at <http://www.peherald.com/news/article/3250>, on the 4/10/2012.

¹⁹⁵ The Report of the September Commission on the Future of the Unions to the Congress of South African Trade Unions, August 1997, <http://www.cosatu.org.za/docs/reports/1997/sept-ch7.htm>. Accessed 03/10/2012.

¹⁹⁶ Section 23 of the constitution RSA.

¹⁹⁷ *Ibid*

¹⁹⁸ *Ibid*

The vast majority of informal sector workers are unorganised, although hawkers have formed associations, and the Self-Employed Women's Union has been established in Kwa-Zulu Natal. Besides, SABTA and NASASA are some of the mechanisms with key role to umbrella informal or small, medium and micro enterprises, (SMME) provide infrastructure, support and services to those in the sector. Besides, they see to it that disputes arising from their relationship are resolved through arbitration by elected officials.¹⁹⁹ One problem plaguing dispute resolution in this sector is that officials are unskilled unlike CCMA Commissioners.

3.4.3. Conciliation-Arbitration

The con-arb procedure was recently introduced as an amendment to the LRA.²⁰⁰ This was done in terms of the Labour Relations Amendment Act.²⁰¹ The process attempts to expedite the dispute resolution process at the CCMA and Bargaining Councils with conciliation and arbitration taking place as a continuous process on the same day. If conciliation failed, the matter could be referred for arbitration, which would take place on some future date which could be days or months later. Because of the conciliation process not resulting in binding decisions, it was often not taken seriously. This two-tiered approach has now been combined into the con-arb procedure for certain categories of cases.

The CCMA must proceed with arbitration immediately after certifying that the dispute is unresolved, in disputes about dismissals or unfair labour practices relating to probation. This means that the dispute must be arbitrated on the same day. The con-arb procedure may also apply in cases not related to probation: where an employee was dismissed for misconduct or incapacity; where there was a constructive dismissal; or where the reason for the dismissal was unknown. However, in these cases the parties have an opportunity to object to the con-arb procedure in terms of CCMA rules.

¹⁹⁹ *ibid*

²⁰⁰ 66 of 1995.

²⁰¹ Act 12 of 2002 (Amendment of section 191 of Act 66 of 1995).

In order to be effective, such an objection has to be submitted in writing to the CCMA and the other party at least seven days prior to the scheduled date. Should these requirements not be met and the dispute is not resolved through conciliation, the matter must be arbitrated immediately. Although the parties may not object to the immediate commencement of arbitration proceedings if conciliation fails, they may object to the same person being both conciliator and arbitrator. If any party objects, a different commissioner must be appointed as arbitrator.²⁰²

The CCMA has as function to conciliate disputes referred to it in terms of the Act. To arbitrate unresolved disputes if the applicable legislation so requires or if disputant parties do consent. They also have the responsibility to compile and publish information and statistics about its activities and to assist in the establishment of workplace forums. Besides, it can advise parties, assist them to obtain legal advice, make rules resulting from legal proceeding, supervise ballots, publish guidelines and conduct and publish research.²⁰³ The effectiveness of the CCMA in labour dispute resolution will be discussed suit.

(a) Jurisdictional Issues

The law stipulates that any dispute must be conciliated or arbitrated in the province where the cause of action arose²⁰⁴ unless the head office senior commissioner directs otherwise. The essential question in the context of jurisdiction is whether an institution has the power to hear the matter referred to it. When should a dispute be referred to the CCMA, Labour Court or Labour Court of Appeal? There are four jurisdictional issues that arise in dispute resolution under the auspices of the CCMA: the existence of a dispute; parties to disputes; time lines for referral of cases to the CCMA; and jurisdictional disputes.²⁰⁵ The following is a discussion of these jurisdictional issues but limited to some jurisdictional disputes.

²⁰² Ferreira G, (2007), "The Commission for Conciliation, Mediation and Arbitration: its effectiveness in dispute resolution in labour relations". Unisa Press.

²⁰³ Van Niekerk *et al*, (2012), *Law at Work*, 2nd Ed, Lexis Nexis. Pg.435.

²⁰⁴ Du Toit *et al* (2003), *Labour Relations: A Comprehensive Guide*. 4th Ed. LexisNexis. Pg.84.

²⁰⁵ Van Kerken, (2000), "Some jurisdictional issues concerning the arbitration of labour disputes by the CCMA" in *Industrial Law Journal*, 21, 39-52.

(b) Jurisdictional Disputes. (CCMA)

The CCMA does not have an inherent jurisdiction over labour disputes. It may attempt to resolve only those disputes that fall within its statutory jurisdiction.²⁰⁶ Sometimes there is overlapping jurisdiction between bargaining councils and the CCMA; a dispute must be referred first to a bargaining council with jurisdiction or, in the absence of a council, to the CCMA. This means that the CCMA will not have jurisdiction over a dispute if there is a bargaining council, unless the council's dispute resolution procedures are inoperative or some party to the dispute frustrates resolution of the dispute through the council.²⁰⁷

As with private agencies, bargaining councils only deal with disputes of interests and disputes relating to dismissals and freedom of association, although they may not arbitrate on the latter. Disputes centering on the disclosure of information to unions, organizational rights, the interpretation and application of collective agreements, agency shop, closed shop and statutory agreements, cancellation of a council's registration, demarcation, picketing, co-decision making, information to be given to workplace forums and the interpretation of the provisions relating to workplace forums are out of their jurisdiction.²⁰⁸

Other exceptions are that certain disputes can only be referred to the Labour Court either directly or immediately upon trigger of the dispute or if the dispute remains unresolved after conciliation at the CCMA or bargaining council (unless all the parties to the dispute opt out of Labour Court adjudication in preference for arbitration in same forum as conciliation). The CCMA is mandated to resolve only the following disputes among others:

i) Disputes in respect of freedom of association and general protections

These are disputes about the interpretation or application of freedom of association: what is meant by participation in lawful activities of a trade union or employers' organization or their federations; and discrimination/victimization for exercising the

²⁰⁶ Supra fn 45.

²⁰⁷ Bosch et al, (2004), *The Conciliation and Arbitration Handbook: A Comprehensive Guide to Labour Dispute Resolution Procedures*. Durban: LexisNexis Butterworth. Pg.221.

²⁰⁸ Bosch et al, *Ibid*. Pg.223.

right to freedom of association (joining trade unions or employers' organizations or their federations). These disputes must be referred to a bargaining council having jurisdiction, or to the CCMA where no bargaining council exists for conciliation. If conciliation fails, the dispute must be referred to the Labour Court for adjudication.²⁰⁹

ii) Disputes about collective bargaining

These disputes revolve around the interpretation, application and exercise of organizational rights: what is meant by sufficient representation, access, deduction of levies, trade union representatives, leave for trade union activities, disclosure of information to union, rights in the domestic sector, thresholds of representativeness and rights of union parties to councils.²¹⁰ These disputes must be referred to the CCMA for conciliation. If conciliation is unsuccessful, the union has the choice to engage in strike action or to invoke arbitration by the CCMA. Where the union takes strike action, it may not refer the dispute to arbitration for a period of twelve months thereafter. A bargaining council, even where one exists in the sector or area, has no jurisdiction. Disputes about the failure or refusal to admit a registered union with a significant interest in the workplace as a party to a closed shop agreement,²¹¹ and disputes centering in the interpretation or application of the statute on bargaining councils, bargaining councils in the public service, statutory councils²¹² must be referred to the CCMA for conciliation followed by Labour Court for adjudication if conciliation fails. No bargaining council has jurisdiction.²¹³

iii) Unfair labour practice disputes

Disputes which centre around unfair conduct relating to promotion, probation (excluding dismissals related to probation), demotion, training, the provision of benefits, unfair suspensions or other disciplinary action short of dismissal, failure or refusal to reemploy or reinstate in terms of any agreement must be referred to a bargaining council having jurisdiction or to the CCMA where no bargaining council exists, for conciliation or, if this fails, arbitration. In the case of unfair discrimination

²⁰⁹ RSA, 1995b, section 9.

²¹⁰ Constitution of the Republic of South Africa (RSA), 1995, sections 16, 21-22.

²¹¹ RSA, 1995, section 26.

²¹² RSA, 1995, sections 38, 61-63.

²¹³ RSA, 1995, section 26.

and occupational detriment (other than dismissal) in terms of the protected disclosures, if conciliation fails at a bargaining council or at the CCMA, the dispute must be referred to the Labour Court for adjudication.²¹⁴

iv). Disputes arising from other pieces of legislation

Disputes about the interpretation or application of the Basic Conditions of Employment Act, 1997²¹⁵ (section 80) and disputes concerning employees' rights and the protection of those rights under the Employment Equity Act, 1998,²¹⁶ must be referred to the CCMA for conciliation, followed by Labour Court adjudication if conciliation fails. Disputes under the Skills Development Act, 97 of 1998,²¹⁷ in respect of the interpretation or application of a learner ship agreement or the contract of employment of a learner, as well as the termination of a learner ship agreement or the learner's contract of employment, must be referred to the CCMA for conciliation first and arbitration later if conciliation is unsuccessful. A bargaining council, even where one operates in the sector or area, has no jurisdiction.²¹⁸

(c) Overlapping Jurisdiction

This issue has plagued dispute resolution effectiveness in South Africa causing delay in the fast resolution of labour disputes. When is the High Court or Labour court having jurisdiction over a dispute? The Labour Court as per section 157 (1)²¹⁹ provides that subject to the Constitution and unless otherwise stated by the LRA, the Court has exclusive jurisdiction in respect of all matters that are to be determined by the Court, either in terms of the LRA or any other law.

The labour Court has concurrent jurisdiction with the High Court in respect of fundamental rights entrenched in the Constitution, arising from employment labour relations.²²⁰ Concurrent jurisdiction means both courts can hear the same case while

²¹⁴ RSA, 1995, section 26.

²¹⁵ Section 80 of the BCEA.

²¹⁶ Sections 10 and 52 of the EEA.

²¹⁷ RSA, 1998.

²¹⁸ Section 19 of the SDA.

²¹⁹ Of the LRA.

²²⁰ Section 157 (2) of the LRA.

exclusive gives each court a right to hear specific disputes. Section 157²²¹ is on the one hand inclined to give effect to the purpose of the LRA and to have labour disputes solely adjudicated within the structures created by the Act. On the other hand, the section regards only those matters specifically assigned to the Labour Court by the LRA as being excluded from the High Courts jurisdiction.

In *Chirwa v Transnet Ltd & others*²²² and *Gcaba v Minister of Safety and Security and Others*,²²³ the Constitutional court had two competing views. The question about overlapping jurisdiction arose after the enactment of the LRA in a number of cases involving misconduct committed by employees during or in the course of a strike. The High Court and the Labour Court were found to have concurrent jurisdiction in the case of *Fienberg v African Bank Ltd*.²²⁴ The High court has exclusive jurisdiction in regards to contractual claims. The Supreme Court of Appeal noted in *Old Mutual Life assurance Co Ltd v Gumbi*²²⁵ and in *Boxers Superstores Mmatha & another v Mbenya*²²⁶ that a line exist between matters dealing with unlawfulness of the termination of employment contract and must be referred to the High Court whereas, a dispute referred to the CCMA and Labour court will be classified as an unfair dismissal dispute.

Most of the jurisdictional uncertainties that have surrounded dispute resolution have been resolved and the dual systems of jurisprudence appear to be abolished. *Gcaba*²²⁷ sees the reinforcement of the role of the Labour court as the sole forum for labour related disputes. The Superior Courts Bill provides that the Labour court will continue as a separate and specialist court in terms of labour disputes.²²⁸ Section 77²²⁹ confers concurrent jurisdiction on the Labour Court with the civil courts to hear and determine any matter concerning a contract of employment. Also, under the

²²¹ LRA.

²²² [2008] 2 BCLR 97 (CC).

²²³ ([2009] 12 BCLR 1145 (CC).

²²⁴ (2004) 21 ILJ 217 (LC).

²²⁵ [2007] 8 BCLR 699 (SCA).

²²⁶ [2007] 8 BCLR 693 (SCA).

²²⁷ Fn 66.

²²⁸ Van Niekerk *et al. Op cit.* Pg 451.

²²⁹ Of the BCEA.

Arbitration Act,²³⁰ the Labour Court has jurisdiction in respect of disputes that would be the subject of arbitration.

3.5. EFFECTIVENESS OF STRUCTURES AND MECHANISMS

3.5.1. Effectiveness of formal structures and mechanisms: Mediation and Arbitration

The CCMA is still faced by some significant challenges. Among others, it has a backlog of outstanding issues that sometimes take months to resolve. Late submissions of cases by applicants, followed by subsequent condonation procedures, as well as the practical problems associated with set-down notifications also result in delays in CCMA adjudication.

Disputes should ideally be resolved as quickly and informally as possible, with little or no procedural technicalities.²³¹ Disputes cannot be allowed to drag on indefinitely until a solution is eventually found. It is difficult to determine whether a process such as mediation is effective or not, since it is impossible to determine whether the presence of a third party has led to the settlement of a dispute. As the mediator only has an advisory or persuading function in the settlement process, the success of the mediation process depends on the concurrence of the parties involved. Normally the mediator does facilitate agreement. The success rate depends, to a large extent, on the negotiating experience of the parties involved and the type of dispute. Interpersonal hostility between the participants is a major reason for the continuation of conflict. The success of mediation is improved if the parties involved are motivated to reach a settlement or if external factors pressurize them to seek agreement. Mediation is less successful where conflict has reached a high level of intensity and where matters of principle are at stake.²³² Disputes about procedures or issues such as dismissals tend to lend themselves more easily to mediation than disputes arising from economic issues. Successful mediation depends as much on the commitment of both parties to a peaceful settlement as on the skills of the mediator.

²³⁰ Act 42 of 1965.

²³¹ Brand *et al*, (1997), Pg 19.

²³² Bendix S, (2001), *Industrial relations in South Africa*, 4th Ed. Cape Town: Juta. Pg.560.

From the above discussion on the con-arb process, it is clear that a laissez-faire attitude to CCMA matters is no longer appropriate or wise. The onus rests on the employer to prove that a dismissal was for a fair reason and that a fair procedure was followed. The con-arb procedure means that the employer might be caught off guard because of the possible absence of a witness, or insufficient preparation. This could have costly consequences. However, it may result in the work of the CCMA being taken more seriously.²³³ The actual number of cases settled increased by nine percent, with the final settlement rate standing at 69 percent, the highest it has been in years. For the first time since the process was introduced in 2002, con-arb cases settled increased by 19 percent, while the number of awards decreased by 19 percent: a really encouraging result.²³⁴

3.5.2. Special Conflicting Issues

Is the CCMA truly independent? Being free and user-friendly, its services are in heavy demand and places a considerable burden on the state which means the drafters of the LRA created a system designed to “get it done” than “get it right”. The implication thereof is that this kind of dispute mechanism may lead to the danger of miscarriage of justice, equality, equity, democracy and fairness in resolving disputes from workplaces. Through the LRA the CCMA must be independent. Eventually the conduct of the CCMA is subject to scrutiny by way of judicial review in the Labour Court. Arbitration awards are quite frequently reviewed because they must satisfy the requirements of regularity and propriety that the common law imposes. Besides that, they must also be able to stand when tested against the constitutional mandated criterion of rationality enunciated in the case of *Carephone (Pty) v Marcus NO*.²³⁵

The CCMA in a sense is an administrative tribunal in the same way the Industrial Court was, this was stated in the case of *SATO v President of Industrial Court*.²³⁶ Being an organ of state in terms of section 239 of the Constitution, it is bound by the

²³³ Ferreira G, (2004), “The Commission for Conciliation, Mediation and Arbitration: its effectiveness in dispute resolution in labour relations”. Department of Public Administration and Management University of South Africa. Pg.82.

²³⁴ CCMA Annual Report, 2010/2011. Pg 6.

²³⁵ (1998) 19 ILJ 1425 (LAC) at 1430 D-E.

²³⁶ 1985 (1) SA 597 (A).

Bill of Rights²³⁷ and the basic values and principles of public administration.²³⁸ The Constitution therefore requires an organ of the state to act impartially, fairly; equitably without bias²³⁹ which means the law places the CCMA to act free from the influence of any powerful pressure group in the field of labour law should it be the government, political parties, employer's organizations or trade unions.²⁴⁰ However being funded largely by the tax payers²⁴¹ as a matter of fact the CCMA can not be truly independent unlike the Labour Court which enjoys inherent powers. The implication in terms of sections 116 and 117(1) of the LRA is that the CCMA will not avoid external influences.

There is always a friction between the terms fair and quick. Under section 17(12) (a) of the previous Act, the Industrial Court (IC) had the power to order costs according to the requirements of law and fairness but in the case of *NUM v East Rand Gold & Uranium*²⁴² Goldstone delivering the unanimous judgment of the court held among other things that, proceedings in the Industrial Court are frequently a part of conciliation process therefore parties should not be discouraged from approaching the IC. The judge opined that consideration should be given to avoid cost orders especially where there is a genuine dispute. *NUM's* case suggests that the court, independent and impartial tribunal or forum should be easily accessible to litigants like those who suffer the effect of the unfair labour practices or dismissals and try to avoid cost orders.

Quick dispute resolution, fairness, democracy and peace at workplace are the major objectives of the LRA. The importance of a speedy resolution has long been recognized in labour fields. For example in the case of *ACTWUV v Veldspun Ltd*²⁴³ on private arbitration the court in emphasizing on speedy resolution of disputes held that expedition is itself an element of justice because "justice delayed is justice

²³⁷ S 8(1) of the Constitution.

²³⁸ Ss 195(1), 195(2) (a) & (b) of the Constitution. Also see s 33 of the Constitution and Section 43 of the Promotion of Administrative Justice Act 3 of 2000.

²³⁹ S 195(1)(d) of the Constitution.

²⁴⁰ *SACCAWU v Speciality Store Ltd* (1998) 19 ILJ 557 (LAC) 560B.

²⁴¹ S 122(1) of the LRA.

²⁴² (1991) 12 ILJ 1221 (A) at 1241J -1243B.

²⁴³ 1994 (1) SA 162 at 169 F-H.

denied". This is a maxim of whose truth one is daily reminded of by the protracted processes of civil and criminal litigations.

For the sake of fairness principle which has become the essence of labour law and practice, it is not only a moral adjunct, that is why a balance between the two must be struck to avoid injustice as stated in *SACWU v Afrox*.²⁴⁴ To balance, both speedy and fairness must always be considered in order to avoid injustice to both parties in a dispute. This means that justice cannot be abandoned in pursuit of expeditions when the two goals conflict each other as *Shoprite Checkers (Pty) Ltd v CCMA*²⁴⁵ suggests that justice should normally be given precedence.

Another special issue relates to the failure of recognizing the right of informal sectors workers in dispute resolution. Bearing in mind that the Constitution of South Africa²⁴⁶ lays down the foundation of all legislation regulating employment relations, one wonders why the provision of the Constitution have not been applied to the informal sector workers. In the aspect of dispute resolution, these informal sector workers have come up with their own structures and mechanisms for resolving labour disputes but it is still ineffective. This is as a result of the fact that officials endorsed with this task are unskilled. Yet, it is as a result of their being barred from accessing statutory dispute resolution mechanisms because they do not fall within the definition of the term "employee" as per the LRA.

Some employers use the informal sector to hide from labour legislations. The employment relationship of the informal worker may be styled by the employer in such a way that it deprived them of constitutional and statutory rights as employees. Included in this category are farm workers, domestic workers, home workers and security guards among other.²⁴⁷ This behavior of some employers makes it difficult in some instances to identify who the employer is in a given situation. An examination of cases referred to the CCMA and the Labour Court, reveals that majority of the

²⁴⁴ (1999) 20 ILJ 1718 (LAC) at 1724 para 22.

²⁴⁵ (1998) 19 ILJ 892 (LC).

²⁴⁶ Act 108 of 1996.

²⁴⁷ ANC Caucus accessed at <http://www.anc.org/caucus/index.php?=-docs/sp/2009/sp0217c.html> on the 13/09/2012.

cases were thrown out. The simply reason being that the Court could not identify who is the employer to begin with. This has to a greater extent limited the proper functioning of statutory mechanisms.

Another issue which calls for concern is the heavy case load that is available at the CCMA. This is due to the fact that, conflicts inherent to the workplace are not dealt with by making maximum use of such internal resolution mechanisms. Besides, this is not the case with informal sector employees as all they have and exhaust sufficiently is their internal mechanisms. This is not to say it is not without its own shortcomings as it is difficult to monitor the procedures unlike in the formal sector.

The standard definition of the term "employee" of the LRA results in many workers in the informal economy (those working at home and on the streets in casual and atypical employment relationships) falling outside the scope of labour regulation and voice regulation bargaining systems. This leaves informal economy workers outside the net of bargaining systems even though there are often conflicts related to informal economy workers' workplaces which lend themselves to resolution through systems of collective bargaining.²⁴⁸ Given the above discussion on the effectiveness of structures and mechanisms, it becomes obvious that there are existing strengths and shortcomings which explain why attention should be given to dispute resolution in South Africa.

3.6. SUMMARY

The labour arena in South Africa has been a primary vehicle in engineering a new democratic order since 1994. The LRA has largely contributed to this situation. Dispute resolution mechanisms were meant to be fair, quick and accessible. The question is how effective they have gone?

The CCMA and other dispute resolution institutions or structures namely bargaining councils; labour Court, Labour Court of Appeal and private dispute resolution agencies, structures and mechanisms in the informal sector and an analysis of their functions and effectiveness in resolving labour disputes were dealt with. The emphasis was on the CCMA: the institution and structure, dispute resolution under

²⁴⁸ *Opcit.*

the CCMA mechanisms, through conciliation, mediation and arbitration, general provisions for arbitration proceedings, mixed process of con-arb, jurisdictional issues and the conflicting issue of overlapping jurisdiction in resolving labour disputes. It is submitted that, it is time informal sector be integrated and given access to statutory dispute resolution mechanisms on both national and international scale.

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. These are the issues to be discussed in the next chapter.

CHAPTER FOUR

SOUTH AFRICAN DISPUTE RESOLUTION MECHANISMS: COMPLIANCE WITH INTERNATIONAL MINIMUM STANDARDS

4.1. INTRODUCTION

The previous chapter dealt with the various dispute resolution mechanisms in South Africa focusing on structures, mechanisms and their effectiveness in South Africa. This part of the research will analyse the role the ILO plays in dispute resolution. The success of a labour relations system depends on the effective and proper functioning of its dispute resolution mechanisms. The ILO has aided member states with conventions and recommendations they can turn to when the need does arise. South Africa as a member also makes reference to these standards when resolving labour disputes. This means that the country's labour legislation and regulations have to comply with the ILO Constitution and those ratified Conventions. Amongst others, these obligations include upholding the rights to freedom of association, to engage in collective bargaining, to equality at work and to eliminate forced labour and child labour.²⁴⁹ The question always raised is to what extent South Africa complies with international minimum standards relating to dispute resolution.

The standards set by the ILO serves as a guide to governments and social partners in their capacity to prevent and resolve disputes. Although it seems not possible to identify a best approach among the different systems of dispute resolution, it is just as important to consider how to prevent disputes as it is to resolving them once they arise.²⁵⁰ Freedom of Association and the Protection of the Right to Organize Convention²⁵¹ and the Right to Organize and Collective Bargaining Convention²⁵² amongst others, set the pace for dispute resolution and has been ratified by South Africa. South Africa also ratified the Collective Bargaining Convention.²⁵³ These

²⁴⁹ Cheadle H, (2006), " Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA". Development Policy Research Unit Working Paper (DPRU). No 06/109. June 2006. Pg.4.

²⁵⁰ High-level tripartite seminar on the settlement of labour disputes through mediation, conciliation, arbitration and labour courts. "Collective dispute resolution through conciliation, mediation and arbitration: European and ILO Perspectives". ILO, Geneva. 2007. Pg. 19.

²⁵¹ 1948 (No 87).

²⁵² 1949 (No.98).

²⁵³ 1981(No.154).

Conventions embrace the right of all employers and workers to form independent organizations and to engage in collective bargaining and dispute resolution with a view to improving working conditions. The question remains, has South Africa ratified the conventions pertaining to dispute resolution?

This chapter will focus on international minimum or minimum standards of the ILO, what they are, which of them have been ratified by South Africa and the extent to which South Africa complies with such standards in the context of dispute resolution. Most importantly, attention will be paid to those standards relating to labour dispute resolution and the existing legislations which impact on this area.

4.2. THE INTERNATIONAL LABOUR ORGANIZATION

The primary international agency charged with developing working standards is the International Labour Organization (ILO). Established in 1919, the ILO advocates international standards as essential for the eradication of labour conditions involving "injustice, hardship and privation". According to the ILO, international labour standards contribute to the possibility of lasting peace, help to mitigate potentially adverse effects of international market competition and help the progress of international development.²⁵⁴ The International Labour Conference took into consideration complaints laid down by COSATU and therefore, the state of South African labour law and labour relations was made consistent with ILO standards. This report from COSATU was thus taken into consideration when drafting the LRA.²⁵⁵

In 1919, following the end of the First World War, the agenda on international labour standards reached a new level of prominence as a result of the founding of the ILO. As mandated by Part XIII of the Treaty of Versailles, the ILO was created as a branch of the League of Nations in order to address all conceivable aspects of labour rights. Preliminary efforts focused primarily on the eradication of slavery and all forms of forced labour.²⁵⁶ The agenda quickly expanded, however, to include the

²⁵⁴Fn 18.

²⁵⁵ Van Niekerk *et al.*, (2012), *Law at work*, 2nd Ed, LexisNexis, Pg 20.

²⁵⁶Brown *et al.* "International Labor Standards and Trade: A Theoretical Analysis." In: *Fair trade and harmonization: Prerequisites for free trade?* Cambridge, MA: MIT Press, 1996. Pg 227-272.

rights to freedom of association and collective bargaining, non-discrimination in employment, and the elimination of child labour. The ILO's creation marked the first instance of multiple major international actors coming together in an attempt to reach a consensus on universal workers' rights. Despite a lack of any formal means of coercion, the ILO then urged its 44 original member countries to adopt and ratify conventions limiting oppressive labour market practices.²⁵⁷

The ILO is a specialized agency of the United Nations, consisting of 183 member countries South Africa inclusive, which deals with labour issues. The ILO, by its existence, is the recognized international vehicle for raising international labour standards issues in a worldwide forum.²⁵⁸ This organization establishes labour standards by means of both conventions and recommendations and has a tripartite governing structure – representing government, employers and workers.²⁵⁹ While ILO recommendations take more of the role of providing mere guidance to member states, the stronger form, ILO conventions, have the status of a treaty, which, in principle, is binding on the member countries that voluntarily ratify them. These represent benchmarks of strong labour standards towards which countries can strive by promulgating and enforcing national laws that comply with the conventions.²⁶⁰ It is through these means that the organization works to enforce international labour standards. South Africa being a member state and has ratified most of the core conventions has gone a long way to facilitate and set down directions for the existence of its dispute resolution system. Such conventions will be discussed in due course of this research.

4.3. INTERNATIONAL LABOUR STANDARDS RELATING TO DISPUTE RESOLUTION: CONVENTIONS AND RECOMMENDATIONS

By virtue of its membership to the ILO, South Africa is bound by principles enshrined in the ILO Declaration on Fundamental Principles and Rights at Work which

²⁵⁷Fn 5.

²⁵⁸Alphabetical list of ILO member countries."International Labour Organization accessed at <http://www.ilo.org/public/english/standards/reim/country.htm> . 31/08/2012.

²⁵⁹Block, Richard N., Karen Roberts, Cynthia Ozeki, and Myron J. Roomkin. "Models of international labor standards." *Industrial Relations* 40, no. 2 (2001): 258-292.

²⁶⁰Berik, Günseli, and Yana Van der Meulen Rodgers. "Options for enforcing labour standards: Lessons from Bangladesh and Cambodia." *Journal of International Development* 22 (2008): 56-85. www.interscience.wiley.com. Accessed 27/08/2012.

embraces the eight ILO Conventions which are considered fundamental or 'core'. These conventions relate to freedom of association and collective and the effective recognition of the right to organize and collective bargaining,²⁶¹ the elimination of all forms of forced or compulsory labour²⁶², the effective abolition of child labour,²⁶³ and the elimination of discrimination in respect of employment and occupation.²⁶⁴ It is from most of these labour related issues that disputes tend to arise in industrial relationships and as such needs to be dealt with effectively to maintain a stable work environment and labour peace.

4.3.1. Right to Organize and Collective Bargaining Convention, No 98 of 1949

This fundamental convention provides that workers shall enjoy adequate protection against acts of anti-union discrimination, including requirements that workers not join or relinquish trade union membership for employment, or dismissal of workers because of union membership or participation in union activities. Collective bargaining has the potential of reducing conflict through the resolution of labour disputes, and can promote workplace democracy and ensure the recognition and protection of the worker's rights. Collective bargaining is a means of regulating relations between management and employees and for settling disputes between them.

Collective bargaining also has the strength of minimizing conflict, and redressing confrontational attitudes and acrimony inherently associated with the employment relationship, thereby promoting industrial peace and ultimately economic growth. On its own, it can serve as a mechanism for labour dispute resolution by setting out procedures for the resolution of labour disputes in collective bargaining agreements. One of the virtues of collective bargaining is that disputes are solved at source, a factor that does not leave the bitterness associated with such adversarial processes of dispute resolution such as adjudication. South Africa has in addition to these also ratified the Collective Bargaining Convention.²⁶⁵

²⁶¹1949 (No 98).

²⁶²1930 (No.29).

²⁶³1999 (No. 182).

²⁶⁴1958 (No.111).

²⁶⁵1981(No.154).

The convention also provides that bodies and procedures for the settlement of labour disputes should be designed to contribute to the promotion of collective bargaining (Article 5(2) (e)). These Conventions embrace the right of all employers and workers to form independent organizations and to engage in collective bargaining with a view to improving working conditions. While Convention No. 154 focuses on collective bargaining, it does not rule out the use of conciliation and/or arbitration as part of the bargaining process where such processes are voluntary (Article 6).

The ILO has long taken cognizance of the critical role collective bargaining can play in bringing about harmonious relations between employers and workers. Article 4 of the Right to Organize and Collective Bargaining Convention,²⁶⁶ provides that:

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

International labour standards therefore, provide a benchmark and best practice on which member states and South Africa precisely can rely on, for guidance in the formulation of their policies and legal frameworks relating to dispute resolution. Trade unions and employer's organizations also rely on these standards in the drafting and negotiation of collective bargaining agreements. It is important at this juncture to ascertain to what extent South Africa is promoting the implementation of this international labour standards relating to the promotion of collective bargaining and the provision of effective dispute resolution systems.

4.3.1.1. The existence of an enabling environment

For a conducive environment for collective bargaining to develop the legal and political system must first and foremost tolerate the existence of trade unions by guaranteeing them freedom of association and the right to organize as envisaged by the relevant ILO instruments which include the Freedom of Association and the

²⁶⁶ 1949 (No.98).

Protection of the Right to Organize Convention, 1948 (No.87), the Right to Organize and Collective Bargaining Convention, 1949 (No.98), and the Collective Bargaining Convention, 1981 (No.154). These conventions have been ratified by South Africa thus, setting a base for collective bargaining to exist. This enables trade unions to exercise their right to represent their members' interests by negotiating on their behalf and to carry out union activities without fear of reprisals or victimization.²⁶⁷

4.3.1.2 Duty to bargain

Collective bargaining can only function effectively if it is conducted genuinely by all the parties to the bargaining process. It sometimes become necessary to regulate the bargaining process as some parties tend to undermine the negotiation process by resorting to such tactics as distortion, misrepresentation, bluff, deceit, secrecy, power play and emotionalism.²⁶⁸ Collective bargaining in South Africa takes place both at the sectoral and plant/enterprise level. This takes place through a number of bargaining councils whose primary function is to regulate relations between management and labour in the sectors of employment over which they have jurisdiction by concluding collective agreements and settling disputes.²⁶⁹ Although provided for and promoted under the LRA the establishment of bargaining councils is purely voluntary, a true reflection of South Africa's general voluntarist approach to the regulation of the labour relations.

The LRA²⁷⁰ of South Africa does not provide for the duty to bargain. It has been left to the courts to determine whether a dispute exist under the 'unfair labour practice' regime. The South African economy is relatively stable, and the majority of its unions such as the Congress of South African Trade Unions (COSATU) are mature and well resourced. These factors appear to have influenced the country's non-interventionist approach, true to Simitis' argument that the level of economic development of a

²⁶⁷ Fumane MKhabo, "Collective Bargaining and Labour Disputes Resolution – Is SADC Meeting the Challenge"? ILO Sub-Regional Office for Southern Africa Harare, Zimbabwe. ILO (Issues Paper No 30), Pg 40, 2008.

²⁶⁸ Brand J., and Cassim, 'The Duty to Disclose – A Pivotal Aspect of Collective Bargaining' (1980) 1, ILJ (SA) 249, Pg. 251.

²⁶⁹ Grogan J, (2003), *Workplace Law*, 7th Ed, Juta & Co P. 299.

²⁷⁰ 66 of 1995.

particular country has a bearing on whether a country adopts an interventionist or a voluntarist approach.²⁷¹

The Act²⁷² merely facilitates collective bargaining and leaves it to the parties to decide how their bargaining relationships are to be structured.²⁷³ Despite the absence of the duty to bargain in South Africa, the LRA²⁷⁴ imposes a duty on the employer to disclose to a representative trade union all the relevant information that will enable the union to engage effectively in collective bargaining.²⁷⁵ Also, section 24 of the Act²⁷⁶ requires every collective agreement to provide a procedure to resolve disputes about the application or interpretation of the agreement. Disclosure of information being an essential element of good faith bargaining, the duty to bargain has indirectly found its way into the South African industrial relations arena and as such facilitates dispute resolution.

4.3.2. Freedom of Association and the Protection of the Right to Organize Convention 1948 (No 87)

This convention sets forth the right for workers and employers to establish and join organizations of their own choice without previous authorization. Workers' and employers' organizations shall organize freely and not be liable to be dissolved or suspended by administrative authority, and they shall have the right to establish and join federations and confederations, which may in turn affiliate with international organizations of workers and employers.

The Committee on freedom of Association (CFA) established in 1951 by the resolution of the governing body is tripartite i.e. government, employer and worker representatives and comprises nine members and an independent chairperson. It has as role to examine allegations of breach of freedom of association submitted by an ILO member state, employers' organization or a workers' organization. It also has

²⁷¹Simitis S, (1986), *Juridification of Labour Relations* Comparative Labour Law 7, p. 93.

²⁷²Fn 19 above.

²⁷³Grogan J, (2007), *Workplace Law*, 9th Ed, Juta& Co, Pg. 271.

²⁷⁴66 of 1995.

²⁷⁵Section 16 (3) of the LRA.

²⁷⁶LRA, 66 of 1995.

as responsibility to recommend to the Governing Body whether cases are worthy of examination by the Governing Body.²⁷⁷

4.3.2.1. Strike as a means to resolving labour disputes and the ILO

The ILO supervisory bodies²⁷⁸ have by and large addressed the issue of collective dispute prevention and resolution in the context of the right to strike. The organization has noted that a prohibition on the right to strike may result in practice from certain legal requirements relating to dispute resolution. For example, requiring the parties to pursue conciliation or mediation before a strike can take place is legitimate as long as the procedures “are not so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness.”²⁷⁹ There has been particular concern expressed over the use of compulsory arbitration that results in a binding award since this approach makes it possible to virtually prohibit all strikes or end them quickly.²⁸⁰

Conventions No. 87 on freedom of association and protection of the right to organize, 1948 and No.98 on the right to organize and collective bargaining, 1949 of the ILO contain no provisions on strikes. Fear that, in one way or another, the freedom of relations between employers’ and workers’ organizations and the possibilities for direct action would be restricted seems to be one of the main reasons why so few ILO standards have been adopted on the settlement of industrial disputes.²⁸¹ In accordance to Article 27 of the ILO Constitution any question or dispute relating to the interpretation of a Convention shall be referred for decision to the International Court of Justice. The conclusions of the experts or representative bodies have been accepted worldwide, but do not have the legal authority of a court judgment. There is no decision of the International Court of Justice regarding the right to strike.

²⁷⁷Fn 5. Pg.25.

²⁷⁸Notably, the Committee of Experts on the Application of Conventions and Recommendations, and the Committee on Freedom of Association.

²⁷⁹ILO: *Freedom of association and collective bargaining*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B), International Labour Conference, 81st Session, Geneva, 1994, para 171 (“General Survey”).

²⁸⁰General Survey, Para 153.

²⁸¹R. Ben Israel, (1988), “ International Labour Standards”. The case of strike, Deventer, Kluwer, Pg.46.

In South Africa, the right to strike is embedded in the constitution as a fundamental right²⁸² although the ILO sees it as not an end in itself.²⁸³ Section 213 of the LRA defines a strike to include “a refusal to work which may be partial or complete... by persons who are or have been employed by the same or different employers for the purpose of remedying a grievance or dispute in respect of any matters of mutual interest between employer and employee...” A strike must also be protected and the strikers as such must comply with the requirements in section 64 of the LRA. The issue in dispute must be referred for conciliation to the CCMA or a bargaining council with jurisdiction before the right to strike is acquired.²⁸⁴ Besides, a certificate of outcome must be issued to show the dispute in question still remains unresolved, or a period of 30 days must have elapsed from the date on which the CCMA or bargaining council received the referral.²⁸⁵ Notice is also one of the requirements as per section 64(1) (b).²⁸⁶

This right like any other right is not absolute as it has a series of limitations imposed by the LRA whether it is of a procedural or substantive nature. In South Africa, those in essential services and the national defense force are limited from strike and it thus complies with the limitation at international level. Strikes are prohibited during natural calamities, epidemics, pandemics, states of emergency, martial law or war.²⁸⁷ The right to strike is therefore one of the mechanisms for the resolution of disputes in labour relations in order to promote the social and economic interests of employees and trade unions.

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

This convention promotes collective bargaining for public sector employees as well as other methods allowing public employees' representatives to participate in the determination of their conditions of employment. Article 8 also provides that disputes

²⁸²Section 239 (c) of the Constitution of the RSA.

²⁸³Van Niekerk, *ibid.* Pg.399.

²⁸⁴Section 64 (1)(a) of the LRA.

²⁸⁵Section 64(1)(a)(i)-(ii) of the LRA.

²⁸⁶LRA.

²⁸⁷ILO: “Strengthening the Mechanisms of Labour Dispute Prevention and Amicable Resolution in the Western Balkan Countries and Moldova”. Montenegro, 25–26 February 2009. Pg.18.

shall be settled through negotiation between the parties or through independent and impartial machinery, such as Mediation, Conciliation and Arbitration in such a manner as to ensure the confidence of the parties involved. The CCMA as a judicial body enforces this convention at the national level.

The South African Public Service Labour Relations Act²⁸⁸ and the LRA²⁸⁹ provide for collective bargaining in the public service. Conditions of employment and regulations pertaining to the public sector are negotiated at the central level through the Public Service Bargaining Council (PSBC) which is the largest bargaining structure covering more than one million workers. The Council comprises four designated sectors covering education, public health and social development, safety and security and the general public service sector. The council's key function is to create a platform for developing sound labour relations in the public service. Public employees have made use of the available rights to bargain collectively. 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.

4.3.4. Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)

This is one of the main ILO instrument dealing with dispute prevention and settlement. It recommends that voluntary conciliation "should be made available to assist in the prevention and settlement of industrial disputes between employers and workers." It further recommends that such procedures should include equal representation of employers and workers, should be free and expeditious and that provision should be made to allow the parties to enter into conciliation voluntarily or upon the initiative of the conciliation authority. It also recommends that parties should refrain from strikes or lockouts while conciliation or arbitration procedures are in progress, without limiting the right to strike. Although this recommendation facilitates by setting guiding principles in dispute resolution, South Africa is yet to ratify it.

²⁸⁸ 1994.

²⁸⁹ 66 of 1995

4.3.5. Examination of Grievances Recommendation, 1967 (No. 130)

This recommendation addresses dispute resolution at the enterprise level, including rights disputes over alleged violations of collective agreements.²⁹⁰ The instrument sets out a number of recommendations on the development and implementation of workplace dispute mechanisms, emphasizing the importance of preventative measures such as sound personnel policy and the co-operation between the social partners on decisions that affect the workers. It further recommends that where efforts to resolve the dispute have failed, there should be a possibility for final settlement either through the procedures set out by collective agreement, through conciliation or arbitration by the competent public authorities, through recourse to a labour court or other judicial authority, or through any other procedure which may be appropriate under national conditions.²⁹¹ These conventions and recommendations have been a guide to those involved in drawing up laws relating to dispute resolution and as such dispute resolution mechanisms have international minimum standards to an extent as its backbone.

4.4. INCORPORATING INTERNATIONAL MINIMUM STANDARDS INTO SOUTH AFRICAN LAW

4.4.1. The process of transforming international to national law

For international law to be applicable in South Africa, it must first be transformed into national law. This domestication process is backed by section 14 of the South African Constitution. Transformation depends on whether the state applies a monist or dualist theory. States that adhere to monism hold the view that national and international law form part of the same system and as such, international minimum standards need not be adopted by separate national legislative Acts and are not transformed into national law upon ratification as is the case of Latin America. Countries like the United Kingdom on the other hand, take to the dualism theory and as such adhere to the requirement of statutory incorporation as is also the case with South Africa.

²⁹⁰Fn 1.

²⁹¹Paragraph 17.

4.4.2. The role of Courts

Labour Courts are specialized in nature and administer both law and equity jurisdiction. In South Africa, the Labour Court and Court of Appeal are both established as courts of law and equity.²⁹² Courts are mandated by the Constitution to, when interpreting the rights in the Bill of Rights or any other legislation,²⁹³ to take into account applicable international law and may consider foreign law.²⁹⁴ Section 35²⁹⁵ provides for the right of access to the courts or tribunals with jurisdiction for the resolution of labour disputes and section 38²⁹⁶ on the other hand, list persons who have locus standi to approach the courts with the enforcement of labour rights as spelt out in section 23 of the Constitution.

The Constitutional Court has affirmed that section 39(1) requires both instruments that are binding on South Africa and those to which South Africa is not a party to be used as tools of interpretation. In *S v Makwanyane*²⁹⁷ the court saw the importance of and made reference to international law. In *NUMSA v Baderpop (Pty) Ltd & another*²⁹⁸ the court made reference to the supervisory structures of the ILO and most especially the Committee of Experts and CFA thereby upholding international law in labour relations and in resolving dispute arising there from.

Although the courts, tribunal and forum has the right to consider international law when interpreting the Bill of Rights, Section 36²⁹⁹ sets ground for limitation of the rights in the Bill of Rights and most especially section 23³⁰⁰ dealing with labour rights. The courts must consider for instance, the nature of the right and the importance of the limitation.³⁰¹ Courts as a dispute resolution mechanism therefore need to comply with the Constitution and international law status of sections 321 and 232 of the constitution of South Africa.

²⁹²Section 151 (1) of the Labour Relations Act as amended by Section 11 and 167-183 of Act 127 of 1998.

²⁹³Section 39 of the Constitution.

²⁹⁴Sections 231-233 of the Constitution.

²⁹⁵Of the Constitution.

²⁹⁶*Fn* 30 above.

²⁹⁷1995 (3) SA 391 (CC).

²⁹⁸2003 vol. 2 *BLLR* Pg 103 (CC).

²⁹⁹*Fn* 30 above.

³⁰⁰*Fn* 30 above.

³⁰¹Section 36 (1) and (2).

(b) ³⁰⁷ of the EEA³⁰⁸ provides that '*it is not unfair to distinguish, or prefer any person on the basis of an inherent requirement of a job*'. This was the case in *Hoffman v South African Airways*³⁰⁹ where the dispute was that of discrimination. This shows the extent to which the enforcement of the Discrimination (Employment and Occupation) Convention 1958 is acknowledged in South Africa. The BCEA³¹⁰ on the other hand, outlines an elaborate procedure for the payment of remuneration of employees in its section 23. This section thus buttresses the Equal Remuneration Convention³¹¹ of the ILO in order to reduce the reoccurrence of disputes arising from less pay in labour relations. The Skills Development Act³¹² and the Social Assistance Act³¹³ have all incorporated international minimum standards in an effort to have access to good dispute resolution mechanisms and maintain a stable work environment in South Africa.

4.5. SOUTH AFRICA'S COMPLIANCE WITH MINIMUM STANDARDS RELATING TO DISPUTE RESOLUTION

Conflict is inevitable in employment relations. What is important is how it is managed. The ideal situation is for parties to bargain voluntarily without third party intervention. Negotiations however sometimes fail. Where negotiations on any terms and conditions of employment have failed, there must be in place mechanisms to which aggrieved parties can resort to. To this end, the Examination of Grievances Recommendation³¹⁴ guarantees workers the right to lodge grievances where the employer's actions are either contrary to agreed norms in the collective bargaining agreement, legislative provisions, and the contract of employment or custom.

The success of collective bargaining rests on the availability of an efficient dispute resolution system. Article 5 (e) of the Collective Bargaining Convention, 1981 (No.154) provides that bodies and procedures for the settlement of labour disputes

³⁰⁷ EEA.

³⁰⁸ Act 55 of 1998.

³⁰⁹ (2001) 1 SA 1(CC).

³¹⁰ Act 75 of 1997.

³¹¹ 100 of 1951

³¹² 97 of 1998

³¹³ Act 13 of 2004.

³¹⁴ 1967 (No. 130).

should be so conceived as to contribute to the promotion of collective bargaining. However, in order for such institutions to bring any meaningful contribution to the promotion of collective bargaining, they must be effective and their method of operation must be autonomous, accessible, informal, expeditious and consensual i.e. be subjected to tripartite consultation so as to ensure the confidence of the parties to the dispute.

To facilitate proper implementation of the legislative framework and to give users guidance on labour law, South Africa has promulgated Codes of Good Practice on a variety of labour related issues. Labour disputes mechanisms in the country are dogged by delays. In the CCMA, a dismissal dispute had to be referred within thirty days of the event, the conciliation held within a further 30 days, and the decision delivered within another 14 days, the entire process not taking longer than 10 weeks. This timing has proved to be largely unattainable.³¹⁵ This problem is not unique to alternative dispute resolution mechanisms as courts also have serious backlogs rendering it difficult to hear cases within a reasonable time.

4.5.1. Tripartism in Context

The establishment of national tripartite structures promotes the principles of social dialogue and tripartism which are central to ILO operations and are in keeping with the Tripartite Consultation Convention.³¹⁶ Tripartism in the context of this research serves as a vehicle through which employers' organizations and trade unions participate in the design of policies relating to the protection and promotion of collective bargaining and to the establishment of effective dispute resolution mechanisms whose ultimate objective would be to achieve decent work for all. Tripartism plays a major role in promoting workplace democracy through the involvement of social partners in decision making processes.

In South Africa, the National Economic and Development Labour Council (NEDLAC), consists not only of government, employers' organizations, and trade unions but also of other national community groupings aimed at discussing and trying to reach

³¹⁵ Tokiso Review 2005/06, p. 28.

³¹⁶ No 144 of 1976.

consensus on issues of social and economic policy.³¹⁷ Tripartism plays a pivotal role in strengthening collective bargaining and ensuring the effective resolution of labour disputes at the national level. Tripartite structures provide a forum for debate, reform or review of national legislation, information sharing, acquisition of knowledge on prevailing labour laws, and awareness of developments in the labour market which will ultimately filter through to their respective constituencies and enhance observance of both international and national laws. Cooperation between social partners is therefore very critical if working conditions are to improve and principles of decent work satisfied.³¹⁸

4.6. SUMMARY

This chapter aimed to look at the extent to which South Africa, a member state of the ILO have 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, its Constitution makes reference to international law should the need arise. The problem is that, not all conventions and recommendations relating to dispute resolution have been ratified by South Africa. It is evident from the standards set out by the ILO and the experiences of governments and social partners of the important interplay between freedom of association, the freedom to bargain collectively and a properly functioning dispute resolution system. Furthermore, allowing flexibility of choice for the social partners within a well regulated system that guarantees access, transparency and legitimate outcomes, will contribute to securing and preserving industrial peace and cooperation between the social partners and to preventing and resolving labour disputes. A few concluding observations can be drawn from the ILO accumulated experience.³¹⁹

³¹⁷CCMA Annual Report, 2010/2011 accessed at <http://www.nedlac.org.za> the 19/09/2012.

³¹⁸Somavia J, (2006), 'Making the Global Goal of Decent Work for All a National Reality in Full and Productive Employment and Decent Work – Dialogues at the Economic and Social Council' Pg.33.

³¹⁹ILO, "Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives", High-Level Tripartite Meeting on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts, Nicosia, Cyprus, October 18th-19th, 2007, http://www.ilo.org/public/english/region/eurpro/geneva/download/events/cyprus_2007/cyprus_dialogue.pdf

The ILO, some of its conventions and recommendations relating to dispute resolution have been dealt with, emphasizing on the South African labour law system, how it incorporates these standards and enforces them nationally. Besides, the role of strikes in collective bargaining as an option in resolving labour disputes was not neglected. Furthermore, whether South Africa complies with these minimum standards to assist in the effective resolution and prevention of disputes was looked at. The challenges facing the effective functioning of dispute resolution mechanisms will be discussed in the next chapter, supported with some tangible recommendations to assist policy makers in the upgrading of dispute resolution mechanisms in South Africa.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1. INTRODUCTION

Initially, it was made clear that it is of critical importance that there should be labour peace at workplaces and that the effective, efficient and timeous resolution of disputes contributes immensely in terms of realizing this objective. The concept of informal employment is not a new phenomenon to the South African economy though its precise nature begs many questions especially in dispute resolution than it answers.

In the previous chapter of this discussion, an analysis of the dispute resolution mechanisms and their compliance with international minimum standards in South Africa was discussed in order to understand and assess the effectiveness of dispute resolution mechanisms in South Africa. The rationale of this analysis was to explore dispute resolution in South Africa and international standards with a view to ascertain if there is compliance and to draw lessons to be learnt by South Africa from such standards. That said, the conclusions and challenges hindering the effective utilization of labour dispute resolution mechanisms will be discussed as the central theme of this part of the discussion. However, the identified challenges will be complimented by some recommendations for law reform as concerns dispute resolution mechanisms in the labour relation of South Africa.

5.2. CONCLUSIONS AND EMERGING CHALLENGES

5.2.1. Insufficient subsidy provided to bargaining councils by the CCMA

In bargaining councils, the dispute resolution function is generally performed by staff of the council of council staff together with outside commissioners. Bargaining councils have, however, complained that the subsidy provided by the CCMA is insufficient and as result the performance of the dispute resolution function has

become a drain on councils' finance.³²⁰ The focal challenge here is the issue of lack of sufficient funding to bargaining councils.

5.2.2. Increase in case load and delays

The ever-increasing caseload of the CCMA will keep challenging the CCMA's capacity. The implication is that the CCMA should not rest on its laurels. Instead, it should keep improving the turnaround time for both conciliations and arbitrations to remain equal to the torrents of referrals. In the event of complacency, the increasing caseload will sooner or later overwhelm the capacity of the CCMA and inefficiencies may creep in. In calculating the turnaround times, the CCMA excludes the period from the date of referral of a case for conciliation or the period from the date of request for arbitration to the date of activation of the referral/request in their database. The time between referral/request date and activation date reflects the time needed for administrative work to complete the collection of information. The 30-or 60-day period to resolve the dispute only commences after a case has been activated.³²¹ This delay may cause disputing parties to turn to private dispute resolution agencies. The critical challenge here relates to the continuous increase in the CCMA's caseload load which tends to limit fast dispute resolution.

5.2.3. The process is still expeditious and relatively inexpensive

For the parties, there are the costs of preparing for and attending an arbitration hearing, on top of attending conciliation. Arbitration hearings also generally take longer than conciliation. For the CCMA, there are the additional costs associated with a more formal process, as well as the costs of engaging an arbitrator. The tape-recording of arbitration hearings is an example of a requirement imported by the Labour Court, with considerable cost implications for both the CCMA and the parties to disputes. The serious emerging challenge here focuses on the expeditious and still relative expensive dispute resolution system in South Africa.

³²⁰ Godfrey *et al*, (2006), "Conditions of Employment and Small Business: Coverage, Compliance and Exemptions". Development Policy Research Unit Working Paper No 06/106, March 2006. Cape Town: University of Cape Town. Pg.25.

³²¹ Benjamin & Gruen, (2006). "The Regulatory Efficiency of the CCMA: A Statistical Analysis of the CCMA's CMS Database". Development Policy Research Unit: University of Cape Town. Pg.28

5.2.4. Enforcement Ineffectiveness

Enforcement of labour dispute mechanisms in South Africa has contributed in denying informal workers labour rights as seen in the problem statement of this discussion. This is a serious challenge plaguing informal workers. For instance, their exclusion from the definition of the term employee as defined by the LRA enacted in relation to labour matters in concordance with section 23 of the Constitution has left a big loophole to the proper enforcement of the Act. Theoretically, standards can be enacted by a stroke of the parliament's pen but there is considerable gap between the legislative say-so and workers enjoying those rights in practice.³²² Thus, the inadequacy of enforcement structures is problematic in South Africa culminating in denial of Constitutional and international labour rights to informal workers in relation to dispute resolution. Besides, very few conventions and recommendations exist at the international level whereby, dispute resolution is covered. The gist of the challenge requires consideration for law reform in the enforcement of dispute resolution mechanisms.

5.2.5. Insufficient Resources

The lack of human resources at the CCMA has been highlighted as particularly problematic. Work overload reduces the effectiveness of commissioners as they are required to conciliate and arbitrate three to six cases a day. Due to the large number of conciliations scheduled for each commissioner every day, commissioners do not have enough time to conciliate cases properly and therefore do not have the time to address the causes and underlying issues of a dispute.³²³ Although the conciliation process is mandatory, legally there is no pressure to resolve a case at this stage and generally neither employees nor employers are eager to settle at this phase. When either of the parties does not attend conciliation hearings, the matter is automatically referred to arbitration. It has been suggested that employees have the impression that the longer the process is drawn out, the bigger the financial award will be. In addition, parties to the dispute also regularly apply for postponements before or at

³²² Paul Benjamin, (2008), "Informal work and Labour Rights in South Africa" DPRU. University of Cape Town.

³²³ Levy, et al, (2006). "Conciliation and Arbitration and the settlement of disputes of right in South Africa". *Tokiso Review 2005/06. The First Annual Report on the State of Labour Dispute Resolution in South Africa*. Johannesburg: Tokiso Dispute Resolution Settlement (Pty) Ltd. Pg.53.

hearings.³²⁴ The major challenge here is the lack of enough resources to facilitate and make efficient dispute resolution.

5.2.6. Labour inspectors in South Africa are poorly trained and staffed

The Labour Appeals Court was established as the court of final instance in matters concerning the interpretation of the LRA and other matters within the jurisdiction of the Labour Court. The LAC was initially staffed by a full-time Judge President and a Deputy Judge President, but by 2006 the LAC only had a full-time Judge President, assisted by High Court judges and retired judges who generally only serve a term at a time.³²⁵ It was initially envisaged that the only matters with regard to which the LAC would not be the final court of appeal, would be constitutional issues, with the Constitutional Court as the final court of appeal. The Constitution, however, established the Supreme Court of Appeal as the final court of appeals in all matters, except constitutional matters. The SCA has subsequently ruled that it is also the final court for appeals against the decisions of the LAC.³²⁶ This means that the SCA can overturn judgments from the LAC. This issue of jurisdiction as discussed earlier in chapter 3 has posed a great challenge to effective dispute resolution in South Africa.

5.2.7. High referrals to the CCMA

It has been estimated that about seventy percent of the employed in South Africa fall under the jurisdiction of the CCMA, with the rest subject to dispute resolution by bargaining councils.³²⁷ It has been suggested that a disproportionate share of semi-skilled workers fall under the bargaining council system, and as a result the CCMA has to provide services to a relatively higher share of skilled formal sector employees. This is certainly true of the private sector, where private sector bargaining councils do not cover Managers and Professionals, while the PSCBC does cover Professionals and certain levels of Management. In addition, the CCMA is the only dispute resolution institution that covers (unskilled) domestic workers and agricultural workers, as well as the majority of elementary workers. As a result

³²⁴ *Ibid.*

³²⁵ Benjamin (2008). *Opcit.*

³²⁶ Bhorat *et al*, (2007), "Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions". DPRU. Pg.16.

³²⁷ *Ibid.*

CCMA coverage is relatively higher at the two extremes of the skills spectrum. High referrals have posed a great challenge to effective dispute resolution in South Africa.

5.2.8. Failure of internal mechanisms

The fact that so many disputes are referred to the CCMA for conciliation could be an indication that the internal conflict resolution mechanisms are not used properly or fully understood in a specific organization. The dispute resolution system should attempt to deal with conflict at a low level before it escalates and becomes highly formalized disputes. The more formalized the conflict, the more careful it should be dealt with as the damages to the parties increase. If conflict is detected in a latent phase, that is, before it becomes visible, it can be dealt with through proper communication, motivation, and sensitivity training. Once it has reached the grievance phase, it usually involves company time and money to resolve the grievance since senior management is involved in the procedure and inquiries. The serious emerging challenge here is the failure of internal dispute resolution mechanisms to take up responsibility and thereby, channeling the work load to the CCMA.

5.3. THE RESULTING RECOMMENDATIONS: A BROAD OVERVIEW FOR LAW REFORM

How effective dispute resolution mechanisms are, has raised a lot of dust in the labour law system in South. The increase in case load, high referrals and the yet high cost involved in dispute resolution has questioned the effectiveness of existing mechanisms. Given the challenges faced by dispute resolution mechanisms, logic demands that some recommendations be made for purposes of law reforms. It is against this background that 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 and their resolution mechanisms.

In order to reduce the number of referrals, a filing fee or the presentation of security for costs should be introduced for certain cases. The idea is that this may restrict

access to the CCMA in such a way that inappropriate cases will be filtered out.³²⁸ This may however also impact on the number of legitimate cases referred to the CCMA, particularly by vulnerable workers who cannot afford such a fee.

Furthermore, for the new dispute resolution system to be successful, it should be efficient and effective. Efficiency is said to be “the holy grail” of dispute resolution. Disputes should be resolved as quickly and informally as possible, with little or no procedural technicalities. The existence of a labour dispute mechanism brings with it the need of the disputing parties to have the dispute resolved – the dispute cannot be allowed to drag on indefinitely, as some solution has to be found. Moreover, the efficiency aspect of the dispute resolution entails that parties should have easy access to the dispute resolution system. They should know who to approach and how to involve the dispute resolution institution in their dispute. There should be the minimum formalities in obtaining the assistance of the dispute resolution mechanisms such as the CCMA.

Similarly, efficiency is not made by machines; efficiency in dispute resolution can only be achieved by human beings with the necessary tools and skills. The people manning the CCMA Commissioners’ office will play a decisive role in determining how efficiently the dispute resolution system works. It is those conciliators and arbitrators and other clerical staff that must strike the balance between countervailing considerations of practical and informal dispute resolution on the one hand and the maintenance of fairness, justice, impartiality and order on the other hand.

Not only will the human resources of the CCMA commissioners determine, to a large extent, the efficiency of the system, but they will also determine the views and the attitudes that employers, employers’ organizations and trade unions (and, for that

³²⁸ Van Niekerk, (2007), “Regulating Flexibility and Small Business: Revisiting the LRA and BCEA, A Response to Halton Cheadle’s Concept Paper”. Development Policy Research Unit Working Paper. No 07/119. March 2007. Pg.47.

matter, even individual employees) take of the dispute resolution system introduced by the LRA.

However, the LRA³²⁹ stipulates that, when a dispute has been referred to the CCMA, the CCMA must attempt to resolve disputes through conciliation within 30 days of the date the CCMA received the referral. According to Benjamin and Gruen allowing for regional variations, the national average of the period between date of referral and activation date ranges from six to ten days. When these days are added to the period from activation to end date, the sum exceeds the 30-day limit for conciliations and the turnaround for arbitrations reaches 50 days. It is recommended that the CCMA should include the period between date of referral/request and activation date in its efficiency calculations and still meet its efficiency requirements. The inclusion will mean increased expedition.

Besides, defects in internal disciplinary procedures especially in small and medium business entities must be identified and rectified quickly. Transparency about internal procedures must be encouraged to avoid unfair labour practices, discrimination and victimization.

The CCMA is faced by a much higher number of referrals than initially anticipated and the accreditation of private agencies should be encouraged, along with the support for bargaining councils' dispute resolution functions, making more use of private dispute resolution. The only true ADR is found in private dispute resolution. 'Employers think it is too expensive but after four or five appearances at the CCMA they begin to think differently.' If the parties are sophisticated enough, as in the case of professional and high level workers as well as unionized sectors of the economy, they should use private dispute resolution. The CCMA should thus be reserved for parties that are unsophisticated and highly adversarial, as in the majority of individual unfair dismissal cases involving small to medium-sized employers.

³²⁹ Section 135.

On the other hand, protection of workers is at the heart of the ILO mandate and accords with principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, and the Decent Work Agenda. Unfortunately too many employees are still excluded from the mantle of freedom of association and collective representation, and this is cause for concern by the ILO, hence its adoption of the Employment Relationship Recommendation, 2006 (No. 198). Most employees are excluded from protection because of the problem of identifying whether they are in an employment relationship or not. Trade unions have to be seen to be actively involved in the implementation of international labour standards.

Most statutes exclude domestic, agricultural, migrant workers and workers in the informal sector from the definition of employee. Unfortunately, these are the most vulnerable of workers. While, these areas pose problems in terms of enforcement of prescribed minimum standards because of the nature of the work and the workplaces involved existing legislation need needs to be amended to cover them as well. For instance, domestic workers are engaged individually and in private households, and agricultural workers are located in relatively remote parts of the country. This can be addressed by employing more flexible standards in respect of these sectors.

Besides, regular training for the presiding commissioners is required in order to keep them with updates of the law. It is obvious that the number of commissioners is not enough therefore; it could be wise to increase a number of commissioners by training or recruiting LLB graduates in order to deal with the current increase of referrals at the CCMA also as way of creating employment in order to reduce poverty in South Africa. Training in labour relations should also extend to employers especially those at the managerial levels who deal with disciplinary issues and the shop stewards who represent the employees. This will lessen the burden of poor staff.

Also, effective use of the CCMA, bargaining councils and accredited agencies may assist in minimizing strike actions, lockouts and replacement labour. Furthermore, this may advance productivity by avoiding unnecessary losses of workdays and

create good working environment, peace and democracy which the LRA is striving for.

Besides, another solution to the problem of the high referral rate would be the training and education of employers, employees and trade union representatives. Awareness levels should be increased and problematic sectors should be targeted for information sharing and training. This training should include requirements for substantive and procedural fairness in internal mechanisms and processes as well as training in the rights and obligations of employers, employees and trade unions.

5.4. CONCLUDING REMARKS

As seen from the beginning of this research, the aims and objectives were to establish and analyse the effectiveness of dispute resolution mechanisms within the South African labour law system, to establish international instruments with a view to harmonise labour laws of South Africa with that of the international community, to identify challenges or gaps in the system, with a view to transform labour relations; and to promote and maintain peace through effective dispute resolution mechanisms at workplace.

In chapter two, some interesting developments pertaining to labour dispute resolution were discussed from the first legislation providing for mechanisms for dealing with labour disputes to the Industrial Conciliation Act³³⁰ with its Industrial Councils and Conciliation Boards, to the Industrial Conciliation Act³³¹ which later became the LRA³³² and to changes brought about by the Wiehahn Commission which removed the exclusion of black employees thus ending the dual system of labour relations in the South Africa.

Chapter three on the other hand, analysed the various structures and mechanisms of labour dispute resolution in South Africa in order to ascertain their effectiveness. Besides, chapter four of this research discussed South Africa's compliance with

³³⁰ 11 of 1924.

³³¹ 28 Of 1956.

³³² *Ibid.*

International minimum standards which arises from the ILO and how these standards impact on dispute resolution and lessons drawn from them by South Africa. The last chapter, that is, chapter five dealt with the emerging challenges derived from the research such as continuous increase in the CCMA's caseload and long delays in the resolution of cases which hampers the effective resolution of labour disputes in the South African labour law system. Resulting recommendations were also raised and discussed to make provisions for law reforms.

In a nutshell, from the beginning of labour law, there has been the struggle for resolving disputes in the workplace and this is still a continuous process as there is need for the government to address new policies that will aid in this light. Peace is essential in the workplace without which, the workplace will be a chaos. It is imperative therefore, for both role players in the industry to employ all necessary efforts and strategy in order to maintain a peaceful balance and resolve disputes amicably, maximizing dispute resolution mechanisms to the full. However, the challenges facing dispute resolution were also analysed and some recommendations for law reforms were advanced. From the issues dealt with above, it is hoped that the title of this discussion has been appropriately examined and the aims and objectives of the study fully achieved. Besides the challenges developed and the proposed recommendations, more work still needs to be done in the future by researchers in the area of dispute resolution.

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