

## **The Commission for Conciliation, Mediation and Arbitration: its effectiveness in dispute resolution in labour relations**

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### **Abstract**

In this article, the important issue of dispute resolution in South African labour relations is explored. After brief reference to the history of labour relations since the seventeenth century, the attention is focused on labour legislation promulgated since 1994. The Commission for Conciliation, Mediation and Arbitration (CCMA) is discussed in greater detail, with some indication of the effectiveness of conciliation and mediation as tools in resolving disputes, as well as a discussion of the most recent available statistics on its activities. The conclusion looks at its future, particularly its continued aim to provide a fast, effective and user-friendly service.

### **Introduction**

At the heart of democracy is an individual with a voice and the right to use it. At the core of economic development and recovery is an individual who works and has a right to a work environment conducive to wellbeing and productivity. Those who work are crucial to the future of South Africa. The new government therefore envisaged in 1994 a comprehensive statutory framework to give effect to the constitutionally entrenched labour rights. This would entail the reform of labour policy to regulate all facets of and to manage the labour relationship (cf. Venter 2003, 148). The potential value of a labour environment free from conflict cannot be denied. The maintenance of constructive and harmonious labour relations through a sound employment relationship, however, often gives rise to divergent interests and different objectives among the parties to the relationship, which could result in conflict. This relationship is further fragile as a consequence of the tension resulting from economic imperatives, high levels of unemployment and prevailing social

conditions, and it should be maintained, among others, through the proper management of resolutions in a constructive manner.

In the government's attempts to promote free collective bargaining within the new socio-political dispensation (see Bendix 2001, 115), a legislative framework to establish this constructive environment was put in place and provision was made to put its principles in practice through an institution for dispute resolution and a variety of appropriate mechanisms. The Labour Relations Act, 1995 (Act 66 of 1995) established the Commission for Conciliation, Mediation and Arbitration (CCMA) to provide a more flexible, cost-effective and constructive mechanism for the resolution of labour disputes through dialogue and joint problem solving. This was an attempt to speed up dispute settlement and to relieve the Industrial Court of much of its burden.

This article explores the history of South African labour relations in broad brush strokes, covering the period from the seventeenth century until the present. It sets out the new legislative framework that governs labour relations in the country. Different types of dispute are defined, and the CCMA and the Labour Courts are discussed in some detail. The work of the CCMA is discussed with references to the latest available statistics on its activities. The article concludes with indications of the Commission's continuing role and its established aim to deliver a dispute resolution process that is fast, effective and user-friendly.

## **Historical development of labour relations in South Africa**

Knowledge about the history of any phenomenon can contribute to a greater understanding of the present by placing it in context and showing how it has evolved. This applies particularly to labour relations in South Africa. In the past, labour relations were characterised by the domination of one group of workers over another group. The development of labour relations was mainly determined by the historical position of black workers. Although all workers played an important role in labour relations, conflict primarily originated from the dualistic system that existed within these relations. The historical development of labour relations may be divided into three distinct periods. These periods are described below.

### **Seventeenth century to the late twentieth century**

During the period 1652 to 1866, South African society was characterised by an agricultural economy. Work relationships were individualistic and paternalistic. Very little collective activity was recorded prior to 1850.

The discovery of diamonds (1867) and gold (1886) marked the beginning of the industrial revolution in South Africa. Trade unions developed gradually during this time, and were characterised by colour and language restrictions, as well as the

requirement that only trained workers were entitled to membership. A number of strikes occurred, especially among mine workers. Various pieces of legislation were passed by government in an attempt to resolve labour disputes. Legislation to regulate black labour issues was introduced as early as 1911, and collective action by black workers started taking shape from 1912. In 1918, the first trade union for black workers was established, and black employees went on strike for the first time in the same year.

After World War I, a global escalation in unemployment and poverty was experienced. In South Africa, poor economic conditions forced industries to close down and the gold price dropped. A general strike, which took place in 1922, was forcefully ended. After the strike, labour relations were institutionalised and legislation was passed to make provision for the statutory recognition and registration of trade unions and employer organisations. Industrial councils and structures aimed at resolving disputes were also instituted. Various labour incidents that took place in the period from 1921 to 1947 created a favourable climate for political change. This period was characterised by increased urbanisation, especially among black people, severe droughts, food shortages, inadequate job opportunities and high inflation rates.

When the National Party came to power in 1948, greater emphasis was placed on the policy of separate development. There was no clear distinction between the political and the labour relations systems during this period. Legislation restricted trade union activities and strikes. The trade union movement became established as a permanent factor in the South African system of labour relations. By 1976 it became clear that the Black Labour Relations Act of 1973 had not solved the problem of black worker labour problems. South Africa's major trading partners, partly because of the 1976 riots, became aware of the labour position of the black worker (Bendix 2001, 74). In the wake of the tension in the labour sphere, the government appointed a Commission of Inquiry into Labour Legislation in 1977, commonly known as the Wiehahn Commission, to seek possible means of adapting the industrial relations system to changing needs by rationalising the then existent labour legislation to eliminate bottlenecks and other problems experienced in the labour sphere.

The findings of the Commission were reported in six parts of which Part 1 dealt with the labour relationship. The last report appeared some time after the legislation that implemented the previous recommendations had been passed. The legislation that followed brought about the most radical changes in the then labour relationship. Voluntary inclusion in the collective bargaining structures of both employers and employees was confirmed by the Wiehann Commission in the conclusion to its report: 'Trade unionism, employers' organisations and collective bargaining are well established in South Africa and are making a valuable contribution to economic growth and stability' (Wiehann Commission 1979, 5). It was the Commission's recommendation that race should no longer be used as a criterion for the statutory recognition of trade unions. This recommendation was accepted by government and

encouraged the mobilisation of black workers. Various other factors also contributed to social violence and strikes during this period.

## **1988–1994**

Significant socio-political changes took place from 1987 onwards, which resulted in the amendment and expansion of labour legislation. Developments in the area of joint consultation, new directions in trade unionism, new employer and government initiatives and a steadily increasing unemployment problem necessitated changes in labour legislation in South Africa. Dispute resolution was adapted accordingly.

## **1995 to the present**

New institutions have been created and are involved in labour relations in South Africa since the promulgation of the Labour Relations Act 66 of 1995. New structures and procedures have been introduced, which represent the government's attempt to achieve a balance of power and to establish co-operation between the different parties involved in labour relations. Other pieces of legislation have been promulgated in support of the Labour Relations Act. This legislation will be briefly discussed in the following sections.

## **The legislative framework governing the labour relationship and labour disputes**

At the core of South Africa's democratic dispensation lies the Bill of Rights, in which a variety of rights are enshrined for all South Africans. As an intrinsic part of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), these rights also include the right to fair labour practices, freedom of association, collective bargaining and the right to strike (section 23). The labour relations legal framework, developed and formalised since, gives effect to the regulation of these rights.

The four bastions of the new labour relations environment framework, which were promulgated in quick succession, are the Labour Relations Act, 1995 (Act 66 of 1995), the Basic Conditions of Employment Act, 1997 (Act 75 of 1997), the Employment Equity Act, 1998 (Act 55 of 1998) and the Skills Development Act 1998 (Act 97 of 1998). These Acts have radically changed the way in which labour relationships are consummated in South Africa today, and together constitute what can be called the most comprehensive labour legislative framework in the world (Venter 2003, 148).

The purpose of the Labour Relations Act of 1995 is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act. These include the following:

- to give effect to and regulate the fundamental rights of all South Africans conferred by Section 23 of the Constitution;
- to promote collective bargaining and collective agreements (sections 23–63);
- to promote worker participation at the workplace (sections 78–94); and
- to promote effective dispute resolution (sections 112–184).

This has to be achieved through the provision of a framework in which employees and their unions, employers and employers' associations can bargain collectively and effectively to resolve disputes.

The Act delegates bargaining council agreements, unfair labour practice determinations and arbitration awards. It also establishes the parameters for the collective labour relationship. In order to promote labour peace, the Act provides a dispute settlement process aimed at conciliation and third-party intervention. Dispute resolution under this Act places less emphasis on costly and lengthy procedures and the courts, and more emphasis on constructive interventions such as mediation and arbitration that focus on co-operation and conciliation. Disputes are clearly an important part of labour relations. The following section discusses the different generic types of dispute.

## The nature of labour disputes

A dispute is 'a highly formalised manifestation of conflict in relation to workplace related matters' (Brand et al. 1997, 11). Disputes are differentiated by right or by interest, based on whether they arise from an actual or perceived entitlement or obligation (Venter et al. 2003, 383).

### Disputes of right

Disputes of right occur when there is a violation of an actual entitlement or obligation as set out in contracts of employment, collective agreements, or in various pieces of legislation and regulations governing the employment relationship.

### Disputes of interest

Disputes of interest may arise when a party to the employment relationship feels he or she should be, but is not yet entitled to something. Should entitlement be established after subsequent negotiation, however, the interest becomes a right. Issues that are bargained over but that are not regulated by any law or agreement may lead to a dispute of interest such as new wage levels and new conditions of

work. In order to settle a dispute, several mechanisms are entrenched in legislation. These mechanisms are discussed below.

## Dispute settlement mechanisms

With the emphasis in legislation regulating labour relations clearly on the quick and cost-effective resolution of conflicts and disputes, provision is made in legislation for the CCMA, as well as a dual-level court system. The CCMA is an institution that brings democracy to action. It is meant to resolve conflict through communication and the reaching of agreement. Where courts were used in the past as the battleground where labour 'wars' were fought, employees of all ranks are now given the opportunity to see their complaints dealt with in a faster way, in a more friendly environment and with quicker results. The court system becomes the final option when all other attempts at resolution have failed, as well as for particular issues.

## The Commission for Conciliation, Mediation and Arbitration

The CCMA has been introduced together with the labour court system to replace the former Conciliation Boards and Industrial Court.

In accordance with the Labour Relations Act, 1995 (Act 66 of 1995) (chapter 7), a commission has to be appointed that is independent of the state and of any political party, union, employers' association, or federation of unions or employers' associations, and which will have jurisdiction in all the provinces to perform the functions outlined below.

The Commission *should*

- attempt to settle, through conciliation, any dispute referred to it in terms of the Act;
- where conciliation has not achieved the desired agreement, conduct arbitration if the Act require it to do so, or if any of the parties to a dispute within the jurisdiction of the Labour Court request the Commission to conduct such arbitration;
- provide assistance with the establishment of workplace forums (the formation of workplace forums is required under law); and
- compile and publish information and statistics regarding its activities (CCMA Annual Report 2002/2003).

The Commission also *may*

- if so requested, advise a party to a dispute on the procedures to be followed in terms of the Act;
- offer to settle a dispute that was not referred to it; and
- conduct pre-dismissal arbitrations, if so requested.

The Commission has compiled a set of rules in accordance with the Labour Relations Act 66 of 1995 and all its amendments. These rules control aspects such as the calculation of periods, the filing of documents with the CCMA, conciliation proceedings, rules for conciliation, arbitration and conciliation-arbitration (or conarb), referral of dismissal disputes to the Labour Court and pre-dismissal arbitration.

The CCMA is governed by a governing body that consists of a chairperson and nine other members (Addendum 3, Labour Relations Act 66 of 1995). 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. The governing body must appoint as many persons as commissioners as it considers necessary to perform the CCMA's functions. Commissioners may be appointed either on a full-time or a part-time basis. The director of the CCMA must be appointed to the governing body and perform the required functions in terms of the Act or any other law. A director of the Commission is a member of the governing body only because of his or her appointment, and may not vote at its meetings. The director may also appoint staff after consulting the governing body.

The Labour Relations Act 1995 attempted both to speed up dispute settlement and to relieve the Labour Court of much of its burden by separating unfair dismissals from other unfair labour practices and by subjecting most of these to mediation and arbitration by the CCMA. The CCMA is an entirely new body, established both to help settle disputes and to assist in the conduct of labour relations (Bendix 2001:567). Different types of dispute are identified by the Act, but disputes of right may be submitted first for conciliation by the CCMA, a bargaining council or its accredited agent and thereafter for arbitration by one of these institutions (Bendix 2001:568). The following types of dispute may be settled by the CCMA:

- dispute of interest in essential services
- dismissals relating to incapacity, incompetence, misconduct and operational requirements
- unfair labour practices (excluding discrimination)
- organisational rights
- collective agreements (interpretation and application)
- agency and closed shop agreements
- disputes relating to refusal bargaining
- workplace forums
- picketing.

The methods to be used in dispute resolution in the workplace are divided into four categories:

- procedures in which a third party attempts to facilitate consensus-building; this category includes conciliation and mediation
- procedures in which a third party is empowered to make final, binding decisions

- in order to resolve disputes; this category includes arbitration
- procedures in which the attempts to facilitate consensus by a third party fails and in which a third party has to make a binding decision in order to resolve the same dispute; this category includes the con-arb process
  - procedures involving adjudication in a court of law, in particular, in the Labour Court.

The first three categories are used by the CCMA in dispute resolution and are explored in greater detail below.

### *Conciliation*

Conciliation means an act of procuring goodwill or inducing a friendly feeling (Bendix 2001, 556). When it comes to dispute resolution, renewed goodwill has to be procured through the conciliation process. A forum has to be established where parties in conflict or in need of an agreement can come together once again 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. 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. The parties may agree to a longer period, however, if necessary. After this period, the commissioner must issue a certificate declaring that the dispute has been resolved or that it remains unresolved.

### *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 (Bendix 2001, 557). The mediator is actively involved in the dispute settlement 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.

### *Arbitration*

Arbitration entails the appointment of a third party to act as adjudicator in a dispute and to decide on the terms of the settlement. 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.

### *Conciliation-arbitration (con-arb)*

The so-called con-arb procedure was recently introduced as an amendment to the Labour Relations Act 66 of 1995. This was done in terms of the Labour Relations Amendment Act 12 of 2002 (Amendment of section 191 of Act 66 of 1995). 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. It may be a good initiative, but employers will have to be diligent. This process could lead to embarrassment and unfortunate consequences. In the past, labour disputes would normally go through a two-tiered process consisting of conciliation and arbitration. If conciliation failed, the matter could be referred for arbitration, which would take place on some future date that 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.

In disputes about dismissals or unfair labour practices relating to probation, the CCMA must proceed with arbitration immediately after certifying that the dispute is unresolved. This means that the dispute must be arbitrated on the same day. Arbitration entails that evidence has to be led and that a final and binding decision can be made. This implies that the parties would therefore have to prepare for the arbitration hearing in advance and have all witnesses and relevant evidence available immediately. 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. These cases represent the majority of disputes referred to the CCMA. However, in these cases the parties have an opportunity to object to the con-arb procedure in terms of CCMA rules. 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.

## Courts of law for labour dispute resolution

The final option available to parties in dispute is to refer the matter to a court of law for litigation. According to Chapter 7, Section D of the Labour Relations Act 66 of 1995, 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. The Labour Appeals Court 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.

This new Labour Court has higher status and extended functions (Bendix 2001, 89). The labour courts created by the Labour Relations Act 66 of 1995, have the same status as the High Court. The Act provides for dispute settlement procedures and facilities and for the resolution of unfair labour practice disputes. It remains the path of last resort and is meant to be utilised when other measures have failed, or in particular predefined cases.

As with all new institutions, as well as with the renewal of existing institutions, it is important to consider how well they are faring in practice. The following two sections will consider the effectiveness of mediation and arbitration as dispute resolution mechanisms, as well as the work of the CCMA.

## Effectiveness of mediation and arbitration

Disputes should ideally be resolved as quickly and informally as possible, with little or no procedural technicalities (Brand et al. 1997, 19). 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 pressurise 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 (Bendix 2001, 560). 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.

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.

## Dispute resolution activities of the CCMA

During the year from 1 April 2002 to 31 March 2003, a total of 118 051 disputes were referred to the CCMA – an average of 470 referrals every working day (CCMA Annual Report 2002/2003). The number of referrals received during this period represented a 7 per cent increase over the number of referrals received during the previous financial year (2001/2002). Of the 118 051 disputes referred to the CCMA, some 34 per cent were deemed to be outside the jurisdiction of the CCMA by the Screening and Allocation Teams located at the front desk of each CCMA provincial office.

Another 12 per cent (9 155) of cases were dealt with at the point of entry through pre-conciliation. This process was introduced with the aim of improving front desk services and the quick, cost-effective resolution of uncomplicated disputes. Of these 9 155 cases, 35 per cent were settled at the time of referral.

Some 71 per cent of the disputes referred to the CCMA during the 2002/2003 period were settled through conciliation. There was a decrease of 4 per cent from the previous year, because of the con-arb process introduced by the amendments to the Labour Relations Act promulgated in August 2002. A total of 2 512 con-arbs were conducted during the year.

A total of 41 896 arbitrations were conducted, representing a 3 per cent increase over the previous year. Of the arbitrations conducted during this period, 52 per cent resulted in awards being rendered, a further 21 per cent were settled by reverting to the conciliation process. Of the total arbitration awards rendered, 60 per cent were in favour of the employee and 40 per cent were in favour of the employer.

These statistics indicate that South African employers and employees are relying heavily on the CCMA to resolve their labour problems, rather than addressing these problems internally. It is convenient to delegate disputes and use the available

services, but the process becomes costly and time-consuming. The implementation of legislative amendments during the 2002/2003 financial year involved a number of projects to ensure the provision of a seamless service through the transition from pre-amendment operations to post-amendment operations. The most significant system changes included the Case Management System (CMS), the CCMA's core operational management system. The largest customer service project delivered in 2002/2003 was the CCMA Call Centre, which has handled an average of 12 300 calls a month since going live in June 2002 (CCMA Annual Report 2002/2003, 5). The majority of labour-legal queries are about operational requirements, emanating mainly from the domestic and retail sectors. The CMS has ensured that the CCMA has been able to administer caseloads never envisaged possible. It provides not only a high-level overview of cases for operational management and control, but also ensures that the institution logs and processes some 470 new cases received each day – a new case every minute of every working day.

## Conclusion

One of the purposes of the Labour Relations Act 66 of 1995 is to provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration, which are put in practice by the CCMA. The CCMA had to replace the previous system of statutory conciliatory bodies that had proved ineffective, costly and complicated (Venter et al. 2003, 522). This is remedied by the CCMA through its use of conciliation, mediation and arbitration in a number of issues. The Labour Court can then deal with and resolve the more serious and involved issues such as discriminatory practices and retrenchments.

It can be argued that there has merely been a change in emphasis from the former judicial system to the CCMA. However, the aim remains to put a more friendly face on processes to resolve issues in the most effective manner without resorting to the courts.

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.

Conflict is an inherent part of the labour relationship and the effective resolution of disputes remains an integral part of labour relations. Traditionally, labour relations in South Africa were characterised by high levels of conflict and were thus considered to be adversarial by nature. This was partially because of the absence of effective mechanisms for the resolution of disputes, which meant that industrial action was often resorted to, where other less confrontational methods may have succeeded.

Under the new Labour Relations Act 66 of 1995, and therefore a new labour dispensation, the emphasis is now placed on maintaining labour peace through co-

operative and constructive problem solving. A comprehensive framework for the resolution of disputes is provided in the Act. The primary body for dispute resolution under the Act is the CCMA, which seeks, through conciliation, mediation, arbitration and if necessary con-arb, to provide a more cost-effective, flexible, and less confrontational approach to conflict management. This has the intention of promoting constructive and harmonious labour relations and thus limiting incidents of industrial action.

The labour arena in South Africa has been a primary vehicle in engineering a new democratic order since 1994. The Labour Relations Act 66 of 1995 largely contributed to this situation. Other Acts in the labour environment have also contributed to the growing democratisation of the workplace and the country. These Acts lead to an increasing regulation of the labour market, with positive implications for the future.

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