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PROPOSAL ON THE DISPUTE PREVENTION AND RESOLUTION SYSTEMS IN NAMIBIA

A MINI THESIS TO BE SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE MASTERS PHILOSOPHY OF LAW.

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KEYWORDS

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ABSTRACT

The resolution of disputes, including unfair dismissal disputes under the Labour Act 2007 is being criticised for being too complex, inefficient, protracted, expensive, and highly legalistic.

This thesis would denote that the provision of proactive and expeditious dispute resolution systems helps to resolve labour disputes in the most effective and efficient manner, without necessarily having to resort to the courts. The ultimate goal is to ensure that the legal framework regulating the labour dispute system in Namibia assures the use of alternative dispute resolution (ADR) of its credibility, thereby creating confidence and enabling stakeholders to trust the system. Ideally, disputes should be resolved at the conciliation level, resulting in the minority of disputes being referred to arbitration or the Labour Court. The Office of the Labour Commissioner must be independent of the state, since the state is the largest employer, to ensure the stakeholders trust the system. However, it has been established that there are gaps between the legal framework relating to labour dispute resolution and the application of laws and regulations in practice, making the attainment of effective and efficient labour dispute resolution difficult. Therefore, the thesis will analyse the ADR in Namibia to finding out if the system is sufficient and appropriate for society's need and to provide a recommendation for the system that is a quicker, equitable, and amicable way of resolving the disputes outside the courts through conciliation and arbitration.

LIST OF ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
BCEA	Basic Condition of Employment Act 75 of 1997
CCMA	Commission of Conciliation, Mediation and Arbitration
EEA	Employment Equity Act
GRN	Government Republic of Namibia
ILO	International Labour Organisation
LA	Labour Act 13 of 2007
LAC	Labour Advisory Council
LC	Labour Commissioner
LO	Labour Office
LRA	Labour Relation Act 66 of 1995
NC	The Namibia Constitution
NEDLAC	National Economic Development and Labour Council
OLC	Office of the Labour Commissioner
PSA	Public Service Act 13 of 1995
AA	Arbitration Act
SA	South Africa
SSA	Social Security Act

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

Labour law in Namibia prior to 1992 was fragmented and for this reason, the very first labour law statute enacted in 1992, this was the first Labour Act 6 of 1992 (Hereinafter the '1992 Act').[1] The purpose of the 1992 Act was to strengthen and consolidate all labour laws in Namibia.[2] However, this was not so, as the 1992 Act was not adequate and sufficient at the time to cover all the labour issues and impediments in workplace forums. This resulted in an eminent need for policy and legislation reform in Namibia to supplement and consolidate the 1992 Act.

The 1992 Act created a legal obligation on Namibia to develop laws and legislation to consolidate labour relations conducive to economic growth, stability, and productivity through the promotion of an orderly system of free collective bargaining, the improvement of wages and conditions of employment to ensure sound Labour relations and fair employment practices.

In addition, the 1992 Act establishes the Office of the Labour Commissioner (hereafter the OLC) which is primarily created to deal with collective relations, including dispute resolution through the establishment of conciliation boards to give effect to sufficient and appropriate dispute resolution mechanism in Namibia.[3] The dispute prevention and resolution systems provided for by the 1992 Act were severely criticized by major stakeholders. The following concerns were raised;

- The process to a dispute resolution was lengthy and cumbersome;
- The system is costly, not accessible to some parties to the dispute who do not have resources to bring their complaints to the Labour Courts;

[1] The Labour Act 6 of 1992.
[2] Chapter 1 of the Labour Act 6 of 1992.
[3] Section 75 of the Labour Act 6 of 1992.

- Interdicts are being granted by courts without the other party being given an opportunity to be heard and state their case;
- The process is frustrating rather than finalising the dispute
- The process is adversarial and not user friendly to the majority of workers
- The system is full of loopholes that are currently misused by parties to achieve their goals.[4]

These concerns gave rise to the amendment of the 1992 Act which was subsequently enacted as Labour Act 2004 (Hereinafter the '2004 Act'). The 2004 Act laid the foundation for the new dispute prevention and resolution system in Namibia. The importance of the 2004 Act was the establishment of the conciliation and arbitration process which was established by the Commission. The comprehensive labour laws in workplace which was established to provide for the systematic prevention and resolution of labour disputes to establish the Labour Advisory Council (hereafter the LAC) the labour court, wage commission, the labour inspectorate, and to provide for the appointment of the labour commissioner and deputy labour commissioner.[5]

The implementation and enforcement of the 2004 Act were ambiguous in its interpretation and application. It was rife with typographic flaws which also led to ambiguity. The major stakeholders with the assistance of the experts from the International Labour Organisation (hereinafter referred to as the ILO)[6] and the Commission of Conciliation, Mediation and Arbitration (hereinafter the CCMA) agree to redraft the 2004 Act which establishes the foundation of the Labour Act No. 11 of 2007 (Hereinafter the 2007 Act) and this was well-received by all major stakeholders.

The 2007 Act introduced an entirely new alternative dispute resolution system in Namibia. The act was assented into operation by the President in terms of article 56 of the Namibian Constitution.[7]

[4] Extract from an Input paper to the Round Table on Labour Relations – on Dispute Resolution, Consultation, and Involvement of Third parties. Presented by Sackey Aipinge – Assistant General Secretary of Mine Workers Union on behalf of NUNW, held on the 13th April 2000, Safari Hotel – Windhoek. Pg 2.
[5] Chapter 1 of the Labour Act 2004.
[6] Article 5 of the International Labour Organisation Convention 1976 (No.144).
[7] The Constitution of the Republic of Namibia, 1990.

The new dispute resolution system also provides for the establishment of the OLC. The OLC would be the key contributor to Namibia's socio-economic growth. The purpose of the OLC would be to realise the following, harmonious labour relations, decent work, full employment and social protection for all.[8] The central features of the OLC are to provide speedy and fair labour dispute settlement and industrial organisation's registration services, registering disputes from employers and employees and/or through their organisation over contraventions of the Labour Act. The OLC is also responsible to resolve disputes through conciliation and by advising to prevent disputes from arising and to resolve disputes through arbitration, to register trade unions and employers' organisations, and training employers and employees on dispute prevention and resolution.[9]

The 2007 Act provides for the appointment of the Labour Commissioner and the Deputy Labour Commissioner by the Minister responsible for labour and they must be competent to perform the functions of conciliation and arbitration.[10] The appointments are done subject to the laws of the public service.[11] The Labour Commissioner refers to an individual appointed in terms of s120 of the 2007 Act.

The OLC is established as a dispute resolution component operating within the Ministry of Labour, Industrial Relations and Employment Creation (hereafter the MLIREC). The OLC is full dependent on the state in terms of capital resources and decision-making.[12] Unlike South Africa, the CCMA operates as an autonomous statutory agency with a legal personality[13] and is an independent agency of the state.[14]

The Labour Commissioner is a government employee appointed by the Minister of Labour in terms of the Public Service Act 13 of 1995[15] as well as the 2007 Act.[16] The Labour Commissioner is expected to be independent and impartial in the performance

[8] Section 121 (1) of the Labour Act 11 of 2007.
[9] Section 121 (1) of the Labour Act 11 of 2007.
[10] Section 120 (2) of the Labour Act 11 of 2007.
[11] Section 4 of the Public Service Act 13 of 1995.
[12] Section 120 of the Labour Act 11 of 2007.
[13] Section 112 of the Labour Relation Act 66 of 1995.
[14] Section 113 of the Labour Relation Act 66 of 1995.
[15] Section 4 of Public Service Act 13 of 1995.
[16] Section 120 (1) of the Labour Act11 of 2007.

of his duties. The Labour Commissioner is expected in terms of section 137 of the 2007 Act to develop the Guidelines and codes of good practice[17].

The 2007 Act stipulates that the Minister may, after consulting the Labour Advisory Council –

(a) Issue codes of good practice;

(b) Issue guidelines for the proper administration of the 2007 Act, including, but not limited to, guidelines on dispute prevention and resolution for application by the Labour Commissioner and the users of the Labour Commissioner's services;

(c) Issue a code of ethics for conciliators and arbitrators appointed in terms of this Act;

(d) Change or replace any code of good practice, code of ethics, or guideline.

(2) Any code of good practice or guideline or any change to or replacement of a code or a guideline must be published in the Gazette.

(3) Any person interpreting or applying this Act must take into account any code of good practice or guideline published in terms of this section.[18]

The Code of Ethics for the conciliators and arbitrators has since the enactment of the 2007 Act remained a draft for a long time. In July 2020, after proper consultation with the LAC, the Minister of Labour has finally issued a code of ethics for conciliators and arbitrators, gazetted under government notice No.185 of 2020.[19] The code of conduct for conciliators and arbitrators sets out the standards of ethics and other obligations that govern the professional and ethical responsibilities of conciliators and arbitrators tasked with the systematic resolution of labour disputes.[20]

The structure of the OLC is not autonomous like the CCMA[21] in SA. It is submitted that the structure of the OLC being a Department under the MLIREC is creating uncertainties and the society is somehow questioning the integrity and /or trust in the alternative dispute resolution system. These uncertainties are particularly where state disputes are involved. The state is the largest employer in Namibia. However, if the

[17] Section 137 of the Labour Act 11 of 2007.
[18] Section 137 of the Labour Act 11 of 2007.
[19] Section 137 (1) (c) of the Labour Act 11 of 2007.
[20] Rule 1 (a) of the Code of Ethics for Conciliators and Arbitrators No.185 of 2020.
[21] Section 113 of the Labour Relations Act 66 of 1995.

dispute involves the state, the dispute may be too complex to resolve. The author submits that, First, if the dispute involving the state is referred to as conciliation, the conciliator is an employee of the state, the complainant is an employee of the state, and the employer is the state. In *Geinogos-Oneugbu v Minister of Higher Education and Innovation*,[22] all parties to a disputes are members of the state. Secondly, the legal representative is the Office of the Attorney General who is a principal legal adviser of the state, established under the Ministry of Justice, and fully dependent on the state. Thirdly, on the Office labour commissioner is also a state component, the Commissioner is appointed by the state and all parties to a dispute are the members of the same trade unions.[23] The situation as described above may create uncertainty in the Alternative Dispute Resolution as some workers are complaining that the system is prolonged, frustrating and cumbersome.

The 2007 Act presupposes conciliation to be the first stage of the process of dispute resolution.[24] The 2007 Act provides that the dispute concerning dismissal be referred to the Labour Commissioner within six (6) months after the date of dismissal, whereas any other labour disputes are referred within one (1) year after the dispute arose.[25] In terms of section 82 of the 2007 Act, the appointed conciliator must attempt to resolve the dispute through conciliation with thirty (30) days of the date the Labour Commissioner received the referral of the dispute.[26]

Based on the provisions of the 2007 Act,[27] the OLC is established to register disputes from employees and employers over contraventions, the application, interpretation, or enforcement of the 2007 Act and take appropriate action. The action taken by the OLC involves the prevention of disputes from arising, giving advice and attempt to resolve disputes through conciliation. During the conciliation proceedings, a party to the dispute may appear in person or be represented only by a member, office-bearer or official of that party's registered trade union or registered employer's organization. A legal practitioner is permitted in terms of the 2007 Act to represent any party provided

[22] *Geinogos-Oneugbu v Minister of Higher Education and Innovation* (HC-MD-CIV-MOT-GEN-2020/392 [2020] NAHCMD 490 (27 October 2020).
[23] Ngutjinazo O & Mogotsi K 'Civil Servant Salary Impasse' *The Namibian* 4 July 2019 available at http://www.namibian.com.na/80394/read/civil-servant-salary-impasse (accessed 4 July 2019).
[24] Section 82 of the Labour Act 11 of 2007.
[25] Section 86 (2) *(a)* (b) of the Labour Act 11 of 2007.
[26] Section 82 (10) (a) of the Labour Act 11 of 2007.
[27] Section 120 of the Labour Act 11 of 2007.

that the parties to the dispute have agreed, and the other party to the dispute will not be prejudiced.[28]

The Act 2007 requires that in deciding whether to permit representation of a party, the conciliator must take into account the applicable code of ethics for conciliators and arbitrators issued in terms of section 137.[29] The code of ethics provides the fundamental principles and values of conciliators and arbitrators in the execution of their duties.[30] Hence, the code requires the dedication of conciliators and arbitrators to the values of honesty, fairness, accountability, dignity, respect, transparency, independence, equality, impartiality, integrity and confidentiality.[31]

It is submitted that the conciliators in abiding by their code of ethics, are challenged by the fact that the settlement agreements resulting from conciliation meetings have no force of law in Namibia, and no statutory established mechanism exists to enforce them and this exposes the inadequacies and loopholes in the ADR system in Namibia.

Moreover, the 2007 Act provides for adjudication essentially in one of the two ways- by either arbitration or by the Labour Court. An arbitration hearing will reside under the Labour Commissioner unless it is private arbitration.[32] The 2007 Act does not make any accreditation of any private agency but provides for arbitration.[33] This implies therefore that the private agencies may be established for this purpose without necessarily being accredited by the Labour Commissioner and may function in terms of section 91[34] of the 2007 Act.

The 2007 Act is the legislation that created institutions to resolve conflicts in the workplace effectively through conciliation and if conciliation fails, through arbitration.[35] The 2007 Act retains the continuation of the labour court to continue to produce authoritative precedents and supervise the arbitration institutions.[36]

The system of dispute resolution established by the 2007 Act has a different point of departure from the 1992 Act. The 2007 Act is structured upon the key concept of

[28] Section 82 (a) *(I)* (ii*) (aa)* (bb) of the Labour Act 11 of 2007.
[29] Section 14 of the Labour Act 11 of 1995.
[30] Rule 3 (1) of the Code of ethics for Conciliators and Arbitrators No.185 of 2020.
[31] Code of Ethics for Conciliators and Arbitrators No.185 of 2020.
[32] Section 86 of the Labour Act 11 of 2007.
[33] Section 91 of the Labour Act 11 of 2007.
[34] Section 91 of the Labour Act 11 0f 2007.
[35] Section 82 (16) of the Labour Act 11 0f 2007.
[36] Section 115 of the Labour Act 11 of 2007.

conciliation, arbitration and adjudication. The 2007 Act recognised the importance of self-regulatory to be the primary mechanism for regulating collective disputes. The registered trade unions and employer's organisation must ensure that all collective agreements contain procedures to resolve the disputes about their interpretation, application and enforcement of such agreement.

Although the 2007 Act brought statutory dispute resolution with the reach of the ordinary workers, the workers seem to be unhappy with the labour dispute resolution system,[37] claiming that the OLC is failing the poor, the system is not strictly time-bound, too complex, inefficient, protracted, expensive, highly legalistic and therefore not responsive to needs of the Namibian society.[38] The predicament experienced by the worker has also raised a concern on the effectiveness and efficiency of the system and whether the purpose of labour law is achieving its purpose as analysed by Rochelle Le Roux. [39]

1.2 PROBLEM STATEMENT

In the past, the resolution of disputes including unfair dismissal disputes under the 1992 Act was criticised for being too complex, inefficient, protracted, expensive and highly legalistic. The same criticism is experienced under the current 2007 Act which includes the dispute being too long, cumbersome, frustrating and too costly especially when the dispute is referred to the Labour Court for adjudication.[40] This thesis will investigate and analyse if the current legal system which deals with dispute prevention and resolution in the Namibian context is sufficient and appropriate for society's needs.

1.3 SIGNIFICANCE OF RESEARCH

The workers in Namibia have expressed their dissatisfaction and disappointment with the dispute resolution system. The criticisms that were raised by the social partners under the 1992 Act seem to surface in the 2007 Act and do not bring about any sufficient changes. The workers are still unhappy of which most have no trust in the

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[37] Shiimi T 'Labour Commissioner fails the poor' *The Namibian* 12 February 2010 available at https://www.namibian.com.na/index.php?id=62739&page=archive-read (accessed on 29 July 2019).
[38] Shiimi T 'Labour Commissioner fails the poor' *The Namibian* 12 February 2010 available at https://www.namibian.com.na/index.php?id=62739&page=archive-read (accessed on 29 July 2019).
[39] Le Roux R 'The Purpose of Labour Law: can it turn green?' in Malherbe K & Sloth-Nielsen J (eds) *Labour Law into the Future: Essay in honour of Darcy du Toit* (2012) 231.
[40] Shiimi T 'Labour Commissioner fails the poor' *The Namibian* 12 February 2010 available at https://www.namibian.com.na/index.php?id=62739&page=archive-read (accessed on 29 July 2019).

OLC anymore. The workers are not satisfied with the dispute resolution system under the current 2007 Act. The significance of this research is to analyse the Alternative Dispute Resolution systems in Namibia and provide recommendations for a quicker, equitable and amicable way of resolving disputes.

1.4 RESEARCH QUESTION

Is the current legal system which deals with dispute prevention and resolution system in Namibia sufficient and appropriate for society's needs?

1.5 RATIONAL OF THE RESEARCH

This thesis is investigating and analysing the current legal framework in terms of dispute resolution systems. The thesis will subsequently provide recommendations for the adjustment of the dispute prevention and resolution system in Namibia. The recommendations aim to consolidate the dispute resolution system that is easily accessible, user- friendly and beneficial to workplace forums in Namibia which could result in determining disputes more quickly and equitably manner.

1.6 LITERATURE REVIEW

To understand the nature of an institution, it is necessary to understand its purpose. Rochelle Le Roux (1995) provides an analysis on what is the purpose of labour law,[41] whilst Bob Hepple (1996) highlighted the future of labour law.[42] As with many legal and social institutions, one approach is to start with their historical evolution. Kate O'Regan states that labour law began with the contract of employment which was intended, like other contracts – to define the legal rights and duties of the parties (the employer and employee relationship) towards each other. [43]

The other mechanism developed for regulating the employment relationship in particular is the legislation and collective bargaining. In this respect, the employment relationship began to distinguish itself from many other contractual relationships. Sources other than contracts became increasingly important in determining the parties' rights and duties. Labour law was the name given to this composition body of

[41] Le Roux R 'The purpose of Labour Law: can it turn green?' In Malherbe K & Sloth-Nielsen J *Labour law into the future: Essays written in honor of Darcy du Toit* (2012) 230 – 249.
[42] Hepple B 'The Future of Labour Law' (1995) 24 *ILJ* 303.
[43] O'Regan K 'Reflecting on 18 Years of Labour Law in South Africa' (1997) 18 *ILJ* 889.

rules deriving from various sources and ultimately concerned with regulating employment relations in society.[44]

However, the evolution expressed the purpose of labour law and why labour law exists in the form that it does. In terms of the South African Constitution, the purpose of labour law is recognised as a key to its interpretation, which is similar to the Namibian Constitution. The purpose of labour law is a key to understand not only its effectiveness (achieving its purpose) but also its further development in response to changing circumstances (how must it be adapted to continue serving its purpose).

Bob Hepple indicates that there is a need to re-invent and modernise the three functions of labour law as elaborated by Kahn-Freud's Labour and the Law, which are special functions - auxiliary, regulatory, and integrative of labour law.[45] Rochelle Le Roux intends to explore and consider whether a recasting and re-imagining of the traditional purpose of labour law is required and can be achieved by re-inventing of labour law.[46]

The Labour Law theme was developed by Kahn-Freud's Labour and the Law, by putting forward an explanation of labour law as a system for resolving the inequality which is inherent in the employment relationship as explained by Paul Davies & Mark Freedland (1983).[47] Labour Law creates a framework for collective bargaining, which places employees in a position where they can engage with employers on a more equal footing in determining terms and conditions of employment. The thesis notes that the employment relationship denotes a contractual relationship where the parties enter into a contract because they both derive some benefit from it. [48]

Barney Jordaan points out that the notion of contract – i.e. mutual rights and duties freely agreed based on negotiation and it does not explain the employment relationship.[49] A contract presupposed equality of bargaining power and consensus between equals. However, the thesis submit that the typical employee and employer relationship is not equal. Often the employer is a powerful corporation since the terms

[44] O'Regan K 'Reflecting on 18 Years of Labour Law in South Africa' (1997) 18 *ILJ* 889.
[45] Hepple B 'The Future of Labour Law' (1995) 24 *ILJ* 303.
[46] Le Roux R 'The Purpose of Labour Law: can it turn green?' in Malherbe K & Sloth-Nielsen J *Labour Law into the Future: Essay in honour of Darcy du Toit* (2012) 231.
[47] Davies P & Freedland M *Kahn-Freud's Labour and the Law* 3 ed (1983) pp 1- 28.
[48] Davies P & Freedland M *Kahn-Freud's Labour and the Law* 3 ed (1983) pp 1- 28.
[49] Rycroft A & Jordaan B *A Guide to South Africa Labour Law* 2 ed (1992) pp 1- 23.

and conditions of the employment contract are often determined by the employer with the employee having little to say in the matter except to accept or reject them.

Alan Rycroft & Barney Jordaan highlight that an essential term of the contract is the subordination of the employer to the employee within the scope of the relationship and further provide some alternative approaches in explaining this unique association.[50] Paul Benjamin gives an overview of the role of labour law in today's world, no longer as a system primarily aimed at protecting employees or balancing the inequality between employer and employees but as part of a broader system of labour market regulations.[51] The role of labour law needs to be contextualised with the framework of a globalised labour market, to such an extent that labour law continues to play a protective function.

The objectives of the labour statutes and centerpiece of the employment dispensation are expected to reflect the purpose seen by the legislature for labour law in general. The labour statute in particular the LRA and 2007 Act aims to provide for the systematic prevention and resolution of labour disputes.[52] The 2007 Act is also aimed to promote the effective and efficient resolution of Labour disputes.[53] The thesis submits that continuously assessing the quality, accessibility, efficiency and effectiveness of ADR methods is essential in the labour market to ensure that labour law is achieving its purpose. Thembeka Ngcukaitobi further highlighted that any work on dispute resolution must accordingly respond to the challenges of constitutionalism through which objects of the labour law statute can be achieved.[54] Thembeka Ngcukaitobi further highlighted that the resolution of disputes, including unfair dismissal disputes, under the Labour Relations Act, 1956 was complex, inefficient, protracted, expensive and highly legalistic.[55]

Finally, John Brand highlights that efficiency is the benchmark of dispute resolution and that disputes should ideally be resolved as quickly and informally as possible with few or no procedural technicalities.[56] The existence of a labour dispute brings with it

[50]Rycroft A & Jordaan B *A Guide to South Africa Labour Law* 2 ed (1992) pp 1- 23.
[51] Paul Benjamin 'Labour Market Regulation: International and South African Perspectives: Human Science Research Councilor' (2005) available at http://www.hsrc.ac.za/Document-1856.phtml.
[52] Labour Act 11 of 2007.
[53] Section 1 of the Labour Relation Act 66 of 1995.
[54] Brand J, Lotter C, Steadman F, Ngcukaitobi *Labour Dispute Resolution* 2 ed (2009) 1.
[55] Brand J et al *Labour Dispute Resolution* 2 ed (2009) 1.
[56]Brand J et al Labour *Dispute Resolution* 2 ed (2009) 15.

the need which the disputing parties have for the dispute to be resolved expeditiously. Therefore, the dispute cannot be allowed to drag on indefinitely. The disputing parties may of course opt for solving the dispute in the form of self-help through the exercise of collective economic power. However, if the dispute is to be referred to a dispute resolution system instead, the parties will expect that with the assistance of that system they will be in a position to resolve the dispute or the dispute will be resolved for them through some participation of the dispute resolution system.[57]

John Brand further provides that there is a downside of efficiency as the amount becomes the prevailing consideration and disproportionately valued above other requisite attributes of a system of dispute resolution, the damage to labour relationships can be disastrous.[58] John Brand further provides that a dispute resolution system presupposes ease of access to be efficient, there should ideally be a minimum of formality involved in obtaining the assistance provided by the dispute resolution mechanism.[59]

Efficiency requires that the parties can call upon the dispute resolution system at short notice and the institutions of the system respond promptly. The longer the dispute is left to simmer between the parties, the slimmer are the chances that a consensus-based solution to the dispute can be found.[60] When the conflict escalates, it may resort to economic power i.e. the form of a strike or a lockout may from the perspective of the disputing parties become the only solution.[61] The ADR system plays an important role in the labour law environment and the parties to the labour disputes expect the ideal labour dispute resolution system to be fair, unbiased, trustworthy, efficient, and / or free, or at least, inexpensive. Considerations relating to cost again stem from the perception that court proceedings are unaffordable.[62]

Finally, Namibia is a developing country and most of the labour law legislation is adopted from South Africa. This thesis will compare Namibia's ADR system with the ADR system of South Africa to see what more can Namibia learn from South Africa.

[57]Brand J et al Labour *Dispute Resolution* 2 ed (2009) 16.
[58] Brand J et al *Labour Dispute Resolution* 2 ed (2009) 16.
[59] Brand J et al Labour *Dispute Resolution* 2 ed (2009) 16.
[60] Brand J et al Labour *Dispute Resolution* 2 ed (2009) 16.
[61] Brand J et al Labour *Dispute Resolution* 2 ed (2009) 16.
[62]Brand J et al Labour *Dispute Resolution* 2 ed (2009) 20.

The thesis will also analyse whether the Namibian ADR systems are achieving its objectives in the promotion of effective and efficient resolution of labour disputes.

1.7 RESEARCH METHODOLOGY

This research will be conducted in a qualitative form to find answers to the research questions. The thesis will gather information on Namibian and South Africa literature on ADR methods used in labour law and labour disputes as well as other relevant labour regulations to draw a comprehensive comparison. The thesis will therefore analyse information that is already available in print or published including the reading materials that were provided on Ikamva and used during course work for discussions and assignment purposes.

A comparative study will be conducted to benchmark how South Africa has been continuously assessing the quality, accessibility, efficiency and effectiveness of ADR methods to resolve labour disputes in the labour market. Analysing of labour law journals, books, and case studies to learn with a possibility of adopting best ideas to improve and enhance efficiency and effectiveness of the ADR systems in Namibia and contextualise that disputes should ideally be resolved as quickly and informally as possible with few or no procedural technicalities.

The thesis will also consult some legislations, articles, case law, and other labour cases on the Southern African Legal Information Institute (SAFLII) and Namibia Legal Information Institution (NamibLII), and other relevant websites, to address issues concerning labour law, in particular, the ADR methods, and also to understand the historical overview of the ADR methods, and how other countries improve their ADR methods to provide effective and efficient resolution of labour disputes.

1.8 CHAPTER OUTLINE

The first chapter of the research will provide a brief introduction as well as the historical background to the Namibian Labour Reform. The chapter will also outline what Labour experts wrote in the evolution of labour law on the global market. This chapter includes the problem statement, the significance of the research, the research question, and the rationale of the research, a literature review, the proposed chapter outline and the research methodology.

Chapter two will provide an overview of the alternative dispute resolution system in Namibia. The method of resolving labour disputes will be elaborated on in this chapter. The labour disputes are into two categories. It is important to understand the types of disputes, differentiate between the industrial disputes namely the dispute of rights and disputes of interest and provide for a mechanism to resolve these disputes. The 2007 Act defined the two categories of disputes. The mechanism to resolve the labour dispute will be discussed as well as the challenges that are experienced when resolving disputes in terms of the 2007 Act. This chapter will further provide an overview of the alternative dispute resolution institutions that are established in terms of the 2007 Act. The institutions that are established manage and perform dispute resolution functions to ensure harmonious and sound labour relations in Namibia.

Chapter three will analyse the ADR institutions and systems in South Africa in order to provide a fair comparison between the ADR systems in South Africa and Namibia. The comparison will therefore enable the thesis to do a proper analysis of whether the Namibian ADR systems are achieving their objectives in the promotion of effective and efficient resolution of labour disputes. The ADR systems of Namibia are mostly adopted from South Africa ADR systems, so the comparison will further enable the thesis to entice a proper conclusion and give recommendations for the adjustment of the dispute prevention and resolution system in Namibia and consolidate the dispute resolution system that is easily accessible, user- friendly and beneficial to workplace forums in Namibia which could result in determining disputes more quickly and equitably manner.

Chapter four will analyse the Dispute Resolution Processes: Comparison of the Labour Commission in Namibia and the CCMA of South Africa with a primary focus on labour legislation, alternative dispute resolution institutions, and alternative dispute mechanisms. The chapter will also highlight the best labour law practices and summarise the differences and similarities of the two respective countries' labour dispute resolution systems, and further point out the best practices that Namibia can learn from South Africa.

Finally, chapter five will serve as a conclusion to the thesis and further propose a recommendation on how the Namibian dispute resolution can be improved in the interest of resolving labour disputes efficiently and effectively.

CHAPTER 2

DISPUTES RESOLUTION SYSTEMS IN NAMIBIA

2.1. INTRODUCTION

The South African post-apartheid labour regime has had a profound impact on labour law within the Southern African region. It has been the catalyst for a great number of reforms in Southern African Development Community (hereafter SADC) countries, particularly in the area of labour dispute resolution.[63] This uplifted the 2007 Act which has established specialised institutions such as the Office of the Labour Commissioner (hereafter OLC) to promote the use of conciliation and arbitration as the primary mechanisms for the prevention and resolution of labour disputes.[64] In the same vein, the labour court system was established for adjudication as a last resort.[65]

This chapter will therefore discuss several institutions created under the 2007 Act. These institutions have their specific jurisdiction and can only deal with disputes that fall within their jurisdiction.[66] The chapter will seek to distinguish between the dispute of rights and dispute of interest and provide the route to resolving these disputes when they arise. The chapter will further outline the procedures of the dispute resolution process including time frames, attendance, and representation, settlement of disputes, referral of dispute as well as the challenges or criticisms experienced under each process.

2.2 ALTERNATIVE DISPUTE RESOLUTION INSTITUTIONS

The 2007 Act was enacted to promote among other things an effective and efficient labour dispute resolution system.[67] The 2007 Act, therefore, intensified the dispute resolution systems by introducing new approaches to the ADR systems to ensure effective and efficient labour dispute resolution as well as the establishment of

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[63] Bronstein A *An International and Comparative Law – the challenges of Labour Law Reforms in South Africa (*2009) 255.
[64] Chapter 9, Part E of the Labour Act 11 of 2007.
[65] Chapter 9, Part D of the Labour Act 11 of 2007.
[66] Bosch D, Molaheli E and Everret W *Conciliation and Arbitration Handbook. A comprehensive Guide to Labour Dispute Resolution Procedure* (2004) 19.
[67] Section 1 (d) *(iv)* of the Labour Relation Act 66 of 1995.

alternative dispute resolution institutions to manage and perform dispute resolution functions to ensure harmonious and sound labour relations in Namibia.

The institutions created under the 2007 Act are the Labour Inspectorate,[68] the Labour Commissioner,[69] Private Arbitration[70] and the Labour Court.[71] However, on this note, the statute establishes no specific private agencies as is the case of bargaining councils in South Africa.[72] What is in place is more sectoral or industrial bargaining bodies for minimum wages and other conditions of employment and impliedly could include dispute resolution internally in terms of the collective agreements in place.

Each of these institutions has their specific jurisdiction and can only deal with disputes that fall within their jurisdiction up to a certain extent.[73] Notwithstanding these created institutions for dispute prevention and resolution, the 2007 Act gives the parties the freedom to determine their dispute resolution mechanism through collective agreements.[74] The parties to a dispute may undertake these routes only when they have exhausted the provisions of their collective agreement thus, the internal procedure contained therein should take precedent.

The institutions are established so that the parties to the dispute are at liberty to choose to resolve their dispute either with the labour inspectorate as the first step of the dispute resolution, or directly at the OLC – depending on the nature of the case, or maybe private arbitration. This is done by either engaging a private arbitrator directly or by application to the labour court in an event of a dispute over an arbitrator.[75]

2.2.1 Labour Inspectorate

[68] Section 125 (2) (1) of the Labour Act 11 of 2007.
[69] Section 121of the Labour Act 11 of 2007.
[70] Section 91 of the Labour Act 11 of 2007.
[71] Section 115 of the Labour Act 11 of 2007.
[72] Section 27 of the Labour Relations Act 66 of 1995.
[73] Bosch D et al The *Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedures* (2004) 19.
[74] Section 73 (1) of the Labour Act 11 of 2007.
[75] Section 91 of the Labour Act 11 of 2007.

The 2007 Act[76] empowers the Minister for Labour to appoint labour inspectors to enforce the Labour Act or any decision, award or order made in terms of the Act. In confirming the said appointment by the Minister, the Executive Director responsible for labour must issue each appointed labour inspector with a certificate confirming the appointment.[77] LRA makes a similar provision[78] which provides for the appointment of labour inspectors to ensure the monitoring and enforcement of the basic conditions of employment. The Labour Inspectors appointed in terms of the LRA have powers to issue compliance orders to ensure full compliance with the Basic Conditions of Employment Act. In Namibia, Labour Inspectors have jurisdiction to enforce the Labour Act which encompasses the basic condition of employment and the dispute resolution provisions[79] and not necessarily only basic conditions of employment as is the case with Labour inspectors in South Africa.

The 2007 Act gives a variety of powers to appointed labour inspectors.[80] Amongst them, which are relevant, to the dispute resolution includes-
the power to assist any person (the complainant or responded) –

(i) Any application, referral or complaint under the 2007 Act
(ii) Settling any application, referral or complaint under Act

Moreover, the 2007 Act bestows powers on labour inspectors to issue compliance orders.[81] The Act further provides that –

An inspector who has reasonable grounds to believe that an employer has not complied with a provision of the Act may issue a compliance order in a prescribed form.[82] Once the inspector has issued a compliance order, the employer must comply unless the employer appeals to the Labour Court, [83]against a compliance order within 30 days after receiving it.[84]

[76] Section 124 (1) of the Labour Act 11 of 2007.
[77] Section 124 (2) of the Labour Act 11 of 2007.
[78] Section 63 of the Labour Relation Act 66 of 1996.
[79] Section 126 of the Labour Act 11 of 2007.
[80] Section 125 (2) of the Labour Act 11 of 2007.
[81] Section 126 of the Labour Act 11 of 2007.
[82] Section 126 (1) of the Labour Act 11 of 2007.
[83] Section 126 (2) of the Labour Act 11 of 2007.
[84] Section 126 (3) of the Labour Act of 2007.

The labour inspectorate is a law enforcement body established to ensure full compliance with the provisions of the labour legislation.[85] This can be construed to mean it is not limited to basic conditions only but to any other provisions of the Act.

With the revolutionary provision of the 2007 Act, labour inspectors have powers to attempt to settle any application, referral or complaint before it reaches the labour commissioner.[86] This approach is intended to reduce the number of disputes going to the labour commissioner, which can be settled by a labour inspector on a plant level. It is submitted that in most instances, as has been the case during the reign of the 1992 Act, the labour inspectorate may still be the first port of call in most cases for labour dispute prevention until the labour commissioner finds ground for dispute resolution.

The provision empowering the labour inspectors to settle any application, referral, or compliance seems to emanate from the old and now defunct rules of the District Labour Court which have been phased out by the 2007 Act. In terms of Rule 6 of the District Labour Court, applicable in terms of the 1992 Act, it provides that;

(i) Upon filing of complaint, the clerk of the Court shall unless good grounds exist not to do so, refer the complaint ~~for~~ about settlement or further investigation by a Labour Inspector.

(ii) That the complainant and the respondent shall be informed of the date and place of any conference for the purpose of sub-rule (1) above, by the Labour Inspector.

(iii) That the parties shall cooperate with the Labour Inspector and attempt to settle their dispute.[87]

In the case of *TransNamib Holding Ltd v Goroeb* NLLP 2004[88] the labour court held that rule 6 conference is intended to facilitate the clarification of issues and to afford the parties a chance to settle the complaint. The approach of assistance will be up to a certain extent only through informal mediation in the event of a dispute, or issuing a compliance order should the issue in dispute be a compliance matter for example Non-

[85] Section 125 of the Labour Act 11 of 2007.
[86] Section 125 (1) Labour Act 11 of 2007.
[87] Rule 6 of the Rules of the District Labour Court.
[88] *Transnamib Holding (Ltd) v Goroeb* NLLP 2004 (4) 68 NLC 30/2001 (LCA).

payment of wages. Should the dispute require formal conciliation and/or arbitration, the labour inspectors will subsequently assist in making such a referral to the Labour Commissioner.[89]

2.2.2 The Office of the Labour Commissioner

The new dispute resolution system also provides for the establishment of the OLC. The OLC would be the key contributor to Namibia's socio-economic growth. The purpose of the OLC would be to realise the following, harmonious labour relations, decent work, full employment, and social protection for all.[90] The central features of the Labour Commissioner's office are to provide speedy and fair labour dispute settlement and industrial organisation's registration services, registering disputes from employers and employees and/or through their organisations over contraventions of the Labour Act. The OLC is mandated to resolve disputes through conciliation and by advising to prevent disputes from arising and to resolve disputes through arbitration, to register trade unions and employers' organisations, and to train employers and employees on dispute prevention and resolution.[91]

The OLC is established as a dispute resolution component operating within the Ministry of Labour, Industrial Relations and Employment Creation (hereafter the MLIREC) which is fully dependent on the state.[92] Unlike South Africa, the Commission of Conciliation, Mediation, and Arbitration operates as an autonomous statutory agency with legal personality.[93]

The 2007 Act provides for the appointment of the Labour Commissioner and the Deputy Labour Commissioner by the Minister responsible for labour and they must be competent to perform the functions of conciliation and arbitration.[94] The appointments are done subject to the laws of the public service.[95] The Labour Commissioner refers to an individual appointed in terms of section 120 of the 2007 Act.[96]

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[89] Section 125 (2) (i) of the Labour Act 11 of 2007.
[90] Section 121 (1) of the Labour Act 11 of 2007.
[91] Section 121 (1) of the Labour Act 11 of 2007.
[92] Section 120 of the Labour Act 11 of 2007.
[93] Section 112 of the Labour Relation Act 66 of 1995.
[94] Section 120 (2) of the Labour Act 11 of 2007.
[95] Section 4 of the Public Service Act 13 of 1995.
[96] Section 120 of the Labour Act 11 of 2007.

The Labour Commissioner is a government employee appointed by the Minister of Labour in terms of the Public Service Act 13 of 1995[97] as well as the Labour Act 11 of 2007.[98]

The primary function of the Labour Commissioner is to conciliate and arbitrate disputes referred to him/her in terms of the 2007 Act. The powers and functions conferred on the Labour Commissioner in terms of the 2007 Act are considerably wider, amongst the other are the primary functions is to –

(i) register disputes from employees and employers and/or through their organizations over the contraventions of the Labour Act.

(ii) To attempt through conciliation and by advising to prevent disputes from arising.

(iii) To resolve disputes through arbitration. To register trade unions and employer organizations.

(iv) To train employees and employers on dispute prevention and resolution.[99]

The 2007 Act further provides for the establishment, [100]functions,[101] and composition[102] of the Labour Advisory Council (hereafter the LAC). The Council is responsible to supervise and oversee the performance of the dispute prevention and resolution by the Labour Commissioner and supervise any activities of the Labour Commissioner.

The Labour Commissioner is also required in terms of the commissioner code of conduct[103] to be independent and impartial in the performance of their duties. The Labour Commissioner is expected in terms of section 137 of Act 2007 to develop the guidelines and codes of good practice[104].

[97] Section 4 of the Public Service Act 13 of 1995.
[98] Section 120 (1) of the Labour Act11 of 2007.
[99] Section 121 of the Labour Act 11 of 2007.
[100] Section 92 of the Labour Act 11 of 2007.
[101] Section 93 of the Labour Act 11 of 2007.
[102] Section 94 of the Labour Act 11 of 2007.
[103] Code of Ethics for Conciliators and Arbitrators No.185 of 2020.
[104] Section 137 of the Labour Act 11 of 2007.

The code of conduct for conciliators and arbitrators has been gazetted in July 2020,[105] and it is expected that despite their status as government officials, it should not influence their decision and policy-making.

It is deduced that the success of the Labour Commissioner in labour dispute resolution would be a shared responsibility by the LAC, although the Labour Commissioner reports directly to the Minister of Labour and is not a member of the LAC. The tripartite council consisting of state, registered trade unions and registered employers' organisations will have to play a major role in ensuring the success of the dispute resolution by the Labour Commissioner.

2.2.3 Private Dispute Resolution Agencies

The Labour Act does not provide much information on private dispute resolution bodies other than the OLC. The 2007 Act provides for the procedures to refer a dispute to private arbitration.[106] The 2007 Act provides a statutory private platform to the parties to a dispute to agree in writing to refer that dispute to arbitration under the 2007 Act.[107] Currently, there are no private arbitration agencies in Namibia.

2.3 TYPES OF DISPUTE

A dispute has its origin in a trigger (a point at which conflict becomes unbearable), from which point on it is transformed into a grievance, subsequently if not addressed, may develop into a full formal dispute that requires some form of resolution.[108] Before the dispute is resolved in terms of the 2007 Act, it is important to note that disputes appear in two categories; dispute of right and disputes of interest. The 2007 Act defined and differentiates between categories of disputes that may be referred to the Labour Commissioner and provides for mechanisms to resolve these disputes which parties are at liberty to exhaust.[109]

2.3.1 Dispute of right

A dispute of right concerns the interpretation and application of terms and conditions of employment in a contract of employment, collective agreement or statute, the right

[105] Section 137(2) of the Labour Act 11 of 2007.
[106] Section 91 of the Labour Act 11 of 2007.
[107] Section 91 of the Labour Act 11 of 2007.
[108] Brand J et al *Labour Dispute Resolution* 2 ed (2008) 9.
[109] Section 1 of the Labour Act 11 of 2007.

relates to benefits or conditions of service to which an employee may be entitled by virtue of legislation or an employment contract or collective agreement.[110] Indeed, by their very nature, it is appropriate to have such a dispute resolved by the court.

The definition of a dispute of right seems to have been derived from the International Labour Organisation (hereafter ILO) concept of differentiating features of disputes of rights and disputes of interests.[111] In terms of the ILO, the concepts of disputes over rights are defined as legal disputes which usually involves individual workers or a group of workers who claim that they have not been treated in accordance with rules laid down in collective agreements, individual contracts of employment, in laws, regulations and elsewhere.[112]

A practical example would be where a worker may claim not to have been paid a wage in accordance with the overtime provisions of the applicable collective agreement or to have been dismissed in contravention of a legal or contractual requirement that dismissal shall not take place unless there is a valid reason for such action. Essentially, the point is that the dispute of rights involves the allegation of violation of an established right recognised by law.

The distinction between dispute of interest and dispute of right is based primarily on the distinction between two processes, namely the process of applying and interpreting an existing agreement as against the process of formulating new ones.[113] The main purpose of the conceptualisation of the two types of industrial dispute is to encourage or ensure that employers and employees seek to resolve their disagreements concerning disputes of rights peacefully through a tribunal or such adjudicative forum rather than resort to industrial action.[114]

2.3.2 Dispute of Interest

Dispute of interest arises when there is disagreement concerning what ought to be the terms and conditions of employment in a contract *TransNamib Holding (Ltd) v Goroeb*

[110] *Hospersa and another v Northern Cape Provincial Administration (*2002*) 21* ILJ 1066 *(*LAC*).*
[111] Chapter IV of the International Labour Guidelines, *substantive provisions of labour legislation: settlement of collective labour disputes.*
[112] Chapter IV of the International Labour Guidelines, *substantive provisions of labour legislation: settlement of collective labour disputes.*
[113] Parker C *Labour Law in Namibia* (2012) 173.
[114] Parker C *Labour Law in Namibia* (2012) 169.

NLLP 2004[115] of employment or a collective agreement. Disputes of interest are not justiciable, their resolution is left to the parties to exercise their economic and industrial power. It is believed that where employees want new employment rights to be created, they should bargain for them, they cannot refer a dispute in this regard to a court for determination.[116]

The 2007 Act defines dispute of interests as any dispute concerning a proposal for a new or changed condition of employment but does not include a dispute that the 2007 Act or any other Act requires to be resolved by:

(a) Adjudication in the labour court or other court of law; or

(b) Arbitration[117]

The other category of disputes are those disputes defined by the 2007 Act, to mean;

(a) a complaint relating to the breach of a contract of employment or a collective agreement;

(b) a dispute referred to the labour commissioner in terms of section 46;

(c) any dispute referred in terms of section (82)(16);

(d) any dispute that is required to be referred to arbitration in terms of the act.[118]

Alan Gladstone (1984) elaborates further on the disputes of interest than what the definition provides for in the 2007 Act. In his view, disputes of interest are sometimes known as economic or bargaining disputes where parties are faced with conflict opposing the interest of a worker, usually expressed through their trade unions and those of an employer or employer's association.[119]

It is therefore submitted that the interest dispute involves the establishment of terms and conditions of employment or the rules regulating various aspects of the relationship between the trade union and the employers' or the employer's association if they reach a deadlock in collective bargaining.

[115] Parker C *Labour Law in Namibia* (2012) 171.
[116] *Protekon (Pty) Ltd v CCMA and others* (2005) 7 BLLR 703 (LC).
[117] Section 1 of the Labour Act 11 of 2007.
[118] Section 84 (2) of the Labour Act 11 of 2007.
[119] Gladstone A *Voluntary Arbitration of Interest Disputes: A practical Guide* (1984) ILO (02) G5.

The 2007 Act provides a mechanism to resolve these disputes of which parties are at liberty to exhaust. Industrial disputes can be settled peacefully outside the court through alternative dispute resolution mechanisms (conciliation, mediation and arbitration).

2.4 CONCILIATION IN NAMIBIA

The 2007 Act defines conciliation to include-

a) Mediating a dispute

b) Conducting a fact finding-exercise and

c) Making advisory award if

   (i) It will enhance the prospects of settlement; or

   (ii) The parties to a dispute agree.[120]

The ILO[121] defines conciliation to refer to the intervention of a third party usually neutral in the continuation of negotiations between the parties. The conciliator attempts to conciliate or bring together the parties to the disputes by exploring with them and eliciting those changes in their respective demands and positions. Conciliation may or may not include settlement proposals on the part of the conciliator but it is not the accepted role of conciliators unlike arbitrators to substitute their judgement for that of the parties and possibly impose a solution with the substance of which the parties may not agree.[122]

Darcy Du Toit defines conciliation to mean reconcile or bring together especially opposing sides in an industrial dispute.[123] That conciliation by its very nature is private, confidential and without prejudice.[124] Conciliation is intended for the parties to arrive at their solution rather than enforcing the law. Moreover, conciliation may become a process in which the neutral expert evaluates the merits of a dispute, advice the parties

[120] Section 81 of the Labour Act 11 of 2007.
[121] Gladstone A *Voluntary Arbitration of Interest Disputes: A Practical Guide* (1984) ILO.
[122] Gladstone A *Voluntary Arbitration of Interest Disputes: A Practical Guide* (1984) ILO.
[123] Du Toit D, Steenkamp A, Cohen T, Godfrey S, Cooper C, Giles G, Conradie B Labour *relation law: A comprehensive guide* 6 ed (2015) 140.
[124] Du Toit D et al *Labour relation law: A comprehensive guide* 6 ed (2015) 140.

to seek bottom lines and ultimately persuade the parties to accept a recommendation that the expert considers appropriate.

The conciliator's role should be to bring the parties to the table and facilitate discussion between them. The conciliator should play an active role in helping the parties to develop options, consider alternatives and reach a settlement agreement that will address the parties' needs.

The conciliator usually attempts to open the channels of communications between the parties and create an environment for the parties can reveal their needs and interest in confidence. The conciliator's aim during this process could be to guide the parties to a settlement. The role of the conciliator is also to explain to the parties how the law may deal with the disputed issues[125] and explore ways in which the interests of both parties may be given effect by a settlement. Lastly, the conciliator makes recommendations on how to resolve the dispute, provided recommendations which do not compromise the conciliator's impartiality.

Brand J states that as part of the conciliation process, the conciliator may consider separating the parties inside meetings.[126] This may be done if it is considered that the joint meeting is not conducive to consensus building and that the process may be better managed by having side meetings. The conciliator should bring the parties together after side meetings if a joint meeting will be helpful to the process. The side meetings may be necessitated by a high level of emotions or abuse or a need for confidential discussions between the parties. In addition, side meetings may be used to promote the settlement seeking process, explore options, develop proposals, and explore the potential movements and challenge parties.[127]

The conciliator should ascertain information to be conveyed from one side meeting to another and should obtain authority in his regard before making the disclosure.[128] It is submitted that parties should be given time to caucus on their own without the conciliator or other part is present.

[125] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 47 – 48.
[126] Brand J et al *Labour dispute Resolution* 2 ed (2008) 117.
[127] Brand J et al *Labour Dispute Resolution* 2 ed (2008) 116.
[128] Rule 13 of the Rules relating to the conduct of conciliation and arbitration before the Labour commissioner, GG No.4151 (2008).

Conciliation is the first phase of the dispute resolution mechanism as provided for in the 2007 Act.[129] The process of conciliation of a dispute begins with the appointment of a conciliator. A conciliator is appointed by the minister in terms of Sec 82 of the 2007 Act.[130] The conciliator is appointed to steer the process of conciliation and intervene as a third party, to assist the disputing parties to arrive at a mutually agreed outcome.[131] It is therefore submitted that conciliation forms an integral part of the dispute resolution mechanism.

During the conciliation proceedings, a party to the dispute may appear in person or be represented only by a member, office-bearer or official of that party's registered trade union or registered employer's organization. A legal practitioner is permitted in terms of the 2007 Act to represent any party provided that the parties to the dispute have agreed, and the other party to the dispute will not be prejudiced.[132]

The 2007 Act requires that in deciding whether to permit the representation of a party, the conciliator must take into account applicable guidelines issued in terms of section 137 of the 2007 Act.[133]

Lastly, the resolution of labour disputes through conciliation is regulated by sections 82 and 83 of the 2007 Act. The 2007 Act prescribes that the conciliator must attempt to resolve the dispute with 30 days of the referral or after the agreed extended period. If conciliation fails after this prescribed period, the conciliator must issue a certificate of outcome stating whether or not the dispute has been resolved.[134] The Act requires that when issuing a certificate of non-settlement, the conciliator must if the parties have agreed refer the unresolved dispute for arbitration.[135]

2.4.1 Conciliation under the auspices of the Labour Commissioner

The 2007 Act empower the Minster to appoint conciliators[136] in terms of the public service laws, to perform the duties and functions conferred on a conciliator in terms of the 2007 Act. These may be both full-time and part-time conciliators.[137] The labour

[129] Section 82 of the Labour Act 11 of 2007.
[130] Section 82 of the Labour Act 11 of 2007.
[131] Brand J et al *Labour Relation Law* 2 ed (2008) 116.
[132] Section 82(13) of the Labour Act 11 of 2007.
[133] Section 137 of the Labour Act 11 of 2007.
[134] Section 82 (15), (16) of the Labour Act 11 of 2007.
[135] Section 82 (16) of the Labour Act 11 of 2007.
[136] Section 82 (1) of the Labour Act 11 of 2007.
[137] Section 82 (2) of the Labour Act 11 of 2007.

Commissioner designates from the appointed conciliators, in an event of reported dispute try to resolve by conciliation the dispute referred to the Labour Commissioner.[138] Once a conciliator has been designated to conciliate the dispute, the conciliator has the discretion to determine the process to be used during conciliation[139] and may include mediation, fact-finding and/or making recommendations to the parties, which could include an advisory award.[140] It is a requirement that all disputes must be conciliated before they can proceed to arbitration.[141]

The 2007 Act requires that the conciliator must attempt to resolve the dispute through conciliation within thirty days of the date the Labour Commissioner received the referral of the dispute or any longer period agreed to in writing by the parties.[142] Before a dispute is referred to the Labour Commissioner, the party who refers the dispute has to satisfy the Labour Commissioner that the parties involved have taken all reasonable steps to resolve or settle the dispute on their own but that they have failed to do so.[143] This means that before a dispute is referred to conciliation, the company's internal disciplinary, grievance or dispute resolution procedure must be utilized. Any internal dispute resolution procedure may be in place by the agreement at the company for example by way of a collective agreement.[144]

Although the 2007 Act does not require a party to allege a cause of action, it should be necessary for the party to allege a dispute with the jurisdiction of the Labour Commissioner. Hence, to do so, the following jurisdictional facts must be asserted or must appear when referring a dispute to conciliation:

(i) That there is a dispute
(ii) The dispute has arisen within an employment relationship
(iii) The dispute falls within the jurisdiction of the labour commissioner
(iv) The issue in dispute is not subjected to a collective agreement; and

[138] Section 82 (3) of the Labour Act 11 of 2007.
[139] Section 82 (11) (a) Labour Act 11 of 2007.
[140] Section 1 of the Labour Act 11 of 2007.
[141] Rule 20 of the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner GG 4151 (2008).
[142] Section 82(10) (a), (*b*) of the Labour Act 11 of 2007.
[143] Section 82 (9) of the Labour Act 11 of 2007.
[144] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 71.

(v) The referral is timeous[145]

A party that wishes to refer a dispute to the labour commissioner for conciliation must do so as prescribed in the rules relating to the conduct of conciliation and arbitration before the Labour Commissioner.

(a) Referral of Disputes to the Labour Commissioner[146]

The 2007 Act provides that a party to a dispute may refer the dispute in a prescribed form to –

(i) The Labour Commissioner; or
(ii) Any labour office

The 2007 Act further requires that the referring party must satisfy the Labour Commissioner that a copy of the referral has been served to all parties to the dispute.[147] Moreover, Rule 11 requires that-

First, the party must refer a dispute to the Labour Commissioner for conciliation by delivering a completed Form LC 12 and Form LC 21, in case of any other dispute ('the referral document').[148]

Secondly, the referring party must sign the referral documents in accordance with Rule 5.[149]

Thirdly, a party must prove to the Labour Commissioner that a document was served by the other party to the dispute.[150] If the referral document is filled out of time, attach an application for condonation under Rule 10 of the Labour Commissioner's rules. It is important to take note that these rules of the Labour Commissioner are similar but not the same as the CCMA rules.

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[145] Du Toit D, Woolfrey D, Godfrey S, Cooper C, Giles G, Bosch C and Rossouw J *Labour Relations Law* 5 ed (2006) 100.
[146] Part 3 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[147] Section 82 (9) of the Labour Act 11 of 2007.
[148] Rule 11 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[149] Rule 5 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[150] Rule 7 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.

(b) Who can refer a dispute?

Generally, any party to a dispute may refer a dispute to conciliation.[151] A party to a dispute is a person with a direct interest in that dispute. In *Rustenburg Platinum Mines Ltd v CCMA* (1997) 11 BLLR 1475 - 1479[152] it was held that while referral may be made by a trade union, the term any party cannot be construed as including labour consultancy acting on behalf of the employee. This decision by the court could be premised on the fact that consultants are not permitted at conciliation proceedings before the CCMA. However, the situation is not similar in Namibia. The 2007 Act provides that a conciliator may permit any other individual to represent a party to a dispute in conciliation proceedings.[153]

This provision generally, could include even consultants or ordinary persons in the absence of strict regulation and requirement thereof, hence they may refer the dispute on behalf of their clients to the Labour Commissioner. However, in dismissal disputes, only an employee can refer the dispute to conciliation or arbitration and not by an employer. Such a dispute can also be referred to by a trade union on behalf of an employee or any other individual, which may include a consultant on behalf of the employee in the Namibia context.

In *Numsa v CCMA* (2000) 11 BLLR 1330 LC,[154] Landman J found that the persons entitled to represent parties at conciliation also have implied authority to sign a referral form on behalf of a dismissed employee to refer the dispute either to conciliation or arbitration. The court stressed that unless the principal is required by law to perform the act personally. If a document must be signed personally, the legislature generally states so in clear terms. The statutory referral form requires a signature by the person who submits the form does not mean that a duly authorized representative cannot sign it.[155] The court cited Rule 4(2) of the CCMA,[156] which is exactly similar in design and content to Rule 5(2)[157] of the Labour Commissioner's Rules. Rule 4(2) indicates that

[151] Du Toit D et al *Labour Relations Law* 5 ed (2006) 104.
[152] *Rustenburg Platinum Mines Ltd v CCMA* (1997) 11 BLLR 1475 - 1479.
[153] Section 82 (13) of the Labour Act 11 of 2007.
[154] *Numsa v CCMA* (2000) 11 BLLR 1330 (LC).
[155] *Numsa v CCMA* (2000) 11 BLLR 1330 (LC).
[156] Rule 4(2) of the Rules for the Conduct of the Commission for Conciliation, Mediation and Arbitration GNR 1448 in GG 25515 of 10 October 2003.
[157] Rule of 5(2) of the Labour Court.

if more than one employee is involved, one mandated employee can sign the documents on behalf of all and attaching the list of the employees who mandated the signatory.

(c) Time limits for referral

The 2007 Act and the rules relating to the conduct of conciliation and arbitration before the Labour Commissioner do not prescribe time limits for the referral of the mutual interest disputes to conciliation. Unless these disputes can be construed to fall within the categories of any other disputes which are required to be transferred within twelve (12) months after the dispute arising.[158] However, in the case of a dismissal dispute, it has to be referred to conciliation within six (6) months after the date of dismissal.[159]

(d) Set Down

The Labour Commissioner is required to conciliate or designate a conciliator to conciliate a dispute within thirty (30) days from the date on which the referral was received unless the parties agree to extend the thirty (30) days period.[160] The Labour Commissioner is further required to give the parties at least seven (7) days' written notice on form LC 28 of the conciliation date.[161] The Labour Commissioner should determine the date, venue and time for the first conciliation meeting. However, it is obligatory for a conciliation meeting to be called within the prescribed period, unless the parties agree to an extension, and that the conciliator does not have the power to extend it. Where there is no consent, the conciliator's hands are tied and any conciliation meeting held after the expiry of the thirty (30) days period is considered null.[162]

(e) Certificate of outcome

The 2007 Act require the conciliator to issue a certificate of the outcome at the end of the conciliation that a dispute is unresolved if –

[158] Section 86 (2) (b) of the Labour Act 11 of 2007.
[159] Section 86 (2) (a) of the Labour Act 11 of 2007.
[160] Section 82 (10) (a) (*b*) of the Labour Act 11 of 2007.
[161] Rules for the conduct of conciliation and arbitration before the Labour Commissioner, Rule 12.
[162] Du Toit D et al *Labour Relation Law: A Comprehensive Guide* 6 ed (2015) 145.

(i) the conciliator believes that there is no prospect of settlement at that stage of the dispute, or

(ii) thirty (30) days or any extended period agreed to by the parties has expired.[163]

The 2007 Act further requires that if the dispute is not resolved at conciliation, a certificate of non-resolution is issued at the end of the conciliation phase. The conciliator must, if the parties have agreed, refer the unresolved dispute for arbitration or adjudication,[164] depending on the nature of the dispute. Parties can also agree to have their disputes resolved through private conciliation and arbitration.[165] The certificate of the outcome is sufficient proof that the dispute has been conciliated.

Once a certificate of outcome has been issued, a copy should be handed to the parties. The parties should be able to examine the certificate and verify that the dispute has been correctly formulated. If the dispute is to be referred to arbitration, a copy of the outcome certificate must be attached to the arbitration referral form LC 21.[166]

2.4.2 Conciliation involving the state as employer

The state is the largest employer in Namibia. However, if the dispute involves the state, the dispute may be too complex to dispose. The thesis submits that if the dispute of the state is referred to conciliation, the conciliator is an employee of the state, the complainant is also an employee of the state. The employer is the state, the legal representative is the Office of the Attorney General who is a principal legal adviser of the state. The office of the Attorney General is established under the Ministry of Justice, and fully dependent on the state. The Office of the labour commissioner is also a state component, the Commissioner is appointed by the state and all parties to a dispute are the members of the same trade unions.[167] The situation as described above may create uncertainty in the Alternative Dispute Resolution as complaint by

[163] Section 82 (15), (16) of the Labour Act 11 of 2007.
[164] Section 82(16) of the Labour Act 11of 2007.
[165] Section 91 of the Labour Act 11 of 2007.
[166] Rule 14 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[167] Ngutjinazo O & Mogotsi K 'Civil Servant Salary Impasse' *The Namibian* 4 July 2019 available at http://www.namibian.com.na/80394/read/civil-servant-salary-impasse (accessed 4 July 2019).

some workers that the system is frustrating and cumbersome. The 2007 Act does not make a special provision like the LRA.[168]

2.4.3 Criticism of Conciliation

Although, the 2007 Act provides that if no resolution of a dispute is achieved within a prescribed thirty (30) days period or the agreed period,[169] a certificate of non-resolutions must be issued. Unfortunately, there is no time limit provided within which the certificate must be issued. There ought to be a clear time limit as to when the certificate of non-resolution can be issued.

Conciliation is a relatively informal and flexible process in which an independent third party (the conciliator) assists the parties involved in a dispute to reach an agreement. It is a quick and inexpensive way of settling a dispute. However, when a party to a dispute has reached an agreement then a settlement agreement can be issued.

In Namibia, despite the provision of settlement agreements, the 2007 Act has not created any mechanism for enforcing these agreements resulting from conciliation. Settlement agreements resulting from conciliation meetings have no expressed force of law in Namibia, and there is no legislated mechanism exists to enforce them. This has caused to exacerbate the inadequacies and loopholes in the ADR system in Namibia.

The only remedy is to approach the labour court to make the settlement an order of the court.[170] The view of the author is that this *lacuna* in the labour law allows parties to the dispute to enter into settlement agreements without the bona fide intention of resolving the dispute, knowing very well that there is no provision in the 2007 Act compelling them to do so.

Consequently, many settlement agreements remain dormant in Namibia. Namibia can learn from South Africa which has a provision permitting the parties to approach CCMA

[168] Section 74 of the Labour Relations Act 66 of 1995.
[169] Section 82 (10) (a) of the Labour Act 11 of 2007.
[170] Section 117 of the Labour Act 11 of 2007.

to convert a settlement agreement to an arbitration award, thereby acquiring the enforcement status of a usual arbitration award.[171]

In respect of representation during the conciliation process, a party to the dispute may appear in person or be represented only by a member, office-bearer or official of that party's registered trade union or registered employer's organization. A legal practitioner is permitted in terms of the 2007 Act to represent any party provided that the parties to the dispute have agreed, and the other party to the dispute will not be prejudiced.[172]

The 2007 Act requires that in deciding whether to permit the representation of a party, the conciliator must take into account applicable guidelines issued in terms of section 137.[173] There has been a delay in the finalisation of the guidelines. Finally, in July 2020 the code of ethics for conciliators and arbitrators was issued in terms of section 137(1) (c) of the 2007 Act after consultations between the Minister of Labour with the LAC.[174]

However, it is submitted that the legal representation at conciliation turns the proceedings to become legalistic and expensive for ordinary parties to the dispute and therefore, has the effect of negating a speedy and simplified labour dispute resolution system.

Although the 2007 Act brought statutory dispute resolution within the reach of ordinary workers, the workers seem to be unhappy with the labour dispute resolution system.[175] The workers are claiming that the OLC is failing the poor, the system is not strictly time-bound, too complex, inefficient, protracted, expensive, highly legalistic and therefore not responsive to the needs of the Namibian society.[176] The predicament as experienced by the worker has also raised a concern on the effectiveness and

[171] Section 142 (a) of the Labour Relations Act 66 of 1995.
[172] Section 82(a) *(I)* (ii*) (aa)* (bb) of the Labour Act 11 of 2007.
[173] Section 14 of the Labour Act 11 of 1995.
[174] Section 137(1) (c) of the Labour Act 11 of 2007.
[175] Shiimi T 'Labour Commissioner fails the poor' *The Namibian* 12 February 2010 available at https://www.namibian.com.na/index.php?id=62739&page=archive-read (accessed on 29 July 2019).
[176] Shiimi T 'Labour Commissioner fails the poor' *The Namibian* 12 February 2010 available at https://www.namibian.com.na/index.php?id=62739&page=archive-read (accessed on 29 July 2019).

efficiency of the system and whether the purpose of labour law is achieving its purpose as analysed by Rochelle Le Roux.[177]

2.5 MEDIATION IN NAMIBIA

Mediation in Namibia is mostly used as a program of the High Court. Under the rules of the High Court, the presiding judge may at any time on his or her own initiative or on the request of a party, refer the proceedings or any issue to mediation in an attempt to resolve that issue or part of the proceeding or issue by way of alternative dispute resolution.[178]

The judge president of the high court has designated certain case types in respect of which the court will require the parties to undergo compulsory mediation, should the parties to dispute not seek mediation of the dispute.

The dispute referred to under this program are cases such as; Insurance claims, medical negligence claims, professional negligence claims, building contracts, divorce and dispute involving custody of children and maintenance for children and a spouse, loan default claims, motor vehicle accident claims, defamation.[179]

The 2007 Act does not provide for mediation. Mediation and conciliation are identical in a labour law context in the sense that a mediator can be a conciliator as well. It is submitted that a mediator only gives advice, guidance and acts as a facilitator. The mediator has no power to prescribe, impose a decision on the parties with their specific prior consent.[180] The 2007 Act only provides for the conciliation process.

Furthermore, a mediator has a tremendous amount of power, and that power should not be used lightly. Comparative purposes, the Chinese mediation system was historically used as an element of social control.[181]

Where else in Maoist China, mediation was used to suppress the masses and instil communist ideology in disputants. Chinese disputants become more interested and

[177] Le Roux R 'The Purpose of Labour Law: can it turn green?' in Malherbe K & Sloth-Nielsen J *Labour Law into the Future: Essay in honor of Darcy du Toit* (2012) 231.
[178] Rules of the High Court of Namibia.
[179] Rules of the High Court of Namibia.
[180] Boulle L & Rycroft A *Mediation: Principles Process Practise* (1997) 115.
[181] Clark K 'The Philosophical underpinning and general workings of Chinese mediation system: what lessons can America mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 135.

focused on their self-interest as they are more likely to avoid mediation.[182] The Chinese mediation system has its roots in Legalism, Confucianism, Maoism and is based on emotion and reason, law and feelings.[183]

On the other hand, the acceptance of mediation in the United States can be seen in the many mediation statutes, the existence of uniform mediation law and the numerous court-annexed mediation programs. There are also codes of ethics for mediators that many full or part-time mediators must follow.[184] The knowledge of mediation in continental Europe is growing – evenly but steadily,[185] unlike in the Africa Continent.

It is submitted that the ADR systems in Namibia need to consider the mediation systems and schemes which are usually established in an attempt to fulfill policy goals and objectives, which in turn, are drawn from a set of core values.[186] One of the values embedded in many court related programs is efficient service delivery in terms of dispute settlement and the other values include empowerment of disputants to manage their own conflict.[187]

2.5.1 Referral to Mediation

In Namibia, mediation is a program of the high court and referral to mediation commences with the initial referral order by the presiding judge with a two week return date. Once the order is made the parties' lawyers are required to visit the ADR office to arrange a date for mediation and to confirm the availability of the chosen mediator. The parties choose a mediator from the list of accredited mediators and confirm his or her availability and the date for the mediation. That order also gives deadlines for the filing of the parties' respective settlement proposals. The mediation referral order also sets the deadlines by which the mediator's report is to be received and postponed the matter to a specific date for a status hearing. If the party wishes to have an interpreter for mediation, that party's must bring that to the attention of the presiding judge.[188]

[182] Clark K 'The philosophical underpinning and general workings of Chinese mediation system: what lessons can America mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 118.
[183] Clark K 'The philosophical underpinning and general workings of Chinese mediation system: what lessons can America mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 133.
[184] Cairns D 'Mediating International Commercial Disputes: Differences in U.S and European Approaches' (2005) 60 *DRJ 62.*
[185] Cairns D 'Mediating International Commercial Disputes: Differences in U.S and European Approaches' (2005) 60 *DRJ 62.*
[186] Alexander N Global Trends in Mediation: Riding the Third Wave (2003) 1 – 32.
[187] Alexander N Global Trends in Mediation: Riding the Third Wave (2003) 1 – 32.
[188] The Mediation Programme of the High Court of Namibia' Outreach Paper No.1 (9 October 2014).

Where the matter has been referred for mediation, the parties are required to exchange settlement proposal in writing. There is an absolute prohibition against either disclosing the contents of a settlement proposals to the judge or attempting to use it in the court case in which the parties are involved or in any other case in the future. The purpose of this prohibition is to encourage parties to exchange proposals freely and in good faith by way of mutual give-and-take.[189]

2.5.2 Role of the Mediator

The Role of the mediator is to assist the parties to negotiate their own settlement by mediating the dispute, conducting a fact-finding exercise, facilitate and offer guidance and expertise and making recommendations to the parties to resolve.[190]

The mediation session is intended to identify pertinent issues, clarify any misunderstandings, explore solutions, and negotiate an agreement.

Thus, a successful mediator all possess the following techniques in fulfilling their function:

(i) Impartiality

(ii) Credibility

(iii) Trust

(iv) Confidentiality

(v) Professionalism; and

(vi) Attentive listener.[191]

Whilst, private mediation must be by agreement between the parties and may be either ad hoc or automatic. The parties expect the mediator to help them analyse and define the nature of their dispute.[192]

Kevin Clark states that there is a place for morality in mediation.[193] Confucian mediation as applicable in the Chinese mediation system was based upon morality

[189] The Mediation Programme of the High Court of Namibia' Outreach Paper No.1 (9 October 2014).
[190] Brand J, Lotter C, Mischke C, Steadman F *Labour Dispute Resolution* (1997) 80.
[191] Brand J et al *Labour Dispute Resolution* (1997) 80.
[192] Brand J et al *Labour Dispute Resolution* 2 ed (2008) 114.
[193] Clark K 'The Philosophical underpinning and general workings of Chinese mediation system: what lessons can America mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 134.

and offered mediators an opportunity to reinstall moral values in disputants.[194] By appealing to morality Confucian, mediators were able to get the disputants to agree to an end to a dispute.[195]

2.5.3 Criticism of Mediation

The Common ADR processes that are acknowledged relevant and legitimate as per the provisions of the 2007 Act are conciliation, arbitration and the Labour Court. Mediation in Namibia is somewhat not subjected to criticism because of its less relevance in the labour relations context.

2.7 ARBITRATION IN NAMIBIA

Arbitration is a process by which the disputant refers their dispute to a third person. An arbitrator who as a general rule makes a final decision after he has received and considered evidence and submission from the disputants.[196] The arbitral process aims to reach finality and the award that the arbitration makes generally binds the parties. The objective of the arbitral proceedings in comparison to judicial proceedings is the promotion of a cost-effective and quick way of resolving disputes. The party to the dispute is free to agree how their disputes are resolved and the court should not intervene except as provided by the 2007 Act. The arbitration tribunal is established as contemplated in Article 12(1) (a) of the Namibian Constitution to resolve disputes.[197] Arbitration operates under the auspices of the labour commissioner. Arbitrators are appointed by the Minister to perform the duties and functions and exercise the powers conferred on arbitrators in terms of the 2007 Act.[198] Arbitration is characterized by the following;

(i) It is a non-judicial process for resolving disputes regarding existing rights of the parties;
(ii) The parties must, barring a statutory prescription, agree to refer their dispute to arbitration;

[194] Clark K 'The Philosophical underpinning and general workings of Chinese mediation system: what lessons can America mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 134.
[195] Clark K 'The Philosophical underpinning and general workings of Chinese mediation system: what lessons can America mediators Learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 135.
[196] Butler D & Finsen E *Arbitration in South Africa - Law and Practice* 4 ed (1993) 1.
[197] The Constitution of the Republic of Namibia 1990.
[198] Section 85 (3) of the Labour Act 11 of 2007.

(iii) The parties themselves appoint an arbitrator, or he may be appointed by someone they agree should do the appointment where they have failed to appoint one, or the arbitrator may be appointed in terms of a statute;
(iv) The arbitrator must impartially receive and consider evidence and submissions of the parties and fairly arrive at his decision;
(v) The parties agree that the arbitrator's award is final and binding on them and therefore cannot be appealed or such stipulation may be provided by statute; Arbitral proceedings are held in private and are largely confidential.[199]

At the conciliation proceedings, a party is not entitled to legal representation.[200] However, parties at arbitration may be legally represented.[201] If the parties to the dispute agree or the arbitrator is satisfied that the dispute is of such complexity that it is appropriate for a party to be represented by the legal practitioner.

The aim of arbitration is to reach finality. The arbitrator performs a "quasi-judicial" function for he is a judge of the evidence presented to him. Although arbitration is generally embarked upon by the consent of the disputing parties, sometimes a statute compels parties to arbitrate.[202] Compulsory arbitration is also provided for under Part C of Chapter 8 of the 2007 Act.[203]

The 2007 Act contemplates that statutory arbitration tribunals will operate under the auspices of the labour commissioner who shall have the jurisdiction to-

(i) hear and determine any dispute or any other matter arising from the interpretation, implementation or application of the 2007 Act and
(ii) make an order that he/she is empowered to make in terms of any provision of the 2007 Act.[204]

The arbitration hearing will resort under the labour commissioner only unless it is private arbitration. The 2007 Act does not make any accreditation of any private agency but provides for statutory arbitration. This implies therefore that the private

[199] Butler D & Finsen E *Arbitration in South Africa-Law and Practise* 4 ed (1993) 213 214.
[200] Section 82 (12) of the Labour Act 11 of 2007.
[201] Section 86 (13) of the Labour Act 11 of 2007.
[202] The Expropriation Act 73 of 1975.
[203] Chapter 8 of the Labour Act 11 of 2007.
[204] Section 85 (2) of the Labour Act 11 of 2007.

agencies may be established for this purpose without necessarily being accredited by the labour commissioner and may function in terms of section 91 of the 2007 Act.[205]

Arbitration in terms of the 2007 Act, is designed to dispose of a dispute finally through an award which is subjected only to procedural review but not appeal on its legal merit provided that the dispute is not finalised at conciliations.

2.6.1 Arbitration by the Labour Commissioner

The 2007 Act empowers the Minister to appoint both full-time and part-time arbitrators to perform the duties and functions or to exercise the powers conferred on arbitrators in terms of the 2007 Act.[206]

The Labour Commissioner may designate one or more arbitrators to constitute an arbitration tribunal to hear and determine the dispute.[207] It is required therefore that arbitration under the 2007 Act, must be fair and equitable, the arbitrator must be fair impartial and unbiased in the performance of the duties in terms of the 2007 Act.[208]

The arbitrator must have jurisdiction and not exceed his or her power, the decision must be consistent with the Act and Constitution. Awards must be justified in relation to the information placed before the arbitrator[209] and the reason given for it. In Con-Arb proceedings, the conciliator or arbitrator must immediately proceed to arbitrate the dispute if conciliation fails.

The absence of this vital jurisdiction fact cannot be condoned by the Labour Commissioner nor do the parties confer jurisdiction to arbitrate where the Act does not provide for it.[210] The referring party must therefore allege facts that bring the dispute within the jurisdiction of the Labour Commissioner in terms of the 2007 Act, failing which the court held, the commissioner or arbitrator must decline jurisdiction.

Furthermore, in *SACCAWU v Woolworths (Pty) Ltd* (1998) 1 BLLR 80 LC[211] the court came to a similar conclusion, finding that it did not have jurisdiction to adjudicate a

[205] Section 91 of the Labour Act 11 of 2007.
[206] Section 85 (3) (4) of the Labour Act 11 of 2007.
[207] Section 85 (5) of the Labour Act 11 of 2007.
[208] Section 85 (6) of the Labour Act 11 of 2007.
[209] *Rustenburg Platinum Mines Ltd v CCMA* [2006] JOL 18359 (SCA) para 21 31.
[210] Rule 13 of the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner GG NR 4151 (2008).
[211] *SACCAWU v Woolworths (Pty) Ltd* (1998) 1 BLLR 80 (LC).

dispute concerning the interpretation or application of a collective agreement as it was a matter of the arbitration.

A remedy for any defect in the arbitration process may only be sought through Labour Court review.[212]

Once the disputes are referred for arbitration within a prescribed time limit and in accordance with the prescribed procedure, failing to adhere to the time limits may require an additional application for condonation. When the dispute is resolved at the end of the arbitration phase, an arbitration award is issued. An arbitration award is the arbitration tribunal's decision on the merits of the dispute. The finality of the arbitrator's award is one of the salient and commendable features of arbitration.

2.6.2 Process of referral to arbitration by the Labour Commissioner

The 2007 Act provides for the procedure to refer a dispute to the labour commissioner, in that unless the collective agreement provides for the referral of the dispute to private arbitration, any party may refer the dispute in writing to-

(i) Labour Commissioner
(ii) Any Labour Office

However, on the referral of the dispute, the party who refers the dispute must satisfy the labour commissioner that a copy of the referral has been served on all other parties to the dispute. Only when satisfied will the labour commissioner refer the dispute to an arbitrator to attempt to resolve the dispute through arbitration.[213]

Referral of a dispute to the Labour Commissioner is governed by Rule 14 of the Rules of the labour commissioner. A party may request the labour commissioner to arbitrate a dispute by delivering a document on Form LC 21 (the referral document),[214] the referring party must sign the referring document in accordance with Rule 4, and a copy of the referral form must be served on the responded. Proof of such service must be attached to the original referral form and the form must be lodged with the labour

[212] Section 89 of the Labour Act 11 of 2007.
[213]Section 86 (1) Labour Act 11 of 2007.
[214] Rule 13(1) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.

commissioner,[215] and if the referral document is out of time, an application for condonation must be made,[216] in accordance with Rule 10.

If the steps have not been complied with, the Labour Commissioner may refuse to accept the referral, as is the case of the CCMA Rule 18(3). Once the referral form has been properly completed and signed, a copy thereof must be delivered to the respondent in a manner outlined in terms of Rule 6. The Act further requires that party to satisfy the labour commissioner that a copy of the referral form is served on the respondent.[217] This is done by attaching one of the following documents –

(i) A copy of the registration slips if the document was sent by registered mail;
(ii) A copy of the email transmission report sent to the other party;
(iii) A copy of the telefax transmission report;
(iv) In the case of hand delivery, a copy of the receipt signed by the person who accepted the document, which must indicate the name and designation of the person who received the document, as well as the place, time and date of service, using form LG36.

The completed referral form with its attachments, that is proof of service and if necessary, an application for condonation must be lodged with the labour commissioner. This is done in terms of rule 8 of the rules of the labour commissioner, through the following-

(i) by handing the document to the Office of the Labour Commissioner at the address listed in the schedule one of the rules;
(ii) by sending a copy of the document by registered post to the head office of the labour commissioner at the address listed in the schedule on of the rules;
(iii) by faxing the document to the head office of the labour commissioner at a number listed in schedule one;
(iv) by emailing the document to the electronic address listed in schedule one.

Rule 8(3) of the rules of the labour commissioner provides that a document is filled with the labour commissioner when –

[215] Rule 13(2) (a) (b) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[216] Rule 13(2) (c) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[217] Section 86(3) of the Labour Act 11 of 2007.

(i) the document is handed to the office of the labour commissioner;
(ii) a document sent by a registered post or mail is received by the office of the labour commissioner; or
(iii) the transmission of a fax is completed.

It is further required that a party must file the original of a document filed by fax or email together with a report confirming transmission, if requested to do so by the labour commissioner, within 5 days of the request. Therefore, any document sent by registered mail/post by a party to the labour commissioner is presumed to have been received seven days after it was posted, unless the contrary is proven.[218]

2.6.3 Time limit for referral to arbitration by the Labour Commissioner

The 2007 Act requires that a dispute must be referred to arbitration within six (6) months after the date of dismissal if the dispute concerns dismissal, or within one year after the dispute arising, in any other disputes.[219] On good cause shown, the labour commissioner may condone a late referral,[220] if the applicant lodges a referral with the labour commissioner outside the prescribed period, an application for condonation must be attached to the referral form.

An application of condonation should be brought in terms of Rule 10 and 33 of the rules of the labour commissioner. The application must be made in writing,[221] signed by the applicant and supported by an affidavit. The applicant should address the following-

(i) the degree of lateness
(ii) the reason for the lateness
(iii) any prejudice on the other party
(iv) prospects of success; and
(v) any other relevant factors

[218] Rule 8 of the Rules for the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[219] Section 86 (2) of the Labour Act 11 of 2007.
[220] Rule 33 of the Rules for the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[221] Rule 17(6) of the Rules for the Conduct of Conciliation and Arbitration before the Labour Commissioner.

A copy of the application must be delivered to the respondent, who may oppose condonation by filling its opposition on LC 39,[222] together with a supporting affidavit, not later than seven days after filing the referral document.

2.6.4 Set down for arbitration by the Labour Commissioner

When a referral in which condonation is not requested, is received by the labour commissioner, the matter must be arbitrated.[223] The labour commissioner will appoint an arbitrator to arbitrate and the matter will be set down for hearing.[224] The labour commissioner must give the parties at least fourteen days' notice, in writing, of the place, date and time on form LC 28 of an arbitration hearing, unless the parties agree to a shorter period.[225] Whilst, set down for hearing by the CCMA, requires that the commission must give the parties at least twenty one (21) days' notice in writing, of an arbitration hearing unless the parties agree to a shorter period.[226]

Once the arbitration is scheduled, during the hearing, the arbitrator has the discretion to conduct an arbitration hearing in a manner that he/she considers appropriate, however, subject to the duty to arbitrate fairly and expeditiously.[227] The labour commissioner/arbitrator should not set a self-imposed time limit to conclude the hearing or place the parties under undue pressure.[228]

The arbitrator or the commissioner must deal with all the issues in dispute and must do so with a minimum of legal formalities.[229]

2.6.5 Postponement of Hearing

An arbitration hearing may be postponed by agreement between the parties or by application on notice to the other party.[230] If all parties agree and a written agreement to postpone is received by the labour commissioner more than seven days prior to the

[222] Rule 10(4) of the Rules for the conduct of Conciliation and Arbitration before the Labour Commissioner.
[223] Section 85 (5) of the Labour Act 11 of 2007.
[224] Section 86 (4) (a) (b) of the Labour Act 11 of 2007.
[225] Section 86 (4) of the Labour Act 11 of 2007.
[226] Brand J *et al Labour Dispute Resolution* (2008) 153.
[227] Section 86(7) (a) of the Labour Act 11 of 2007; Rule 17(1) (2) of the Rules for the conduct of the Conciliation and Arbitration before the Labour Commissioners.
[228] Du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 129.
[229] Section 86(7) (b) of the Labour Act 11 of 2007.
[230] Rule 15 of the Rules for the Conduct of Conciliation and Arbitration before the Labour Commissioner.

scheduled arbitration date, postponement must be granted.[231] Otherwise, any party may apply for postponement by delivering a copy of the notice to all other parties and filing a copy with the CCMA / labour commissioner (the arbitrator) before the date of the hearing.[232] After considering the application, the CCMA / arbitrator or the Labour Commissioner may postpone the matter without convening a hearing to determine whether to postpone.[233] If an application for postponement is made during a hearing, the arbitrator must seek the view of the other party and consider the grounds for the application before deciding.[234]

2.6.6 Attendance and Representation

On the day the case is scheduled, the parties must attend the arbitration hearing unless a postponement of the matter has been requested and granted.[235] If the applicant or its representative fails to appear at the arbitration hearing, the arbitrator may dismiss the matter by issuing a written ruling. Where the respondent or its representative is absent, the matter may be postponed or the arbitrator may continue with the hearing in the absence of the respondent.[236]

The 2007 Act together with the rules of the labour commissioner permit representation at arbitration.[237] The representation is similar to conciliation and arbitration. What is important thereof is the representation is solely at the discretion of the conciliator and arbitrator.

In terms of the CCMA rules, parties may appear at an arbitration hearing in person or maybe represented by-

(i) legal practitioner,
(ii) a director or employee of either party or, a close corporation, a member thereof

[231] Rule 15 of the Rules for the Conduct of Conciliation and Arbitration before the Labour Commissioner; Rule 29(2) (a) (b) of the Rules for the Conduct of Proceedings before the CCMA; Rule 23(2) of the Rules for the Conduct of proceedings before the CCMA.
[232] Rule 23(2) of the Rules for the Conduct of Proceedings before the CCMA.
[233] Rule 29(4) (a) (b) of the Rules for the Conduct of Conciliation and Arbitration before the Labour Commissioner: Rule 23(4) of the Rules for the Conduct of Proceedings before the CCMA.
[234] Du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 157.
[235] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure (*2004) 143.
[236] Rule 27 of the Rules for the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[237] Section 86(12), (13) of the Labour Act 11 of 2007, s 86(12), (13).

(iii) a member, office-bearer or official of an employee's registered trade union or an employer's registered organisation.[238]

2.6.7 Role of the arbitrator

The rules relating to the conduct of conciliation and arbitration issued in terms of the 2007 Act provides that unless a dispute has already been conciliated;

(1) the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration,
(2) the arbitrator must attempt to assist the parties to reach consensus on issues to shorten the proceeding including;[239]

The arbitrator therefore deals with each aspect of the case that was presented at arbitration.

The 2007 Act gives discretion to an arbitrator to conduct the arbitration hearing in a manner that the arbitrator deems appropriate to determine the dispute fairly and quickly, but while dealing with the substantial merits of the dispute with a minimum of legal formalities.[240]

Dawie Bosch *et al* states that commissioners and arbitrator are likely to be rather robust in their decision on procedures to play more of an inquisitorial role rather than just listening to the evidence and arguments of the parties and to put pressure on the parties to complete the presentation of their case in a short time as possible.[241] The arbitration hearing normally takes the form of a trial where the parties give an opening statement and each party presents its case by calling the witness to testify under oath or affirmation. Further, those witnesses are cross-examined by the opposing party and thereafter, the hearing is concluded by each party submitting closing arguments.[242]

[238] Rule 25 of the Rules for the Conduct of Proceedings before the CCMA.
[239] Rule 20 of the Rules for the Conduct of Proceedings before the CCMA.
[240] Section 86 (7) *(a*) (b) of the Labour Act 11 of 2007.
[241] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 144.
[242] Section 86(10) of the Labour Act 11 of 2007.

Dawie Bosch *et al* is of the view that it is important to create a proper understanding so that parties and their representatives know when it is their turn to speak or present evidence.[243]

Arbitrators should briefly explain this process to the parties at the commencement of the arbitration and assist the parties throughout the hearing by prompting and directing parties to the procedure. Rule 34 of the rules of the labour commissioner, requires the arbitrator to keep records of-

(i) any evidence given in an arbitration hearing;
(ii) any sworn testimony given in at the proceedings before the arbitrator;
(iii) any arbitration award or ruling made by an arbitrator.[244]

Further that in terms of rule 34 Sub-rule (2) of the rules of the labour commissioner, the records may be kept by legible hand-written notes or by means of an electronic recording.

The 2007 Act specifically list different awards which the arbitrator is empowered to issue, these may include;

(i) an interdict;
(ii) an order directing the performance of any action that will remedy a wrong;
(iii) a declaratory order;
(iv) an order of reinstatement of an employee;
(v) an award of compensation;
(vi) an order for cost where a party or the person who represented the party in the arbitration proceedings acted in a frivolous and vexation manner.
(vii) the advisory award,[245]

Dawie Bosch *et al* provides that once a dispute has been arbitrated, the arbitrator is obliged to issue an arbitration award, the award which should be the arbitrator's

[243] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 145.
[244] Rule 34 of the Rules for the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[245] Section 86 (15) of the Labour Act 11 of 2007.

decision or judgement in the matter.[246] The 2007 Act 2007 provides that within thirty (30) days of the conclusion of the arbitration proceedings, the arbitrator must issue an award giving concise reasons and signed by the arbitrator.[247] Rule 21 supplements the 2007 Act and stipulates that;

(i) The arbitrator must deliver his or her award giving concise reasons and signed by the arbitrator within 30 days of the conclusion of the arbitration proceedings;
(ii) That the award shall specify the period within which the award is to be complied with and the arbitrator must allow such time for such compliance as he/she may deem reasonable in the circumstances of the case;
(iii) That the award in a class dispute shall include and define those members whom the chairperson finds to be members of the class and shall specify those members who have requested exclusion;
(iv) Every arbitration award shall be sent to the parties with an accompanying notice informing the parties of their rights to appeal the award to the labour court on issues of law or to apply to the labour court to review the award of the arbitrator;
(v) That administrative and clerical mistake in the award may at any time be corrected by the arbitrator on notice to the parties, but without such corrections being subject to an appeal.[248]

The arbitrator is expected by law to put into consideration the following points when making an arbitration award-

(a) Contents of an Arbitration Award

An arbitration award should give a summary of the evidence led by the parties as well as the arbitrator's analysis of the evidence. The 2007 Act requires that the arbitrator give a concise reason for the decision.[249] The similar provision contained in sec138 (7) of the LRA was interpreted in *Country Fair Food (Pty) Ltd v CCMA* (1998) 19 ILJ 903[250] Ngcobo AJP provided the following interpretation-

[246] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* 2004) 136.
[247] Section 86 (18) of the Labour Act 11 of 2007.
[248] Section 86 (18) of the Labour Act 11 of 2007.
[249] Section 86 (18) of the Labour Act 11 of 2007.
[250] *Country Fair Food (Pty) Ltd v CCMA* (1998) 19 ILJ 903.

……. though desirable …… it is not expected of the commissioners to write well researched and scholarly awards. Awards must be brief and the proceedings before the commissioner must be dealt with expeditiously …... However, failure to deal with an important facet may, depending on the circumstances of the case, provide evidence that the commissioner did not apply his/her mind to that particular facet.

The arbitrator will be likely therefore to deal with every aspect of the case that was presented at arbitration. However, the award, although maybe brief, must give sufficient reasons to justify the conclusion.

Dawie Bosch *et al* state that the arbitrator/commissioner in his/her award should refer to legal principles and give an explanation of how the principles and case law used have been applied to reach the findings and the award.[251] In arriving at the decision, the arbitrator must take into account codes of good practice i.e. dismissal, issued or published in terms of the 2007 Act.[252]

In addition to the principles and case law used, the award must be clearly written. It is submitted that if it is vague, it will be enforceable. The award must deal with and address all the questions that had to be decided so that no matter is left unsettled. The award must bring finality to the dispute.

(b) Reasons for the Award

The 2007 Act requires the arbitrator to give concise reasons for an award of the ruling.[253] The reasons required therefore need be no more than a summary of the issues, evidence, arguments, factual findings and the decision itself. The reasons must relate to the decision and that the award must be justifiable concerning the reasons given.[254]

(c) Legal Effect of an Award

The 2007 Act provides that;

1) An arbitration award made by the arbitrator

[251] Du Toit D *et* al Labour relations Law: A Comprehensive Guide 6 ed (2015) 161.
[252] Section 137 of the Labour Act 11 of 2007.
[253] Section 86 (18) of the Labour Act 11 of 2007.
[254] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 *BLLR* 1097 (CC).

(a) Is biding unless the award is advisory

(b) Becomes an order of the Labour Court in filling the award in the court by-

(i) Any party affected by the award; or

(ii) The Labour Commissioner[255]

2) If an arbitration award orders a party to pay a sum of money, the amount earns interests from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgement debt in terms of the Prescribed Rates of Interest Act,1975 (Act No.55 of 1975) unless the award provides otherwise.[256]

It is essential to note that not all decisions made by an arbitrator constitute an award. It was submitted that, for an award to exist, specific requirements included in the Labour Act and common law must be met. These include that the award must determine and finally dispose of the dispute between the parties. It must be in writing and contains reasons for the decisions or award and it must be signed by the arbitrator. It is further submitted that if the award lacks these essential elements, it cannot be enforced and that it may be set aside on review in the Labour Court.[257]

The 2007 Act provides that the parties to an arbitration award may apply to a labour inspector in the prescribed form requesting the inspector to enforce the award by taking such steps as are necessary to do so, including the institution of execution proceeding on behalf of an applicant party.[258]

(f) Variation and Rescission of an Arbitration Award

The 2007 Act provides that an arbitrator who has made an award may vary or rescind the award, at the arbitrator's instance, with thirty (30) days after service of the award if-

(i) It was erroneously made in the absence of any party affected by that award

[255] Section 87 of the Labour Act 11 of 2007.
[256] Section 87 of the Labour Act 11 of 2007.
[257] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 122.
[258] Section 90 of the Labour Act 11 of 2007.

(ii) It is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, or error or omission; or

(iii) It was made as a result of a mistake common to the parties to the proceeding;[259]

(g) Appeals or Review of Arbitration Awards

The 2007 Act provides the basis of appeal or circumstances under which the labour court may consider the review of arbitration awards issued or made by the arbitrator.[260] It is further stated that a party to a dispute may appeal to the Labour Court against an arbitrator's award on any question of law alone.[261]

An appeal can also be made in the case of an award in a dispute initially referred to the labour commissioner in terms of the 2007 Act, [262] on a question of fact, law or mixed fact and law.

The 2007 Act further provides that in lodging an appeal on the grounds listed above, the appellant must note an appeal following the rules of the high court, within thirty (30) days after the award is served on a party.[263] In an event of late noting of an appeal, the labour court may condone such, on good cause shown by the appellant.[264]

Once an appeal is noted or an application for review is made to the labour court, such an appeal or application for review operates to suspend any part of the award that is adverse to the interest of an employee and does not operate to suspend any part of the award that is adverse to the interest of an employer.[265]

The 2007 Act gives resources to the employer against whom an adverse award has been made to apply to the labour court for an order varying the effect of such an award and the court may make an appropriate order.[266] In considering such an application the labour court must-

[259] Section 88 of the Labour Act 11 of 2007.
[260] Section 89 of the Labour Act 11 of 2007.
[261] Section 89 (1) of the Labour Act 11 of 2007.
[262] Section 87 (1) (a) of the Labour Act 11 of 2007.
[263] Section 89 (2) of the Labour Act 11 of 2007.
[264] Section 89 (3) of the Labour Act 11 of 2007.
[265] Section 86 (6) of the Labour Act 11 of 2007.
[266] Section 89 (7) of the Labour Act 11 of 2007.

(i) Consider any irreparable harm that would result to the employee and the employer respectively if the award, of part of it, were suspended, or were not suspended;
(ii) If the balance of irreparable harm favours neither the employer nor the employee conclusively, determine the matter in favour of the employee.[267]

(h) Grounds of the Review of the Arbitration Award

The 2007 Act provides that if there are allegation of defects in an arbitration proceeding, the party who alleges may apply to the labour court for an order reviewing and setting aside the award-

(i) Within 30 days after the award was served on the party, unless the defect involves corruption;
(ii) If the alleged defect involves corruption, within 6 weeks after the date the applicant discovers the corruption;[268]

Darcy Du Toit argues that there is a fundamental difference between appeal and review. This argument is premised on the authority found in *Lekoto v First National Bank SA Ltd (*1998) 10 BLLR 1021 (LC)[269] where the court held that when receiving the arbitration award, it is not the function of the court to decide whether the commissioner/arbitrator acted correctly, but whether he/she committed misconduct of gross irregularity or exceeded his or her power within the meaning of section 145 of the LRA, similar to section 89(5) of the 2007 Act. In *Sidumo v Rustenburg Platinum Mines Ltd [*2007] 12 *BLLR* 1097 (CC)[270] the court held that the constitutional standard of reasonableness (applicable to all administrative action) suffuses section 145 of the LRA.

Finally, in settling disputes by arbitration, an arbitrator may grant any appropriate award, including; (i) interdict, (ii) a declaratory order, (iii) an order directing the performance of any act that will remedy a wrong, (iv) an order of reinstatement of an employee, (v) compensation and (vi) order of costs.[271] The 2007 Act provides that an

[267] Section 89 (8) of the Labour Act 11 of 2007.
[268] Section 89 (4) of the Labour Act 11 of 2007.
[269] *Lekoto v First National Bank SA Ltd,* 1998 10 BLLR 1021 (LC) para 11.
[270] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 *BLLR* 1097 (CC).
[271] Section 86 (16) of the Labour Act 11 of 2007.

arbitrator must within thirty (30) days after the conclusion of an arbitration grant an award under his signature with concise reasons.[272] The arbitration award is final and binding but in terms of the rules of natural justice. The aggrieved parties are accorded the rights in terms of section 89(1) of the labour Act to appeal, review in an event of irregularities in the process or set aside the decision made by the arbitrator. Therefore, the party is at liberty to appeal to the labour court against an arbitrator's award to be reviewed and setting aside of the award.[273]

2.6.8 Criticism of Arbitration

The view of the author is that the criticism of the arbitration process lies at the end of the process which is the arbitration award. The arbitration award must be issued within thirty (30) days of the conclusion of an arbitration hearing by the arbitrator in Namibia which is criticised to be too long in comparison with the fourteen (14) days by CCMA commissioners in South Africa.

The Director of the CCMA has the statutory power to certify the award, thereby making it enforceable immediately.[274] However, this is different in Namibia. The Labour Commissioner has no such powers. It is for the parties or the Labour Commissioner at his/her own instance to approach labour court to make the award an order of the court, consequently becoming enforceable.[275] It is submitted that this creates further delays in Namibia when compared to the immediate enforcement of awards in South Africa, where approaching the court is an alternative rather than the first recourse.

2.7 ROLE OF THE LABOUR COURT IN ALTERNATIVE DISPUTE RESOLUTION

The 2007 Act retains the continuation of the labour court to continue to produce authoritative precedents and supervise the arbitration institutions.[276] In terms of the above reference, the labour courts have the power to deal with all matters necessary

[272] Section 86 (16) of the Labour Act 11 of 2007.
[273] Section 89 (4) of the Labour Act 11 of 2007.
[274] Section 143 (1), (3) of the Labour Relations Act 66 of 1995.
[275] Section 87(1)(a)(b) of the Labour Act 11 of 2007.
[276] Section 115 of the Labour Act 11 of 2007.

or incidental to its functions under the 2007 Act including any labour matter, whether or not governed by the provisions of the Act or any other law or common law.[277]

The Labour Court is vested with exclusive jurisdiction to hear and determine the following matters-

(a) Determine appeals from-
    (i) Decisions of the Labour Commissioner made in terms of this Act;
    (ii) Arbitration tribunals' award, in terms of section 89; and
    (iii) Compliance orders issued in terms of section 126
(b) Review-
    (i) Arbitration tribunals' award in terms in this Act; and
    (ii) Decisions of the minister, the permanent secretary, the labour commissioner or any other body or official in terms of the Act 2007, and any other Act relating to labour or employment for which the minister is responsible;
(c) Review, despite any other provision of any Act, any decision of anybody or official provided for in terms of any other Act, if the decision concerns a matter within the scope of the 2007 Act,
(d) Grant a declaratory order in respect of any provision of the 2007 Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought;
(e) To grant urgent relief including an urgent interdict pending resolution of a dispute in terms of chapter 8 of the 2007 Act;
(f) To grant an order to enforce an arbitration agreement;
(g) Determine any other matter which it is empowered to hear and determine in terms of the 2007 Act;
(h) Make an order which circumstances may require to give effect to the objects of 2007 Act;
(i) Deal with all matters necessary or incidental to its functions under the 2007 Act, concerning any labour matter, whether or not governed by the provisions of the 2007 Act, any other law or the common law.[278]

[277] Section 117 (1) (i) of the Labour Act 11 of 2007.
[278] Section 117 of the Labour Act 11 of 2007.

The labour court may refer certain disputes concerning the dispute of interest to the labour commissioner for conciliation or request the inspector general of the Namibian Police Force to provide a situation report on any danger to life, health or safety of persons arising from a strike or lockout.[279]

The jurisdiction of the labour court has remained essentially intact, with the exception that appeals and reviews largely originate from the arbitration award as opposed to district labour court judgements in the past. New additions are the power to refer certain disputes to the labour commissioner for conciliation or arbitration; the power to request the inspector general of the police for a situation report and certain requirements to be met before granting interdicts.

Efficiently, the labour court is expected to bring finality to the matter and that an appeal to the Supreme Court should be restricted on the question of law and that if the law is decided upon facts in disputes should they become complex and contentious issues. The most practical, less costly and fair cause would be for the Supreme Court to decide the merits of the case on appeal.[280]

This entails that a labour matter may not just end in the labour court but may even be heard in the Supreme Court, especially when it concerns the fundamental rights of employees, despite the absence of such provision in the 2007 Act. The Supreme Court of Appeal, which is also the constitutional court in practice would ordinarily bring the matter to finality.[281] In *Cronje v Municipality Council of Mariental* NLLP 2004 (4) 129 NSC (case No SA 18/2002)[282] the supreme court of appeal held that generally, the labour court has no jurisdiction but that the 1992 Act, gave very extensive and wide power to the labour court that includes jurisdiction to make an order for reinstatement.

(a) Costs

The labour court is generally prohibited from making an order of costs against a litigating party in a matter before it unless that party has acted frivolously or vexatiously by instituting, proceeding with or defending those proceedings.[283]

[279] Section 117 (2) of the Labour Act 11 of 2007.
[280] *Cronje v Municipality Council of Mariental* NLLP 2004 (4) 129 NSC (SA 18/2002).
[281] *Cronje v Municipality Council of Mariental* NLLP 2004 (4) 129 NSC (SA 18/2002).
[282] *Cronje v Municipality Council of Mariental* NLLP 2004 (4) 129 NSC (SA 18/2002).
[283] Section 118 of the Labour Act 11 of 2007.

2.8 CONCLUSION

The 2007 Act broadly emphasises the concept of conciliations, arbitration and adjudication of labour disputes with conciliation as the primary process in an attempt to resolve labour dispute and thereby encouraging self-regulatory by means of collective agreement and collective bargaining by the parties themselves.

The 2007 Act introduced a new point of departure in dispute resolution and prevention, in which a number of institutions have been created to perform dispute resolution functions, with the Office of the Labour Commissioner the only statutory institution.

It is essential to note that conciliation is the first step in most dispute resolution process prescribed by the 2007 Act. The 2007 Act envisages many disputes would be resolved at first instance and only a relatively small number of disputes will be referred for resolution through arbitration, adjudication or strikes and lock-outs. The conciliation process focuses on consensus or agreement whereby a conciliator proposes a solution.

Although the conciliation process is a flexible process and supposedly inexpensive way of settling a dispute by issuing a settlement agreement when the agreement has been reached, there are no mechanisms created for enforcing agreements resulting from conciliation. The only remedy is to approach the labour court to make the settlement an order of the court.

The arbitration process succeeds the conciliation process. When the dispute remains unresolved, the arbitrator has an inquisitorial role to play and have the discretion to conduct the hearing in a manner he/she may consider appropriate to determine the dispute fairly, quickly and should be deal with the substantial merits of the dispute with minimum legal formalities.

In the end, the arbitrator is empowered to issue different types of an award provided for in the 2007 Act. Although the award is final and binding, the award may be subjected to an appeal on the question of law and facts or review in an event of irregularities in the process.

It is for such reason that the labour court as established by section 15 of Act 1992 is continued as a division in the high court with exclusive jurisdiction to determine

appeals from decisions of the labour commissioner and review arbitration tribunals' awards in terms of the 2007 Act.

The thesis aims to measure the efficiency and effectiveness of ADR systems in Namibia in comparison to the ADR methods in South Africa. The next chapter will give a broader overview of the ADR processes of South Africa for comparison purposes.

CHAPTER 3

SOUTH AFRICAN ALTERNATIVE DISPUTE RESOLUTION

3.1 INTRODUCTION

The South African Constitution[284] (hereafter the Constitution') entrenches a right to fair labour practices. Section 23 of the constitution provides that everyone has a right to fair labour practices,[285] every worker has the rights to form and join a trade union, to participate in the activities and programmes of a trade union, and to strike.[286]

The labour statutes enacted in 1994 set out to implement the fundamental rights protected by the Constitution and international law. The Labour Relation Act of 1995,[287] (hereafter the 'LRA of 1995') followed by the Basic Conditions of Employment Act of 1997[288] (hereafter the 'BCEA of 1997') and the Employment Equity Act of 1998[289] (hereafter the 'EEA of 1998') are enacted to give effect to section 23(1) of the constitution. Section 23(1) explains what fair labour practices mean in the context of an employment relationship that is informed by the rights and interests of the employers and employees. Furthermore, the BCEA of 1997 was amended in 2002 to ensure advanced economic development and social justice. The BCEA was also amended to give effect to and regulate the right to fair labour practices by establishing, enforcing as well as regulating variation of basic conditions of employment.[290] The primary objective of the BCEA is also to give effect to obligations incurred in South Africa as a member state of the International Labour Organisation.

The EEA of 1998 was enacted to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the

[284] The Constitution of the Republic of South Africa, 1996.
[285] Section 23 of the Constitution.
[286] Section 23 of the Constitution.
[287] Labour Relations Act 66 of 1995.
[288] Basic Conditions of Employment Act 11 of 2003.
[289] Employment Equity Act 55 of 1998.
[290] Section 2 of the BCEA 11 of 2002.

disadvantages in employment experienced by designated groups to ensure equitable representation in all occupational categories and levels in the workforce.[291]

The LRA provides four main procedures through which parties to a dispute can resolve a labour dispute, namely,[292] mediation, conciliation and adjudication.[293] In terms of the LRA the Commission for Conciliation, Mediation and Arbitration (hereafter CCMA'), bargaining councils and the labour courts have been established as the institutions through which disputants can resolve their labour disputes.

The evolution in the dispute resolution system was recognised after South Africa became a democratic state in 1994. The Industrial Conciliation Act of 1956 formed part of the apartheid system of racial segregation in South Africa. It prohibited the registration of any new mixed unions and imposed racially separate branches.[294] The jurisdiction of the dispute resolution system established by the LRA has, since 1996, been broadened to deal with disputes arising in terms of other labour statutes as well as contractual disputes.[295]

This chapter will discuss the establishment of the dispute resolution institutions with the view to analyse the functions and roles each institution plays in the dispute resolution system and their exclusive jurisdiction to decide matters arising from the LRA.

3.2 DISPUTE RESOLUTION INSTITUTIONS

The LRA created a number of statutory dispute resolution institutions namely the CCMA, bargaining councils and private resolution agencies as primary institutions of dispute resolution.[296]

3.2.1 The Commission for Conciliation, Mediation and Arbitration

The CCMA is a dispute resolution body established in terms of the LRA.[297] It is an independent body and does not belong to and is not controlled by any political party,

[291] The Employment Equity Act 55 of 1998.
[292] Grogan J *Workplace Law* 11 ed (2004) 470.
[293] Grogan J *Workplace Law* 11 ed (2004) 470.
[294] Explanatory Memorandum (1995) 16 *ILJ* 278.
[295]Du Toit D et al A *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 117.
[296] Du Toit D et al A *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 117.
[297] Section 112 of the Labour Relations Act 66 of 1995.

trade union or business.[298] The CCMA was established to promote labour stability, social justice and job security. The ambition of its creators is to establish an institution that provides accessible, cheap, quick and non-technical dispute resolution in categories of the labour dispute. The CCMA is missioned to give effect to everyone's constitutional rights and freedom ,[299] rights in terms of the labour relation as stipulated in article 23 of the constitution.[300]

3.2.1.1 The functions of the CCMA

The LRA confers CCMA a number of functions.[301] In terms of section 115 of the LRA, the CCMA has four primary functions.[302] The functions of the CCMA include resolving disputes through conciliation (finding a compromise between the two parties) or arbitration (acting as the objective third party to resolve the dispute).[303] Secondly, advise parties to a dispute on getting legal advice.[304] Thirdly, the CCMA must help in forming workplace forums.[305] Fourthly, the CCMA shall publish information on its activities and guidelines for dispute resolution.[306]

3.2.1.2 The officers of the CCMA

The CCMA is a tripartite body that is governed by a governing body.[307] The governing body is made up of an independent chairperson, director and nine representatives of organised labour, organised business and the state.[308] The representatives are each nominated by the National Economic Development and Labour Council (hereafter NEDLAC)[309] and then appointed by the Minister of Labour to hold office for three years[310].

[298] Section 113 of the Labour Relations Act 66 of 1995.
[299] Benjamin P '*Conciliation, Arbitration and Enforcement*: The CCMA Achievement and Challenges' (2009) 30 *ILJ* 26.
[300] Article 23 of the Constitution of the Republic of South Africa.
[301] Section 115 (1); (6) of the Labour Relations Act 66 of 1995.
[302] Section 115 of the Labour Relations Act 66 of 1995.
[303] Section 115 (1) of the Labour Relations Act 66 of 1995.
[304] Section 115 (2) (b) of the Labour Relations Act 66 of 1995.
[305] Section 115 (3) (b) of the Labour Relations Act 66 of 1995.
[306] Section 115 (6) (a) of the Labour Relations Act 66 of 1995.
[307] Section 116(1) of the LRA of 1996.
[308] Section 116 (2) *(a)*, (b) of the Labour Relations Act 66 of 1996.
[309] NEDLAC is a representative and consensus-seeking statutory body established in law through NEDLAC Act of 1994, to facilitate sustainable economy growth, greater social equity at the workplace and in the communities, to increase participation by all major stakeholders in economic decision-making ant national, company and shop floor level.
[310] Section 115 of the Labour Relations Act 66 of 1995.

The commissioners (conciliators and arbitrators) are appointed by the Governing Body of the CCMA on the strength of their experience and expertise in labour matters, particularly dispute prevention and dispute resolution. The commissioners are obliged to carry out their job with complete impartiality and they are bound by the Commissioner Code of Conduct.[311]

Each provincial office has a team of full-time commissioners supported by an additional complement of part-time commissioners. They conciliate, facilitate, mediate and in some instances prevent and settle industrial disputes. Convening Senior Commissioners (CSC) have been appointed in each province and their role is to monitor the professional standard of the CCMA and to assist in the allocation of cases to commissioners.[312]

In terms of sections 115(2A) and (6) of the LRA,[313] the governing body of the CCMA publishes the Rules for the Conduct of Proceedings before the CCMA[314] (hereafter the CCMA Rules) as guidelines which provide disputants and commissioners with the necessary information to effectively and efficiently resolve labour disputes.

3.2.1.3 The jurisdiction of the CCMA

Du Toit states that the CCMA has jurisdiction in all provinces in South Africa with offices in each province including many local offices where it deems necessary.[315] A dispute must be referred to the provincial office located in the province in which it arose.[316]

Although the LRA does not require a party to allege a cause of action, it is necessary to allege a dispute within the jurisdiction of the CCMA.[317]

The CCMA may only arbitrate disputes in respect of which the Act requires arbitration.[318] The absence of this vital jurisdictional fact cannot be condoned by the CCMA nor can the parties confer jurisdiction to arbitrate where the Act does not

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[311] Section 115 of the Labour Relations Act 66 of 1995.
[312] Section 117(2), (6), (7) of the LRA 66 of 1995; Du Toit D et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 119.
[313] Section 115 (2A) (6) of the Labour Relations Act 66 of 1995.
[314] The Rules for the Conduct of Proceedings before the CCMA, GNR 1448 of 2003.
[315] Du Toit D et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 118.
[316] Rule 24(1) of the Rules for the Conduct of proceedings before the CCMA.
[317] Du Toit D et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 128.
[318] Section 136 (1) of the Labour Relations Act 66 of 1995.

provide for it.[319] The essential question in the context of jurisdiction is whether an institution has the power to hear the matter referred to it. The Commissioner must ensure that the CCMA has jurisdiction to arbitrate the matter.

Bosch states that the CCMA has jurisdiction to arbitrate disputes relating to organisational rights, workplace forums, agency and close shop agreements. The jurisdiction includes the ministerial determinations, demarcation of sectors and areas, disputes about collective agreement of a de-registered council. Furthermore, the CCMA has jurisdiction to arbitrate disputes about the interpretation or application of collective agreements where the agreement does not contain a dispute procedure, or where the dispute procedure is inoperative or where the procedure is frustrated by a party.[320]

There are jurisdictional facts that should be asserted before the commencement of the arbitration proceedings. All evidence must be presented and the nature of the dispute will determine whether the CCMA can entertain the matter to make a determination. First is to ascertain the existence of a dispute. The existence of a dispute is a primary jurisdictional requirement. Since the function of the CCMA is to resolve disputes, the LRA does not require formal proof that there is a dispute. However, if a dismissal dispute is brought before the CCMA, then proof of the existence of a dispute becomes an integral part of the employee's onus to prove that he or she has been dismissed unfairly.[321]

The second jurisdictional fact is the party to a dispute. The dispute must concern a matter of mutual interest and the party to a dispute must be on the one side: one or more trade unions, one or more employees, or one or more trade unions; one or more employers' organisations, one or more employers, or one or more employers' organisations and one or more employers.[322]

[319] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 136.
[320] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 137.
[321] Du Toit D et al A *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 129.
[322] Section 134 of the Labour Relations Act 66 of 1995.

The dispute must have been referred by a party to the dispute or by someone on their behalf. The party who refers the dispute to the CCMA must copy the referral to all other parties to the dispute.

The third fact is the timelines for the referral of cases to the CCMA. Parties must refer disputes to the CCMA within the prescribed timeframe. In the case of dismissal, employees must refer an unfair dismissal dispute to the CCMA within 30 days of the date of the dismissal or, if there has been an internal appeal hearing within 30 days of the employer making the final decision to dismiss or uphold the dismissal.[323]

In the case of an unfair labour practice, the period is 90 days from the date of the act or omission that allegedly constituted an unfair labour practice or if an employee only became aware of the occurrence at a later date, the dispute must be referred to the CCMA within 90 days of the employee becoming aware of such occurrence.[324] In the case of discrimination, the time limit is six months for the act or omission that constituted unfair discrimination. A timeframe of 90 days also exists for requests for arbitration if a dispute remains unresolved after conciliation. Where a party wishes to object to the appointment of the same commissioner (who attempted conciliation) for arbitration, the time limit is seven days after a certificate of non-resolution has been issued.[325]

The accounting of seven days excludes the first day but includes the last day and all days including weekends and public holidays. If the above periods have elapsed, the referring party must apply for condonation to request the CCMA to condone the failure to refer the case timeously.[326] An application for condonation must set out the grounds for seeking condonation and must include details on the reasons of lateness, the reasons for the lateness, the referring parties' prospects of succeeding with the referral and obtaining the relief sought against the other party; any prejudice to the other party; and any other relevant factors.[327]

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[323] Section 191 of the Labour Relations Act 66 of 1995.
[324] Section 191 of the Labour Relations Act 66 of 1995.
[325] Section 136 of the Labour Relations Act 66 of 199.
[326] Rules for the Conduct of Proceedings before the CCMA.
[327] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 138.

The fourth final jurisdiction point is the jurisdictional dispute. The CCMA does not have inherent jurisdiction over labour disputes, but there are a number of conciliation and arbitration jurisdiction disputes the CCMA may attempt to resolve, but only those disputes that fall within its statutory jurisdiction. These are disputes in respect of freedom of association and general protections, disputes about collective bargaining, unfair labour practice disputes, disputes involving workplace forums, disputes centering in strikes or lock-outs, disputes arising from unfair dismissals, disputes arising from other pieces of legislation.[328]

3.2.2 Bargaining Councils

Bargaining councils are joint employer-union bargaining institutions. They are formed in two steps. The initial step comes from the parties themselves. One or more registered trade union(s) and one or more registered employers' organisation(s) must agree to establish a bargaining council by adopting a constitution for the council.[329] Then they must negotiate the terms of the constitution, as well as the sector (industry or service) of the economy and geographical area over which the council they intend to establish will have jurisdiction.[330]

Parties to the bargaining council are represented by their representatives on the council. The parties enjoy equal representation: half the representatives on the council must be appointed by the trade unions and the other half by the employers' organisations.[331] Any registered trade union or registered employers' organisation may apply in writing to a council for admission as a party to that council at a later stage.[332]

The constitution of a bargaining council must provide for the appointment of representatives to the council,[333] the representation of small- and medium-sized enterprises on the council, the manner in which decisions are to be made in the

[328] Brand J et al *Labour dispute Resolution* 2 ed (2008) 46.
[329] Section 27 (1) of the Labour Relation Act 66 of 1995.
[330] Brand J et al *Labour dispute Resolution* 2ed (2008) 49.
[331] Section 30 of the Labour Relations Act 66 of 1995.
[332] Section 29 of the Labour Relation Act 66 of 1995.
[333] Section 30 (1) (a) of the Labour Relation Act 66 of 1995.

council, the procedure for the resolution of disputes between parties to the council and between a party and its members. The constitution of the bargaining council must further describe the procedure for the granting of exemptions from collective agreements concluded by the council; and the admission of additional registered trade unions and registered employers' organisations to the council.[334] Once the constitution has been agreed to by the parties, an application is made to the registrar of labour relations to register the council. Subsequently, once a council is registered, it obtains all the powers, functions and duties of a council imposed by the LRA, and it attains a legal personality: it can own property, enter into contracts in its own right and sue and be sued in its own name.[335]

In terms of the LRA, bargaining councils have the powers and functions to conclude collective agreements, to enforce those collective agreements, to prevent and resolve labour disputes, to perform the dispute resolution functions or any other matters of mutual interest between/among its members. The bargaining councils have a role to play in the establishment and administering of a fund to be used for resolving disputes.[336]

The bargaining council is also mandated to promote and establish training and education schemes, to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefits of one or more of the parties to the bargaining council or their members.[337]

The bargaining council is responsible to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area. In addition Bargaining council may determine by collective agreement the matters which may not be an issue in dispute for the purpose of a strike or a lock-out at the workplace, confer on workplace forums additional matters for consultation, further provide industrial support services within the sector, extend the services and

[334] Section 30 (1) of the Labour Relations Act 66 of 1995.
[335] Section 29 of the Labour Relations Act 66 of 1995.
[336] Section 28 of the Labour Relations Act 66 of 1995.
[337] Section 28 of the Labour Relations Act 66 of 1995.

functions of the bargaining council to workers in the informal sector and home workers.[338]

Bargaining councils also have a dispute resolution function, which extends to all employers and employees falling within the jurisdiction of the council, irrespective of whether they are members of the trade unions and employers' organisations that are parties to the council.[339] If a dispute arises between an employer's organisation and a trade union that is parties to the bargaining council, the dispute must be resolved in terms of the dispute resolution procedure contained in the constitution of the council. If one of the parties to the dispute is not a party to the council but the dispute falls in the sector and area over which the council has jurisdiction, the dispute must still be referred to the council.[340]

The council must attempt to resolve the dispute through conciliation. If conciliation fails (in the case of a rights dispute), the council must resolve the dispute through arbitration if the LRA requires the dispute to be resolved through arbitration or if the parties agree that the council must arbitrate the dispute. In the case of an interest dispute, or where the LRA does not require the dispute to be resolved through arbitration or where the parties do not agree to arbitration, they may resort to a strike or lock-out. In any case, the bargaining council, where it exists always is the first port of call by law. If there is no bargaining council, then the CCMA becomes the first institution of engagement.[341]

The LRA provides that bargaining councils must apply to the CCMA for accreditation to perform dispute resolution functions in respect of non-parties.[342] Accreditation is not necessary in the case of disputes between parties to the council. If the council is not in a position or is unwilling to perform dispute resolution functions itself, it may outsource the dispute resolution function to the CCMA or another accredited dispute resolution agency.[343]

[338] Section 28 of the Labour Relations Act 66 of 1995.
[339]Section 51 of the Labour Relations Act 66 of 1995.
[340] Basson A, Mischke C, Christianson M & Strydom E *Essential Labour Law* 4 ed (2005) 16.
[341] Du Toit D et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 175.
[342] Section 52 of the Labour Relations Act 66 of 1995.
[343] Section 52 of the Labour Relations Act 66 of 1995.

3.2.3 Private Dispute Resolution Agencies

The LRA also vests the CCMA with powers to license private agencies to attempt to resolve disputes through conciliation and arbitration if the disputes remain unresolved after conciliation and if the 1995 Act requires arbitration.[344] Any organisation can perform dispute resolution functions with the blessing of the LRA as long as it is accredited by the CCMA.

The CCMA may accredit an applicant to perform any function for which it seeks accreditation after considering whether the services provided by the applicant meet the CCMA's standards and provided that the applicant is able to conduct its activities effectively. The dispute resolvers are competent and independent. The applicant has an acceptable code of conduct to govern its dispute resolvers. The applicant uses acceptable disciplinary procedures to ensure that its dispute resolvers subscribe and adhere to the code of conduct and the applicant's service is broadly representative of South Africa.[345]

According to the LRA, an accredited council or accredited agency may charge a fee for performing dispute resolution functions. The 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. This includes circumstances where a dispute involves only parties to the council. Circumstances where the parties to the dispute agree to council conciliation or arbitration are considered where an arbitrator enforcing a collective agreement of a council imposes an arbitration fee. A fee can also be charged where a collective agreement permitting that such a fee is extended to non-parties. A council performs accredited functions involving non-parties to the council. The council may charge a fee only in circumstances in which the LRA allows a commissioner to charge a fee.[346]

[344] Section 127 of the Labour Relations Act 66 of 1995.
[345] Section 127 of the Labour Relations Act 66 of 1995.
[346] Section 128 of the Labour Relation Act 66 of 1995.

Bargaining councils and private agencies may apply to the CCMA for subsidies for performing dispute resolution functions in terms of the LRA for which the accredited agency is accredited and for training persons to perform those functions.[347]

3.3 DISPUTE RESOLUTION MECHANISMS

According to the LRA, if a party refers a dispute to the CCMA, the CCMA must appoint a commissioner to attempt to resolve the dispute through conciliation.[348] The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the CCMA received the referral. However, the parties may agree to extend the 30 days.[349] If the CCMA appoints one commissioner in respect of more than one dispute involving the same parties, that commissioner may consolidate the conciliation proceedings so that all the disputes concerned may be dealt with in the same proceedings.

If the dispute remains unresolved after conciliation and a commissioner has issued a certificate of non-resolution, the CCMA must arbitrate the dispute if the 1995 Act requires the dispute to be resolved through arbitration. If within 90 days after the date on which that certificate was issued, some party to the dispute has requested that the dispute be resolved through arbitration or (where the Labour Relations Act, 1995 requires the dispute to be referred to adjudication at the Labour Court) if all the parties to the dispute consent in writing to arbitration under the auspices of the CCMA. Arbitrations may be conducted by the same commissioner who attempted conciliation. However, any party may object to the appointment of the same commissioner. Both parties may also by agreement and in writing, request the CCMA to appoint a particular commissioner or a senior commissioner to attempt to resolve the dispute through arbitration.[350]

Mostly, the first stage in dispute resolution involves a consensus-seeking process.[351] This is not compulsory as further steps in the dispute resolution process (such as

[347] Section 132 of the Labour Relations Act 66 of 1995.
[348] Section 133 of the Labour Relations Act 66 of 1995.
[349] Section 135 of the Labour Relations Act 66 of 1995.
[350] Section 135; 136 of the Labour Relations Act 66 of 1995.
[351] Brand J et al *Labour dispute Resolution* 2 ed (2008) 114.

arbitration, Labour Court adjudication or industrial action) depend on this consensus-seeking process having been completed, given that the resolution of the dispute is always subject to agreement by all the parties to the dispute.[352] In the next sections, these consensus-based processes (conciliation, mediation, fact-finding, advisory arbitration and facilitation) will be discussed.

3.5.1 Conciliation

The LRA expressly mandates the CCMA to commence conciliation in all disputes referred to it within 30 days. Conciliation is a process whereby a neutral or acceptable third party assists disputing parties to reach a mutually acceptable and binding agreement. The conciliator helps the parties to develop options, consider alternatives and reach a settlement agreement that will address the party's needs. The conciliation process focuses on consensus or agreement. The conciliator has no decision-making power to determine and impose the final agreement on the parties.[353] The settlement and the resolution regarding the dispute remain with the parties themselves. The conciliator only tries to get the parties themselves to agree to a mutually acceptable settlement. Once the agreement is reached, the conciliator issues the certificate of outcome to indicate that the matter has been resolved. If the parties do not reach an agreement or at the end of the statutory 30 day period or any further period agreed between the parties, the conciliator will issue the outcome certificate on non-resolution to indicate that the dispute remains unresolved.[354] The conciliator must serve a copy of that certificate on each party to the dispute or to the person who represented a party in the conciliation proceedings and the commissioner must file the original of that certificate with the CCMA. A conciliator who conciliates as a CCMA commissioner under the LRA has definite duties and powers prescribed for them by LRA.[355] The CCMA may by agreement between the parties or on application by a party, turn a settlement agreement into an arbitration award.[356]

The process of conciliation is the first step before going to an adjudicative process such as arbitration or labour courts, and also before allowing parties to exercise power

[352] Brand J et al *Labour dispute Resolution* 2 ed (2008) 114.
[353] Du Toit D et al *Labour relation law: A comprehensive guide* 6 ed (2015) 140.
[354] Brand J et al *Labour dispute Resolution* 2 ed (2008) 130.
[355] Section 135 of the LRA 66 of 1995; Section 142 of the LRA 66 of 1995.
[356] Section 142A Labour Relations Act 66 of 1995.

tactics such as strikes or lockouts. If disputes of interest are not resolved through conciliation then strikes action or lockouts may occur. If disputes of rights are not resolved at the conciliation phase, it is then referred to arbitration or adjudication.[357]

The commissioner appointed to help the parties settle the dispute must determine an appropriate process with may include, mediation, fact-finding, making recommendations to the parties, which may be in the form of an advisory award and Facilitation.[358] Conciliation is the umbrella term for a consensus-seeking process as described hereunder.

3.5.2 Mediation

Mediation and conciliation are similar in that mediation involve a mediator acting in an advisory and conciliatory capacity only, and with no decision-making powers. However, mediation is more proactive in bringing parties to a mutually agreeable outcome by objectively advising the parties. Mediation is crucial in situations where parties are incapable of continuing negotiations or are unable to communicate directly on their own with each other. A mediator's role is to promote constructive communication by intervening directly in the face of poor communication and also advise and coach the parties on effective communication techniques.[359]

A mediator only gives advice, guidance, act as a facilitator, and the mediator has no power to prescribe, impose a decision on the parties with their specific prior consent.[360]

3.5.3 Arbitration

Arbitration differs from mediation in that arbitrators have the ultimate power to make the final and binding decision unless the decision is overturned in court. Under certain strict conditions, the LRA allows for the decision to be reviewed at the Labour Court.[361] Only in certain cases after conciliation disputes of rights are usually referred to arbitration whereas other disputes will be referred to the labour court.

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[357] Bhorat H, Pauw K & Mnube L 'Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data' (2009) 8.
[358] Du Toit D et al *Labour relation law: A comprehensive guide* 6 ed (2015) 141.
[359] Boulle L, Rycroft A *Mediation: Principles Process Practice* (1997) 121.
[360] Clark K 'The Philosophical underpinning and general workings of Chinese mediation system: what lessons can America mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 135.
[361] Section 145 of the Labour Relations Act 66 of 1995.

Unlike in the consensus-seeking processes,[362] the neutral third party plays an active role in resolving the dispute in arbitrations by conducting a hearing, receiving and considering evidence and submissions from the parties, determining or deciding the dispute between the parties, and making a final and binding award to which the parties must adhere.[363] In other words, in arbitrations, the third party has powers to make a final decision. Unlike in consensus-based processes, the parties do not have control over the outcome. In arbitrations, the third party can influence it through their evidence and arguments. The decision regarding the dispute lies with the arbitrator, and it is final and binding. The discussion in the following sections will be on general provisions governing arbitration proceedings, arbitration awards, mixed dispute resolution processes, con-arb, the powers of commissioners when attempting to resolve disputes, representation and assistance in CCMA proceedings, and jurisdictional issues.

(1) General provisions for arbitration proceedings

The LRA gives commissioners the discretion to conduct arbitrations in any form they deem appropriate, provided that they determine the dispute fairly and quickly, although they must deal with the substantial merits of the dispute with a minimum of legal formalities.[364] Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a commissioner is duty-bound to permit a party to the dispute to give evidence, call witnesses, question the witnesses of any other party and address concluding arguments to the commissioner. Arbitration takes the following stages:

The first phase is the introductory phase, during which the arbitrator and the parties introduce themselves. Seating arrangements and the language for the conduct of the proceedings as well as housekeeping rules are agreed upon. The arbitrator also briefly explains the purpose of arbitration and how it differs from consensus-based processes.[365] At this stage, the arbitrator may offer to assist the parties in attempting to resolve the dispute through a consensus-based process. If the parties agree, the

[362] Brand J et al *Labour dispute Resolution* 2 ed (2008) 114.
[363] Brand J et al *Labour dispute Resolution* 2 ed (2008) 145.
[364] Section 138 of the Labour Relations Act 66 of 1995.
[365] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 145.

commissioner may suspend the arbitration proceedings and attempt to proceed by way of the consensus-based process. If no settlement is reached by the end of the consensus-based process, the arbitration will resume. The arbitrator also highlights some elements of rules of evidence that will play a key role in weighing up the evidence presented.[366]

The party that bears the onus of proof generally begins the case. In a dismissal case, where the parties agree that the employee was dismissed, the onus is on the employer to prove the fairness of the dismissal. Ordinarily, the employer will begin. If the dispute centers on whether or not the employee was dismissed in constructive dismissal, the employee bears the onus to prove the existence of a dismissal. The employee then begins. In a dispute concerning an unfair labour practice, the onus is on the employee to prove that the employer committed an unfair labour practice. Therefore, the employee party will begin. The party that has to begin gives an opening address or statement first, submits to the arbitrator and to the other party any documents on which that party wishes to rely. The other party then follows with its opening statement. After both parties' opening statements, the arbitrator considers whether the case poses any jurisdictional issues. If so, the jurisdictional issues should be dealt with before the hearing proceeds. The arbitrator subsequently narrows the issues in consultation with the parties, to identify the issues in dispute that require evidence and to shorten the proceedings.[367]

The second phase is the presentation of oral evidence. The parties are responsible for securing the presence of their witnesses at the hearing. A witness's evidence usually consists of three phases, evidence in chief, cross-examination and re-examination.[368] The purpose of the evidence in chief is to place on record all the relevant facts of the case of which the witness has first-hand knowledge. The party or their representative may then question the witness to get his or her version on record. A party who appears in person (who represents himself or herself) may give evidence under oath by explaining what happened, and the arbitrator may play an inquisitorial

[366] Brand J et al *Labour dispute Resolution* 2 ed (2008) 153.
[367] Brand J et al *Labour dispute Resolution* 2 ed (2008) 153.
[368]Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 145.

role by asking questions. Once the witness's evidence in chief is completed, the other party or representative has the opportunity to cross-examine that witness. The main purpose of cross-examination is to highlight those statements made by the witness that the other party disagrees with or to discredit the witness so that the arbitrator disregards his or her evidence. [369]

The purpose of re-examination is to clarify or explain issues that were raised during the cross-examination. This is not an opportunity to place new evidence on record, but rather to complete or qualify answers that were given during cross-examination. If new evidence is handed in during re-examination, the opposing party must be allowed to cross-examine the witness on the new issues. The arbitrator may disallow such new evidence if not satisfied that there is good reason to allow such new evidence and further cross-examination. The same procedure is followed regarding each witness. The second party also follows the same procedure: evidence in chief, cross-examination of witnesses by the other party, and re-examination of the witness by the witness's party. Once all witnesses have testified, the party closes its case.[370]

When both parties have completed and closed their cases, the parties will be allowed to present closing statements, also referred to as closing arguments, the parties' submissions to the arbitrator, or if submitted in writing, the heads of argument. The purpose of closing arguments is to remind the arbitrator of the issues to be decided, to summarise and analyse the evidence of each witness without repeating all the evidence, to apply the law to the facts, to dispose of the other side's arguments, to outline the relief sought, to refer the arbitrator to relevant judgments, and to deal with submissions and arguments presented by the other side. The party who began the case will usually give its closing argument first, the other party will respond with its closing argument, and the first party will have an opportunity to reply to the arguments of the second party. The second party has already had such an opportunity because it presented its argument after hearing the argument of the first party.[371]

[369] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 145.
[370] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 145.
[371] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 145.

After the hearing, the arbitrator considers the evidence and arguments. According to the 1995 Act, the commissioner must issue an arbitration award within 14 days of the conclusion of the arbitration proceedings, with brief reasons for the decision (sufficient to justify the conclusion).[372] An arbitration award gives a summary of the evidence led by the parties and the commissioner's analysis of that evidence. The award proclaims in whose favour the commissioner has decided, and will usually include an order for relief.[373] The award must be clear: if vague, it will be unenforceable. If it includes an order of compensation, the basis or formula should be included and the date when payment is due should be stipulated. The award also deals with the questions that had to be decided, so that no matter is left undecided.[374] The award must be signed by the commissioner, who must serve a copy of the award to each party to the dispute (or their representative) and file the original with the Registrar of the Labour Court. The commissioner may not include an order for costs in the arbitration award unless a party or the person who represented the party in the arbitration proceedings acted in a frivolous or vexatious manner in their conduct during the arbitration proceedings.

The CCMA may charge an arbitration fee if the commissioner finds that the dismissal is procedurally unfair, If the CCMA resolves a dispute about the interpretation or application of a collective agreement that does not contain a procedure for conciliation and arbitration of such disputes, or if the agreed procedure or a bargaining council's dispute resolution procedure is inoperative; or if a party to a collective agreement has frustrated the resolution of the dispute under the procedure in the collective agreement. In the last two cases, the fees require the parties to bear the CCMA's process costs, because the CCMA is in effect performing a function that the parties themselves should have performed.[375]

If a party to a dispute fails to appear in person or to be represented at the arbitration proceedings and that party is the complainant, the commissioner may dismiss the matter or if that party is the respondent, the commissioner may continue with the

[372] Section 138 (7) of the Labour Relations Act 66 of 1995.
[373] Du Toit D et al *Labour relation law: A comprehensive guide* 6 ed (2015) 160.
[374]Du Toit D et al *Labour relation law: A comprehensive guide* 6 ed (2015) 160.
[375] Section 138 (10) of the Labour Relations Act 66 of 1995.

arbitration proceedings in the absence of that party, or the commissioner may adjourn the arbitration proceedings to a later date.[376] As an internal measure of efficiency, the CCMA binds commissioners to avoid postponements altogether, or not to exceed 5% of their caseload per year. The CCMA requires arbitrations to be concluded within 60 days of the request for arbitration.[377]

The CCMA may only arbitrate disputes in respect of which the 1995 Act requires arbitration.[378] The absence of this vital jurisdictional fact cannot be condoned by the CCMA nor can the parties confer jurisdiction to arbitrate where the Act does not provide for it.[379] The essential question in the context of jurisdiction is whether an institution has the power to hear the matter referred to it. The Commissioner must ensure that the CCMA has jurisdiction to arbitrate the matter.

(2) Con-arb

The con-arb process is a mixture of both conciliation and arbitration. It is a "one-sitting" process that has two steps.[380]The process starts with conciliation and if the parties cannot reach an agreement, the person who conducted the conciliation proceeds to arbitrate the dispute.[381]The same person is therefore the conciliator and the arbitrator. The con-arb process tries to expedite the dispute resolution process by having conciliation and arbitration take place as a continuous process on the same day.[382] Con-arb is compulsory in unfair dismissal or unfair labour practice disputes involving probationary employees.[383]In all other cases, con-arb is applicable only if the parties to the dispute agree at the commencement of the dispute resolution procedure that if conciliation fails, the arbitration will take place immediately.

(3) Powers of commissioners when attempting to resolve disputes

[376] Section 138 (5) of the Labour Relations Act 66 of 1995.
[377] Bhorat H, Pauw K & Mnube L *Understanding the* Efficiency *and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data* (2009) 8.
[378] Section 136 (1) of the Labour Relations Act 66 of 1995.
[379] Bosch D et el *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 136.
[380] Bosch D et al *The Conciliation and Arbitration Handbook: A Comprehensive guide to Labour Dispute Resolution Procedure* (2004) 79.
[381] Brand J et al *Labour dispute Resolution* 2 ed (2008) 42.
[382] Du Toit D et al A *Labour relation law: A comprehensive guide 6* ed (2015) 145.
[383] Section 191 (5) (a) of the Labour Relations Act 66 of 1995.

According to the LRA, a commissioner who has been appointed to attempt to resolve a dispute has power to conciliate or arbitrate the dispute as the case may be, to determine the procedure to be followed in the conciliation or arbitration, to subpoena a person for questioning experts to give evidence, or the production of documents if this may assist in the resolution of the dispute, to administer an oath or accept an affirmation from witnesses, and to order costs.[384]At any reasonable time but only with the written authorisation of the labour court, the commissioner may enter and inspect any premises on or in which any document or object that is relevant to the resolution of the dispute is to be found or is suspected on reasonable grounds of being found there, to examine, to demand the production of, and to seize any document or object that is on or in those premises and that is relevant to the resolution of the dispute, to take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement, and to inspect and retain for a reasonable period any of the books, documents or objects that may have been produced to or seized by the CCMA.

A person commits contempt of the CCMA if, after having been subpoenaed to appear before the commissioner, the person without good cause does not attend, fails to remain in attendance until excused by the commissioner, refuses to comply with the commissioner's instructions or requirements, insults, disparages or belittles a commissioner or prejudices or improperly influences the proceedings or improperly anticipates the commissioner's award, wilfully interrupts or misbehaves during the proceedings, or does anything which, if done in relation to a court of law, constitutes contempt of court. The CCMA does not have the power to institute criminal proceedings in the case of contempt of the CCMA, but it may refer the matter to the Labour Court for an appropriate order to be made against the contemptuous party.[385]

(4) Arbitration involving the state

The LRA limits the powers of an arbitrator in certain disputes involving the state. If an award has financial implications for the state[386]It will only bind the state after 14

[384] Section 142 of the Labour Relations Act 66 of 1995.
[385] Section 142 of the Labour Relations Act 66 of 1995.
[386] Section 74 (5) of the Labour Relations Act 66 of 1995.

days.[387] If the Minister of Labour tables the award in Parliament within that period[388] or within 14 days of the beginning of the next session of Parliament,[389] Parliament has a further 14 days to confirm or reject it.[390] The LRA provides that if the parliament does not reject the award, it automatically becomes binding.[391] If Parliament rejects the award, the dispute must be referred back to the CCMA for further conciliation. If the dispute further remains unresolved, the CCMA must arbitrate it at the request of any of the parties. This arrangement or procedure is only applicable to the central government. The LRA only made that provision for the parliament.[392] This is however not a case in Namibia. The 2007 Act does not make an exclusive provision for the arbitration involving the state.

(5) Representation and assistance in CCMA proceedings

In respect to representation during the conciliation process, representation is limited to the parties at conciliation meetings, as stated in the LRA.[393] In South Africa, legal representatives, including consultants are not permitted at the conciliation level. According to CCMA Rule 25, no provision is made for legal representation in conciliation proceedings. Legal practitioners are excluded from the CCMA conciliation proceedings.[394] In its place, a party may appear in person or be represented only by a director or employee of that party and/or by a close corporation, also by a member thereof, or by any member, official or office bearer of that party's registered trade union or registered employers' organisation. Persons falling outside this list of potential representatives are not allowed to represent a party in conciliations.

At arbitration, legal representation is permitted, except if the dispute is about dismissal for conduct or capacity. However, even in these cases, a party can use legal representation if all the parties including the commissioner, consent or if the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation after having considered the nature of the

[387] Du Toit D et al A *Labour relation law: A comprehensive guide* 6 ed (2015) 171.
[388] Section 74 (5) (a) of the Labour Relations Act 66 of 1995.
[389] Section 74 (7) (a) of the Labour Relations Act 66 of 1995.
[390] Section 74 (5) (b); (7) (b) of the Labour Relations Act 66 of 1995.
[391] Section 74 (5) (b) of the Labour Relations Act 66 of 1995.
[392]Du Toit D et al A *Labour relation law: A comprehensive guide* 6 ed (2015) 171.
[393] Rules for the Conduct of Proceedings before the CCMA.
[394] Rule 25 of the Rules for the Conduct of Proceedings before the CCMA.

questions of law raised by the dispute, the complexity of the dispute, the public interest, and the comparative ability of the opposing parties or their representatives to deal with the dispute.[395] Similarly, legal representation is not allowed in the conciliation stage of the con-arb process but maybe permitted at the arbitration stage, subject to the same rules governing legal representation in arbitrations.

It is submitted that the rationale for the exclusion of legal representation in conciliations and arbitrations is that legal representation tilts the balance in favour of the party with greater resources (generally the employer) and the participation by lawyers results in cases becoming more technical and complicated as well as drawn out (prolonged) and expensive. The author is of the view that lawyers often delay proceedings owing to their unavailability or the approach adopted and consequently place individual employees and small businesses at a disadvantage because of mounting costs and delayed justice. In the case of the *Commission for Conciliation, Mediation and Arbitration and others vs Law Society of the Northern Provinces,* the Northern Gauteng High Court considered the constitutionality of Rule 25(1)(c).[396] The Law Society argued that the rule should be declared unconstitutional as it unfairly discriminates against legal practitioners and that it also breaches the right to equality which is guaranteed in terms of section 9(3) of the Constitution. Tuchten J argued in *CCMA v Law Society, Northern Provinces* 2013[397] that the rule is inconsistent with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (hereafter 'PAJA').[398] The Law Society went on to argue that the said rule contravenes section 22 and 34 of the Constitution which respectively protect the right of every individual to freely choose his or her trade, occupation and profession as well as the right to have any dispute resolved in a fair public hearing before a court or independent and impartial tribunal or forum"[399].

(6) Arbitration awards

[395] Section 138 of the Labour Relations Act 66 of 1995.
[396] *CCMA V Law Society, Northern Provinces* (005/13) 2013 ZASCA 118 para 8.
[397] *CCMA v Law Society, Northern Provinces* (005/13) [2013] ZASCA 118 para 8.
[398] Section 3 (3) (a) of the Promotion of Administrative Justice Act 3 of 2000.
[399] *CCMA v Law Society, Northern Provinces* (005/13) [2013] ZASCA 118 para 26.

An arbitration award issued by a commissioner is final, binding and it may be enforced as it was an order of the labour court, unless it is an advisory award[400] and also provided that the Director of the CCMA (or another person to whom this function has been delegated) certifies it.[401] The award is the most important aspect of arbitration since it embodies the resolution of the dispute.[402]There are certain important aspect concerning the award and should also form part of an award-

(i) *Timing* of the award, for a speedy resolution of a dispute, the award should be issued within a specified time. The LRA provides that the award must be issued within 14 days of the conclusion of the proceedings but the Director may extend the period on good cause shown.[403]

(ii) The Commissioner must provide *reasons* for an award.[404] The reasons need to be more than a summary of the issues, evidence, arguments, factual findings and the decision itself.

(iii) The parties should consider whether or not they wish to allow the arbitrator to make an award as to *costs* or whether or not they will be sharing the costs.[405]

(7) Appeals and Reviews of awards

An appeal generally involves a reconsideration of the merits of a dispute but the rehearing is often limited to the evidence on which the decision under appeal was given. Review on the other hand has to do with the legality or validity of an award. Evidence may be led but only to prove the existence of irregularities.[406]

An award may be set aside after review by the labour court if an award deals with a dispute which may be referred to arbitration on one or more of the following grounds-

(i) If the arbitrator has committed misconduct concerning his duties as arbitrator

(ii) If the arbitrator has committed any gross irregularities in his conduct of the arbitration proceedings

[400] Section 143(1) of the Labour Relations Act 66 of 1995.
[401] Section 143 of the Labour Relations Act 66 of 1995.
[402] Du Toit D et al A *Labour relation law: A comprehensive guide* 6 ed (2015) 172.
[403] Section 139 (7) of the Labour Relations Act 66 of 1995.
[404] Section 139 (7) (a) of the Labour Relations Act 66 of 1995.
[405] Du Toit D et al A *Labour relation law: A comprehensive guide* 6 ed (2015) 162.
[406] Du Toit D et al A *Labour relation law: A comprehensive guide* 6 ed (2015) 224.

(iii) If the arbitrator has exceeded his powers

(iv) If the award has improperly obtained

The awards can only be enforced through the High Court.[407]

3.6 CONCLUSION

This chapter highlights the legal framework of the CCMA. In particular, the chapter began with an overview of dispute resolution before 1995 and ends with statutory dispute resolution since1995. The chapter discussed the CCMA and other dispute resolution institutions namely bargaining councils and private dispute resolution agencies. The chapter further provides a detailed discussion on the establishment of the CCMA and other the institution, dispute resolution under the CCMA, the resolution of disputes through consensus-based processes, the resolution of disputes through arbitration, general provisions for arbitration proceedings, the effect of arbitration awards, the resolution of disputes through the mixed process of con-arb, the powers of commissioners when attempting to resolve disputes, representation and assistance in CCMA proceedings, and jurisdictional issues.

The process as discussed will further enable the proper comparison of the Namibian Dispute Resolution systems under the OLC and the CCMA. The Comparison to the dispute resolutions system between the two counties is discussed in the next chapter which outlies the findings on the similarities and disparities in the provisions of the 1995 Act and 2007 Act, and lastly, provide recommendations for the adjustment of the dispute prevention and resolution system in Namibia and consolidate the dispute resolution system that is easily accessible, user-friendly and beneficial to workplace forum in Namibia.

[407] Section 145 (2) (a) of the Labour Relations Act 66 of 1995.

CHAPTER 4

A COMPARISON OF THE DISPUTE RESOLUTION PROCESSES IN NAMIBIA AND SOUTH AFRICA

4.1 INTRODUCTION

The purpose of this comparative study is to highlight and explain the differences between the alternative dispute resolution systems of Namibia and South Africa with the view to assess the effectiveness of the 2007 Act and the labour commissioner rules. The thesis is focusing on the strengths and weaknesses in utilising ADR methods in labour disputes in Namibia.

It is submitted that the South African system may be adapted for use in Namibia ADR systems and institutions.[408]The Namibian labour statutes and dispute resolution systems are similar to the South African labour relations law. The reason for the view is premised on the basis that Namibia and South Africa are not necessarily identical, there are distinct differences in certain areas, such as economic development. However, the differences between the systems do not mean that Namibia cannot adopt solutions that have proved successful in South Africa, therefore, a degree of transferability can be considered.

4.2 LABOUR LEGISLATION

As it was stated earlier in chapter 3, the LRA adopted the ADR systems of conciliation and arbitration and created the labour court as a last resort in dispute resolution.[409] Namibia followed South Africa's example with the enactment of the 2007 Act, therefore confirming that the current Namibian labour dispute resolution system is based on the South Africa alternative dispute resolution system.[410] However, minor differences do exist and are discussed in this chapter.

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[408] Blanpain R et al *Comparative Labour Law and Industrial Relations* 6 ed (2014) 29.
[409] Section 1(d) (v) of the Labour Relations Act 66 of 1995.
[410] *Purity Manganese (PTY) Ltd v Tjeripo Katzao* [2011] NALC 19 (LC 86/2011) par 33.

4.2.1 The Labour Act 11 0f 2007 and the Labour Relations Act 66 of 1995

The Labour Relations Act (LRA) stopped the use of criminal law to enforce labour law and collective agreements. Having moved away from criminal sanctions to enforce labour laws, South Africa has adopted an approach of self-regulation and enforcement through private law interventions, such as statutory arbitration, private arbitration, and adjudication by the Labour Court.[411] In Namibia, despite the Wiehahn Commission's recommendation that criminal law should not be used to enforce labour legislation, the drafters of both the 1992 Act and the 2007 Act ignored these recommendations and permitted the inclusion of criminal sanctions in labour legislation. The Namibian Police Force and prosecutors experience serious difficulties in ensuring the successful prosecution and conviction of offenders due to the complexity of related charges[412]. Consequently, this thesis contends that there is no purpose for the inclusion of such criminal provisions, given the very low rate of success (if any) in bringing offenders before criminal courts.

4.3 ALTERNATIVE DISPUTE RESOLUTION INSTITUTIONS

Although Namibia has adopted much of its labour relations law from South Africa in terms of the ADR methods, it must be borne in mind that the application of these methods will be unique to each country. The differences in the application of the ADR mechanisms are discussed below.

4.3.1 Labour Commissioner and the CCMA

The thesis submits that the Labour Commissioner's office in Namibia and the South African Commission for Conciliation Mediation and Arbitration are comparable institutions created by the respective countries' labour legislation to promote and provide the framework for the effective and efficient resolution of labour disputes. In Namibia, the Labour Commissioner is an individual civil servant appointed by the

[411] Brassey *Commentary on the Labour Relations Act* A1- 4.
[412] *Namibia wildlife resorts limited v Iilonga* [2012] NALC 26 LCA 03/2012.

Minister of Labour[413] and includes conciliators and arbitrators in his office.[414] As a result, social partners have very little input with regards to decisions made in the appointment of the Labour Commissioner, conciliators, and arbitrators since the power is vested in the LAC as an advisory body to investigate and advise the Minister qualifications and appointments of conciliators and arbitrators in terms of the 2007 Act.[415]

In South Africa, the CCMA is established as an autonomous statutory body with legal personality.[416] The director and commissioners are appointed by the governing council of the CCMA. The CCMA is independent of the state, political parties, trade unions and employers' organizations.[417] This is not the case in Namibia, despite recommendations by the task force responsible for drafting the Labour Act that the Labour Commissioner be independent of the state. Nevertheless, it should be noted that the 2007 Act places a great deal of emphasis on the independence and impartiality of the Labour Commissioner and all arbitrators in the performance of their statutory functions, despite their appointment as civil servants.[418]

4.3.2 Bargaining councils

It has been found that the bargaining council system in South Africa complements the work of the CCMA, thereby reducing the organisation's caseload and backlog.[419] In Namibia, there are no statutory recognised bargaining council systems, but industry bargaining forums are prevalent. This is a progressive innovation initiated by the parties themselves, which operate on a purely voluntary basis in the industries where bargaining forums exist, such as security, construction, and farming, have proved to be useful in terms of determining collective conditions of employment and setting of minimum standards of employment, such as minimum wages. However, they have no statutory power to resolve labour disputes, except referring to such disputes to the Labour Commissioner's office.

[413] Section 120 of the Labour Act No 11 of 2007.
[414] Section 82 (2) & 85 (4) of the Labour Act No 11 of 2007.
[415] Section 93 (1) (n) of the Labour Act 11 of 2007.
[416] Section 112 of the Labour Act 66 of 1995.
[417] Section 113 of the Labour Act 66 of 1995.
[418] Section 85 of Act 11 of 2007.
[419] Section 29 of the Labour Relations Act 66 of 1995.

4.3.3 Private arbitration

The private arbitrator is another alternative method of voluntary dispute resolution available to disputants in terms of the Arbitrations Act No.42 of 1965.[420] Private arbitration in Namibia and South Africa is done in the same manner and premised on the same Arbitration Act. There are, however, no properly established and recognised private arbitration institutions in Namibia, such as Tokiso Dispute Resolution in South Africa.[421] It is therefore submitted that parties have limited choices in Namibia, except for agreeing on using the services of individuals practicing as labour consultants.

The private arbitration system plays a valuable complementary role in labour dispute resolution as it has the potential to offer parties alternative adopted and agreed formulas. It contributes to benefit such as privacy, informality, speed and focuses on substance rather than form. This makes private arbitration cost-effective even where it is not publicly subsidised.[422]

4.3.4 Labour Court

Aside from available ADR machinery, the Namibian Labour Act of 2007 and the LRA of South Africa established labour courts in both countries, as well as the labour appeal court in South Africa which is established as a court of law and equity, being the final court of appeal in respect of all judgements and orders made by the Labour Court.[423] In South Africa, the labour court has been afforded the same status as a division of the High Court of South Africa and has exclusive jurisdiction over cases concerning dismissals for operational requirements, strike dismissals and other cases in which the dismissal is alleged to involve discrimination.[424] The labour court in South Africa is separate from the high court, although it has, in certain disputes, parallel jurisdiction.

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[420] Options for private arbitration in Namibia, presented by Namibia Institute for Democracy in association with the Konrad-Adenauer-Stiftung, 23 October 2001.
[421] Options for private arbitration in Namibia, presented by Namibia Institute for Democracy in association with the Konrad-Adenauer-Stiftung, 23 October 2001.
[422] Thompson C *Dispute Prevention and Resolution* (2010) 46.
[423] Section 167(2) of the LRA 66 of 1995.
[424] Benjamin P 'Accessing South Africa's Commission for Conciliation, Mediation and Arbitration' (2013) *International Labour Office* 6.

Dedicated judges who specialise in labour law preside over the court. In contrast, Namibia's labour court is a division of the high court and has no dedicated specialist judges. Any judge of the high court can be appointed to preside over a labour dispute. This practice or system tends to compromise labour issues as they require specialisation and arbitrators are entrusted with specialised skills to handle disputes effectively.[425]

4.4 ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

4.4.1 Conciliation/Mediation

Although the principles of conciliation are similar in both countries, the original 2007 Act empowered conciliators to determine labour disputes at the conciliation level.[426] This created the perception that conciliation meetings had similar trappings to a court or tribunal, which produced binding awards. The Namibian Labour Court has since condemned this provision and practice by pointing out that conciliation is simply an avenue to resolve labour disputes without necessarily having to make legally binding awards against any party to a dispute.[427] In South Africa, since the inception of conciliation, commissioners had no binding determination powers at the conciliation level.

4.4.1.1 Settlement agreements

In Namibia, despite the provision on the settlement agreements, the 2007 Act has not created any mechanism for enforcing these agreements resulting from conciliation. The only remedy is to approach the labour court to make the settlement an order of the Court.[428] This Lacuna allows parties to the dispute to enter into settlement agreements without the bona fide intention of resolving the dispute, knowing very well that there is no provision in the Labour Act compelling them to do so. Consequently,

[425] Khabo F M 'Collective Bargaining and Labour Dispute Resolution: is SADC Meeting the Challenges' (2008) 14.
[426] Section 85 of the Act 11 of 2007.
[427] Parker C *Labour Law in Namibia* (2012) 45.
[428] Section 117 of the Labour Act 11 of 2007.

many settlement agreements remain dormant in Namibia. Namibians can learn from South Africa, which has a provision permitting the parties to approach CCMA to convert a settlement agreement to an arbitration award, thereby acquiring the enforcement status of a usual arbitration award.[429]

4.4.2 Arbitration

The arbitration system has been created as a means to resolve labour disputes and has been so developed mainly in response to the inadequacies of the previous statutory adjudication process contained in the 1992 Act.[430] These procedures have been lacking in satisfying the stakeholders' needs and expectations as they were too technical, complicated and cumbersome. Similar sentiments were expressed in South Africa at the adoption of the LRA from the old 1956 Act. The explanatory memorandum to the 1956 LRA which have similar concerns raised by social partners at various consultative meetings or workshop on the reform of the labour dispute in Namibia, read as follows –

> *"The resolution of a dispute, including unfair dismissal disputes was complex, inefficient, protracted, expensive and highly legalistic"*[431]

It is submitted that both the 2007 Act and the LRA place great emphasis on the use of arbitration as a means of resolving disputes. One of the common purposes contained in both the statutes is to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration.

4.4.2.1 Arbitration awards

An arbitration award must be issued with 30 days of the conclusion of an arbitration hearing by arbitrators in Namibia[432] and within 14 days by CCMA commissioners in South Africa. In both cases, the award is final and binding and automatically earns interests. It is submitted that if i.e the award is issued to the employer, the employer is required to adhere to or comply with the terms of the award once served on him/her,

[429] Section 142(a) of the Labour Relations Act 66 of 1995.
[430] Labour Act 6 of 1992.
[431] Brand J et al *Labour Dispute Resolution* 2 ed (2008) 1.
[432] Section 86(18) of the Labour Act 11 of 2007.

depending on the nature of the award. The employer seldom complies with the award, especially if it is a monetary one. This becomes a heavy burden to bear for an applicant appearing in person without any legal assistance. Should the employer refuse to comply with the terms of the award, the applicant is left to return to the CCMA. During this period interest accrues in respect of the award in terms of s 143(2) of the LRA, as prescribed in terms of s 2 of the Prescribed Rate Act 55 of 1975. Failure by the employer to comply with the order results in the employer being in default, and the next step is to have the award certified in terms of s 143(3).[433] In Namibia, the interest accumulates from the date of judgment or award to the date of payment and does not prescribe.[434]

The Director of the CCMA has the statutory power to certify the award, thereby making it enforceable immediately.[435] In Namibia, the Labour Commissioner has no such powers. It is for the parties or the Labour Commissioner at his/her own instance to approach labour court to make the award an order of the court, consequently becoming enforceable.[436] It is submitted that this creates further delays in Namibia when compared to the immediate enforcement of awards in South Africa, where approaching the court is an alternative rather than the first recourse.

In Namibia, despite the prescriptive instruction by the 2007 Act for statutory arbitration and the labour court to take into account the code of good practice when deciding cases that come before them,[437] without any doubt, the code of good practice will facilitate proper implementation of the legislative framework and give users guidance on labour law and dispute resolution. Code of good practices play a significant educational function and serve as an important dispute prevention aid.[438]

4.4.2.2 Enforcing an arbitration award

[433] *Griekwaland Wes Korporatiet v Sheriff Hartswater and Others In re Sheriff, Hartswater and Another v Monanda Landbou Dienste* [2009] JOL 23720 (LC). .
[434] *JB Cooling & Refrigeration CC v Kastro Kavendjaa* and Another [2012] 8 NALC 32 (LCA 15/2010).
[435] Section 143 (1), (3) of the Labour Relations Act 66 of 1995.
[436]Section 87(1) (a) (*b*) Labour Act 11 of 2007.
[437] Section 86 (17) of the Act 11 of 2007.
[438] Thompson C *Dispute Prevention and Resolution in the Public Service labour Relations: Good policy and practise* ILO 33.

There are methods of enforcing arbitration awards in Namibia. Compensation awards are enforced by a writ of execution, while reinstatement is enforced by filing for contempt of court proceedings. In Namibia, the duty to enforce arbitration awards lies with labour inspectors who instruct Deputy Sherriff to obtain a writ of execution. Contempt of court, on the other hand was instituted by the Government Attorney on behalf of the Labour Inspector. However, the Government Attorney is a Department within the Ministry of Justice. The Attorney General advised that the Contempt of Court application is in the interest of a private individual and the Office of the Attorney General does not act on the instructions of private individuals but merely acts on behalf of the government and its agencies. Therefore, in the matter between *Namibia Conference of SIDA Churches v Tuuliki Mwafufya Shikongo*; LCA 37/2014, it was held that the Government Attorney does not have the jurisdiction to institute an application of Contempt of Court.

In South Africa, labour inspectors play no role in the enforcement of arbitration awards. It is left to the parties themselves to pursue enforcement at their own cost. This, for obvious reasons, maybe unattainable for the ordinary party who may not be able to meet the cost involved. However, despite the involvement of the Government Attorney in the enforcement of reinstatement awards in Namibia, very little, if any, has been achieved. At this time in point, very few contempt of court case has been brought before the court. This has led to a loss of confidence in the system by persons with unenforced reinstatement awards.

4.4.2.3 Review and appeal of an arbitration award

In Namibia, the Labour Act permits appeal against arbitration awards on limited grounds, namely on any question of law, on a question of fact, or a combination of these.[439] An appeal is permitted on the basis of Article 12(1)(a) of the Namibia Constitution, which guarantees the right to a fair trial, as arbitration is considered a tribunal for the purpose of resolving labour disputes. In South Africa, the CCMA is an administrative body as defined in section 33 of that country's Constitution. However, there is no appeal against arbitration awards. Arbitration awards are subjected to review only on the grounds listed in section 145 of the LRA.

[439] Section 89 (1) (a) (b) of the Labour Act 11 of 2007.

There is no right of appeal against an arbitration award in the South African system, in contrast to Namibia where an aggrieved party has the choice to either appeal against or apply for a review of the arbitration proceedings. Inherent delays in finalising disputes are prevalent in both the South Africa and Namibia court systems, contradicting the ultimate objective of labour legislation, which sought to ensure that labour disputes are resolved expeditiously and in an efficient manner. These delays are caused by the lack of statutorily established timelines with which labour disputes must be finalised by the labour court, particularly where the enforcement of the award has stayed. Therefore, it is submitted that this has an adverse effect on the beneficiaries of the award, particularly where the affected party continues to suffer the effects of unemployment.

4.4.2.4 Compensation

It has also been shown that, in South Africa, the LRA provides clear guidelines for awarding compensation where, for instance, reinstatement is not a feasible option. For this reason, the LRA places limitations on the awarding of compensation by commissioners and the labour court.[440] In Namibia, the Labour Act fails to provide similar guidelines on awarding compensation as such, unjustified compensation awards have been made by arbitrators in the Labour Commissioner's office. This has created varying opinions as to the permissible limit of compensatory awards. The Namibian Labour Court has neither been very helpful in this respect. All the court was prepared to say is that compensation should be equal to the amount of loss suffered or the amount of remuneration the employee would have been paid had he not been dismissed.[441] This leaves it up to the arbitrator to award compensation from the date of dismissal to the date of the award, irrespective of the time that has elapsed. This equally applies to the labour court itself, where the amount of time it takes to finalise the matter is not taken into account. In most cases, this had led to arbitrators issuing vague arbitration awards that fail to specify the amount of and the time frame for compensation, making it effectively impossible to enforce by labour inspectors and to obtain writs of execution.[442]

[440] Section 194 of the Labour Relations Act 66 of 1995.
[441] *Pupkewitz Holding (Pty) Ltd v Petrus Mutanuka and others [2008]* NAHC 145 LCA 2007/47.
[442] Section 90 of the Labour Act 11 of 2007.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 RESEARCH QUESTION

In the past, the resolution of disputes including unfair dismissal disputes under the 1992 Act was criticised for being too complex, inefficient, protracted, expensive and highly legalistic. The same criticism is experienced under the current 2007 Act which includes the dispute being too long, cumbersome, frustrating and too costly especially when the dispute is referred to the labour court for adjudication.

The thesis has answered the research question by doing a literature review of the legal position in both Namibia and South Africa.

5.2 FINDINGS

Based on the information gathered, the thesis further provides a comprehensive report hereunder on the two countries under review.

5.2.1 Namibia

The 2007 Act introduced a new point of departure in dispute resolution and prevention, in which a number of institutions have been created to perform dispute resolution functions, with the Office of the Labour Commissioner (hereafter the OLC) the only statutory institution. The OLC is established as a dispute resolution component operating within the Ministry of Labour, Industrial Relations and Employment Creation (hereafter the MLIREC). The OLC is fully dependent on the state in terms of capital and human resources as well as decision-making. It is submitted that the structure of the OLC being a department under the MLIREC is creating uncertainties and society is questioning the integrity and /or trust in the alternative dispute resolution system. These uncertainties are particularly where state disputes are involved.

Conciliation is a relatively informal and flexible process in which an independent third party (the conciliator) assists the parties involved in a dispute to reach an agreement

in a quick and inexpensive way. An appointed conciliator must attempt to resolve the dispute through conciliation with 30 days of the date the Labour Commissioner received the referral of the dispute. When a party to a dispute reaches an agreement then a settlement agreement can be issued. However, despite the provision on settlement agreements, the 2007 Act has not created any mechanism for enforcing these agreements resulting from conciliation. Settlement agreements resulting from conciliation meetings have no expressed force of law in Namibia, and there is no legislated mechanism that exists to enforce them.

The 2007 Act permits in terms of section 82 (13) legal representation during conciliation proceedings provided that the parties to a dispute agree or at the request of a party to a dispute. Representation is permitted if the conciliator is satisfied that the dispute is of such complexity that is appropriate for a party to be represented by a legal practitioner. It is submitted that the legal representation at conciliation turns the proceedings to become legalistic and expensive for ordinary parties to the dispute and therefore, has the effect of negating a speedy and simplified labour dispute resolution process.

During arbitration proceedings, an arbitrator makes a final decision after he has received and considered evidence and submission from the disputants. The 2007 Act provides that within thirty (30) days of the conclusion of the arbitration proceedings, the arbitrator must issue an award giving concise reasons and signed by the arbitrator. The thirty-days is criticised to be too long and causing unnecessary delays.

The Labour Commissioner has no power to certify the award and therefore make it an order of the court. The party to a dispute or the Labour Commissioner at his/her own instance has to approach the labour court to make the award an order of the court, consequently becoming enforceable. It is submitted that this creates further delays.

Although the award is final and binding, the award may be subjected to an appeal on the question of law and facts or review in an event of irregularities in the process. Finally, when the dispute is heard in the court for adjudication, there is a need for representation by an admitted lawyer who can practice in the court of law. It is submitted that the process becomes costly and prolonged, and at the time even

becomes complicated. The involvement of a lawyer can make the process more difficult and unbearable to some workers who cannot afford it.

5.2.2 South Africa

The LRA provides four main procedures through which parties to a dispute can resolve a labour dispute namely, mediation, conciliation, arbitration and adjudication. In terms of the LRA the Commission for Conciliation, Mediation and Arbitration (hereafter CCMA'), bargaining councils and the labour courts have been established as the institutions through which disputants can resolve their labour disputes.

The CCMA is a dispute resolution body established in terms of the LRA, as an independent body and does not belong to and is not controlled by any political party, trade union or business, and it is independent of the state.

The LRA also vests the CCMA with powers to license private agencies to attempt to resolve disputes through conciliation and arbitration if the disputes remain unresolved after conciliation and if the 1995 Act requires arbitration. Any organisation can perform dispute resolution functions with the blessing of the LRA as long as it is accredited by the CCMA. There are no licensed private agencies in Namibia.

In terms of the LRA, bargaining councils have the powers and functions to conclude collective agreements, to enforce those collective agreements, to prevent and resolve labour disputes, to perform the dispute resolution functions, or any other matters of mutual interest between/among its members. The bargaining councils have a role to play in the establishment and administering of a fund to be used for resolving disputes.

According to the LRA, if a party refers a dispute to the CCMA, the CCMA must appoint a commissioner to attempt to resolve the dispute through conciliation within 30 days of the date the CCMA received the referral. The conciliator only tries to get the parties themselves to agree to a mutually acceptable settlement. The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award.

In respect to representation during the conciliation process, representation is limited to the parties at conciliation meetings, as stated in the LRA. In South Africa, legal representatives, including consultants are not permitted at the conciliation level. According to CCMA Rule 25, no provision is made for legal representation in conciliation proceedings. Legal practitioners are excluded from the CCMA conciliation proceedings. In its place, a party may appear in person or be represented only by a director or employee of that party and/or by a close corporation, also by a member thereof, or by any member, official or office bearer of that party's registered trade union or registered employers' organisation. Persons falling outside this list of potential representatives are not allowed to represent a party in conciliations.

At arbitration, legal representation is permitted, except if the dispute is about dismissal for conduct or capacity.

An arbitration award issued by a commissioner is final, binding and it may be enforced as it was an order of the labour court, unless it is an advisory award and also provided that the Director of the CCMA certifies it. The award is the most important aspect of arbitration since it embodies the resolution of the dispute.

An appeal generally involves a reconsideration of the merits of a dispute but the rehearing is often limited to the evidence on which the decision under appeal was given. Review on the other hand has to do with the legality or validity of an award. Evidence may be led but only to prove the existence of irregularities.

5.3 RECOMMENDATIONS

In the interest of resolving labour disputes efficiently and effectively, the thesis recommends an adjustment to the process of alternative dispute resolution in Namibia, specifically through unambiguously defined parameters as to what constitutes a fair and quick determination of disputes.

The establishment of the office of the labour commissioner should be reassessed to be independent of the state just like the CCMA. Making the Labour Commissioner's

office independent will restore users of the system's confidence in it, particularly where government disputes are involved.

The current thirty days period applicable in the conciliation process and provided in the rules of the labour commissioners should include arbitration proceedings. A time-bound system that does not take effect only at the conclusion of the arbitration, but that operates from the effective time of referral of the dispute is required. Arbitration should not be allowed to lengthen disputes unnecessarily, its ultimate purpose of achieving quicker, fairer, and equitable results must be ensured.

Settlement agreements resulting from conciliation meetings have no expressed force of law in Namibia, and no statutory established mechanisms exist to enforce them. South Africa has adopted its system by creating a provision in the LRA that permits any party to the settlement agreement to apply to the CCMA to have the agreement converted to an arbitration award. Given the widespread non-compliance with settlement agreements in Namibia, social partners and policy-makers are called upon to consider an amendment to this effect. It is proposed that a provision similar to section 142A of the LRA be included in the 2007 Act.

This will allow conciliation agreements to be enforced in the same manner as ordinary awards in terms of section 90 of the 2007 Act. Conciliation settlements may be reinforced by the labour court in terms of section 117(1) (f) of the 2007 Act.

Section 82 (13) of the 2007 Act should be amended to exclude legal representation during conciliation proceedings.

Section 86 (17) of the 2007 Act provides for Issuance of Arbitration award with 30 days of the conclusion of the arbitration proceedings. The thesis recommends amendments to this section to replicate it with section 143 of the LRA which provides that the award must be issued within fourteen days of the conclusion of the proceedings but the director may extend the period on good cause shown. The thirty days stipulated in the 2007 Act will make the process long. Issuing an arbitration award cannot take that long, such delays will promote ineffectiveness, incompetency, negligence, reluctance among arbitrators.

The 2007 Act contains some provisions that may be fairly perceived to have been borrowed or transplanted from South African labour law, but, unlike South Africa, Namibia does not currently have bargaining councils but rather just associations i.e security association that can engage in a collective agreement, regarding minimum wages.

Given the current delays in making awards enforceable, the thesis recommends an amendment to section 87 of the 2007 Act. Section 87 currently provides for the parties or the labour commissioner to file the award with the court, thereby making it enforceable. In South Africa, the Director of the CCMA has statutory powers to certify the award, making it immediately final, and binding and enforceable as if it were an order of the court. The same approach can be adopted in Namibia to reduce the backlog experienced at the labour court and to do away with the current unclear procedure of filling arbitration awards for enforcement.

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