

The Commission for Conciliation, Mediation and Arbitration (CCMA) and Alternative Dispute Resolution (ADR) in labour relations in South Africa: an appraisal of efficacy and challenges

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Abstract

The Labour Relations Act 66 of 1995 provides that Alternative Dispute Resolution (ADR) is predicated on providing less complex statutory processes within which labour disputes may be expeditiously and cost effectively resolved. Has or is this fundamental objective being realised? This article proffers a critical disposition of the realities besieging South Africa's prime institution of labour dispute resolution, the Commission for Conciliation, Mediation and Arbitration (CCMA), whose establishment brought about high expectations in terms of normalising systems of labour dispute resolution, and ushering in employee-friendly employment relations. It has been observed that although the CCMA provides simplified labour dispute processes, majority of workers still struggle to achieve a practical realisation of the intended ADR benefits, largely owing to low literacy levels and the skewed bargaining power which is still slanted towards employers. Employers still wield the determining power at both conciliation and arbitration stages, and are better placed to manipulate a conciliation outcome due to technical knowledge of labour laws and the power of record keeping, against employees, who often are the disadvantaged proletariat with limited or no skills or training in labour relations. Further, the arbitration process still manifests some elements of adversarialism, which favours the resources-rich employers.

Keywords: *labour disputes resolution, labour rights, conciliation, arbitration, labour peace.*

JEL Classification: *J52, K31*

1. Introduction

It is difficult to undertake a precise assessment of the efficacy of the Commission for Conciliation, Mediation and Arbitration (CCMA),² particularly because labour relations, and labour disputes arising therein, are dynamic in nature. It is also because of the socio-economic complexities facing workers in the modern political economy and the institutional challenges in general, all of which to a large extent impact on the wellbeing of workers, labour peace and economic development. Further, not all labour disputes are referred to the CCMA, often because employees lack requisite knowledge on what ought to be referred to the CCMA and how to challenge employers. It should be noted that labour relations is fundamentally

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² Anton Roskam, *An Exploratory Look into Labour Market Regulation*, "Development Policy Research Unit" (2007) at p. 38.

characterised by constant contest between two parties, employers and employees, whose interests are traditionally at conflict, grapple with balancing such competing interests, and are thus required to find strategies of strengthening their working relations while each of the party correspondingly endeavours to protect or safeguard their interests. It is for this reason that labour disputes ought to be understood as a characteristic daily occurrence in the workplace. This entails that the labour dispute resolution systems and institutions, especially the CCMA, carry a huge constitutional obligation to assist parties to employment in resolving their disputes in order to achieve the core ideals of the Alternative Dispute Resolution (ADR). When the CCMA was established, it was seen as the most innovative essence of post-apartheid institutional reconstruction in the area of labour dispute resolution, especially because it given a fundamental mandate of resolving labour disputes in a manner that encourages parties to refrain from playing technicalities and delays that are predominantly prevalent in the traditional adversarial litigation process.³ Distressingly, the present dispute resolution system is observed to be under a heavy strain.⁴ This necessitates the need to establish the efficacy of the CCMA in its quest of labour disputes resolution in the contemporary highly contested labour market, whose economy is also under stress.

2. Rationale and research approach

At the centre of attention, this article proffers a critical reflection on the efficacy of the CCMA in its quest of advancing a constitutional mandate of providing expeditious and cost effective mechanisms of labour dispute resolution. The CCMA is such a unique institution that has been playing a fundamental role in the resolution of disputes in labour relations. It varies significantly from a traditional court system, but serve the significant function of supplementing mechanism(s) of dispute resolution other than litigation. The CCMA was established in November nineteen-ninety-six (1996) in terms of section 112 of the Labour Relations Act,⁵ with its prime functions being to foster for a swift, cost effective and expeditious resolution of labour disputes, among others.⁶ It is an autonomous statutory agency with legal personality,⁷ primarily funded by, but independent from, the state to provide free services to its users, emphasizing particularly on employees, considering the already slanted bargaining power in labour relations (between employer(s)-employee(s)). This was necessitated by the fact that majority of the workforce was made under-resourced (both economically and educationally) during the apartheid regime, resultantly, rendering them incapable to bear with the costs and complexities

³ Paul Benjamin, *Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges*. "Industrial Law Journal" (2009) at p. 26.

⁴ Hanneli Bendeman, *An Analysis of the Problems of the Labour Dispute Resolution System in South Africa*, "African Journal on Conflict Resolution" (2006) p. 83.

⁵ Labour Relations Act, 66 of 1995.

⁶ Paul Benjamin & Carola Gruen, 'The Regulatory Efficacy of the CCMA: A Statistical Analysis of the CCMA's CMS Database, (2005) at p. 10.

⁷ Darcy Du Doit et al, *Labour Relations Law: A Comprehensive Guide*, "LexisNexis" (2006) at p. 90.

associated with the traditional litigation system. The Commission's primary functions include amongst others, conciliating and arbitrating disputes referred in terms of the LRA and other labour statutes. It was hoped that labour relations disputes settlement rate would increase and levels of strikes would drop.⁸ Upon its inception, the general expectation was that the Commission would solely oversee and execute the dispute resolution functions as stipulated in the LRA. Considerate of the load and pressures in the process, Commission recognized the need of supplementary bodies to assist in easing the loads and pressures it had in carrying out the dispute resolution functions. This the Commission does by accrediting bodies such as bargaining and statutory councils and private agencies, on application,⁹ and establishing workplace forums, notably making dispute resolution systems effective.

Therefore, of utmost importance is to establish whether the CCMA is adequately efficient in carrying out its labour dispute resolution mandate. Further, it is crucial to understand if the institution has succeeded in ending adversarial approaches to labour dispute resolution, and how the system is beneficial to employees. The article employs doctrinal method of research, in that it focuses on both constitutional and legislative prescripts, legal norms that provides a regulatory framework and thus inform development of policy and practice in the workplace. These legal tools are relied upon and utilised as theoretical basis upon which arguments are formulated, considerate of constant workplace changes and the challenges compounded by globalisation and the political economy.

3. Historical overview of labour disputes resolution in South Africa

Until 1994, South Africa's industrial relations epitomised conflict itself, such that it was described as 'an explosive situation'.¹⁰ It is a troubled history. Labour relations were undoubtedly characterised by supremacy of employers over workers, lack of fair statutory framework, which excluded a huge workforce from the protective ambits of the law and thus denied of their basic labour rights such as to access labour dispute resolution institutions. Therefore, the dark historical outlook with regard to labour relations bargaining power (adversarialism), the complex traditional, too formal and costly litigation system contributed immensely towards the establishment of the CCMA. The rationale was to provide an institution with less stringent mechanisms best suited for dealing with workplace disputes in a manner favourable to the disputants.

It should be noted that events that occurred between the 17th and 20th centuries, which also resulted in the industrial revolution, were largely determined by the historical position of the exploited workers.¹¹ In South Africa, incidents that occurred during 1921 to 1947 culminated in labour relations changes, especially the

⁸ Paul Benjamin & Carola Gruen, (supra) (2005) at p. 1.

⁹ LRA, s127.

¹⁰ Meera Ichharam, *South Africa's Bargaining Council & their Role in Dispute Resolution*, (2002) at p. 4.

¹¹ Gera Ferreira, *The CCMA: Its effectiveness in dispute resolution in labour relations*, (2004) at p. 74.

1922 strike action, which led to the passing of Industrial Conciliation Act in 1924, the Act which gave birth to Industrial Conciliation Act of 1956, which was later renamed Labour Relations Act of 1956. After the 1922 strike, labour relations were institutionalised and legislation passed to grant recognition and registration of trade unions and employers' organisations.¹² Most importantly, Industrial Councils and structures for resolving industrial disputes were instituted.¹³ In 1948, the Nationalist Party took over government, emphasizing on a policy of separate development, also called apartheid. The majority of workers were excluded from the protective ambit of such labour laws, understandably because this would be a source of cheap labour to be exploited. Moreover, and after 1956, the then LRA did not apply to farm workers, civil servants, educators or domestic workers,¹⁴ which impliedly meant that the 1924 instituted Industrial Councils, could not be accessed by majority of workers for the resolution of their labour disputes and further, trade union activities and strikes were restricted by the Act, merely to ensure tougher controls over black workers. Tensions in labour relations soon worsened, and lasted until 1979, when the government appointed the Wiehahn Commission to establish mechanisms which could best deal with labour problems. On its findings, the Commission made its recommendations, amongst others, that 'race should no longer be a criterion for statutory recognition of trade unions and its members'. This largely meant that dispute resolution institutions should be accessible to all. Notwithstanding the Commission's recommendations, the labour tensions persisted due to apartheid system until early 1990s and at the attainment of democracy in 1994 when the dispute resolution was adapted accordingly.¹⁵

At the advent of democracy, the Constitution became the supreme law of the republic, and enshrined a comprehensive Bill of Rights, which included labour rights¹⁶ among others. Resultant from these entrenched constitutional labour rights, dedicated labour legislation¹⁷ was passed to deal exclusively with the labour matters, giving effect to the Constitution. Of utmost importance was the LRA of 1995, which established the CCMA.¹⁸ Amongst LRA's main purposes was to advance economic development, social justice, labour peace and democratisation of the workplace.¹⁹ The CCMA has been/remain an instrumental institution in the resolution of labour disputes. The LRA brought about historic changes in labour law, reshaping labour

¹² *Ibid.*, at p. 75.

¹³ *Ibid.*

¹⁴ Neville Botha & Carl Mischke, *A New Labour Dispensation for South Africa* (1997) at p. 134.

¹⁵ Gera Ferreira, (*supra*), (2004) at p. 76.

¹⁶ The Constitution, s23 – which includes the rights to fair labour practices and the right to strike, freedom of association and collective bargaining.

¹⁷ Labour Relations Act (LRA) 66 of 1995, Basic Conditions of Employment Act (BCEA) 75 of 1997, Employment Equity Act (EEA) 55 of 1998, Occupational and Safety Act (OHS) 85 of 1993, Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 and Skill Development Act 97 of 1998.

¹⁸ LRA s112 - s126.

¹⁹ Gera Ferreira, (*supra*), (2004) p.76. *See also* s1 of the LRA (in Chapter 1).

relations into a democratic field,²⁰ and providing a framework for new partnerships between employees and employers and between government, labour and business.²¹

4. The CCMA at glance: structure, functioning and jurisdiction

The LRA brought about drastic changes in labour dispute resolution processes by establishing the CCMA²² as an institution of first instance in labour disputes resolution, except where the bargaining councils or statutory councils, accredited by the Commission, exists to prevent such referral or is able to resolve such disputes.²³ It was meant to resolve disputes through communication and agreement reaching, opposed to an adversarial adjudication or court system. The CCMA was introduced together with the Labour Court system to replace the old Conciliation Boards and Industrial Court.²⁴

As stated, the CCMA is independent of government, any political party, trade union, employers' association, or federation of trade unions. It is governed by a tripartite governing body consisting of a chairperson and other nine members, each nominated by National Economic, Development and Labour Council (NEDLAC), a representative body appointed by the Minister of Labour for three years.²⁵ The governing body has to be representative of three social partners; workers, business and government, becomes the supreme policy making body and strategic executive of the CCMA.²⁶ At the CCMA, the actual dispute resolution processes are executed by Commissioners appointed by the governing body. These Commissioners may be appointed on a full-time or part-time basis, and do not necessarily need to possess a legal qualification.²⁷ The CCMA has jurisdiction in all nine provinces of the Republic of South Africa.²⁸ Its main functions includes; resolving disputes, establishing workplace forums, providing advice, assistance and training on dispute resolution design and collective bargaining structures and accrediting councils and private agencies to conciliate and arbitrate certain disputes.²⁹

5. Has the CCMA met the expectations as aspired by the LRA of 1995?

The yardstick in ascertaining whether the CCMA has succeeded in meeting its statutory aspirations and obligations shall be by establishing its labour dispute settlement rate through mechanisms such as conciliation and arbitration, in slight

²⁰ Meera Ichharam, (*supra*), (2002) at p.6.

²¹ Department of Labour, *Know Your LRA: A guide to the new LRA, 1995*, (1997) at p.1.

²² *Ibid*, at p.66.

²³ King, In Sarah Christie & Lovemore Madhuku, '*Labour Dispute Resolution in Southern Africa*' 1996 at p. 62.

²⁴ Gera Ferreira, (*supra*), at p.78.

²⁵ See s116 (2) of the LRA.

²⁶ CCMA Annual Report 2008/2009 by the Dept. of Labour, at p.4.

²⁷ LRA, s117.

²⁸ LRA, s114.

²⁹ Dept. of Labour, *Know Your LRA: A guide to the new LRA, 1995*, at p.67. See also s115 of LRA.

comparison with its predecessors, pre-1994. Establishing the Commission's efficiency should also be done in close check with the primary objective that the LRA sought to achieve through this institution. Most importantly, the efficacy of the CCMA can also be gauged by closely ascertaining how the mechanisms used (conciliation/mediation and arbitration) have fared in practice. This entails a question whether it is the presence of a third party which gets the dispute resolved or the parties themselves. In doing so, it remains crucial to also note the critical challenges and problems that the Commission encounters, which is inclusive of amongst others, the high levels/rate of referrals, inadequate competence in staff, and so forth. Hence, the success of the CCMA to a large extent determines the success of the entire LRA with regards to its approach towards labour dispute resolution.³⁰ In ascertaining the effectiveness of this institution, it is also crucial to establish whether the 'expeditiousness' of proceedings does not impact on the quality of service in the labour dispute resolution. This is necessitated by a concern that facilitating a quick resolution may merely be for case completion and not actually for ensuring a quality service, which may as well be compromising the rationale for the institution.

One of the most notable challenges that the CCMA has had to grapple with is the issue of escalating referrals³¹ and backlog regarding cases referred for conciliation and arbitration. Notwithstanding these problems, the institution has been central in transforming the landscape of labour relations in South Africa,³² particularly in labour dispute resolution. General statistics showed that employers and employees are relying heavily on the CCMA to resolve their labour problems.³³ The use of the CCMA mechanisms surely has led to a significant decline in the levels of industrial actions (strikes and lock-outs), since the involvement of disputants in dispute resolution place them better to explore alternatives in settling their dispute.

6. The efficacy of the CCMA mechanisms in dispute resolution

The mechanisms proffered by the CCMA have been both user-friendly and efficient in resolving labour disputes, considerate of what the LRA sought to achieve, though not without critiques. These mechanisms (particularly conciliation and arbitration) bring democracy into action, resolving disputes through communication and reaching of agreement.³⁴ The CCMA provides for a simplified procedure and a specific time-frame for dispute resolution. Once a dispute is declared, an employee or employer should refer it without delay to the CCMA, which must conciliate it within 30 days. If the matter remains unresolved, the Commissioner issues a certificate to that effect, which is for party(ies) whether to request arbitration or opt for industrial action. The CCMA also provides for the most expedited mechanism, con-arb, which is where an impartial third party assists parties settle their dispute

³⁰ Neville Botha & Carl Mischke, *A New Labour Dispensation for South Africa*, (1997) at p. 139.

³¹ Paul Benjamin & Carola Gruen, (*supra*), (2005) at p.5 figure 1 (caseload from 1996 – 2005).

³² CCMA Annual Report 2008/2009 by the Dept. of Labour, at p. 3.

³³ Gera Ferreira, (*supra*), (2004) at p.83.

³⁴ *Ibid* at p.78.

through conciliation, failure for which s/he determine dispute by an arbitral award.³⁵ While con-arb offers an advantage of expediting disputing resolution process at the CCMA, it also has its own pitfalls. Parties, particularly those with high bargaining power, often turn to take the conciliation stage less serious, as they know that arbitration will settle the matter. This therefore has a bad bearing on the efficiency of the institution. What is pleasing is that the mechanisms provided by the institution are less formal than the traditional adversarial court system, as intended by the LRA, except that there are still problems posed by the levels of illiteracy in the majority of the general workforce. This is noted to have led to an initiative that legal representation be allowed at the arbitration, because questions of law are entertained at the proceedings.

At the conciliation of the CCMA, a party may appear in person or only be represented by a director or employee of that party or any member, office bearer or official of that party's registered trade union or registered employer's organisation.³⁶ Legal representation is not allowed. Parties may be represented by a Legal practitioner in arbitration, except in disputes for misconduct or incapacity, unless the commissioner consent and concludes that the matter requires legal representation. Arbitration award(s) is final and binding, without an appeal option, on the parties and may only be reviewed by the Labour Court.³⁷

6.1 Complementing the CCMA and labour dispute resolution processes

Considerate of the high levels of referrals and the backlog of cases, the CCMA accredits bodies such as bargaining councils,³⁸ statutory councils,³⁹ private agencies⁴⁰ and workplace forums.⁴¹ These bodies are accredited by the CCMA to resolve disputes, easing pressure on the institution and assisting parties to design systems tailored to their needs.⁴² It is for this reason that the existence of these bodies assist the CCMA in dealing with its case backlog and allow representation of workers in less organised sectors. However, there has been a noted reluctance on the part of the Commission in the accreditation of these bodies, which counteract an ambition of an efficient, time and cost effective resolution of dispute at the CCMA.

Given the need for a comprehensive understanding of its functioning, the CCMA have established a Best Practice and Information Programme, which fundamentally aims at providing all stakeholders with guidelines and training in the use of the institution and its dispute resolution mechanisms. In 2005/6/7 to date, this programme conducted nationwide seminars which consisted amongst others, shop steward workshops, trade unionist workshops, employers workshops and CCMA

³⁵ John Brand, *Labour Dispute Resolution*, (1997) at p. 62.

³⁶ Conciliation, <http://www.ccma.org.za/Display.asp?LI=32&L2=12> (accessed on 13/04/2010)

³⁷ Darcy Du toit, et al., (*supra*), (2006) 5th ed. at p.117.

³⁸ LRA, s.27.

³⁹ *Ibid*, s.40.

⁴⁰ Haroon Borhat & Halton Cheadle, *Labour Reform in South Africa*, (2009) at p. 32.

⁴¹ LRA, s.80.

⁴² Haroon Borhat & Halton Cheadle, (2009) (*supra*).

user forum meetings.⁴³ The rationale for these seminars has been to ensure an efficient dispute resolution by the Commission. In this regard it is contended that these workshops should to a large extent, also prioritise equipping the Commissioners with dynamics that play out in the labour relations, which would do more to effectuate the CCMA's dispute resolution mandate.⁴⁴ The CCMA, through Senior Commissioners in the provinces, further monitors rulings, settlement agreements and awards made at the institution to ensure the highest standards of professional conduct are maintained.

6.2 A brief statistical reflection

Since its inception, the CCMA has had to grapple with a substantial amount of escalation in the number of case referrals. This demonstrates the labour legitimacy being enjoyed by this institution and the common ground held by the social partners about its existence, especially the workers. Six years after its inception, that was in 2002/3, the CCMA recorded a total of 118 051 disputes that were referred for resolution, an average of 470 a day, most (71%) of which were settled through conciliation (and within the 30 days' time-frame) and arbitration respectively.⁴⁵ In 2008/09, the CCMA dealt with more than 100 000 cases annually,⁴⁶ a number which a decade later, would be 188 449 cases, representing over 88% increase, 68% of such cases were settled through conciliation for 2017/18 years.⁴⁷ In 2009, approximately 80 000 of such cases were for dismissal, amounting to 80% of its referrals.⁴⁸ The high rate of referrals indicates that the CCMA plays a pivotal role in the dispute resolution system, but equally signifies the dynamics besieging the labour market, workers in particular.

The ever increasing caseload that the CCMA continues to grapple with should be a cause for concern, because it impacts on the efficacy of the institution, especially with regards to perfecting the injunction of universal access to an essential statutory worker entitlement which does not only resolve labour disputes, but ensures justice as well. And of course, it should be worrying how the institution may cope with this caseload. In recognition of the challenge, the LRA recognises the establishment of bodies such as bargaining and statutory councils, private agencies and workplace forums, to amongst others, assist in preventing and resolving labour disputes. This ensures that the institution performs as per its primary objectives and its efficiency is not compromised. During 2017, the year during which the CCMA celebrated its twentieth birthday, it was reported that since its inception, the CCMA registered a total of 2,7 million cases, with over 1,8 million of such cases resolved

⁴³ Ibid. See also *CCMA Annual Report 2006/2007* by the Department of Labour at p.7.

⁴⁴ Anton Roskam, (*supra*), (2007) at p. 38.

⁴⁵ Gera Ferreira, (*supra*), (2004) at p. 83.

⁴⁶ CCMA Annual Report 2008/2009 by the Dept. of Labour at p. 7.

⁴⁷ The CCMA, *Annual Report 2016/17*, at p. 24.

⁴⁸ Haroon Borat & Halton Cheadle, 'Labour Reform in South Africa' 2009 at p. 31.

through conciliation, and over 800 000 through arbitration,⁴⁹ and in most instances, fundamentally ending several protracted destructive industrial actions.

6.3 The efficacy of the CCMA: an appraisal

Except for notable operational challenges such as high referrals or caseloads, it is asserted that the CCMA has generally been efficient in executing its dispute resolution mandate. This is considerate of the extent of settlement rates particularly through conciliation as aspired by the LRA, which in the main, has sought to provide expeditious, cost effective and informal dispute resolution through the CCMA. It is asserted that to a large extent, this has been achieved, though not without appraisals, because the 71% settlement rate at conciliation in principle cost parties nothing and is mostly within the 30 days' time-frame. Through the CCMA, adversarialism in labour relations was at least brought to an end, in favour of mechanisms providing for an employee-employer joint-problem solving strategy.

Although the institution is observed to have been efficient in labour disputes resolution, there are several notable aspects which threaten its effectiveness. These aspects are identified as emerging challenges facing the CCMA. I have opted to highlight three practical issues which feature predominantly as clear challenges. *First*, the case referral remains somewhat legalistic in form and nature. The forms to be completed are still complex for a layman, and unnecessarily long. *Second*, the employers are still better placed to influence an outcome of the conciliation process because they still wield a superior bargaining power. I have practically observed this in a case where the employer was clearly hellbent on relying on his power as to constrain the employee into settling on terms most favourable to the employer, but not necessarily conforming to prescripts of justice, fairness and economic development as aspired by the LRA. *Third*, majority of the working population are still semi-literate or illiterate. This entails that their ability to comprehend complex legal issues that unfolds during either conciliation or arbitration is limited, which suggests that the employer has leverage to utilise his knowledge of labour laws to his advantage.

7. Conclusion

The object of this article was to ascertain the efficacy of the CCMA in effectuating the constitutional injunction of providing employee orientated labour justice and social peace, through accessible, cheap and expeditious labour disputes resolution. However, it has been observed that ascertaining the precise efficacy of the CCMA is a difficult exercise, mainly owing to the ever spiralling challenges that the institution encounters on a daily basis. This is inclusive of the issue of rising caseload and the labour market dynamics that continue to expose workers to enormous labour risks. Often such labour market dynamics result in some labour

⁴⁹ The CCMA, *Annual Report 2016/17*, at p. 13.

disputes not being reported or ever getting an opportunity of being heard by the CCMA, mostly because employees have no knowledge on how to challenge their employers, who still wield stronger bargaining power, or employees lack knowledge and skill with regards to what laws to invoke in order to realize labour justice. But apart from these notable practical challenges, it is asserted that the existence of CCMA has to a large extent transformed the landscape of labour disputes resolution by considerably ending adversarialism in both decision making and resolution of labour disputes. The institution is steadfast in its attempt to perfecting service delivery of providing expeditious, cost effective and informal methods of resolving labour disputes. But, the issue of employers still relying on their stronger bargaining power to influence conciliation and arbitration outcomes is a major problem. Thus, it is significant for employers to appreciate the extent of employees' vulnerability, and perhaps be justice orientated, which shall assist in relationship restructuring, then in adversarial litigation where parties only seek outcomes favourable to their position.

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