

**TOWARDS AN EFFICIENT NAMIBIAN LABOUR DISPUTE  
RESOLUTION SYSTEM: COMPLIANCE WITH  
INTERNATIONAL LABOUR STANDARDS AND A  
COMPARISON WITH THE SOUTH AFRICAN SYSTEM**

**by**

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**FELIX ZINGOLO MUSUKUBILI**

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## **DEDICATION**

To

My late parents Mr and Mrs Musukubili

How I wish you lived to see and celebrate this degree. I will always cherish the wisdom you gave me.

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# LIST OF ABBREVIATIONS

## ABBREVIATIONS

ADR	-	Alternative Dispute Resolution
ANC	-	African National Congress
AJA	-	Acting Judge of Appeal
AJ	-	Acting Judge
BCEA	-	Basic Conditions of Employment Act
BLLR		Butterworth Labour Law Reports
CCMA	-	Commission for Conciliation, Mediation and Arbitration
CFA	-	Committee on Freedom of Association
CC	-	Constitutional Court
CEACR and	-	Committee of Experts on the Application of Conventions Recommendations
CJ	-	Chief Justice
COIDA	-	Compensation for Occupational Injuries and Diseases Act
Con-Arb	-	Conciliation and Arbitration
COSATU	-	Congress of South African Trade Union
DWCP	-	Decent Work Country Programme
EEA	-	Employment Equity Act
EPZ	-	Export Processing Zone
GN-AG	-	Government Notice – Administrator General
GG	-	Government Gazette
GRN	-	Government Republic of Namibia
GSP	-	Generalized System of Preference
ICJ	-	International Court of Justice

ILO	-	International Labour Organization
ILC	-	International Labour Conference
ILJ	-	Industrial Law Journal
ILSSA	-	Improving Labour Standards in Southern Africa
J	-	Judge (Justice)
LaRRi	-	Labour Resource and Research Institute
LAC	-	Labour Appeal Court
PAJA	-	Promotion of Administrative Justice Act
LC	-	Labour Court
LCA	-	Labour Court of Appeal
LRA	-	Labour Relations Act
MoU	-	Memorandum of Understanding
NACTU	-	National Council of Trade Unions
NEDLAC	-	National Economic Development Labour Council
NEHAWU	-	National Education, Health and Allied Workers' Union
NEPRU	-	Namibian Economic Policy Research Unit
NGO	-	Non Governmental Organization
NUNW	-	National Union of Namibian Workers
NUMSA	-	National Union of Metalworkers of South Africa
NEF	-	Namibian Employer's Organization
NLLP	-	Namibia Labour Law Publication
NLC	-	Namibia Labour Court
OPO	-	Ovambo People's Organization
SADC	-	Southern African Development Community
SACCAWU	-	South Africa Commercial, Catering and Allied Workers' Union
SACCOLA	-	South Africa Consultative Committee on Labour Affairs

SCA	-	Supreme Court of Appeal
SDA	-	Skills Development Act
SWAPO	-	South West Africa People's Organization
TECL	-	Toward the Elimination of Child Labour
UIF	-	Unemployment Insurance Fund
UN	-	United Nations
WTO	-	World Trade Organization
ZSC	-	Zimbabwe Supreme Court

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## ABSTRACT

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The thesis examines the Namibian labour dispute resolution system by undertaking a comparative analysis of South African and international labour standards. It describes the legal provisions that exist for the effective and efficient resolution of labour disputes through an alternative dispute resolution (ADR) system, which is given recognition in national labour legislation, and in a number of international labour standards and regional labour instruments. It argues for the provision of a proactive and expeditious dispute resolution system that helps to resolve labour disputes in the most effective and efficient manner, without necessarily having to resort to the courts.

The study examines the provisions of relevant international labour standards on labour dispute resolution to ascertain their adequacy as part frameworks that apply to Namibia and South Africa's obligation to provide ADR systems that respond to the needs of the labour relations community. It is argued that ratifying particular ILO conventions creates obligations to comply with their provisions, and to apply them in national legislation and in practice. It is further argued that by having ratified those international labour standards that provide for ADR, Namibia assumes specific obligations under international law, enjoining the country to provide the required ADR system of conciliation and arbitration, which is credible and trusted by disputants and the general public.

A comparative approach is adopted, which relies on primary and secondary sources of data, thereby undertaking an in-depth content analysis. The focus of the comparison is on whether the South African ADR system can inform Namibia's application of its newly adopted ADR system. South Africa has a labour dispute resolution system that has influenced Namibian labour law, prompting Namibia to borrow its ADR system from South Africa's advanced Commission for Conciliation Mediation and Arbitration (CCMA). In this sense, it is submitted that there are fundamental similarities and differences in the two respective systems.

Ideally, disputes should be resolved at conciliation level, resulting in the minority of disputes being referred to arbitration or the Labour Court.

In terms of implementation, it is argued that despite the international obligation and commitment to provide and make available free and expeditious ADR services, there are gaps that exist between the legal framework regulating the ADR system and the application thereof in practice, making the attainment of effective and efficient labour dispute resolution difficult.

Disputes should be resolved as quickly and informally as possible, with little or no procedural technicalities, and without allowing them to drag on indefinitely, offering immediate solutions instead. This is far from the reality of the situation. In contrast, the study found that although the Labour Act, 2007 and the South African Labour Relations Act (LRA) have brought statutory dispute resolution within the reach of the ordinary worker, these Acts may have compounded the problems relating to dispute resolution in the respective countries. The statutes in question have created sophisticated systems of dispute resolution in which most role players are seen as failing to operate as a result of the complex and technical processes of dealing with disputes. For this reason, the author proposes several remedial interventions that look to the future and the continued provision of fast, effective and user-friendly ADR services.

Solving these problems and making effective and efficient labour dispute resolution a reality calls for renewed commitment from government and social partners and investment in appropriate human and financial resources. This requires a strong political will as well as concerted efforts from all role players in the labour relations community in the two respective countries.

# CHAPTER 1

## GENERAL INTRODUCTION

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### 1. INTRODUCTION

This study analyses the Namibian labour dispute resolution system, compliance with and enforcement of labour law and standards from a comparative perspective against international labour standards and South African labour legislation. The study surveys the topic from the onset of colonisation during the German era and South Africa's occupancy over the territory. During these periods, the country had no comprehensive labour legislation in place, but relied heavily on the labour legislation of the colonial masters.<sup>1</sup> The study focuses on the labour dispute resolution system in terms of the first comprehensive post-independence labour law, namely the Labour Act 6 of 1992,<sup>2</sup> and the current Labour Act No 11 of 2007,<sup>3</sup> which ushered in

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<sup>1</sup> LaRRI *Labour Rights in Namibia* (2005) 4.

<sup>2</sup> Hereinafter referred to as the "1992 Act".

<sup>3</sup> Hereinafter referred to as the "Labour Act of 2007".

significant changes to the Labour dispute resolution process and introduced the alternative dispute resolution<sup>4</sup> processes of conciliation, mediation and arbitration.

One of the objectives of the new schemes of labour dispute prevention and resolution<sup>5</sup> is to give effect to the constitutional commitment<sup>6</sup> to adhere to and act in accordance with international conventions and the recommendations of the International Labour Organization (ILO). As a member state of the ILO and by virtue of the country's obligation arising from article 22 of the ILO Constitution, Namibia has been subject to the ILO's regular supervisory machinery for ratifying conventions. One of the objectives of this study is to determine the extent to which the country complies with its ILO obligations.<sup>7</sup> In this respect, the study focuses on the relevant ILO conventions and recommendations that Namibia has ratified relative to labour dispute resolution.

As the title of the study suggests, it seeks to explore the extent to which the Namibian labour dispute resolution system is relative to the South African system. The reason for this comparative analysis is that the South African labour dispute resolution system is the major source of Namibia's new labour dispute resolution system.<sup>8</sup> The Labour Act of 2007 contemplates the provision of effective labour dispute prevention and resolution through compliance with and enforcement of the Act.<sup>9</sup> However, the new labour dispute resolution system is seen as failing to bring about the desired results.

Instead, it has created a sophisticated system of labour dispute resolution with a very legalistic approach that is coupled with long delays and declining settlement rates.<sup>10</sup> To address this situation, the ILO, as an international custodian of labour relations,

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<sup>4</sup> Hereinafter referred to as the "ADR".

<sup>5</sup> Chapter 8 of the Labour Act of 2007.

<sup>6</sup> Art 95(d) of The Namibian Constitution, provides for membership of the International Labour Organization and where possible, adherence to and action in accordance with international Conventions and Recommendations.

<sup>7</sup> Fenwick *Labour Law in Namibia: Towards an Indigenous Solution* (2005) 14.

<sup>8</sup> Benjamin "The challenges of labour law reform in South Africa" in Brostein (ed.) *International and Comparative Labour Law Current Challenges* (2009) 240.

<sup>9</sup> Preamble to the Labour Act of 2007.

<sup>10</sup> Grogan *Workplace Law* (2004) 442.

urges member states to implement less complex and unsophisticated procedures for labour dispute resolution and to be the catalyst for workplace justice that is accessible to all.<sup>11</sup>

This study therefore aims to provide policy makers in Namibia with a meaningful analysis of the labour dispute resolution system, including issues of compliance and enforcement. The ultimate goal is to improve the efficiency and effectiveness of the existing ADR system, and, as such, to be of use to policy makers, scholars, labour law practitioners, conciliators and arbitrators, but also be of equal interest to those with broader interest in Namibia's labour dispute resolution system.

This chapter is structured as follows: the chapter starts with an outline of the ILO as a global organisation that prescribes international labour standards based on which compliance is measured in member states. This is followed by an analysis of the current Namibian labour dispute resolution process, and a comparison with the South African ADR system. The chapter further sets out the rationale of the study, the statement of the problem, research questions and objectives. The chapter also outlines its significance, the methodology that is used and the justification for comparison. The chapter concludes with an outline of the research chapters.

## **2. CONTEXT AND RATIONALE FOR THE STUDY**

### **2.1 THE INTERNATIONAL LABOUR ORGANIZATION**

The ILO is a by-product of the 1919 Peace Conference that followed the First World War and its original constitution formed part of the Treaty of Versailles. The organisation was established on 11 April 1919 as an autonomous body associated with the League of Nations. The aims and objectives of the ILO are set out in its constitutional preamble, which declares that "universal and lasting peace can be established only if it is based upon social justice". Thus, the primary objective of the ILO can be seen as an objective catalyst for the improvement of social conditions throughout the world.<sup>12</sup> Since its inception, the mandate of the ILO includes the

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<sup>11</sup> Zack *Can Alternative Dispute Resolution Help Resolve Employment Disputes?* (1997) 136.

<sup>12</sup> The Preamble of the ILO Constitution states as follows: "...whereas universal and lasting peace can be established only if it is based upon social justice; and whereas conditions of labour exist

adoption of international labour standards, promoting their ratification and application in member states,<sup>13</sup> and supervising their application as the fundamental means of achieving its objectives. The application of these international labour standards in member states is monitored by the ILO using a supervisory mechanism that is unique at an international level.<sup>14</sup>

Article 19 of the ILO Constitution creates a number of obligations for member states upon the adoption of international labour standards. These obligations include: firstly, the requirements to submit newly adopted standards to a nationally competent authority and, secondly, the obligation to report periodically on measures taken to give effect to the provisions of unratified conventions and recommendations. This is achieved by the ILO carrying out examinations of the standards-related obligations of member states derived from ratified conventions. In this regard, the ILO follows a process of regular monitoring procedures of annually submitted reports<sup>15</sup>, as well as special procedures based on complaints or representations to the Governing Body made by ILO constituents,<sup>16</sup> as provided for in articles 24 and 26 of the ILO Constitution.

## 2.2 INTERNATIONAL LABOUR STANDARDS

International labour standards are the conventions and recommendations drawn up and agreed upon by the ILO's membership.<sup>17</sup> They result from debates or negotiations that take place during the annual International Labour Conference held

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involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required...".

<sup>13</sup> Art 1 of the ILO Constitution provides as follows "A permanent organization is hereby established for the promotion of the objectives set forth in the Preamble to the Constitution and in the Declaration concerning the aims and purpose of the ILO adopted at Philadelphia on 10 May 1944".

<sup>14</sup> ILO *Application of the international labour standard. Report of the Committee of Experts on the Application of Conventions and Recommendations* (2009) 10.

<sup>15</sup> Art 22 of the ILO Constitution provides- "each Member agree to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provision of the convention to which it is party."

<sup>16</sup> Art 3 of the ILO Constitution read as follows: the General Conference shall be attended by four representatives of each of the members, of whom two shall be government delegates and two others shall be delegates representing respectively the employers and the workpeople.

<sup>17</sup> Art (1) and (2) of the ILO Constitution provide for the membership of the ILO to include government, employers and workers.

each June.<sup>18</sup> The labour standards are based on consensus developed to protect basic workers' rights and aim to enhance worker job security by improving terms and conditions of employment on a global scale. The standards are created to serve as worldwide minimum levels of protection from inhumane labour practices.<sup>19</sup> While it can be agreed that there are certain basic human rights that are universal to humanity, in an ever growing and changing global landscape international labour standards ensure the provision of these rights in the workplace.<sup>20</sup>

International labour standards can either be conventions, which are legally binding international treaties that may be ratified by member states,<sup>21</sup> or recommendations, which are non-binding guidelines.<sup>22</sup> Upon ratification of the convention by a member state, the convention comes into force for that country one year after the date of ratification.<sup>23</sup> By ratifying the convention, a member state commits itself to applying the convention to national laws and practices<sup>24</sup> and to regularly report to the ILO on its application.

International labour standards have grown into a comprehensive system of instruments on work and social policy, backed by a supervisory system that addresses a variety of problems in their application at a national level.<sup>25</sup> Several of the adopted ILO instruments promote and protect the right to collective bargaining and contain provisions relating to labour dispute settlement mechanisms. These instruments include the eight fundamental conventions<sup>26</sup> designated by the

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<sup>18</sup> Hereinafter referred to as the "ILC".

<sup>19</sup> [International\\_labour\\_standards](#) available on ILOLEX. Accessed on 11/01/2011.

<sup>20</sup> Brown, Deardorff and Stern *International Labour Standards and Trade: A Theoretical Analysis* (1996) 227-272.

<sup>21</sup> Art 19(5) of the ILO Constitution.

<sup>22</sup> Art 19(6) of the ILO Constitution.

<sup>23</sup> Art 19(5)(b) of the ILO Constitution.

<sup>24</sup> *Ibid.*

<sup>25</sup> Doumbia-Henry *Rules of the Game: A Brief Introduction to International Labour Standards* (2009) 9.

<sup>26</sup> These Conventions are: Freedom of Association and Protection of the Right to Organize Convention No. 87 of 1948; Right to Organize and Collective Bargaining Convention, No 98 of 1949; Forced Labour Convention, No 29 of 1930; Abolition of Forced Labour Convention, No 105 of 1957; Minimum Age Convention, No 138 of 1973; Worst Forms of Child Labour Convention, No 182 of 1999; Equal Remuneration Convention, No 100 of 1951; and, Discrimination (Employment and Occupation) Convention, No 111 of 1958.

Governing Body<sup>27</sup> of the ILO and a total of 190 conventions and 200 recommendations adopted by the ILO since its inception.<sup>28</sup> Amongst the fundamental conventions, two of them are central to the promotion of collective bargaining. These are: the Freedom of Association and the Protection of the Right to Organize<sup>29</sup> Convention and the Right to Organize and Collective Bargaining Convention.<sup>30</sup> These conventions embrace the right of all employers and workers to form independent organisations of their own choosing, and to engage in collective bargaining with representatives of those organisations, with the aim to improving working conditions.<sup>31</sup> Collective bargaining is considered an effective tool for industrial democracy and social justice, and is therefore one of the most important aspects of the ILO's strategic objectives concerning the promoting and strengthening of social justice. As a result, it plays a significant role in reducing conflict through the resolution of labour disputes.<sup>32</sup>

### 2.3 THE REGULATION OF COLLECTIVE BARGAINING IN NAMIBIA

Namibia recognises collective bargaining as the cornerstone of the country's system of labour relations.<sup>33</sup> On 2 September 1987, on the recommendation of the Cabinet,<sup>34</sup> a Commission of Inquiry into Labour Matters in Namibia was appointed by the Administrator General, Mr LA Pienaar.<sup>35</sup> At the time, the country was experiencing significant labour development. It also became clear that the present labour law structure and system was no longer capable of resolving labour disputes, which were rapidly becoming part of the Namibian labour landscape.

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<sup>27</sup> Art 14 of the ILO Constitution provide for the Governing Body and its composition of 56 persons: 28 representing governments, 14 representing the employers and 14 representing the workers.

<sup>28</sup> Doumbia-Henry *Rules of the Game* 14.

<sup>29</sup> C.87 of 1948.

<sup>30</sup> C.98 of 1949.

<sup>31</sup> Khabo *Collective Bargaining and Labour Dispute Resolution – Is SADC Meeting the Challenge?* (2008) 3.

<sup>32</sup> Fashoyin "The Role of Collective Bargaining" in Khabo (ed) *Collective Bargaining and Labour Dispute Resolution - is SADC Meeting the Challenge?* (2008) vii.

<sup>33</sup> Wiehahn Report of Commission of Inquiry into Labour Matters in Namibia (1989) 96 (hereinafter referred to as the Wiehahn Report-Namibia).

<sup>34</sup> This was the Cabinet in the colonial Namibia prior to Independence.

<sup>35</sup> In his capacity as Administrator General of the Territory of South West Africa. The appointment was made in terms of the GN AG 1 of 1987 read with Proclamation AG 32 of 1978.

In pursuance of the Wiehahn recommendations, collective bargaining was entrenched in the Namibian Constitution when independence was gained. The Constitution guarantees fundamental freedoms, such as freedom of association to form and join trade unions<sup>36</sup> and to participate in their activities. In addition, article 95<sup>37</sup> of the Namibian Constitution provides for the adoption of policies aimed at active encouragement of the formation of independent trade unions to protect workers' rights and interests, and the promotion of sound labour relations and fair employment practices. The Constitution further provides for membership to the ILO and commitment to adhere to its conventions and recommendations.<sup>38</sup>

The enactment of the Labour Act, 2007, gives effect to Article 95 of the Namibian Constitution to produce a labour relations policy conducive to economic growth, stability and productivity. This particular piece of labour legislation hopes to achieve this through promoting an orderly system of free collective bargaining, and through providing for the systematic prevention and resolution of labour disputes.<sup>39</sup>

## 2.4 RATIFICATION OF RELEVANT ILO INSTRUMENTS BY NAMIBIA

As a member state of the ILO, Namibia has ratified conventions that are central to the promotion of collective bargaining, namely the Freedom of Association and the Protection of the Right to Organize Convention No. 87 of 1948<sup>40</sup> and the Right to Organize and Collective Bargaining Convention<sup>41</sup> No. 98 of 1949.<sup>42</sup> By virtue of the ratification, Namibia is bound to comply with the provisions of these conventions. Articles 3 and 4 of the Collective Bargaining Convention calls for the creation of

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<sup>36</sup> Art 21(1)(e) of the Namibian Constitution provides that "all persons shall have the right to: freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties".

<sup>37</sup> Art 95(c) and (d) of the Namibian Constitution provides: The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following: (c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices; (d) membership of the International Labour Organization (ILO) and where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO.

<sup>38</sup> Fenwick *Labour Law in Namibia: Towards an Indigenous Solution* 11.

<sup>39</sup> Preamble and purpose of the Labour Act, 2007.

<sup>40</sup> Hereinafter referred to as the "Right to Organize Convention".

<sup>41</sup> Hereinafter referred to as the "Collective Bargaining Convention".

<sup>42</sup> Namibia ratified these two Conventions on 3 March 1995 while South Africa, the comparator, ratified on 19<sup>th</sup> February 1996.

bodies and the establishment of procedures for the settlement of labour disputes that contribute to the promotion of collective bargaining.

The Voluntary Conciliation and Arbitration Recommendation<sup>43</sup> (No. 92 of 1951) supplements the Collective Bargaining Convention in that it urges governments to make available expeditious voluntary conciliation mechanisms at no cost to the disputants in order to assist in the prevention and settlement of labour disputes.<sup>44</sup> In addition, Namibia has ratified the Termination of Employment Convention.<sup>45</sup> This convention urges workers whose employment has been unjustifiably terminated to appeal against such termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.<sup>46</sup> These bodies are the same dispute resolution mechanisms contemplated by the Collective Bargaining Convention that have now been embraced by Namibia.

## **2.5 LABOUR DISPUTE RESOLUTION AND ADR SYSTEM IN NAMIBIA**

The ILO asserts that ADR bodies and procedures contribute to the success of collective bargaining. However, this success depends on the availability of an efficient labour dispute resolution system that is meaningful and dedicated to the collective bargaining process.<sup>47</sup> Moreover, the ILO suggests that the system's

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<sup>43</sup> Art 19 of the ILO Constitution states that on adoption of the Recommendation, the Recommendation will be communicated to all members for their considerations with a view to effect being given to it by national legislation or otherwise. Subsection (b) requires member States within 18 months to bring the Recommendation before the authority or authorities whose competence the matter lies for the enactment of legislation or other action. Subsection (c) relates to informing the Director General of the International Labour Office of the measures taken in accordance with this article to bring the Recommendation before the said competent authority or authorities regarded as competent, and of the actions taken by them. Subsection (d) provides that no further obligation shall rest upon the Members, except that they shall report to the Director General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or proposed to be given.

<sup>44</sup> Art 1 of the Conciliation and Arbitration Recommendation of 1951, reads "Voluntary conciliation machinery, appropriate to national conditions, should be made available to assist in the prevention and settlement of industrial disputes between employers and workers". Article 3, calls for the procedure to be free of charge and expeditious; such time limits for the proceedings as may be prescribed by national laws or regulations should be fixed in advance and kept to a minimum".

<sup>45</sup> No 158 of 1982.

<sup>46</sup> Art 8 of C.158 of 1982.

<sup>47</sup> Khabo *Collective Bargaining and Labour Dispute Resolution* 5.

methods of operation should be effective, autonomous, accessible, informal, expeditious and consensual, involving tripartite consultation so that the confidence of the parties to the dispute is ensured.

Trollip (1991)<sup>48</sup> opines that to achieve success in labour dispute resolution, the general trend for countries is to move towards the adoption of an ADR system that has the elements of voluntarism, informality, accessibility and speedy resolution of labour disputes and which is informed by the provisions of the Conciliation and Arbitration Recommendation.

Although ADR is a new phenomenon in SADC member states, Namibia has embraced ADR by enacting the Labour Act of 2007, where the focus has moved from reliance on the District Labour Courts<sup>49</sup> to the new concepts of conciliation and<sup>50</sup> arbitration,<sup>51</sup> and the establishment of the labour inspectorate,<sup>52</sup> which has statutory powers to enforce arbitration awards. Further, the Labour Act of 2007 contains provisions for the continuation of the Labour Court<sup>53</sup> with exclusive jurisdiction<sup>54</sup> to adjudicate appeals or review arbitration awards.<sup>55</sup> To give effect to this new scheme of labour dispute resolution, the Labour Commissioner has been entrusted with the

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<sup>48</sup> Trollip *Alternative Dispute Resolution* (1991)7-9.

<sup>49</sup> The District Labour Courts were applicable in terms of s78 the 1992 Act.

<sup>50</sup> S 82 of the Labour Act, 2007 provides for the resolution of disputes through conciliation by the Labour Commissioner.

<sup>51</sup> S 86 of the Labour Act, 2007 makes provision for the resolution of dispute through arbitration by the Labour Commissioner.

<sup>52</sup> The Labour Act, 2007 s124, provides for the appointment of labour inspectors to enforce the Act or any decision, award or order, made in terms of this Act. Section 125(2)(g) on the other hand, empowers labour inspectors to enforce arbitration awards on application made by any party in terms of s 90 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 proceedings on behalf of that person.

<sup>53</sup> S 115 of the Labour Act, 2007.

<sup>54</sup> S 117 of the Labour Act, 2007 provides the continuation of the Labour Court with exclusive jurisdiction to –

- (a) determine appeals from - Decisions of the Labour Commissioner made in terms of s 89; and
  - (i) Arbitration tribunals' awards, in terms of s 89; and compliance orders issued in terms of s 126.
- (b) review –
  - (i) arbitration tribunals' award in terms of this Act; and (ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of this Act or any other Act relating to labour or employment for which the Minister is responsible.

<sup>55</sup> S 89 of the Labour Act, 2007.

powers and functions to conciliate and arbitrate labour disputes. The Labour Act of 2007<sup>56</sup> provides for the functions of the Labour Commissioner to include amongst others:

- “(a) to register disputes from employees and employers over contraventions, application, interpretation or enforcement of the Labour Act, 2007 and to take appropriate action;
- (b) to attempt, though conciliation or by giving advice, to prevent disputes from arising;
- (c) to attempt, through conciliation, to resolve disputes referred to the Labour Commissioner in terms of the Labour Act, 2007 or any other law;<sup>57</sup>
- (d) to arbitrate a dispute that has been referred to the Labour Commissioner if the dispute remains unresolved after conciliation and in terms of the Labour Act of 2007 requires arbitration; or if the parties to the dispute have agreed to have the dispute resolved through arbitration.”

The new scheme of labour dispute resolution is a hybrid system, which requires disputes to be conciliated before commencing arbitration (“con-arb”).<sup>58</sup> However, despite this provision, the Act permits any person who challenges an infringement of fundamental rights or protections under Chapter 2 of the Labour Act of 2007 to approach the Labour Court directly for enforcement of that right, for protection or other appropriate relief.

As a member state of the ILO and by virtue of having ratified the Collective Bargaining Convention, Namibia is under an obligation<sup>59</sup> to report to the Director-General of the ILO to inform the office on the application in practice of the labour dispute resolution mechanisms established by the Labour Act of 2007. This gives effect to Articles 3 and 4 of the Collective Bargaining Convention.

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<sup>56</sup> S 121 of the Labour Act, 2007.

<sup>57</sup> Disputes referred to the Labour Commissioner in terms of s 45 of the Affirmative Act (Employment) Act, 1998 (Act No 29 of 1998). This section provide:(1) Any employee may bring to the attention of the Commission any dispute between such employee, or his or her representative. Further the section states, (2) The Commission may, if necessary, refer a complaint referred in s (1) to the Labour Commissioner for conciliation.

<sup>58</sup> S 86 of the Labour Act, 2007, provides that “unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration”.

<sup>59</sup> The obligation arose from the provisions of Art 22 the ILO Constitution which requires – member states to report to the International Labour Office on measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

Consequently, under the ambit of the Collective Bargaining Convention, Namibia has been subject to the ILO's regular supervisory mechanisms to determine the level of compliance with international labour standards relative to collective bargaining that promotes labour dispute resolution. However, the ILO not only supervises compliance with standards, but provides technical assistance to members states to fulfil their obligations. To this end, the ILO has provided technical assistance to the Government of the Republic of Namibia on a range of issues, including assistance in the drafting of the Labour Act of 2007 and the training of conciliators and arbitrators for the labour dispute resolution system.<sup>60</sup>

## 2.6 THE REGULATION OF COLLECTIVE BARGAINING IN SOUTH AFRICA

In South Africa, unlike in Namibia, the right to collective bargaining is explicitly enshrined in the Constitution,<sup>61</sup> in section 23(5) of the Bill of Rights.<sup>62</sup> To give effect to this provision, the Labour Relations Act 66 of 1995<sup>63</sup> regulates collective bargaining and re-affirms the constitutional right of every trade union, employers' organization and employee to engage in collective bargaining.

In the above context, collective bargaining has been identified as one of the mechanisms intended to implement fair labour practices. Employers are required to endeavour to conclude collective agreements to regulate the manner in which trade unions are to exercise their statutory organisational rights.<sup>64</sup> Further, there is a duty to consult and attempt to reach agreements with the representative trade unions

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<sup>60</sup> Fenwick *Labour Law in Namibia* 13.

<sup>61</sup> The Constitution of the Republic of South Africa, Act No 108 of 1996 (hereinafter referred to as the South African Constitution”).

<sup>62</sup> S 23(5) the South African Constitution provides that “Every trade union, employers' organization and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)”. Section 36(1) on the other hand provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom, taking into account relevant factors listed herein in the section.

<sup>63</sup> Hereinafter referred to as the “LRA”.

<sup>64</sup> S 12, of the LRA.

concerning the drafting and implementation of an employment equity plan.<sup>65</sup> Similarly, the Basic Conditions of Employment Act<sup>66</sup> promotes collective bargaining, for example when contemplating the variation of statutory minimum conditions in terms of the BCEA. Essentially, the right to engage in collective bargaining is constitutionally entrenched.<sup>67</sup> The subject matter of collective bargaining is widely defined to include terms and conditions of employment or any other matters of mutual interest.<sup>68</sup>

Collective bargaining in South Africa is effected through a number of bargaining councils. Their primary function is to regulate employment relations between management and labour in various sectors of employment, over which they have jurisdiction, by concluding collective agreements and settling labour disputes.<sup>69</sup>

Bargaining councils are accredited by the Commission for Conciliation, Mediation and Arbitration (the “CCMA”) and are mandated to resolve labour disputes affecting parties falling within their council. These structures complement the CCMA to ease the workload and help promote efficiency on its part.<sup>70</sup>

## **2.7 LABOUR DISPUTE RESOLUTION AND ADR SYSTEM IN SOUTH AFRICA**

In South African, the LRA creates two new institutions for labour dispute resolution and adjudication. The CCMA was established under section 112 of the LRA<sup>71</sup> as an independent,<sup>72</sup> although government sponsored,<sup>73</sup> institution. The CCMA’s functions are provided for in section 115 of the LRA:

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<sup>65</sup> Godfrey, Maree, Du Toit and Theron *Collective Bargaining in South Africa* (2010) 5. See also the Employment Equity Act 55 of 1998.

<sup>66</sup> Act 75 of 1997, hereinafter referred to as the “BCEA”.

<sup>67</sup> S 23(5) the South African Constitution read with s 36.

<sup>68</sup> S 213, of the LRA.

<sup>69</sup> Grogan *Workplace Law* (2003) 271.

<sup>70</sup> Khabo *Collective Bargaining and Labour Dispute Resolution* 20.

<sup>71</sup> S 112 of the LRA established the Commission for Conciliation, Mediation and Arbitration as a juristic person.

<sup>72</sup> S 113 of the LRA reads – “The Commission is independent of the State, any political party, trade union, employer, employer’s organization, or federation of trade unions.

<sup>73</sup> Benjamin *The Challenges of Labour Law Reform in South Africa* 244.

“(1) The Commission must –

- (a) attempt to resolve, through conciliation, any dispute referred to it in terms of the LRA;
- (b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if –
  - (i) the LRA requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or
  - (ii) all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission;
- (c) assist in the establishment of workplace forums in the manner contemplated in Chapter V; and
- (d) compile and publish information and statistics about its activities.”

The LRA also created a specialised system of Labour Courts with exclusive labour law jurisdiction. The Labour Court is established in terms of section 151:

“(1) The Labour Court is hereby established as a Court of law and equity.

(2) The Labour Court is a superior Court that has authority, inherent powers and standing in relation to matters under its jurisdiction, equal to that which a Court of provincial division of the Supreme Court has in relation to the matters under its jurisdiction.

(3) The Labour Court is a Court of record.”

The court hears, as court of first instance, cases about dismissals for operational requirements, strike dismissals and other cases in which the dismissal is alleged to have involved discrimination.<sup>74</sup> In addition, the LRA created the Labour Appeal Court<sup>75</sup> as court of law and equity and to serve as the final court of appeal in respect of all judgments and orders made by the Labour Court in relation to matters within its exclusive jurisdiction. It is a superior court that has authority, inherent powers and standing in respect of matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in respect of matters under its jurisdiction.

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<sup>74</sup> Benjamin *The Challenges of Labour Law Reform in South Africa* 245.

<sup>75</sup> S 167 of the LRA.

Unlike in Namibia, the ADR system has not been fully embraced in South Africa. There is no mandatory, compelling requirement that all labour disputes must first go through con-arb by the CCMA. It is submitted that employees can effectively determine which forum has jurisdiction by the manner in which they formulate the dispute.<sup>76</sup> However, such a route depends entirely on the nature of the dispute, which becomes the determining factor in respect of the institution the dispute may be referred to.

The LRA identifies two categories of disputes that may be referred to the CCMA. These are disputes referred in terms of the LRA<sup>77</sup> and disputes about matters of mutual interest.<sup>78</sup> Moreover, the CCMA has jurisdiction over labour disputes referred to it in terms of other statutes. In respect of disputes “referred in terms of the Act”, which relate to disputes of interpretation or application of the LRA, the CCMA has jurisdiction to conciliate and arbitrate and, if not settled during conciliation, these disputes may be referred to the Labour Court. Notwithstanding this provision, where the LRA provides for adjudication the parties may confer jurisdiction on the CCMA by consenting in writing to arbitration rather than taking the route of the Labour Court.<sup>79</sup> In contrast, in Namibia, it is within the province of the Labour Court’s discretion to refer any dispute within its jurisdiction to the Labour Commissioner for conciliation, and no written consent is required from the parties to the dispute.<sup>80</sup>

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<sup>76</sup> Grogan *Labour Litigation and Dispute Resolution* (2010) 61.

<sup>77</sup> S 133(1)(b) of the LRA.

<sup>78</sup> S 133(1)(a) read with s 134 of the LRA.

<sup>79</sup> S 133(2)(b) of the LRA. It has been Grogan argues that an employee should also be able to refer dismissal disputes that may be referred to the Labour Court to arbitration without the consent of the employer if it is alleged that the reason for the dismissal is one listed in s 191(5)(a). Grogan submits that the right can be exercised within the meaning of “may” in s 191(5)(b) and supported by the fact that the CCMA or a council must arbitrate dismissal disputes if the employee does not know the reason for dismissal [s 191(5) (a) (iii) the LRA]. Grogan “Jurisdictional jigsaw - which dispute fits where?”(2000) *Employment law journal*. See also Du Toit *et al Labour Relations Law* 93.

<sup>80</sup> S 117(1)(h)(i) of the Labour Act, 2007.

## 2.8 RATIONALE

In the present study, a compliance analysis of the Namibian labour dispute resolution system with regard to international labour standards is undertaken and, further, a comparison with the South African labour dispute resolution system is conducted. The study investigates the provisions of the ADR system and adjudication as established mechanisms for labour dispute resolution and examines the efficiency and effectiveness of the Namibian labour dispute resolution system.<sup>81</sup>

An examination of the factors contributing to the widespread enforcement and compliance failures experienced by Namibia's labour dispute resolution institutions is conducted. The study takes into account the nature of the existing legal procedures or legal rules required to refer and resolve labour disputes and the structural capacities of the institutions charged with resolving labour disputes by comparing the Namibian structures with the corresponding structures in South Africa.

An in-depth analysis of international labour standards, the legislative framework regulating labour dispute resolution in Namibia and South Africa, is also completed and analysed in the context of the legal frameworks assuring the users of the ADR system of its credibility.<sup>82</sup> These legal frameworks envisage labour dispute resolution systems that are non-adversarial, aimed at giving employers and workers an opportunity to break with the intense antagonism that previously characterised labour relations.<sup>83</sup> The adoption of ADR systems sparked expectations that they would provide proactive and expeditious dispute resolutions that are available to all workers<sup>84</sup> and, ultimately, provide cost-effective services to the labour relations community.<sup>85</sup> These anticipated outcomes are based on proponents' views that the

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<sup>81</sup> Ferreira "The CCMA: It's Effectiveness in Dispute Resolution in Labour Relations" 2004 23 *Politeia* 73-85.

<sup>82</sup> Nupen and Cheadle *Dispute resolution the Uses of 'Soft Law'*. Paper presented at the thirteenth Annual Labour Law Conference – (2000) on Rethinking South Africa Labour Law.

<sup>83</sup> Du Toit, Woolfrey, Murphy, Godfrey, Bosch and Christie *The Labour Relations Act of 1995. A Comprehensive Guide* (1999).

<sup>84</sup> Robertson "Dispute Resolution System in the Draft Labour Relations Bill" (1995) 19 *South Africa Labour Bulletin*, 67-70.

<sup>85</sup> Hobo, *The Resolution of Labour Disputes in South Africa: A Study of the CCMA*. Dissertation submitted for the M.Pub. Admin Degree, University of Western Cape (1999).

ADR process allows most labour disputes to be resolved at conciliation level, resulting in only a minority of disputes being referred to arbitration or the Labour Court.<sup>86</sup>

Preliminary studies show that the existing legal framework and practices are wanting in several respects, making the attainment of effective and efficient labour dispute resolution difficult.<sup>87</sup>

Based on the outcomes of this study, recommendations are made that look to the future, particularly at the continued work of the ADR system in Namibia, to provide a fast, effective and user-friendly service. This study also suggests future areas of reform that may increase efficiency, compliance and effective enforcement, as well as measures to adapt the ADR systems to comply with international labour standards in order to satisfy the labour relations community.

### **3. STATEMENT OF THE PROBLEM**

It is submitted that the outcomes of the ADR system are not uniformly accepted or properly understood by a significant percentage of employers and employees. This is evident from the increasing number of reviews and appeals launched and lodged with the Labour Court by employers, in most cases, dissatisfied with the outcome of arbitration. At the same time, there are indicators that officials responsible for the implementation of ADR processes and enforcement of arbitration awards do not fully comprehend the applicable statute and, therefore, misunderstanding of fairness and compliance influences their decision making at times, which leads to incorrect outcomes.<sup>88</sup>

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<sup>86</sup> S 86(5) of the Labour Act, 2007 provides that, unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration. On the other hand, the LRA institutionalizes the process of “con-arb”. In terms of s 191(5A) of the LRA an arbitration hearing must immediately follow on conclusion of the conciliation proceedings once a certificate of non-resolution has been issued in disputes concerning dismissal or unfair labour practices relating to probation see also Bosch *et al*, (2004) 77.

<sup>87</sup> Khabo *Collective Bargaining and Labour Dispute Resolution* 29.

<sup>88</sup> De Beer *Comments and Interpretation on Conciliation and Arbitration* (2010).

Based on the preliminary analysis it can be agreed that the Labour Act of 2007 in Namibia and the LRA in South Africa were enacted to provide, amongst other things, simple procedures for the resolution of labour disputes through ADR processes managed by the Labour Commissioner and the CCMA or bargaining councils respectively. These institutions replaced the previous system of statutory conciliation bodies<sup>89</sup> that had proven to be ineffective, costly and complicated.<sup>90</sup> However, in Namibia, the new ADR system seems to be developing bottlenecks. For instance, Minister Immanuel Ngatjizeko of the Ministry of Labour and Social Welfare<sup>91</sup> highlighted some of the bottlenecks in the ADR system and called for its immediate improvement to address the setbacks.<sup>92</sup> Minister Ngatjizeko pointed out that-

“[t]he current Labour Act has not only “revolutionised” the antiquated confrontational dispute resolution process that characterized its predecessor (the Labour Act 6 of 1992) during the period of its operation, but it has effectively transformed the whole process into a modern ADR popularly known as conciliation/arbitration system (con/arb) ... [thus] the idea for the revolution and transformation of labour relations and dispute resolution is to address specific concerns, namely:-

- to have a time bound system that is responsive to both business and trade union (employee) needs and expectations;
- to have an inexpensive and simple, yet effective system;
- to achieve quicker, fairer and equitable results; and
- a system that is accessible by all employers and employees regardless of their status and standing in our economic set up.”

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<sup>89</sup> S 75 of the 1992 Act, provided for the establishment of conciliation boards. Subsection (1) reads: subject to the provisions of subsections (2) and (3), the Commissioner shall, upon the receipt of a notice referred to in s 74(1), as soon as practicable after the date of such receipt, establish a conciliation board for such period as may from time to time be determined by the parties to the dispute by mutual agreement consisting of: (a) a person determined by the parties to the dispute by mutual agreement or, in the absence of any such agreement, the Commissioner or a person designated by him or her who is not a party to the dispute, who shall be the chairperson of the conciliation board; and (b) such equal number of other persons as may be determined by such parties by mutual agreement and nominated by each party to the dispute from amongst their number or otherwise, in the absence of any such agreement, three persons from amongst each one of such parties nominated by such parties or, in the absence of such nomination, by the Commissioner.

<sup>90</sup> Venter, Grossett and Hills *Labour relations in South Africa* (2003) 383.

<sup>91</sup> Government of the Republic of Namibia (GRN) Report of the Retreat of the office Labour Commissioner held on 4-8<sup>th</sup> July 2011.

<sup>92</sup> GRN, ministerial statement read at the operational retreat of the Labour Commissioner’s Office. Held in Ongwediva, July 2011.

Given the prevailing situation, it is evident that there has merely been a change in emphasis, from the former judicial system or cumbersome<sup>93</sup> process of conciliation boards under the Labour Commissioner to the new ADR system. The contention is that the fundamental objectives of ADR systems have not been met. Bendeman<sup>94</sup> points out that the aim of the new ADR system is to put a more friendly face on the processes that resolve labour disputes in the most effective manner without resorting to the courts. However, these aspirations are impeded by significant challenges to the institutions responsible for ADR. The challenges include the backlog of outstanding disputes that sometimes take months to resolve<sup>95</sup> and the late submission of cases by applicants<sup>96</sup>, followed by subsequent condonation procedures and other practical problems associated with set-down notifications.<sup>97</sup> Both the Office of the Government Attorney and the Judge President echoed these sentiments on the current challenges in the ADR system in Namibia. In their view the

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<sup>93</sup> See fn 89 supra on the cumbersome process of conciliation boards. No time limits were determined, and the whole process was left entirely to the parties to decide who to appoint as chairperson and when to hold meetings.

<sup>94</sup> Bendeman "Alternative Dispute Resolution (ADR) in the Workplace: The South African Experience" 2006 *African Journal of Conflict Resolution* (1).

<sup>95</sup> In Namibia, for example there is no time limit set from the date of commencement of arbitration hearing to the date of conclusion. After the party refers the dispute on Form LC21 to the Labour Commissioner, (s 86)(3) the Labour Act, 2007, the Labour Commissioner if satisfied, is required to give the parties at least 14 days notice of an arbitration hearing on Form LC28, unless the parties agree to a shorter period. See Rule 15 of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner: Labour Act, 2007. GG the Republic of Namibia No 4151 dated 31 October 2008. Windhoek (hereinafter referred to as the Rules of the Labour Commissioner). Thereafter it is incumbent on the arbitrator to conduct the arbitration in a manner that he/she considers appropriate in order to determine the dispute fairly and quickly, without fixing any time limit. This is open ended. The duty only arises at the conclusion of the arbitration hearing for the arbitrator to issue his/her award within 30 days [s 86)(18). This is the cause of delays and backlog in concluding cases, as the Labour Commissioner continuously designates cases on referral while cases may be piling-up with the arbitrators. Conciliation is time bound and clearly provides that the conciliator must attempt to resolve the dispute within 30 days of the date the Labour Commissioner received the referral of the dispute. A similar provision should have been set for arbitration proceedings, to ensure speedy resolution of the disputes that go through to arbitration.

<sup>96</sup> S 86(2)(a) and (b) the Labour Act of 2007, provides that "a party may refer a dispute in terms of subsection (1) only (a) within six months after the date of dismissal if the dispute concerns dismissal, or (b) within one year after the dispute arising, in any other case. The use of "may" suggests that late referral can be condoned as provided for in Rule 10 of the Rules Labour Commissioner.

<sup>97</sup> In South Africa, the time limit has not been prescribed in the majority of instances. A dispute may be referred within a reasonable time from the date it arose. However, in terms of s 191(1) the LRA, a dismissal dispute must be referred within 30 days of the date of the dismissal or, if it is a late date, within 30 days of the employer making the final decision to dismiss or uphold the dismissal. Unfair labour practice disputes must be referred within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a late date, within 90 days of the date on which the employee became aware of the act or occurrence. With good cause condonation for late referral may be granted. See Bosch *et al* (2004) 72.

problems include, amongst others:<sup>98</sup> delays while the Labour Court finalises appeal and review applications; the quality of arbitration awards, for example absurd awards which do not provide for ascertainable compensation; non-compliance with the time limits to issue arbitration awards on completion of arbitration; delays in submitting certified records to the Labour Court; challenges in the efforts of labour inspectors to enforce settlement agreements; and arbitration awards sanctioned by orders to stay, granted by the court to the detriment of the dismissed employees and applicants who cannot afford legal representation.<sup>99</sup> Essentially, although the arbitration award is binding on the parties,<sup>100</sup> it does not imply that the award is full and final or brings finality to the dispute. This is because the Labour Act of 2007<sup>101</sup> makes provision for staying arbitration awards in that –

“when an appeal is noted in terms of subsection (1), or any application for review made in terms of subsection (4), the appeal or application –

- (a) operates to suspend any party of the award that is adverse to the interest of an employee; and
- (b) does not operate to suspend any party of the award that is adverse to the interest of an employer”.

However, although an appeal or review application does not stop the execution of the award if it is made in favour of the employee, the execution of the award may be stayed by the employer approaching the Labour Court for such an order, as provided for in section 89(7) of the Labour Act of 2007. This section allows an employer against whom an adverse award has been made to apply to the Labour Court for an order varying the effect of subsection (6) and the court may make an appropriate order.<sup>102</sup>

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<sup>98</sup> GRN Report of the operational retreat of the Office of the Labour Commissioner 5.

<sup>99</sup> S 89 of the Labour Act, 2007 provides that – An employer against whom an adverse award has been made may apply to the Labour Court for an order varying the effect of s (6), and the Court may make an appropriate order. It is within this ambit that stay orders are granted to the adverse effect of employees. Stay orders are secured by employers in most cases even while labour inspectors are busy ensuring enforcement through an internalized ‘Order to Comply with Arbitration Award’.

<sup>100</sup> S 87 of the Labour Act, 2007 read – (1) an arbitration award made in terms of this Part- (a) is binding unless is advisory; (b) becomes an order of the Labour Court on filing the award in the Court by any party affected by the award; or the Labour Commissioner.

<sup>101</sup> S 89(6) of the Labour Act, 2007.

<sup>102</sup> *Namibia Breweries v Kaeka* (28 May 2010) Case No LCA 34/10, the court held that an application for staying must be brought duly and promptly after becoming aware of the order.

Although the Labour Act of 2007 envisaged the quick resolution of labour disputes without necessarily resorting to the court, the Labour Court<sup>103</sup> has jurisdiction to adjudicate appeals against arbitration awards in terms of the Namibian Constitution, which guarantees the right to a fair trial<sup>104</sup> at the arbitration proceedings. In line with this provision, the court held that if the discretion at the arbitration proceedings has been exercised on judicial grounds and for sound reasons that are without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to interfere and substitute its own decision. The court requires of the appellant to show that the arbitration award is wrong and that the decision ought to have been in his favour. Given this legal provision to appeal against awards, there is no finality to arbitration awards when issued by arbitrators. The only exception to this is when there is voluntary compliance by the party at fault, which is rarely the case in Namibia. The majority of arbitration awards are only finalised when court orders are made on finalisation of the appeal or review hearing. Furthermore, there is no time limit set to finalise cases.

The South African position is different from the position in Namibia. The LRA provides that an arbitration award is final and binding and that there is no right of appeal against it.<sup>105</sup> Once the award is certified by the CCMA director it immediately acquires the status of a judgment of the Labour Court<sup>106</sup> and becomes enforceable as such.<sup>107</sup> This means that an award may be executed in the same manner as an

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Further, the court held that, by the time the application for staying is filed the appeal should be noted as a requirement for the application to stay. The prospects of success on appeal should also be considered during the application for condonation for late filing of appeal.

<sup>103</sup> *Edgars Stores v Olivier & Another* (18 June 2010) Case No.LCA 67/2009.

<sup>104</sup> Art 12(1)(a) of the Namibian Constitution reads- In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of moral, public order or national security, as is necessary in a democratic society. See also s 85(1) which reads - There are established, as contemplated in Article 12(1)(a) of the Namibian Constitution, arbitration tribunals for the purpose of resolving disputes.

<sup>105</sup> S 143(1) of the LRA. There is one exception concerning disputes about agency shops and closed shop agreements. See also s 24.

<sup>106</sup> S 143(3) of the LRA.

<sup>107</sup> S 143(1) was inserted after it was realized that the process of approaching the Labour Court in terms of s 158(1)(c) of the LRA was cumbersome and potentially costly. This was submitted and held in *Gois t/a Shakespeare's Pub v Van Zyl & others* (2003) 24 ILJ 2302 (LC) at par 21.

order of court and it would therefore be unnecessary to approach the Labour Court to make the award an order of court as is the prevailing practice in Namibia.<sup>108</sup> However, the LRA<sup>109</sup> contemplates that the expression of “final and binding” does not exempt awards from review. Although the launching of a review application against an award does not suspend its operation,<sup>110</sup> the Labour Court will invariably stay the execution of an award if a review application has been filed,<sup>111</sup> provided the applicant proves reasonable prospects of success. The court has, however, held that the staying of awards requires a special application.<sup>112</sup> Where the enforcement of an award is stayed pending review, the application for enforcement is normally set down with the review application, and where the review application fails the award is enforced.

The process set out above does not lead to the speedy resolution of labour disputes. Given these challenges in the current ADR system, Bendeman<sup>113</sup> is of the view that although the LRA has brought statutory dispute resolution within reach of the ordinary worker, it may in reality have compounded the difficulties relating to labour dispute resolution. The author submits that the LRA has created a sophisticated system of dispute resolution that many of the role players may not be familiar with.

Grogan (2004),<sup>114</sup> on the other hand, submits that the ADR system under the CCMA is under strain due to a very legalistic approach with long delays and declining settlement rates. He argues that the ADR system should have rather revolutionised the shortcomings and problems experienced with the old system of labour relations before the advent of democracy, which was characterized by high legal costs,

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<sup>108</sup> S 87(1)(b) the Labour Act, 2007. The award “only” becomes an order of Court on filing by any party affected by the award or the Labour Commissioner. There is a big ongoing debate as to how such filing must be done and whether or not, there must be a motion hearing. The Labour inspectors have been given various contradicting advice on the process. At the time of writing, there has not been any single award made an order of court on mere filing of award.

<sup>109</sup> Grogan *Labour Litigation and Dispute Resolution* (2010) 161.

<sup>110</sup> *National Education Health & Allied Workers Union on behalf of Vermeulen v Director-General Department of Labour*(2005) 26 ILJ 911 (LC).

<sup>111</sup> The court is empowered to do so by s 145(3) of the LRA.

<sup>112</sup> *Olivier v University of Venda* (2003) 24 ILJ 208 (LC).

<sup>113</sup> Bendenman 2006 *African Journal of Conflict Resolution* 81.

<sup>114</sup> Grogan *Workplace Law* (2004) 442.

prolonged legal actions and low settlement rates. Mischke<sup>115</sup> suggests the adoption of new, enhanced ADR methods and the implementation of procedures and institutions that effectively deal with labour disputes in an economical and expeditious manner to mitigate the current challenges.

The ILO calls for less complex and unsophisticated procedures for labour dispute resolution, accessible to more people, at lower cost<sup>116</sup> and with greater speed than the conventional government channels.<sup>117</sup> This situation accordingly calls for critical assessment or evaluation and requires a considerable amount of analytical work, which forms the basis of this study, in order to create new knowledge and to propose realistic and efficient solutions to the current problems.

#### **4. RESEARCH QUESTIONS**

In order to address the main topic of the study the following main issues need to be investigated:

- Is Namibia's labour dispute resolution system compliant with international labour standards?
- How does the new Namibian ADR system compare with South Africa's ADR system?
- What are the current legal challenges in the existing ADR system causing it to be ineffective and inefficient?
- What can be done at the legislative level to improve enforcement of and compliance with international labour standards?

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<sup>115</sup> Mischke "Beginnings, Conflicts, Grievances" in Brand (ed) *Labour Dispute Resolution* (1997) 3.

<sup>116</sup> In Namibia at present, there are no costs involved on referral of labour disputes to the Labour Commissioner.

<sup>117</sup> Zack ILO *Can Alternative Dispute Resolution Help Resolve Employment Disputes?* (1997) 136.

- What can Namibia learn from South Africa with a view to strengthening and improving the country's labour dispute resolution systems?

## **5. AIMS AND OBJECTIVES**

The first aim of this study is to analyse the Namibian labour dispute resolution system, and compliance with and enforcement of labour standards in terms of the Labour Act 2007.

Second, a comparison with the South African labour dispute resolution system is undertaken with a view to finding solutions to problems in the Namibian system.

The specific objectives of the study are:

- To examine Namibia's application in practice of international labour standards, such as relevant conventions and recommendations on labour dispute resolution, including the ILO's role in ensuring Namibia's level of compliance and enforcement of the ADR. system;
- To analyse the existing Namibian labour dispute resolution system and compare it with that of South Africa; and
- To propose and make recommendations through which the efficiency and effectiveness of the labour dispute resolution system can be achieved.

## **6. RESEARCH MOTIVATION / SIGNIFICANCE OF THE STUDY**

The workplace is changing rapidly due to the influence of globalisation, putting the labour dispute resolution systems in many countries, including Namibia and South Africa, under stress.<sup>118</sup> The rising number of labour disputes has put pressure on dispute resolution machineries. Labour disputes and conflict are inherent in employment relations; they occur when collective bargaining has failed, often giving

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<sup>118</sup> <http://itcilo.org/en/the-centre/areas-of-expertise/social-dialogue-and-tripartism/labour> accessed on 30 January 2012.

rise to industrial action or recourse to third party interventions.<sup>119</sup> An effective labour dispute settlement system helps to contain labour conflicts within economically and socially acceptable bounds and promotes industrial peace.<sup>120</sup>

Given the above, many countries have taken to preventing or resolving labour disputes by adopting processes such as conciliation, mediation and arbitration because they help to relieve pressure on the court system. The court system is often overloaded with cases, leading to delays and raising costs for both workers and employers. The ILO standards provide useful guidance regarding ADR systems. This applies particularly to the ILO core standards, namely the Freedom of Association and the Right to Collective Bargaining Convention and Recommendation 92, which advocates setting up free mechanisms for voluntary conciliation and arbitration in labour disputes.

Several years after the adoption of the Namibian labour dispute<sup>121</sup> resolution system, it is necessary to reflect on the system and the institutions created to provide the ADR services, which include conciliation,<sup>122</sup> arbitration<sup>123</sup> and adjudication, in order to determine whether they are still relevant and provide effective and efficient service.

From the evidence available no such academic comparative study has ever been conducted in Namibia. In the comparative jurisdiction of South Africa, Ferreira<sup>124</sup> has investigated the effectiveness and efficiency of the CCMA as an institution mandated to provide the ADR service. However, these studies are not comparable to Namibia. Thus, this study is unique and of significance to scholars, labour law practitioners,

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<sup>119</sup> Khabo *Collective Bargaining and Labour Dispute Resolution* 11.

<sup>120</sup> Preamble the Labour Act, 2007.

<sup>121</sup> Labour disputes take different forms and each is most susceptible to a particular type of dispute settlement procedure. There are two general types of labour disputes, namely disputes about rights and disputes about interest (also known as economic rights disputes).

<sup>122</sup> Conciliation and mediation are avenues available to assist the parties to the disputes, through a neutral third party intervention, to reach a mutually agreed settlement. The Conciliator or mediator assists the parties to settle the dispute by themselves when negotiations have failed or reached an impasse. The conciliator or mediator is not empowered to impose a settlement on the parties. Bosch *et al* (2004) 47.

<sup>123</sup> Arbitration is a procedure for settling labour disputes by submitting them to an independent and neutral third party for a final and binding decision which is commonly called an award or decision. Bosch *et al* 84.

<sup>124</sup> Ferreira 2004 *Politeia* 73.

conciliators and arbitrators and of equal importance to those with broader interest in the Namibian labour dispute resolution system.

Moreover, this study provides policy makers in Namibia with a meaningful analysis of the labour dispute resolution system's compliance and enforcement. The ultimate goal is to improve the efficiency and effectiveness of the existing ADR system.

## **7. RESEARCH METHODOLOGY**

In order to reach these conclusions, a literature study is carried out using both primary and secondary data sources. The primary data used includes: international labour standards, the Namibian Constitution, the Labour Act of 2007, the South African Constitution of 1996, the LRA and case law relevant to the topic. Secondary data includes: journal articles, labour law text books, government reports and other electronic sources on the topic under study. The primary data is subjected to a comparative and in-depth content analysis.

## **8. JUSTIFICATION FOR COMPLIANCE AND COMPARATIVE STUDY**

### **8.1 THE NAMIBIAN LABOUR LAW AND ILO STANDARDS**

The ILO has been instrumental in labour law reform in Namibia and was critical of the colonial *apartheid* labour law regime of South Africa prior to independence.<sup>125</sup> Under its mandate, the ILO played a significant role in shaping labour laws in Namibia and continues to do so. Such intervention includes, but is not limited to, the influence to appoint a Commission of Inquiry into labour matters in Namibia by the *Apartheid* government<sup>126</sup>, which recommended, amongst other things, that on independence Namibia should comply with international labour standards.

The ILO played an equally pivotal role in the drafting and funding of both the 1992 Labour Act<sup>127</sup> and the Labour Act of 2007.<sup>128</sup> In pursuance of the Wiehahn

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<sup>125</sup> ILO *Labour and Discrimination in Namibia* (1997) 58.

<sup>126</sup> Fenwick *Labour Law in Namibia* (2005) 22.

<sup>127</sup> The ILO funded an expert advisor on labour law to the government in the person of an internationally renowned labour law academic Bob Hepple see Bauer *Labour relations in occupied Namibia in Klerck et al* (1998) 55-57.

recommendations, at independence the Namibian Government, undertook to be a member of the ILO and, where possible, adhere to and act in accordance with the international conventions and recommendations of the ILO.<sup>129</sup> Given this commitment, Namibia has ratified relevant conventions applicable to labour dispute resolution<sup>130</sup> and is therefore bound to comply accordingly in terms of its obligations.

In order to facilitate comparative analysis, international labour standard requirements and the South African experience forms the backdrop of the study's analysis.

## 8.2 COMPARISON WITH THE SOUTH AFRICAN ADR SYSTEM

History is said to be made up of the interaction of many forces, including social, economic, political, cultural and ideological forces.<sup>131</sup> In this context, Namibia's political history is heavily influenced by South Africa's colonial regime. In fact, Namibia was under South African administration from 1915 to 1990.<sup>132</sup> During this era, the country had no comprehensive labour legislation in place aside from fragmented pieces of racially discriminatory labour law largely copied from South Africa, designed to suit the prevailing powers at the time. These labour laws were enacted to facilitate economic exploitation of the country by the colonisers.<sup>133</sup>

After independence, South Africa's labour dispute resolution system has continued to influence Namibian labour law, prompting Namibia to copy<sup>134</sup> its ADR system from the advanced South African CCMA.

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<sup>128</sup> The ILO funded the drafting of the Labour Act, 2007, in this case, Professor Halton Cheadle, University of Cape Town, was the expert who drafted the 2004 Labour Act which culminated into the Labour Act of 2007. This Act was transmitted to the ILO Headquarters for technical comments on its compliance with international labour standards.

<sup>129</sup> Art 95(d) of the Namibian Constitution.

<sup>130</sup> Benjamin "The Challenges of labour law reform in South Africa" 253.

<sup>131</sup> Bronstein *International and Comparative Labour Law* (2009) 1.

<sup>132</sup> Fenwick *Labour Law in Namibia* (2005) 5.

<sup>133</sup> Van Rooyen *Portfolio of Partnership* (2006) 105.

<sup>134</sup> Musukubili *A Comparison of the South African and Namibian Labour Dispute Resolution System*. Treatise submitted for the degree of Magister Legum at the Nelson Mandela Metropolitan University (2009) 92.

The influence of South Africa's ADR system on Namibia is apparent in the continued working relationship between the two countries. The CCMA continues to train conciliators and arbitrators and co-manage the case management system of the Labour Commissioner. To this end, the relationship has been formalised by the signed Memorandum of Understanding (MoU) between the Government of the Republic of Namibia and the Government of the Republic of South Africa. This relates to cooperation and lending technical assistance and support with regard to labour dispute resolution systems.<sup>135</sup>

From the explanation set out above, it is apparent that a study using South Africa as a comparison is justified.

## **9. ASSUMPTION**

The study submits that, contrary to international labour standards on ADR systems that seek to provide simple procedures for the resolution of labour disputes that are within reach of ordinary workers, the present dispute resolution system has compounded the problems relating to labour dispute resolution. It has created a sophisticated, complex and technical legal process for dealing with labour disputes. It is assumed that there are practical, capacity building and legal measures that the Namibian government can take to improve the efficiency and effectiveness of the ADR system.

## **10. LIMITATION OF THE STUDY**

This study is limited to the Namibian and South African labour dispute resolution systems and compliance with international labour standards. This limitation contributes to the originality of the present study, since much of the commentary on the Namibian ADR system is not simply the restatement of the views of others.

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<sup>135</sup> See the MoU corporation on ADR, (GRN) Ministry of Labour and Social Welfare (2006).

## **11. PROPOSED CHAPTER OUTLINE**

### **CHAPTER 1: GENERAL INTRODUCTION**

This chapter defines major concepts and provides a contextual background along with the rationale of the study. The chapter further outlines the statement of the problem, the research objectives and the methodology used in the study.

### **CHAPTER 2: INTERNATIONAL LABOUR ORGANIZATION AND INTERNATIONAL LABOUR STANDARDS**

Chapter Two covers the general background leading to the formation of the ILO and the creation and application of international labour standards, such as the relevant conventions and recommendations on labour dispute resolution. The chapter continues to analyse the ILO's enforcement and supervisory mechanisms with regard to ratified conventions by member states. Thereafter, the chapter provides a detailed explanation of ILO envisaged ADR concepts, systems and processes. The chapter concludes with outlining the suggested and acceptable functions, composition and operation of the labour dispute settlement institutions in member states as contained in the conventions and recommendations of the ILO.

### **CHAPTER 3: NAMIBIA'S LABOUR DISPUTE RESOLUTION SYSTEM**

This chapter provides the general introduction and historical background to the Namibian ADR system and a compliance analysis of the labour dispute resolution system in terms of the repealed 1992 Labour Act and the current Labour Act of 2007. Moreover, a closer examination of the institutions created to resolve labour disputes, such as the Labour Commissioner, Labour Inspectorate, industry bargaining forums and the Labour Courts, is undertaken. In addition, the provisions of other labour related statutes on labour dispute resolution are studied in the context of the wider scope of labour dispute resolution.

## **CHAPTER 4: SOUTH AFRICAN LABOUR DISPUTE RESOLUTION SYSTEM**

Chapter Four provides a general introduction and historical exposition of the labour relations system in South Africa. After the introduction and historical section, an analysis of the labour dispute resolution system in terms of the LRA is delineated. The chapter also details the current ADR system, concepts, process and procedures for dispute resolution, which include enforcement and compliance mechanisms. The chapter then extends the discussion to include private and bargaining councils' labour dispute resolution systems and the role of the Labour Court, Labour Appeal Court and the Constitutional Court in labour dispute resolution. Other relevant labour related statutes are included in the study to determine their extent in labour dispute settlement.

## **CHAPTER 5: NAMIBIA'S COMPLIANCE WITH AND ENFORCEMENT OF INTERNATIONAL LABOUR STANDARDS**

The chapter provides a general introduction and thereafter examines Namibia's compliance level with and the enforcement of ratified international labour standards relative to the country's labour dispute resolution systems. The chapter is subdivided into several parts based on specific issues or groups of issues.

## **CHAPTER 6: COMPARISON WITH THE SOUTH AFRICAN ADR SYSTEM**

The chapter juxtaposes the two countries' labour dispute resolution systems. It is subdivided into several parts based on specific issues or groups of issues to be compared.

## **CHAPTER 7 : RECOMMENDATIONS AND GENERAL CONCLUSIONS**

This chapter addresses the general recommendations for Namibia. It proposes ways to improve compliance with international labour standards and draw positive lessons from South Africa, which Namibia can learn with a view to strengthening and improving the country's labour dispute resolution system.

**CHAPTER 2**

**THE INTERNATIONAL LABOUR ORGANIZATION AND STANDARDS  
RELATING TO LABOUR DISPUTE RESOLUTION**

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## **2.1 INTRODUCTION**

The International Labour Organization (ILO) was established in 1919 as a consequence of the Treaty of Versailles. In 1946 it became the United Nations<sup>1</sup> Organization's first specialist agency. The organization's mandates include promoting universal and lasting peace based upon social justice, and to help improve, monitor and supervise social conditions throughout the world. The ILO continuously adopts international labour standards, promoting their ratification and application in member states. These standards are created during the annual ILO conference and are based on value judgments developed to protect workers' rights, enhance job security and improve terms and conditions of employment on a global scale.

Enforcement of and compliance with international labour standards is achieved through various supervisory mechanisms available to the ILO, such as the Committee of Experts on the Application of Conventions and Recommendations<sup>2</sup> and the Conference Committee on the Application of Standards' scrutinising of annual reports submitted in terms of article 22 of the ILO Constitution. The ILO not only supervises the application of ratified conventions, but also undertakes to provide technical assistance to member states and social partners in order to allow them to fulfil their functions and obligations in meeting international labour standards.

This chapter analyses the ADR process in detail, which purports conciliation and arbitration as effective labour dispute settlement systems and as alternatives to litigation. The chapter concludes by giving an overview of the ILO's proposed labour dispute settlement structures, the personnel requirements and the independence required of these structures.

## **2.2 BACKGROUND TO THE FORMATION OF THE ILO**

Robert Owen, an idealistic seventeenth-century British mill owner, campaigned for the protection of the working class from social and working conditions that perpetuated misery in society. He called on the whole world to protect the working

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<sup>1</sup> Hereinafter referred to as the "UN".

<sup>2</sup> Hereinafter referred to as the "CEACR".

class. Owen's argument was based on humanitarian considerations and therefore of the opinion that social problems required an international solution.<sup>3</sup> In 1788, Jacques Necker, a Swiss banker, called for the extension of the Sunday rest period in other countries to ensure fair business competitiveness among countries, promoting improved conditions from a business competition point of view. Although he did not campaign for international labour standards to regulate rest days, he appreciated that the protection of workers was an international issue as advocated by Owen above.<sup>4</sup>

Between 1840 and 1848, Daniel Legrand, an Alsatian factory owner, also came onboard and repeatedly requested international labour regulations, which he considered the only way to overcome the dilemmas faced by industrialised countries' exposure to destructive foreign labour competition. He did not support the idea of countries adopting humanitarian measures to protect their own workers.<sup>5</sup> In fact, Legrand was one of the few early advocates of using international labour standards to forestall the social upheavals that occur once the working masses refuse to tolerate their degrading working conditions.<sup>6</sup>

Before the First World War no international labour standards were in place. Labour laws were purely national and established by individual sovereign states. However, a number of attempts were made to achieve international labour standards through international agreements, particularly in Europe. In 1889, an International Conference on Labour was held in Berne, Switzerland. The conference called for a system of international agreements to regulate work in factories. This was followed by the formation of an International Association for Workers' Statutory Protection in 1901 in Basle, Switzerland. The organization was aimed at disseminating information on the observance of workers' rights.<sup>7</sup>

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<sup>3</sup> Hepple *Labour Law and Global Trade* (2005) 26.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Ghebali *The ILO: A Case Study of a UN Specialized Agency* (1989)3.

<sup>7</sup> Ramm "Laissez-faire and State Protection of Workers and Epilogue the New Ordering of Labour Law"(1918)in Hepple (ed)*The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (1986)73277.

By 1914, no significant progress had been made to establish international labour standards. Agreements that prevailed were between industrialised countries, with significant disparities in their application.. The situation lacked mechanisms for effective supervision, compliance and enforcement.<sup>8</sup> It was only after the effects of the First World War were felt that significant change took place in a general political and social context and various attempts were made to establish international labour standards.<sup>9</sup> After the First World War, all antagonists, including those favouring Germany, acknowledged the suffering and sacrifices of workers during the war and came to realise how much gratitude workers were owed by their countries. This led to both the British and French Prime Ministers vowing to include labour clauses in the World Peace Treaties and workers were promised improved conditions of employment once the hostilities ended. The situation of the millions of demobilised soldiers equally called for urgent international action.<sup>10</sup>

In response to the British and French Prime Ministers' call for the inclusion of labour clauses in World Peace Treaties, the Treaty of Versailles, signed in the Hall of Mirrors at the Chateau of Versailles on 29 June 1919, included part XIII, which was devoted to labour and the establishment of a permanent labour organisation. This laid the foundation for the ILO Constitution and for the institution's tripartite character.<sup>11</sup> Influential labour leaders, such as George Barnes from Britain and Albert Thomas from France, were appointed as advisors to their governments and, together with their new colleagues in government circles, such as the prominent civil servants Edward Phelan and Harold Butler, they were instrumental to the setting up of the ILO.<sup>12</sup> Their influence was so apparent that it led to both Thomas and Butler becoming successive directors of the ILO during the inter-war years. Phelan, a prominent civil servant, became the "icon" of the ILO's unique tripartite structure as director of the office during the Second World War. He was also co-draftsman of the 1944 Declaration of Philadelphia, which redefined the ILO's objectives.<sup>13</sup>

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<sup>8</sup> Hepple *The Making of Labour Law in Europe* (1986) 29.

<sup>9</sup> Servais *International Labour Law* (2009) 24.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> <http://www.ilo.org/global/about-the-ilo/lang--eng/index>.accessed 31October 2011.

<sup>13</sup> *Ibid.*

## 2.2.1 THE ILO

The ILO was created in 1919 as part of the Treaty of Versailles that ended the First World War. The formation of the organization was based on the belief that universal and lasting peace can be accomplished only if it is based on social justice.<sup>14</sup> The organization's founders, such as Thomas and Phelan, were committed to spreading humane working conditions and combating injustice, hardship and poverty. In 1944, ILO members reinforced these aims by adopting the Declaration of Philadelphia. They spoke out against labour being viewed as a commodity. As such, the ILO agreed on basic human and economic rights on the principle that "poverty anywhere constitutes a danger to prosperity everywhere".<sup>15</sup>

In 1946, the ILO became the United Nations Organization's first specialist agency. Another milestone followed this in 1969, when the ILO was awarded the Noble Peace Prize.<sup>16</sup> In 1998 the ILO distinguished itself further by adopting a declaration<sup>17</sup> setting out principles and rights, such as the right to freedom of association and collective bargaining, and the elimination of child labour, forced labour and discrimination linked to employment. This declaration is essential as it enables people or workers to claim, freely and based on equality of opportunities, their fair share of the wealth they have generated in order to achieve their full human potential.<sup>18</sup>

At the time of writing, the ILO has 182 member states with a unique tripartite structure, comprising representatives of governments, employers' and workers' on an equal footing, to address issues related to labour and social policy.<sup>19</sup> The ILO's broad policies are set by the International Labour Conference<sup>20</sup> (ILC), which meets once a year, and brings together all the ILO constituents.<sup>21</sup> The ILC adopts new international

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<sup>14</sup> See preamble to the ILO Constitution.

<sup>15</sup> Declaration of Philadelphia (1944) Clause 1.

<sup>16</sup> Doumbia-Henry *Rules of the Game-A Brief Introduction to the International Labour Standards* (1999)13.

<sup>17</sup> ILO *Declaration on Fundamental Principles and Rights at Work* (1998).

<sup>18</sup> *Ibid.*

<sup>19</sup> See ILOLEX.

<sup>20</sup> Hereinafter referred to as the "ILC".

<sup>21</sup> Art 3 of the ILO Constitution reads – "[t]he meeting of the General Conference of representatives of the members shall be held from time to time as decision may require, and at least once in every year. It shall be composed of four representatives of each of the members of

labour standards and the ILO's work plan and budget.<sup>22</sup> At the beginning of February 2012, there were 189 conventions and 200 recommendations of the ILO,<sup>23</sup> with some of these instruments dating as far back as 1919. Many of them no longer correspond to today's needs and it is on this basis that the ILO adopts conventions that replace and protocols that add new provisions to older conventions.<sup>24</sup>

In between sessions of the ILC, the ILO is guided by the Governing Body,<sup>25</sup> which is the organization's executive council. The Governing Body meets several times a year to coordinate and shape the work of the ILO. It is responsible for, amongst other things, the drafting of the ILC agenda, which the conference has powers to change, although this rarely happens. The Governing Body appoints the Director General<sup>26</sup> of the ILO and examines the proposed ILO budget for each financial year before it approves it for adoption by the conference. The ILO secretariat has its headquarters in Geneva, Switzerland, and maintains field offices in more than 40 countries.<sup>27</sup>

## 2.2.2 ILO AIMS AND OBJECTIVES

The ILO's aims and objectives are set out in the preamble to its constitution.<sup>28</sup> The preamble declares that "universal and lasting peace can be established only if it is based upon social justice". The basic objectives of the ILO are to improve, monitor and supervise social conditions throughout the world. This is achieved through the creation of measures "urgently required" for the:

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whom two shall be government delegates, and two others shall be delegates representing respectively the employers and the workpeople of each of the members".

<sup>22</sup> Art 13 of the ILO Constitution.

<sup>23</sup> <http://www.ilo.org/ilolex/english/doc/declaworld.htm> accessed on 08 November 2011.

<sup>24</sup> <http://www.ilo.org/global/standards/introduction-to-international-labour-standards>. accessed on 31 October 2011 .

<sup>25</sup> Article 14 of the ILO Constitution provides for the Governing Body and its composition as follows: (1) the Governing Body shall consist of fifty–six persons, twenty-eight representing governments, fourteen representing the employers and fourteen representing the workers. (2) of the twenty eight persons representing government, ten shall be appointed by the members of the Chief Industrial Importance, and eight shall be appointed by the members selected for that purpose by the government delegates of the members mentioned above.

<sup>26</sup> Article 18(1)(d)(2) of the ILO Constitution provides for the appointment of the Director General of the ILO by the Governing Body. The Director General is to be responsible for the efficient conduct of the ILO and any other assigned duties. He /she is equally required to attend all meetings of the Governing Body.

<sup>27</sup> Doumbia-Henry *Rules of the Game* 13.

<sup>28</sup> See Preamble of the ILO Constitution.

- regulation of the hours of work and regulation of the labour supply;
- prevention of unemployment and provision of an adequate living wage;
- protection of workers against sickness, disease and injury arising out of their employment;
- protection of children, young persons and women, and provision for old age and injury;
- protection of the interests of workers when employed in countries other than their own;
- recognition of the principle of equal remuneration for work of equal value; and
- recognition of the principle of freedom of association.

At the 1944 Philadelphia conference the ILC rephrased and broadened the aims and purpose of the ILO. The Philadelphia Declaration consequently amended the ILO constitution and re-affirmed the following principles:

- that labour is not a commodity;
- that freedom of expression and association are essential to sustained progress;
- that poverty anywhere constitutes a danger to prosperity everywhere; and
- that the war against want must be carried on, not only with unrelenting vigour, but also with continuous and concerted international efforts in which the constituents enjoy equal status in free discussion and taking democratic decisions, with a view to promoting the common welfare.<sup>29</sup>

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<sup>29</sup> Declaration of Philadelphia (10 May 1944) Clause I.

The ILO was entrusted with the solemn obligation to further these principles amongst member states.<sup>30</sup>

## 2.3 INTERNATIONAL LABOUR STANDARDS

International labour standards are the conventions and recommendations drawn up and agreed upon by the ILO's constituents.<sup>31</sup> They result from debates or negotiations that take place during the ILC, which are based on value judgments developed to protect basic workers' rights. They enhance workers' job security and improve their terms and conditions of employment on a global scale. The standards are created to serve as worldwide minimum levels of protection from inhumane labour practices.<sup>32</sup> Certain basic human rights are universal to humanity, therefore international labour standards are developed to ensure the provision of these rights in the workplace.<sup>33</sup>

Conventions are legally binding international treaties that may be ratified by member states,<sup>34</sup> while recommendations are non-binding guidelines.<sup>35</sup> Conventions lay down the basic principles to be adhered to by ratifying member states, whereas recommendations supplement the conventions by providing detailed guidelines relating to the application of the convention. However, in some circumstances recommendations can be autonomous and not linked to any convention.<sup>36</sup>

On adoption of standards by the ILC, member states are required under the ILO Constitution to submit them to their competent authorities,<sup>37</sup> which in most cases is the country's parliament. This is when a member state considers the ratification of the instrument. Upon ratification by a member state, the convention comes into force for

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<sup>30</sup> Servais *International Labour Law* 28.

<sup>31</sup> Article (1) and (2) of the ILO Constitution provides for the membership of the ILO to include government, employers and workers (herein "the constituents" and social partners).

<sup>32</sup> [http://en.wikipedia.org/wiki/international\\_labour\\_standards](http://en.wikipedia.org/wiki/international_labour_standards). accessed on 1 November 2011.

<sup>33</sup> Brown, Deardorff and Stern *International Labour Standards and Trade: A Theoretical Analysis* (1996) 227,272.

<sup>34</sup> Art 19(5) of the ILO Constitution.

<sup>35</sup> Art 19(6) of the ILO Constitution.

<sup>36</sup> Dombia-Henry *Rules of the Game* 14.

<sup>37</sup> Art 19(5)(c) of the ILO Constitution.

that country one year after the date of ratification.<sup>38</sup> By ratifying the convention, a member state commits itself to applying the convention through national laws and practices<sup>39</sup> and to report to the ILO regarding its application on a regular basis.

Amongst all the ILO conventions thus far adopted, the Governing Body has identified eight of the 189 conventions and 200 recommendations as fundamental conventions. These are:

- Freedom of Association and Protection of the Right to Organize Convention, No. 87 of 1948.
- Right to Organize and Collective Bargaining Convention, No. 98 of 1949.
- Forced Labour Convention, No. 29 of 1930.
- Abolition of Forced Labour Convention, No. 105 of 1957.
- Minimum Age Convention, No. 138 of 1973.
- Worst Forms of Child Labour Convention, No. 182 of 1999.
- Equal Remuneration Convention, No. 100 of 1951.
- Discrimination (Employment and Occupation) Convention, No. 111 of 1958.

The ILO launched a campaign in 1995 to ensure a universal ratification by all member states of these eight core conventions.<sup>40</sup> In 2009, the ILO reported over 1290 ratifications, representing about 88.5 percent of the member states.<sup>41</sup>

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<sup>38</sup> Art 19(5)(b) of the ILO Constitution.

<sup>39</sup> *Ibid.*

<sup>40</sup> Doumbia-Henry *Rules of the Game* 14.

<sup>41</sup> Doumbia-Henry *Rules of the Game* 15.

The Governing Body also designated four conventions as priority instruments and encouraged member states to ratify them because of their significance to the functioning of the international labour standards system. These are:

- Labour Inspection Convention, No. 81 of 1947.
- Labour Inspection (Agriculture) Convention, No. 129 of 1969.
- Tripartite Consultation Convention, No 144 of 1976.
- Employment Policy Convention, No 122 of 1964.

## 2.4 THE CREATION OF INTERNATIONAL LABOUR STANDARDS

International labour standards are created in response to growing international concern that action needs to be taken on issues.<sup>42</sup> These issues are, for example, the provision of maternity protection to working women or setting safe working conditions for agricultural workers. The process involved is a unique international legislative development that fully takes into account the views of all ILO constituents worldwide.<sup>43</sup>

The Governing Body puts the issue on the agenda of the next ILC. The ILO, in turn, prepares detailed reports that analyse the law and practices regarding the state of the issue at stake and forwards these to member states and social partners for their comments and discussion at the next ILC. After the first discussion, a second report is prepared by the office, with a draft instrument for further comments and for discussion at the coming ILC. At this second conference, the draft is amended as necessary and proposed for adoption.<sup>44</sup> The purpose of the double discussion, according to the ILO, is to give conference participants sufficient time to examine the draft instrument and make appropriate comments on it. There is a requirement for two-thirds majority votes cast by delegates present for a standard to be adopted.<sup>45</sup>

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<sup>42</sup> <http://www.ilo.org/global/standard/introduction-to-international-labour-standards/interna...> accessed on 31 October 2011.

<sup>43</sup> <http://www.ilo.org/global/stanadrds/introduction-to-international-labour-standards/interna...> Accessed on 31 October 2011.

<sup>44</sup> Rules for the Conference article 11 available on <http://www.ilo.org/ilc/Rulesfortheconference/lang--en/index.htm> accessed on 06 March 2012.

<sup>45</sup> Art 19(2) of the ILO Constitution.

The delegates come from all ILO member states, with each delegation comprising of two government delegates, one employer delegate and one worker delegate and each delegate having only one vote.<sup>46</sup> The ILO Constitution provides that each delegate may be accompanied by no more than two advisers for each item on the conference's agenda. Committees are constituted in terms of the Rules of the Conference.<sup>47</sup> The advisers are not permitted to speak during the discussions except on request made by the delegate whom they accompany and may not participate in the voting process.<sup>48</sup> Although this may be a standing rule, from the author's personal experience gained while attending the ILC five times, three times as an employer delegate and twice as government adviser, government advisers are free to participate in group meetings. However, social partners are required to nominate a spokesperson for the group and only that person has the right to speak on behalf of the group. All conference participants are required to have credentials for the meetings.<sup>49</sup> Voting is strictly limited to delegates who are allocated voting codes.

Once the majority of the participants have voted in favour of the adoption of the standard, the instrument is adopted and communicated formally to member states by the Director-General. In turn, member states are required to bring the standard to the attention of their competent authorities for the enactment of the relevant legislation or other actions, including ratification if deemed appropriate.<sup>50</sup> An adopted convention normally comes into force twelve months after ratification by two member states, it having been communicated it to all member states for ratification by the ILO.<sup>51</sup> Ratification in itself entails a formal procedure where a member state, through its parliament, accepts the convention as a legally binding instrument and agrees to subject itself to the ILO's regular supervisory system by ensuring that the convention is applied in practice.

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<sup>46</sup> Art 3(2) of the ILO Constitution.

<sup>47</sup> Art 8 and 9 of the Rules of the Conference available on <http://www.ilo.org/ilc/Rulesfortheconference/lang--en/index.htm>.

<sup>48</sup> Art 3(6) of the ILO Constitution.

<sup>49</sup> Art 3(9) of the ILO Constitution.

<sup>50</sup> Art 19(5)(b) of the ILO Constitution.

<sup>51</sup> Art 19(5)(a) of the ILO Constitution.

Although industrialised countries were the forerunners in forming international labour standards, many developing countries, including Namibia and South Africa, have since subscribed to ILO membership.<sup>52</sup> The standards are developed with flexibility that allows for their incorporation into national laws and practices, with due regard to the economic differences among member states. Examples include standards set on minimum wages, which do not require member states to set a specific minimum wage, but to establish a system and the necessary machinery to fix minimum wage rates appropriate to their economic development.<sup>53</sup>

Some of these flexible clauses permit member states to introduce temporary standards that are lower than those normally prescribed, which may exclude certain categories of workers from the application of a convention, or to apply only certain parts of the instrument. Flexible usage, however, requires member states to make a declaration to the Director-General of the ILO after consultation with social partners.<sup>54</sup>

## **2.5 THE USAGE OF INTERNATIONAL LABOUR STANDARDS**

On adoption of standards by the ILC, they automatically become conventions and recommendations, which must be communicated to member states by the ILO after the conference.<sup>55</sup> These conventions become part of the primary tools for governments, in consultation with social partners, when drafting and implementing their domestic labour laws and social policies to ensure conformity with international standards. When a country contemplates ratifying a convention, it first examines the necessary instrument and, if necessary, revises its domestic legislation and policies in order to achieve compliance with standards or instruments it wishes to ratify. International labour standards essentially serve as guidelines in harmonising national labour laws and practice in a given field.<sup>56</sup>

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<sup>52</sup> Khabo *Collective Bargaining and Labour Dispute Resolution* 2.

<sup>53</sup> Doumbia Henry *Rules of the Game* 18.

<sup>54</sup> *Ibid.*

<sup>55</sup> Art 19(5)(a) of the ILO Constitution reads- In the case of a Convention: (a) the Convention will be communicated to all Members for ratification.

<sup>56</sup> Doumbia-Henry *Rules of the Game* 20.

Other than providing guidance for national labour laws and practices, international labour standards are used as terms of reference at national level. For example, labour courts in a number of countries are able to use international labour standards to decide cases where national labour law is inadequate or silent on a matter in question. In these cases, Namibian courts have repeatedly relied on international labour standards to decide cases where national labour law does not provide a solution. For example, in the matter between *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia*,<sup>57</sup> the Supreme Court took into account the provisions of the Private Employment Agencies Convention<sup>58</sup> and the Employment Relationship Recommendation<sup>59</sup> to decide on the unbanning of labour hire in Namibia. Similarly, in the matter between *Du Toit v the Office of the Prime Minister*,<sup>60</sup> the court made specific reference to articles 3 and 10 of the Termination of Employment Convention<sup>61</sup> in determining the meaning of dismissal, as well as the powers the court has to declare a dismissal invalid and order reinstatement in the absence of such provision in the national labour legislation. A similar approach was adopted in the case of *Namibia Development Corporation v Visagie*,<sup>62</sup> where reference was made to the Termination of Employment Convention in determining the meaning of consultation for the purpose of retrenchment.

In South African jurisdiction, the Constitutional Court, in deciding the matter between *SA National Defense Union v Minister of Defense*,<sup>63</sup> made specific reference to the Right to Organize Convention<sup>64</sup> to decide that workers and employers, without distinction, have the right to establish and join unions of their own choosing without prior authorisation and that these rights extend to the armed forces to the extent determined by national laws. Similarly, in *NUMSA v Bader BOP (Pty) Ltd*,<sup>65</sup> the Constitutional Court referred to the Collective Bargaining Convention<sup>66</sup> to determine

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<sup>57</sup> Case No. SA 51/2008 date delivered 2009/12/14 reportable.

<sup>58</sup> No 181 of 1997.

<sup>59</sup> ILO Recommendation No198 of 2006.

<sup>60</sup> NLLP (1998) (1) 54 NLC, Case No LCA 6/94.

<sup>61</sup> No158 of 1982.

<sup>62</sup> NLLP (1998)(1) 166 NLC, Case No LCA8/96.

<sup>63</sup> 1999 (20) ILJ 2265 (CC).

<sup>64</sup> No87 of 1948, art 2 and 9.

<sup>65</sup> [2003] 2 BLLR 103 (CC).

<sup>66</sup> No98 of 1949.

the right of a minority trade union to strike in support of a demand that the employer recognise the union's shop steward.

These references provide sufficient evidence in practice that demonstrates how international labour standards are used as terms of reference in the two countries' judicial systems in instances where national laws were not sufficient in providing guidance on the matters at stake.

International labour standards are further used to provide guidance for developing national labour policies, such as employment policies. For example, the Namibian National Labour Inspection Policy was developed based on the ILO requirements before it became operational. At the time of writing, the Namibian National Employment Policy was under ILO scrutiny before it would be put into force. The purpose of this scrutiny is to determine the country's level of compliance with international standards and norms.

International labour standards play an important role in improving various administrative structures, such as labour administration, labour inspection, social security administration and employment services. In addition, they serve as benchmarks for good industrial relations applied by labour dispute resolution bodies for effective collective bargaining.<sup>67</sup> Besides being instruments used by governments, international labour standards are used by multinational enterprises to adopt labour conditions that are consistent with these standards. Advocacy groups use these standards to influence changes in policy, law and practice, and various regional organisations are incorporating the standards in their bilateral, multilateral and regional trade agreements.<sup>68</sup>

The ILO reports show that a number of bilateral and multilateral trade agreements, as well as regional economic-integration arrangements, contain social and labour provisions related to workers' rights. A good example is in the European Union where special incentive arrangements for sustainable development and good governance

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<sup>67</sup> <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/interna...> accessed on 31 October 2001.

<sup>68</sup> Doumbia-Henry *Rules of the Game* 22.

have been implemented, which provide for additional benefits for countries implementing certain international standards in respect of humane labour matters.<sup>69</sup>

## 2.6 THE TERMINATION OF ILO CONVENTIONS AND RECOMMENDATIONS

International treaties are terminated when they are abrogated, denounced or reviewed.<sup>70</sup> In respect of international labour standards, they contain final provisions that authorise the ILC to close them to any new ratification.<sup>71</sup> The ILO Constitution is, however, silent on the condition of abrogation. In 1997, the ILC adopted an amendment to the constitution to enable it to abrogate outdated conventions in accordance with the *acte contraire* procedures, such as similar methods of concluding conventions to be applied on termination. However, the amendment has not been effected due to its failure to attract a sufficient number of ratifications. Therefore, there is nothing currently preventing the ILO from terminating outdated standards by following *acte contraire* procedures. The ILO has instead adopted a system of creating new relevant standards to meet with current realities.<sup>72</sup>

## 2.7 ILO SUPERVISORY MECHANISMS

Since the ILO's establishment in 1919, the organization has been committed to adopting international labour standards and vigorously promoting their ratification and application in member states. The supervision of the application of ratified conventions is one way of achieving the organization's objectives.<sup>73</sup>

The ILO imposes obligations on member states that ratify conventions to report regularly on measures they have taken to implement relevant conventions.<sup>74</sup> The obligations include the requirement to submit newly adopted standards to the

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<sup>69</sup> *Ibid.*

<sup>70</sup> Servais *International Labour Law* 49.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> ILO *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2009) 1.

<sup>74</sup> Art 20 the ILO Constitution.

national competent authority<sup>75</sup> and the obligation to report at intervals on measures the country has taken to give effect to the provisions of unratified conventions and recommendations.<sup>76</sup> Member states are required to submit reports every two years detailing the steps that the country has taken in law and practice in order to apply any of the eight fundamental and priority conventions it has ratified. In respect to all other conventions, the country must submit reports every five years, except for conventions that have been shelved, which are no longer supervised on a regular basis.<sup>77</sup>

In submitting reports to the Director-General of the ILO, governments are required to communicate copies to social partners, employers' and workers' organizations. This allows these organizations the opportunity to comment on the reports and to provide comments to government or the ILO.<sup>78</sup>

There are a number of established supervisory bodies that oversee the implementation and application of international labour standards. These bodies or machineries are tasked to examine the standard-related obligations of member states under the ILO Constitution. The available supervisory mechanisms include regulation through annual reports<sup>79</sup> and special procedures for complaints or representation to the Governing Body.<sup>80</sup>

It is submitted that it is not the existence *per se* of conventions and recommendations that makes the ILO effective, but their implementation through regular and systematic monitoring.<sup>81</sup> The supervision of standards is mainly carried out by two bodies. These are the Committee of Experts on the Application of Conventions and

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<sup>75</sup> Art 19(5)(b) the ILO Constitution.

<sup>76</sup> Art 19 par 5(e) the ILO Constitution provides that, A Member State undertakes, in respect of any Convention which it has ratified, to: Report to the Director General of the [ILO], at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt within the Convention, showing the extent to which effect has been given or is proposed to be given, to any of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.

<sup>77</sup> Doumbia-Henry *Rules of the Game* 80.

<sup>78</sup> Art 23(2) the ILO Constitution.

<sup>79</sup> Art 22 the ILO Constitution.

<sup>80</sup> Art 24 and 26 the ILO Constitution.

<sup>81</sup> Swepston *Supervisory Mechanisms of the ILO* (2010)2. Available on <http://www.leeswepston.net/supersys.htm>. accessed on 20 November 2011.

Recommendations<sup>82</sup> and the Committee on the Application of Standards of the International Labour Conference.<sup>83</sup>

### **2.7.1 COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS (CEACR)**

This committee was set up in 1926 to examine government reports on ratified conventions.<sup>84</sup> It is composed of 20 members with outstanding legal expertise and good knowledge of economics and social problems and comprises of members from national and international level. Members are appointed by the Governing Body on the recommendation of the Director-General of the ILO in his or her personal capacity for a period of three years. The committee's fundamental principles include independence, impartiality and objectivity in noting the extent to which each member state conforms to the terms of the conventions and obligations accepted under the ILO Constitution.<sup>85</sup>

The committee is mandated to examine:<sup>86</sup>

- Annual reports under article 22 of the ILO Constitution on the measures taken to give effect to the provisions of conventions.
- The information and reports concerning conventions and recommendations communicated by member states in accordance with article 19 of the ILO Constitution.
- Information and reports on the measures taken by member states in accordance with article 35 of the ILO Constitution.<sup>87</sup>

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<sup>82</sup> CEACR.

<sup>83</sup> Hereinafter referred to as the "Conference Committee on the Application of Standards".

<sup>84</sup> Dombia-Henry *Rules of the Game* 80.

<sup>85</sup> ILO *Handbook on Procedure Relating to International Labour Conventions and Recommendations* (2006) 35.

<sup>86</sup> These terms of reference are as revised by the Governing Body at its 103<sup>rd</sup> Session of 1947.

<sup>87</sup> The fundamental principles and terms of reference and working methods of the CEACR are resonated in the Committee's report to the 73<sup>rd</sup> Session of the ILC 1987 Report iii Part 4A Parr 37-49.

The CEACR meets annually in November and December to review reports submitted by member states in terms of article 22 of the ILO Constitution. The committee determines to what extent the member states' legislation and practice conform to the ratified conventions and the extent to which the member states have fulfilled their obligations under the ILO Constitution in respect of the standards being examined. In fulfilling its mandate, the committee has two methods of conducting its business: it may choose to adopt either observations or direct requests. Direct requests usually relate to less important matters or may be mere requests for information.<sup>88</sup> Direct requests are sent directly to governments and workers' and employers' organizations in the countries concerned. If the particular government furnishes the requested information to the aforementioned entities or takes the measures requested; the matter goes no further.<sup>89</sup>

In cases of serious or persistent failure by a member state to implement the identified measures the committee makes observations on fundamental questions raised by the application of a particular convention by a member state. These observations are sent to governments for their reaction and are reproduced in the committee's annual reports, which are submitted to the ILC's Conference Committee on the Application of Standards in June every year.<sup>90</sup>

## **2.7.2 CONFERENCE COMMITTEE ON THE APPLICATION OF STANDARDS**

The Conference Committee on the Application of Standards is the next highest level of supervision.<sup>91</sup> This is one of the two standing committees of the ILC, which meets annually in June. It is composed of the ILO's tripartite structures of governments, workers' and employers' representatives.<sup>92</sup> In terms of Article 7 of the Rules of the Conference, the committee's mandate is to consider the following:

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<sup>88</sup> ILO *Application of International Labour Standards Report iii* (2009) 2.

<sup>89</sup> ILO *Handbook of Procedure Relating to International Labour Conventions and Recommendations* 36 par 56.

<sup>90</sup> Elliot "The ILO and Enforcement of Core Labour Standards"(2000) 6 *Institute for International Economics* 2.

<sup>91</sup> Elliot "The ILO and Enforcement of Core Labour Standards" 3.

<sup>92</sup> Art 7 of the Rules for the Conference. Available on <http://www.ilo.org/ilc/rulesfortheconference/lang...en/index.htm>.

- measures taken to give effect to ratified conventions in terms of article 22 of the ILO Constitution;
- reports communicated in accordance with article 19 of the ILO Constitution (general survey); and
- measures taken in accordance with article 35 of the ILO Constitution (non-metropolitan territories).

The committee's discussion is based on reports submitted by the CEACR. The committee selects a number of important or persistent cases from governments. The government concerned is asked to appear before the committee to explain the reasons for the situation noted by the CEACR.<sup>93</sup> This forum provides an opportunity for governments, employers and workers to review the manner in which governments are satisfying their standards-related obligations arising out of ratified conventions. At the session the governments in question are given the opportunity to elaborate on information previously supplied and to indicate any progress or corrective measures taken or proposed since the previous session of the CEACR. In the same vein, the particular government shares the difficulties encountered in the fulfilment of obligations with and seeks guidance on how to achieve their obligations from committee members.<sup>94</sup>

The committee would normally conclude with drawing up conclusions recommending that the governments in question must take specific steps to remedy the identified problems, or invite the ILO mission to assist, or call for technical assistance.<sup>95</sup>

The committee concludes its session with the production of a full report that is submitted to the ILC. The report contains problems governments are encountering in fulfilling their obligations under the ILO Constitution or in complying with the

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<sup>93</sup> ILO *Handbook of Procedures Relating to International Labour Conventions and Recommendations* 35 para60 (iii).

<sup>94</sup> ILO *Application of International Labour Standards Report iii* 3.

<sup>95</sup> Dombia-Henry *Rules of the Game* 81.

conventions they have ratified. This report is incorporated in the published ILC report.<sup>96</sup>

Besides the supervisory process employed by the ILO described above, the organisation uses other mechanisms, such as direct contacts, to supervise the application of ratified conventions. This process is utilised either at the request of governments or at the initiation of the ILO itself, on condition that the government in question adheres thereto. The ILO would normally send an official or an individual expert to discuss the particular problem with the government and help it to arrive at a desired solution. During this process, the usual supervisory authorities are suspended for that country to allow the non-compliance to be resolved.<sup>97</sup>

### 2.7.3 REPRESENTATION PROCEDURES

Representation procedures before the ILO are articulated in articles 24<sup>98</sup> and 25<sup>99</sup> of the ILO Constitution. Trade union organisations and employers' associations have the right under Article 24 to file a representation with the Governing Body if, in their view, a country has failed to secure, in any respect, the effective observance within its jurisdiction of any convention to which it is a party.<sup>100</sup> This representation can only be filed against a government that has ratified the convention concerned while it is still a member of the ILO or, if it has withdrawn its membership, it must still be bound by a convention it had ratified.<sup>101</sup>

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<sup>96</sup> The ILC Reports are made available on the ILOLEX.

<sup>97</sup> Swebston *Supervisory Mechanism of the ILO* 4.

<sup>98</sup> Art 24 the ILO Constitution reads – in the event of any representation being made to the ILO by an industrial association of employers or of workers that any of the members has failed to secure in any respect the effective observance within its jurisdiction of any convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made and may invite that government to make such statement on the subject as it may think fit.

<sup>99</sup> Art 25 the ILO Constitution provides that, if no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any made, in reply to it.

<sup>100</sup> Swebston *Supervisory Mechanisms of the ILO* 4.

<sup>101</sup> ILO *Handbook on Procedures Relating to International Labour Conventions and Recommendations* 48 par 77.

The Governing Body, if satisfied with the merits of the representation and after having declared it receivable, appoints a three-member committee of a tripartite nature to examine or investigate the representation and the government response received.<sup>102</sup> The Governing Body also has the opportunity to study the investigation report and its outcome.

The committee then investigates the legal and practical aspects of the case by examining the information submitted by the party that made the representation. On its conclusion of the investigation the committee makes recommendations to the Governing Body. If the government response is found to be unsatisfactory, the Governing Body invites the government concerned to make a representation before it and, depending on the outcome, the Governing Body may opt to publish the original representation and the response received. All the parties are informed of the intention to publish.<sup>103</sup> However, Swepston<sup>104</sup> points out that the Governing Body's ultimate decision does not in itself rest the matter. This is because all questions raised by the investigation team may be followed up on by the ILO's supervisory bodies, such as the CEACR and the Conference Committee on the Application of Standards, which may raise questions on any matter that they may feel requires further examination.<sup>105</sup>

#### **2.7.4 COMPLAINTS MADE IN TERMS OF ARTICLE 26 OF THE ILO CONSTITUTION**

Article 26 of the ILO Constitution provides as follows:

- (1) Any Member shall have the right to file a complaint with the [ILO] if it is not satisfied that any other Member is securing the effective observance of any convention which both have ratified in accordance with the foregoing articles.
- (2) The Governing Body may, if it thinks fit, before referring such complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.

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<sup>102</sup> *Ibid.*

<sup>103</sup> Blanpain *Comparative Labour Law and Industrial Relations* (1982) 61.

<sup>104</sup> Swepston *Supervisory Mechanisms of the ILO*(2010)4.

<sup>105</sup> Swepston *Supervisory Mechanism of the ILO* 6.

- (3) If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.
- (4) The Governing Body may adopt the same procedures either of its own motion or on receipt of a complaint from a delegate to the Conference.
- (5) When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

Subject to Article 26 of the ILO Constitution illustrated above, a complaint must be brought against a member state for not complying with a ratified convention by another member state that has ratified the same convention, or by a delegate to the ILC, or by the Governing Body in its own capacity. There are no formal requirements as to the form and language of the complaint, except for the requirements set out in Article 26. To be subjected to scrutiny, the country in question must still be a member of the ILO or, if it has withdrawn its membership, it must still be bound by the convention it ratified while a member.<sup>106</sup>

Upon receipt of the complaint, the Governing Body must consider the complaint and forward it to the government concerned for its comments. If this direct contact is not sufficient, a commission of inquiry may be instituted to investigate the charges. The commission is free to set out its own rules and practices. However, it must carry out a full investigation of the allegations to ascertain all the facts of the case. Depending on the findings, it should make recommendations on the measures<sup>107</sup> to be taken to address the non-compliance and for the country to align its laws and practices to be consistent with the relevant convention.<sup>108</sup>

In this respect, a commission of inquiry is regarded as the ILO's highest-level investigation procedure, instituted when a member state is accused of committing persistent and serious violation(s) and when it has resisted addressing the

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<sup>106</sup> *Ibid*.

<sup>107</sup> Art 28 the ILO Constitution.

<sup>108</sup> Elliot "The ILO and Enforcement of Core Labour Standards"5.

violation(s).<sup>109</sup> The ILO's records indicate that, to date, only twelve commissions of inquiry have been established. The latest was in Zimbabwe, where an investigation was conducted on the premise of a complaint filed against the government in 2008.<sup>110</sup> At the one hundredth session of the ILC, which the author attended as a government delegate for the Republic of Namibia, Zimbabwe appeared before the Conference Committee on the Application of Standards to explain its non-compliance.

Where the government concerned disputes the recommendations of the commission of inquiry, it has the right to refer the complaint to the International Court of Justice (ICJ).<sup>111</sup> The decision of the ICJ is final<sup>112</sup> and may either be an affirmation, a variation or a reversal of the findings of the commission of inquiry.<sup>113</sup> Swepston<sup>114</sup> submits that although the ILO Constitution has this recourse provision to governments or the ILO itself, it has never been utilised. However, it remains a possibility available to aggrieved parties.

In 2000, the ILO relied on the provisions of Article 33<sup>115</sup> of its Constitution for the first time in its history. The Governing Body requested the ILC to take measures to compel Myanmar to end the use of forced labour. In 1996, a complaint to this end, in terms of Article 26 of the ILO Constitution, was filed against Myanmar for the continued violation of the Forced Labour Convention.<sup>116</sup> A commission of inquiry was established and found widespread and systematic use of forced labour in the country.<sup>117</sup> It was against this background that the Governing Body recommended the ILC call upon all member states and employers', workers' and other international

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<sup>109</sup> ILO *Handbook of Procedures Relating to International Labour Conventions and Recommendations* 50 par 80.

<sup>110</sup> Doumbia-Henry *Rules of the Game* 86.

<sup>111</sup> Hereinafter referred to as the "ICJ".

<sup>112</sup> Art 31 the ILO Constitution.

<sup>113</sup> Art 32 the ILO Constitution.

<sup>114</sup> Swepston *Supervisory Mechanisms of the ILO* 7.

<sup>115</sup> Art 33 the ILO Constitution provides – In the event of any member failing to carry-out the measures within the time specified in the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the [ICJ], as the case may be, the Governing Body may recommend to the conference such action as it may deem wise and expedient to secure compliance therewith.

<sup>116</sup> No.29 of 1930.

<sup>117</sup> Doumbia-Henry *Handbook on Alternative Labour Dispute Resolution* 86.

organisations to review their relations with Myanmar in order to ensure that they do not support forced labour in that country. It was only after this measure was taken that Myanmar responded positively by allowing the ILO to investigate the complaint and to help the country eliminate forced labour.<sup>118</sup>

Although this decision was taken by the ILO in the case of Myanmar, Elliot (2000)<sup>119</sup> submits that Article 26 of the ILO Constitution was carefully constructed in order to avoid the imposition of penalties and the organisation uses this only as a last resort. He suggests that these provisions be applied in situations where a member state has flagrantly and persistently refused to carry out its obligations under a convention.

## 2.8 TECHNICAL ASSISTANCE AND TRAINING

The ILO's Constitution confers a special mandate upon the organization to provide advice in relation to labour legislation.<sup>120</sup> Pursuant to this mandate, Article 10, paragraph 2, of the Constitution calls upon the Office to accord to governments, at their request, all appropriate assistance within its powers in connection with the drafting of laws and regulations based on the decisions of the ILC. Given the constitutional obligation of the ILO to provide assistance, the Office does not only supervise the application of ratified conventions, but also undertakes various forms of technical assistance designed to assist governments, employers' and workers' organisations in order to fulfil their functions and their roles in the standard-setting and supervisory systems. This involves working closely with all three constituents and other relevant institutions in various countries in order to identify the countries' priorities in terms of both labour standards and technical cooperation.<sup>121</sup>

ILO officials and experts are sent to countries to help address problems in legislation and practices so that they are aligned to ratified instruments. During these missions, the ILO officials or experts conduct discussion sessions with governments to identify problems in the application of standards and conduct promotional activities, including

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<sup>118</sup> Swepston *Supervisory Mechanisms of the ILO* 7.

<sup>119</sup> Elliot "The ILO and Enforcement of Core Labour Standards" 5.

<sup>120</sup> <http://www.ilo.org/legacy/english/dialogue/ifpdia/llg/intro/index.htm> accessed on 05 March 2012.

<sup>121</sup> ILO *Handbook of Procedures Relating to International Labour Conventions and Recommendations* 52 par 86.

seminars and national workshops, to raise awareness and to develop the capacity to comply with standards.<sup>122</sup> It is within this mandate that the ILO continues to render technical assistance to countries such as Namibia, having developed both the 1992 and 2007 Labour Acts, and to provide continued technical assistance in terms of the Decent Work Country Programme.

## 2.9 DO THE ILO SUPERVISORY MACHINERIES WORK?

It is submitted that for the ILO supervisory machineries to be credible, there must be a legal supervisory system that ensures that the methods of evaluation are applicable and enforceable with regard to every member state. Having such systems in place ensures complete impartiality.<sup>123</sup> It is therefore on this premise that the scope of the CEACR is restricted to the provisions of the instrument before it, which must be verified. In doing so, the committee does not take into consideration factors such as the economic and social conditions of a given country that are not mentioned in the instrument's text under analysis.<sup>124</sup>

In contrast, the Conference Committee on the Application of Standards has pointed out that although economic and social disparities may have led to flexible wording of the standards, the same attitude is not adopted in the monitoring of their application. The purpose of this exclusion is to minimise subjective appraisals.<sup>125</sup> On adopting international labour standards, flexibility is taken into account, bearing in mind different countries' historical backgrounds, cultures, the respective powers of their main social partners, the political and philosophical contexts, the economic substrata and the role of the law in social organisation.<sup>126</sup>

It is within this ambit that the ILO supervisory bodies assess the extent to which each individual country implements each convention. The assessment is aimed at verifying effective application of the standard. The role of the supervisory bodies is to

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<sup>122</sup> Doumbia-Henry *Rules of the Game* 91.

<sup>123</sup> Servais "Flexibility and Rigidity in International Labour Standards" 125(2) March- April (1986)*ILR* 193-208.

<sup>124</sup> Servais *International Labour Law* (2009) 303.

<sup>125</sup> *Ibid.*

<sup>126</sup> Servais *International Labour Law* (2009) 84.

ascertain whether the provisions of an instrument are fully applied. The ILO supervisory bodies are inflexible when it comes to pinpointing anomalies between a country's law and practices and compliance with the relevant convention that a particular country has freely and autonomously undertaken to apply.<sup>127</sup>

Although the CEACR comprises of independent persons, judges, university professors and other reputable legal scholars whose opinions are valued and respected, the conclusions and recommendations of this committee are not binding.<sup>128</sup> This is because the ILO conventions provide for no sanctions in the event of the infringement of standards and recommendations.<sup>129</sup> Comments, although they may be critical, are purely intended to initiate actions and foster dialogue and are not aimed at condemning a particular government.

Having no power to impose sanctions, the ILO supervisory bodies have been frequently criticised for their dependence on goodwill from member states, which is lacking on the part of the worst offenders.<sup>130</sup> There is, however, significant evidence in many cases that goodwill is prevalent and produces the desired results.<sup>131</sup> The dependence on goodwill does not mean that the supervisory machineries are not working at all, but rather suggests that diplomatic measures require patience and persistence. The Myanmar case, for example, took 30 years of persistent CEACR observations before a commission of inquiry was initiated. It was continuous threats of undefined sanctions, coupled with sensitive and difficulty negotiations, which ultimately pressured the dictatorial government to respond.<sup>132</sup>

Besides reliance on the combination of diplomacy and moral urgings, the ILO supervisory bodies have other means of exhorting a member state to comply fully with the labour standards. Actions, such as the publication of conclusions of the supervisory bodies and discussion of non-compliance in international forums, could influence member states to comply accordingly in their endeavour to avoid being

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<sup>127</sup> *Ibid.*

<sup>128</sup> Servais *International Labour Law* 303 par 1019.

<sup>129</sup> Servais *International Labour Law* 303 par 1020.

<sup>130</sup> Hepple *Labour Law and International Trade* 54.

<sup>131</sup> CEACR *Report III Part 1A* (2003) 1 parr 107-10.

<sup>132</sup> Hepple *Labour Law and International Trade* 54.

cited before the international community, where they may wish to enjoy universal friendship.<sup>133</sup>

Hepple<sup>134</sup> points out the legal ambiguities in the scope of the “actions” contemplated under Article 33 of the ILO Constitution. His arguments are based on the fact that Article 33 refers only to “such actions” as may be deemed wise and expeditious to secure compliance. This provision leaves wide discretion to member states and international organisations to implement measures they consider appropriate. To address such ambiguity, Manpain<sup>135</sup> suggests that appropriate measures considering the alignment with trade sanctions be imposed on member states by virtue of their commitments to the World Trade Organisation.<sup>136</sup>

O’Higgins,<sup>137</sup> on the other hand, suggests the establishment of a special international labour tribunal to provide authoritative interpretation of conventions. He points out that the jurisdiction of the ICJ has not been invoked since the 1930s and that the forum lacks specialist knowledge of and experience with labour matters, thus requiring the establishment of a special international labour tribunal to give authoritative interpretations.

Although the CEACR conclusions and recommendations may not be legally binding on member states, their interpretations are nevertheless regarded as valid and generally recognised unless they are contradicted by ICJ decisions.<sup>138</sup> With the lack of authoritative decisions, Hepple<sup>139</sup> suggests putting into effect the provisions of Article 37(2) of the ILO Constitution, which provides for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a convention. He submits that the establishment of a specialist

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<sup>133</sup> Weisband “Discursive Multilateralism Global Benchmarks, Shame and Learning in the ILO Labour Standards Monitoring Regime” (2000) 643-666.

<sup>134</sup> Hepple *Labour Law and International Trade*(2005)55.

<sup>135</sup> Manpain *Protection Internationale des travailleira et la liberalization due commerce Mondiale* (1996)45.

<sup>136</sup> Hereinafter referred to as the “WTO”.

<sup>137</sup> O’Higgins “The interaction of the ILO, the Council of Europe and European Union Labour Standards” in Hepple (ed) *Social and Labour Rights in a Global Context* (2002) 68.

<sup>138</sup> CEACR Report, (1990) parr 7and 8.

<sup>139</sup> Hepple *Labour Law and International Trade* (2005) 56.

labour tribunal could help resolve disputes between member states and the supervisory bodies and clarify the meaning of ILO instruments. All things considered, the author strongly advocates the establishment of an international conciliation and arbitration service in order to resolve labour disputes involving governments and workers' and employers' organisations over alleged rights violations under ILO conventions, bilateral treaties, corporate codes and international collective agreements.

At the time of writing none of the suggested alternatives to existing ILO supervisory mechanisms are being contemplated or implemented and the organisation continues to rely on the goodwill of member states in complying with their constitutional obligations.

## **2.10 INTERNATIONAL LABOUR STANDARDS ON LABOUR DISPUTE RESOLUTION**

Several ILO conventions and recommendations address labour dispute prevention and resolution. The main principles contained in these instruments include:

- Convention No. 154 of 1981 concerning the Promotion of Collective Bargaining, which provides that bodies and procedures for the prevention and settlement of labour disputes be designed to contribute to the promotion of collective bargaining.<sup>140</sup> Although Convention 154 focuses on collective bargaining, it does not exclude the use of conciliation and arbitration as part of the bargaining process where these processes are voluntary.<sup>141</sup> One of the objectives of labour dispute resolution is to promote the mutual resolution of the differences between workers and employers, essentially promoting collective bargaining.<sup>142</sup>
- The Labour Relations Convention No. 151 of 1978, which provides for the settlement of disputes regarding the terms and conditions of employment to be sought through independent and impartial mechanisms, such as

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<sup>140</sup> Art 5 par 2(e) of Convention No 154 of 1981.

<sup>141</sup> Art 6 of Convention No 154 of 1981.

<sup>142</sup> ILO *Collective Dispute Resolution Through Conciliation, Mediation and Arbitration* (2007) 7.

mediation, conciliation and arbitration. Settlement is to be established in a manner that ensures the confidence of the parties involved.<sup>143</sup>

- The Right to Organize and Collective bargaining Convention No. 98 of 1949, a fundamental convention, which provides that measures appropriate to national conditions are taken, where necessary, to encourage and promote the full development and utilisation of mechanisms for voluntary negotiations between employers or employers' organisations or workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective bargaining.<sup>144</sup> Mechanisms include the use of the conciliation and arbitration process to resolve labour disputes between social partners.
- The Termination of Employment Convention No. 158 of 1982, which provides that a worker who considers his employment to have been unjustifiably terminated shall be entitled to appeal against such termination to a tribunal, arbitration court or arbitrator. The convention further empowers these bodies to examine the reasons given for the termination and the circumstances relating to the case.
- The Voluntary Conciliation and Arbitration Recommendation<sup>145</sup> is the main ILO instrument that deals with labour dispute prevention and resolution. It recommends that voluntary conciliation be made available to assist in the prevention and settlement of industrial disputes between employers and workers. It further recommends equal representation of employers and workers in these proceedings. Moreover, the instrument demands that conciliation services be expeditious and free of charge to the disputants. Further, that it should allow the parties to enter into conciliation voluntarily or upon the initiative of the conciliation authority. This instrument calls on the parties to refrain from strikes or lockouts while engaged in conciliation or arbitration procedures. This, however, does not limit the right to strike.

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<sup>143</sup> Art 8 of Convention 151 of 1978.

<sup>144</sup> Art 5 of the Collective Bargaining Convention No 98 of 1949 .

<sup>145</sup> No 92 of 1952.

- The Examination of Grievance Recommendation,<sup>146</sup> which addresses the resolution of disputes at an enterprise level. The instrument suggests a number of recommendations on the development and implementation of workplace dispute mechanisms. It emphasises the importance of preventative measures, such as the adoption of sound personnel policies and co-operation between social partners on decisions that affect the workers. The instrument goes on to recommend that where efforts to resolve the dispute fails, the parties should have the opportunity for final settlement of the dispute. The final settlement may be through the procedures set out by collective agreements, such as conciliation and/or arbitration by the competent public authorities, and parties should have recourse to a labour court or other judicial authority.
- The Labour Administration Recommendation,<sup>147</sup> an instrument which provides that competent bodies within the system of labour administration be in a position to provide conciliation and arbitration appropriate to national laws, in agreement with social partners.<sup>148</sup>

These ILO instruments create ample room for member states to develop their own system for labour dispute prevention and resolution. However, these systems must be consistent with the following principles:<sup>149</sup>

- Voluntary conciliation machineries appropriate to national circumstances should be made available, which are free of charge and expeditious, to assist in the prevention and resolution of labour disputes. Time limits for the proceedings should be prescribed by national laws or regulations, be fixed in advance, and kept to a minimum.<sup>150</sup>

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<sup>146</sup> No 130 of 1967.

<sup>147</sup> No 158 of 1978.

<sup>148</sup> Para 10 of the Recommendation.

<sup>149</sup> Labour Legislation Guidelines available at <http://www.ilo.org/public/em/english/dialogue/ifpdial/index.htm>. accessed on 20 February 2012.

<sup>150</sup> Recommendation No 92 of 1951 concerning Voluntary Conciliation and Arbitration par 1 and 3.

- The parties to the dispute should be encouraged to abstain from strikes and lockouts while conciliation and arbitration is in progress.<sup>151</sup>
- Agreements reached during or because of conciliation should be drawn up in writing and accorded the same status as agreements concluded in the usual manner.<sup>152</sup>

Given the proposed labour dispute settlement mechanisms, many countries have adopted conciliation, arbitration and adjudication as processes, as promoted by the ILO, to resolve labour disputes.<sup>153</sup> These procedures are, in the main, established on a statutory basis. They involve independent third parties to assist in the resolution of labour disputes or could be established under the terms of collective agreements.<sup>154</sup>

## 2.11 ALTERNATIVE DISPUTE RESOLUTION (ADR)

The manner in which labour disputes are resolved between employers and employees has changed and evolved over the last few decades. This has, in part, been due to the influence of globalisation and competition for goods and services on the global market. This influence has led many countries to improve their labour relations environment and to enhance the industrial peace essential for economic achievement. Ultimately, such an environment brings about attraction and retention of foreign and domestic investments.<sup>155</sup>

Steadman<sup>156</sup> describes ADR as processes of dispute resolution mechanisms that are short of, or alternatives to, full-scale court processes. It refers to all means available to the parties, including facilitated negotiations during which parties are encouraged to negotiate directly with each other prior to some other legal process.

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<sup>151</sup> Parr 4 and 5 of Recommendation No 92 of 1951.

<sup>152</sup> Par 5 of Recommendation No 92 of 1951.

<sup>153</sup> Khabo *Collective Bargaining and Labour Dispute Resolution* 29.

<sup>154</sup> <http://www.ilo.org/public/english/dialogue/ifpdial/iig/index.htm> accessed on 20 February 2012.

<sup>155</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* (2005)7.

<sup>156</sup> *Ibid.*

ADR is also seen as a means for disagreeing parties to come to an agreement without litigation and is an alternative process to a formal court hearing or litigation.<sup>157</sup>

Trollip<sup>158</sup> submits that ADR is a process that involves the use of a neutral third party to make the settlement of the dispute outside formal court proceedings easier. He points out that these processes vary from voluntary and non-binding settlement procedures such as mediation, to compulsory and binding arbitration. Steadman<sup>159</sup> equally stresses that ADR processes include negotiations, conciliation, mediation and several types of arbitration. These processes are all intended to resolve disputes in a faster, cheaper and less adversarial manner. The purpose, according to Steadman, is to achieve better outcomes for disputants than those they can achieve through the process of litigation. ADR processes, such as conciliation, mediation and arbitration, are regarded as extra-judicial, which are solutions that do not involve going to court or appearing before a labour tribunal.<sup>160</sup>

### 2.11.1 THE DEVELOPMENT OF ADR AND ITS APPLICATION

The use of the ADR process is not a new phenomenon, but dates back many years.<sup>161</sup> Brown<sup>162</sup> submits that the extensive promotion and proliferation of ADR models are the result of recent focus.

In the United States, for example, ADR was developed in the 1960s following the political and civil conflicts of that era.<sup>163</sup> In the 1970s, the United States launched ADR as a social movement to resolve community-wide civil rights disputes through mediation. It became a legal movement used to address the expenses and delays involved in litigation arising from an over-crowded court system. ADR in America has since grown to be the most efficient and effective alternative to litigation.<sup>164</sup>

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<sup>157</sup> [http://en.wikipedia.org/wiki/alternative-dispute\\_resolution](http://en.wikipedia.org/wiki/alternative-dispute_resolution) accessed on 01 February 2012.

<sup>158</sup> Trollip *Alternative Dispute Resolution* (1991) 7.

<sup>159</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 9.

<sup>160</sup> ILO *Collective Dispute Resolution Through Conciliation, Mediation and Arbitration* (2007) 2.

<sup>161</sup> Fiadjoe *Alternative Dispute Resolution: A Developing World Perspective* (2004) 3-4.

<sup>162</sup> Brown *et al International Labour Standards and Trade*(1996) 5.

<sup>163</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 10.

<sup>164</sup> *Ibid.*

Giana<sup>165</sup> explains that the popularity of ADR comes as a result of the high caseloads in traditional courts. He established that ADR imposes less costs than litigation and that confidentiality is preserved, which allows parties to have greater control over the selection, in some cases, of the individual or individuals to decide their dispute. On an international scale, ADR has expanded in both developing and developed countries. ADR processes are being implemented in a number of countries to meet a wide range of social, legal, commercial and political goals.<sup>166</sup> In South Africa, for example, ADR was introduced by the government to address the social patterns of the *apartheid* era and to move away from the adversarialism that characterised the labour relations system.<sup>167</sup> In Namibia, ADR processes were introduced by the Namibian government to address the antiquated, confrontational dispute resolution process that existed before the advent of the Labour Act, 2007.<sup>168</sup>

ADR was introduced to deliver dispute resolutions as the courts were becoming overloaded with cases, thereby failing to provide quick and easy access to justice. The court system of labour dispute resolution is seen as frustrating and no longer functioning effectively.<sup>169</sup> Against such shortcomings, an alternative non-legal system of ADR was developed with the following goals:

- relieving court congestion and reducing undue costs and delays;
- enhancing community involvement in the dispute resolution process;
- facilitating access to justice; and
- providing more effective dispute resolution.

Brown<sup>170</sup> points out that, within the context of the rule of law initiatives, ADR processes can:

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<sup>165</sup> Giana "Avoid Court at all Cost" *The Australian Financial Review* Nov 14 (2000) available on [http://wikipedia.org/wiki/alternative\\_dispute\\_resolution](http://wikipedia.org/wiki/alternative_dispute_resolution) accessed on 01 February 2012.

<sup>166</sup> Brown *et al International Labour Standards and Trade* 5.

<sup>167</sup> Trollip *Alternative Dispute Resolution* 9.

<sup>168</sup> GRN *Ministry of Labour and Social Welfare. Ministerial Report: Office of the Labour Commissioner (2011)* 4-8.

<sup>169</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 10.

<sup>170</sup> Brown *et al International Labour Standards and Trade* 5.

- support and compliment court reforms;
- by-pass ineffective and discredited courts;
- increase popular satisfaction with dispute resolution systems;
- increase access to justice for disadvantaged groups;
- reduce delays in the resolution of disputes; and
- reduce the cost of resolving disputes.

### 2.11.2 ADR AND CONFIDENTIALITY

ADR is a confidential process where the parties agree and commit themselves before, during and after ADR proceedings to act as advised or agreed. Communication during the ADR process is not subject to disclosure and may not be used as evidence against any participant or the neutral third party in any ensuing judicial or administrative proceedings.<sup>171</sup> None of the parties to the dispute or the neutral third party may be required to testify or be subjected to a process requiring disclosure of confidential information. This non-disclosure applies even during the ADR process, where the third party is not required to disclose to either party information given in confidence by the other party unless expressly authorised to do so.<sup>172</sup>

### 2.11.3 ADR AND ITS SUCCESS RATE

Trollip<sup>173</sup> submits that ADR settlement rates vary depending on the type of ADR process the parties choose. He is of the view that the outcome depends on various factors, such as the time of referral, commitment and skills brought to bear by the parties, and the ADR facilitator. He, however, notes that success is not measured only by the number of formal settlements reached, but also where written agreements are not reached. The ADR process often clarifies and narrows the issues in dispute for the next stage of resolution.

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<sup>171</sup> Labour legislation guidelines available on <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/intro/index.htm> accessed on 06 March 2012.

<sup>172</sup> *Ibid.*

<sup>173</sup> Trollip *Alternative Dispute Resolution* 10.

Trollip<sup>174</sup> further points out that the ADR process should not be regarded as a panacea for all ills as settlements reached through the ADR process lack the legitimacy of authoritative judicial decisions. He therefore suggests that the outcomes of ADR processes should be in the form of binding precedents like those of a court of law to guide future disputes. Moreover, he opines that the handing down and publication of ADR decisions could constitute valuable public good by disseminating information about what can and cannot lawfully be done.

## **2.12 LABOUR DISPUTE SETTLEMENT PROCEDURES**

### **2.12.1 DEFINITION AND CLASSIFICATION OF LABOUR DISPUTES**

The ILO<sup>175</sup> asserts that labour disputes take different forms, each of which is subject to a particular type of dispute settlement procedure at a final stage. The ILO reports that many countries distinguish between several types of labour disputes and have established several procedures for dealing with them. This distinction and the procedures established in various countries reflect on the historical development of that country's labour relations system.<sup>176</sup>

The ILO classifies labour disputes in the following categories:

- individual and collective disputes; and
- disputes about rights and interests (also known as economic disputes).

The latter distinction characterises the dispute settlement mechanisms of many countries, Namibia and South Africa included.

A dispute of rights concerns the violation of or interpretation of an existing right or obligation embodied in law, a collective agreement or an individual contract of employment. At its core is the allegation that individual workers, or groups of workers, have not been afforded their proper entitlement.<sup>177</sup> The basic principle underlying

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<sup>174</sup> Trollip *Alternative Dispute Resolution* 10.

<sup>175</sup> ILO *Settlement of Collective Labour Disputes* 113.

<sup>176</sup> Simpson *Labour Dispute Resolution – ILO* (1999) 3.

<sup>177</sup> ILO *Collective Dispute Resolution Through Conciliation and Arbitration* 3.

procedures for the settlement of disputes over rights is that they should be resolved by arbitration. However, in some countries it is a function of either a court of law or a labour tribunal. Such disputes cannot be settled by industrial actions because they entail the determination of existing rights, duties or obligations, which both parties are bound to respect.<sup>178</sup>

Disputes of interest differ from rights disputes. They arise from differences over the determination of future rights and obligations and are usually a result of the failure of collective bargaining. The dispute does not have its origin in an existing right, but in the interest of one of the parties to create such a right through its embodiment in a collective agreement and the opposition of the other party to doing so.<sup>179</sup> The principle here is that parties must resolve the dispute themselves through negotiations. During this process the parties may threaten or, if necessary, take industrial action. Third parties are only involved in the event of a breakdown in negotiations. The third party's role would be only to assist parties to find a mutually acceptable solution to their differences. Essentially, this is the first method of labour dispute settlement, before recourse is taken in other processes.<sup>180</sup>

Individual and collective disputes are simple to distinguish from one another. Individual disputes can easily develop into collective disputes. This is common, for example, where a point of principle is involved and is taken up by a trade union. The general distinction is that an individual dispute involves a single worker, or a number of workers as individuals. The dispute becomes collective if it involves a number of workers collectively.<sup>181</sup>

The ILO states that collective disputes often have important legal and strategic consequences when determining the methods for resolving them. For example, in rights disputes where a valid collective agreement is in force, the agreement may

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<sup>178</sup> ILO *Collective Dispute Resolution Through Conciliation and Arbitration* 4.

<sup>179</sup> *Ibid.*

<sup>180</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 18.

<sup>181</sup> Simpson *Labour Dispute Resolution* 3.

include provisions setting out the mechanisms that the parties should follow in the event of a dispute arising.<sup>182</sup>

## **2.12.2 REPORTING OF DISPUTES AND INITIATING PROCEDURES**

Many countries' labour legislation requires or makes provisions for the reporting of labour disputes to the competent authorities or structures created for that purpose. This report becomes the catalyst for the commencement of labour dispute settlement procedures. The process is coupled with the requirement to report labour disputes within a certain period of occurrence and to provide sufficient details of the dispute.<sup>183</sup>

The reporting of the labour dispute by one party should be sufficient to necessitate the conciliation or mediation process. However, in some cases both parties are required to agree to the submission of the dispute for the procedure to be set in motion. This is more often applicable in interest disputes where the reason for requiring one party to refer the dispute is to avoid an industrial dispute. The rationale for requiring both parties to consent to submission of the dispute to conciliation or mediation is that the procedure is hardly likely to succeed unless both parties are amenable to it.<sup>184</sup>

## **2.13 CONSENSUS-BASED DISPUTE RESOLUTION PROCESS**

### **2.13.1 CONCILIATION AND MEDIATION**

Conciliation and mediation are labour dispute resolution processes that involve the use of a neutral third party, who is called upon to assist the disputants to reach a settlement by guiding them through a structured process, much like negotiations or collective bargaining. This process comes into play where negotiations have failed or reached an impasse. The process is conducted with due consideration to confidentiality and on a without prejudice basis.<sup>185</sup>

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<sup>182</sup> ILO *Collective Dispute Resolution Through Conciliation, Mediation and Arbitration* 3.

<sup>183</sup> ILO *Collective Dispute Resolution Through Conciliation, Mediation and Arbitration* 5.

<sup>184</sup> *Ibid.*

<sup>185</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 19.

Conciliation and mediation is differentiated from each other based on the role of the conciliator in each process. The conciliator does not suggest solutions but tries to help the parties settle their differences on their own terms. The mediator, on the other hand, makes formal recommendations as the basis for settlement, provided both parties are willing, but unable, to reach their own settlement. However, this distinction differs from country to country. In some countries, mediators do not make recommendations, but play an active facilitative role.<sup>186</sup> In some instances, the distinction is provided for in legislation, although not often. In Namibia, for example, section 1 of the Labour Act, 2007 defines conciliation to include mediating a dispute. Despite this inclusion, the Act explicitly differentiates between the two processes.

Simpson<sup>187</sup> illustrates that the difference between a conciliator and a mediator is an academic debate. He points out that a good conciliator or mediator makes various suggestions or proposals to solve a problem and is able to break a deadlock. In fact, a good conciliator or mediator does not impose a solution, but leaves it upon the parties to reach an agreement.

### **2.13.2 VOLUNTARY AND COMPULSORY CONCILIATION AND MEDIATION**

Conciliation and mediation may be voluntary or compulsory. It is voluntary in the sense that parties are free to have recourse to it or not. Further, it is voluntary where undertaken by a mutually chosen private third party outside the machineries established by government or by law.<sup>188</sup> Simpson<sup>189</sup> states that the goal of voluntary conciliation is to attempt to conciliate the dispute where the parties are not convinced that it is the appropriate way to resolve their dispute.

In respect to compulsory conciliation and mediation, the parties to a labour dispute are required to have recourse to these processes. Of course, this does not presuppose that the conciliation process must result in an agreement. It simply suggests that some steps of the process are compulsory, such as the obligation to

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<sup>186</sup> Brand, Lotter, Steadman and Ngcukaitobi *Labour Dispute Resolution* (2011)115.

<sup>187</sup> Simpson *Labour Dispute Resolution* 22.

<sup>188</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 20.

<sup>189</sup> Simpson *Labour Dispute Resolution* 24.

attend a conciliation meeting when invited.<sup>190</sup> Compulsory conciliation and mediation are means to compel hostile parties to a labour dispute to come to the negotiating table. It is preferred in a situation where labour relations systems are not well developed or in cases where parties have reached a deadlock in their negotiations.<sup>191</sup> Compulsory conciliation and mediation are beneficial to the parties as this educates them about the advantages of a co-operative, rather than confrontational, approach to labour dispute resolution.

The ILO outlines the following requirements to engage in conciliation and/or mediation:<sup>192</sup>

- an obligation to notify the competent authority of a labour dispute;
- a requirement to report labour disputes to the authorities, who may then be empowered to initiate conciliation and mediation proceedings, and to require the attendance of the parties to such proceedings;
- a restriction on the choice of the third party called upon to conduct the conciliation and mediation;
- a requirement to participate in conciliation and mediation;
- the prohibition of strikes and lockouts before conciliation and mediation procedures have been exhausted and completed;
- an obligation to adhere to an agreement concluded during conciliation and mediation; and
- in cases of rights disputes, the requirement to have undergone conciliation before the dispute can be referred to a court or a labour tribunal.

Brand<sup>193</sup> submits that conciliation is helpful in the following circumstances:

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<sup>190</sup> *Ibid.*

<sup>191</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 20.

<sup>192</sup> *Ibid.*

- when relationships are important;
- when the parties want control of the outcome;
- if there is not great disparity in power;
- when speed is important;
- when confidentiality is important;
- when both parties need the opportunity to “let off steam”;
- when neither side really wants to litigate;
- when the parties are unable to talk to each other directly;
- when the parties have neither skills nor the desire to talk to each other; and
- when the parties cannot find a solution themselves.

Simpson<sup>194</sup> furthermore enumerates the following advantages of conciliation and mediation:

- the parties remain in control of the outcome of the process;
- it is a flexible process;
- it is a private process;
- it is a peace-making process;
- it avoids the uncertainties of a judicial or arbitral decision;
- it leaves room for the innovative, imaginative resolution of a dispute; and
- it can safeguard the ongoing relationship between the parties.

In addition to the above attributes, the ILO notes that conciliation is useful as a means to address an underlying collective disagreement before it transforms into a fully-fledged labour dispute.<sup>195</sup> Essentially, conciliation is not concerned with law enforcement, but regarded as a process of assisted bargaining in which the third party conciliator or mediator attempts to bring the parties closer together, encourages

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<sup>193</sup> Brand *et al Labour Dispute Resolution* 115.

<sup>194</sup> Simpson *Labour Dispute Resolution* 28.

<sup>195</sup> ILO *Collective Dispute Resolution Through Conciliation, Mediation and Arbitration* 15.

them to reach a solution that will satisfy both parties and is consistent with legal requirements.<sup>196</sup>

The ILO suggests that systems that compel participation in conciliation should have provisions that sanction failure to comply with the requirement to attend. Sanctions may include a party being held liable to a fine for failing to appear without good cause. Further, a party which does not attend a conciliation meeting may risk the dispute being declared unresolved, leaving the other party in a position to embark on industrial action. In some cases or countries, dispute settlement bodies have the power to award costs against a party which has failed to appear.<sup>197</sup>

The ILO recommendation concerning conciliation<sup>198</sup> promotes the following principles of conciliation:

- that voluntary conciliation machineries be made available to assist in the prevention and settlement of labour disputes between employers and employees;
- that where voluntary conciliation is constituted by the social partners, it should include equal representation of employers and employees;
- that conciliation be free of charge and be expeditious;
- that it should be possible for conciliation to be initiated by any of the parties to a labour dispute or by a conciliation authority;
- that if a dispute has been submitted to conciliation with the consent of all the parties concerned, the parties should be encouraged to abstain from strikes and lockouts while conciliation is in progress; and

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<sup>196</sup> Heron and Van Nord *National Strategy on Labour Dispute Prevention and Settlement in Cambodia* (2004)ILO 24.

<sup>197</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 20.

<sup>198</sup> Recommendation No.92 of 1951.

- that agreements reached during conciliation should be reduced to writing and be legally binding.

However, conciliation is not easy. There are several obstacles that may impede a successful conciliation process. These include:<sup>199</sup>

- the conciliator may be seen as being biased;
- the conciliator may not have prepared well enough for the case;
- the conciliator may have a possible solution to the dispute in mind and as such may impose it on the parties;
- one or both parties to the dispute may not really want to conciliate and may accept an agreement and refuse to comply with it later on;
- the conciliator may have a heavy workload and therefore may force an agreement upon the parties;
- one of the parties to the dispute is normally much stronger than the other and may therefore dominate the proceedings; and
- one or both parties may be represented by lawyers who may concentrate on a legal argument rather than the real issues.<sup>200</sup>

Given the above, the conciliation process has three major steps: preparing for the conciliation, conducting the conciliation and the outcome, which includes the follow-up.<sup>201</sup> In brief, these steps involve the following:

In preparation for conciliation, the conciliator is required to:

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<sup>199</sup> Bosch, Molahlehi and Everett *The Conciliation and Arbitration Handbook: A Comprehensive Guide to Labour Dispute Resolution Procedures* (2004)54.

<sup>200</sup> Simpson *Labour Dispute Resolution* 29.

<sup>201</sup> Bosch *et al The Conciliation and Arbitration Handbook* 55-58.

- make initial contact with the parties to the dispute;
- collect and analyse the background information;
- decide how to guide conciliation; and
- design a conciliation plan.

In conducting the conciliation, the conciliator should:

- open the conciliation;
- define the issues and agree on the agenda with the parties;
- interact with the parties;
- suggest options for the settlement; and
- assist the parties in the final bargaining without imposing a solution.

At the end of the conciliation, the conciliator has to:

- draft the agreement;
- make a conciliation report; and
- follow up if no agreement between the parties is reached.

## **2.14 FACILITATION**

Facilitation, another form of labour dispute resolution, is described as a process in which people who are involved in or about to enter into negotiations over complex issues use an independent third party to assist them. The third party designs the process for the parties and guides them through it. In some countries, either the employer or the employees may compel the other to submit to a facilitation process during consultation on retrenchment. It is voluntary in nature and paid for by the parties.<sup>202</sup>

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<sup>202</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 21.

## 2.15 RIGHT-BASED DISPUTE RESOLUTION PROCESS IN EMPLOYMENT LABOUR DISPUTES

### 2.15.1 ARBITRATION

Arbitration is defined by the ILO as a process in which an independent third party hears the parties' respective cases, determines the dispute for them and issues an award or decision. The award or decision is typically final and binding. However, while it may be subject to review, it is not subject to appeal.<sup>203</sup> In the arbitration process, the independent third party hears evidence from both sides, thus his role is to arbitrate and not to advocate. This means that the arbitrator should not help either party to make or present its case, but should simply make an award on the basis of the evidence presented.<sup>204</sup>

Arbitration is a quasi-judicial process in which a neutral third party renders a decision.<sup>205</sup> It is considered a last resort in cases where disputants cannot otherwise resolve their differences. It typically follows after all attempts at conciliation and/or mediation between the parties have proved unsuccessful.<sup>206</sup>

Like conciliation, the referral of a dispute to arbitration may be voluntary or compulsory. It is voluntary where it is set in motion by the agreement of the parties.<sup>207</sup> Compulsory arbitration is considered as one of the most radical forms of intervention by authorities in collective bargaining, directly in terms of the law or as a result of an administrative decision. Compulsory arbitration is undertaken when parties do not reach an agreement at conciliation.<sup>208</sup> However, it is seen as conflicting with the voluntary nature of negotiations, as the outcome imposed does not derive from the will of both parties, but from a third party whom they may not have chosen jointly.<sup>209</sup>

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<sup>203</sup> *Ibid.*

<sup>204</sup> Heron *et al National Strategy on Labour Dispute Prevention and Settlement in Cambodia* 28.

<sup>205</sup> ILO *Collective Dispute Resolution Through Conciliation, Mediation and Arbitration* 17.

<sup>206</sup> *Ibid.*

<sup>207</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 22.

<sup>208</sup> Gernigon, Odero and Guido *ILO Principles Concerning Collective Bargaining* (2000) 44.

<sup>209</sup> *Ibid.*

In an arbitration process, the parties relinquish their power to the arbitrator to make the decision on their behalf. Arbitration, therefore, does not promote the continuation of the negotiation process, but the award that is given is intended to finally dispose of the dispute.<sup>210</sup>

Some countries promote compulsory arbitration on the grounds that trade unions are not powerful enough to engage in successful collective bargaining. The purpose of this is to avert industrial actions, which may have an economic impact on the country.<sup>211</sup> The ILO is of the view that interest arbitration may sometimes be used to determine the terms of a collective agreement between bargaining parties, contrary to having recourse to industrial action through strikes or lockouts.<sup>212</sup>

Compulsory arbitration is commonly used in collective disputes regarding essential services, where the government assumes public policy interest in preventing industrial action. In these situations, the ILO states that interest arbitration is usually imposed upon the parties by legislation and the arbitrator or the arbitration panel attempts to replicate the outcome as though the parties had been able to resolve the dispute themselves.<sup>213</sup> This position is set out in the Voluntary Conciliation and Arbitration Recommendation,<sup>214</sup> which stipulates that if a dispute has been submitted to arbitration for final settlement with the consent of all parties concerned, the parties should be encouraged to abstain from strikes and lockouts while the arbitration is in progress and should accept the arbitration award.

Arbitration has numerous advantages, including:<sup>215</sup>

- It is less time-consuming than the usual bargaining through conciliation and mediation.

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<sup>210</sup> Maseko *Comparison of the Labour Dispute Resolution System of South Africa and Swaziland* (2007) 11.

<sup>211</sup> Olotu *A Comparative Study of Dispute Settlement and Resolution in South Africa and Tanzania* (2005)55.

<sup>212</sup> ILO *Collective Dispute Resolution Through Conciliation, Mediation and Arbitration* 17.

<sup>213</sup> Simpson *Labour Dispute Resolution* 36.

<sup>214</sup> No 92 of 1951.

<sup>215</sup> Simpson *Labour Dispute Resolution* 62.

- It ends the deadlock between the parties.
- In some cases, the parties choose the arbitrator. This gives them a feeling of ownership of the dispute and a commitment to its outcome.
- It requires the parties to prepare for the hearing, at which their arguments are subjected to independent scrutiny. This enables the parties to focus on key issues.
- The hearing does not follow formal courtroom procedures, creating a less confrontational approach to the problem.

There are obstacles that may impede successful arbitration. These include:

- The arbitrator may be perceived as biased by the parties. The arbitrator may tend to advocate, instead of arbitrate, the dispute.
- The hearing may be dominated by legal arguments by legal counsels at the expense of substantive issues.
- The hearing may take longer than expected due to delay tactics employed by one or both parties.
- The decision may not be acceptable to either party, thereby raising the possibility of further conflict and disputation.
- The arbitrator's award may be ambiguous and confusing.<sup>216</sup>

Brand<sup>217</sup> summarises the arbitration process to three major steps – preparing for arbitration, conducting arbitration and writing the award.

In preparation for arbitration, the arbitrator is required to:

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<sup>216</sup> Simpson *Labour Dispute Resolution* 36.

<sup>217</sup> Brand *et al Labour Dispute Resolution* 145-146.

- Contact the parties to inform them about the arbitration process and the time and place of the hearing. The arbitrator should not discuss the case with any of the parties.
- Summon witnesses and experts where necessary.

During the hearing:

- the arbitrator opens the proceedings;
- gives each party the opportunity to present its case;
- the arbitrator may ask questions (inquisitorial in nature) to seek clarification;
- witnesses and experts may be invited to clarify certain issues; and
- on-site visits may be required.

At the end of the arbitration hearing the arbitrator is required to write an arbitration award embodying his or her decision. The decision must be free of ambiguities to prevent new problems from arising from the interpretation of the award.<sup>218</sup> Most national labour legislations and practices stipulate that the award must simply set out the decision taken by the arbitrator or set out the decision as well as the reasons for that decision.<sup>219</sup>

The arbitration award is binding on both parties. However, one party to the award may refuse to execute one or all of the provisions of the award, leaving the other party to approach the Labour Court to have the decision enforced. Various countries' labour legislation includes provisions to appeal an arbitration award to a court on various legal grounds that may be provided in such legislation. However, this prolongs the final resolution of the dispute.<sup>220</sup>

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<sup>218</sup> Simpson *Labour Dispute Resolution* 34.

<sup>219</sup> *Ibid.*

<sup>220</sup> Simpson *Labour Dispute Resolution* 35.

## 2.16 THE HYBRID PROCESS

The ILO proposes the use of mixed processes for both interest-based and rights-based processes of conciliation and mediation.<sup>221</sup> The organization defines “med-arb” or “con-arb” as a process in which the parties to a labour dispute go through a single third party who first mediates and conciliates. When mediation or conciliation efforts fail, the third party determines the dispute by final and binding arbitration. However, this process may pose challenges to the third party, who may not rely on confidentially obtained information from one party during mediation when acting as an arbitrator. Therefore, it is suggested that when using this method, mediators and conciliators should not meet the parties separately at the mediation stages.<sup>222</sup>

### 2.16.1 CONCILIATION –THEN ARBITRATION

“Conciliation – then arbitration” is a process whereby the parties to a labour dispute first go to a single third party for conciliation and, if settlement fails, immediately to another third party who determines the dispute by final and binding arbitration.<sup>223</sup> The rationale for this approach is that one third party conducts the conciliation and another third party performs the arbitration function in order to maintain confidentiality.

## 2.17 ADJUDICATION

Adjudication is described as the settlement of a labour dispute through a formal court system. It is used to:

- settle industrial rights disputes;
- as a form of appeal against the decision made by an arbitrator; or
- as a last resort, if all other means of labour dispute resolution have failed.<sup>224</sup>

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<sup>221</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 35.

<sup>222</sup> *Ibid.*

<sup>223</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 29.

<sup>224</sup> Simpson *Labour Dispute Resolution* 39.

The adjudication process involves parties presenting their arguments and evidence to an independent judge, who makes a determination or judgment that is enforceable by the authority of the adjudicator.<sup>225</sup> Maseko<sup>226</sup> submits that under judicial settlement, the parties to the labour dispute incur cost and experience delays normally associated with the judicial process, as litigation involves stringent procedures and is highly institutionalised. There are typically detailed rules and numerous compliance mechanisms to be adhered to. It is for this reason that many disputants prefer the ADR system of conciliation and arbitration to litigation.<sup>227</sup>

## 2.18 LABOUR DISPUTE SETTLEMENT INSTITUTIONS

The ILO urges member states to establish bodies and procedures for the prevention and settlement of labour disputes, which should be designed in such a manner as to promote collective bargaining.<sup>228</sup> In addition, the Voluntary Conciliation and Arbitration Recommendation No, 92 of 1951 encourages member states and their governments to design their own dispute settlement systems and to make voluntary conciliation machineries available. The recommendation provides that these systems must be free of charge and expeditious in order to assist in the prevention and settlement of industrial disputes.

Pursuant to this recommendation, the Committee on Freedom of Association calls on governments to appoint bodies or establish bodies for the settlement of labour disputes between the parties to collective bargaining, and that these suggested bodies be independent and recourse to them be on a voluntary basis.<sup>229</sup> Steadman suggests that statutory labour dispute services must function independently of the state, but that they should largely be financed by the state through the departments or ministries of labour. The writer submits that this helps to deal with challenges of legitimacy and resources.<sup>230</sup> These bodies are required to settle several types of

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<sup>225</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 31.

<sup>226</sup> Maseko *Comparison of the Labour Dispute Resolution System in South Africa and Swaziland* 13.

<sup>227</sup> *Ibid.*

<sup>228</sup> Collective Bargaining Convention No 154 of 1981 art 5 par 2(e).

<sup>229</sup> Gernigon *et al ILO Principles Concerning Collective Bargaining* 44.

<sup>230</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 52.

labour disputes and can further be assigned broader educational and advisory roles.<sup>231</sup>

In countries where independent labour dispute settlement bodies have been established, the ILO notes that these institutions have centralised the functions of conciliation, mediation and arbitration. However, the parties must remain free to have recourse to conciliators and arbitrators of their own choice. In some countries, though, conciliation is done by officers of the ministries of labour, while arbitration and adjudication of labour disputes are assigned to industrial relations institutions, arbitration tribunals or the court system.<sup>232</sup>

### **2.18.1 STATUS OF LABOUR DISPUTE SETTLEMENT PERSONNEL**

While the ILO provides that conciliation and arbitration services can be provided by government officials or private persons, the impartiality of these personnel is essential. Conciliation and arbitration can be undertaken on a full-time or part-time basis; in some countries government officials are appointed as full-time, dedicated conciliators and arbitrators who have no other responsibilities. In some cases, other government officials, such as labour inspectors, undertake conciliation and arbitration work on a part-time basis.<sup>233</sup> This is potentially problematic for labour inspectors who may be involved in dual, and sometimes incompatible, functions of labour inspection and labour relations.<sup>234</sup>

Private persons may also work as conciliators and arbitrators, operating on a fee-for-services basis. Their fees are paid either by the disputants or by labour dispute settlement institutions. Other private persons, such as university labour law professors or retired labour-relations officers, may be occasional conciliators and arbitrators providing services on an *ad hoc* basis.<sup>235</sup>

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<sup>231</sup> *Ibid.*

<sup>232</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 53.

<sup>233</sup> Heron *et al National Strategy on Labour Dispute Prevention and Settlement in Cambodia* 25.

<sup>234</sup> *Ibid.*

<sup>235</sup> Labour legislation guidelines available on <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/intro/index.htm> accessed 06 March 2012.

The ILO suggests that it is not mandatory for a conciliator and arbitrator to hold formal qualifications in law, economics, psychology, finance or any particular academic field. However, it is important that conciliators and arbitrators be trained in the actual process of conciliation and arbitration. In addition, they must possess good knowledge of the legal and economic framework within which the dispute takes place; the industry situation; detailed background information of disputes; and personal qualities such as impartiality, integrity, sincerity and patience.<sup>236</sup>

Besides ordinary conciliators and arbitrators, the ILO recommends the creation of senior positions to run and manage institutions established in order to settle labour disputes. These positions may include a president or vice-president in some countries, or directors, labour commissioners or senior commissioners in others. Their responsibilities may include the allocation of disputes among members of staff or consultants and monitoring the overall performance of conciliators and arbitrators in significant or difficult disputes.<sup>237</sup>

In order to re-enforce the independence and authority of labour dispute settlement institutions, senior staff, such as the head of the institution, must possess the required qualifications, such as those of judges, to be eligible for appointment. In some countries, the heads or senior members of compulsory conciliation and arbitration bodies are commonly accorded a status similar to that of judges. This aids the institution in possessing moral authority.<sup>238</sup>

## **2.19 CONCLUSION**

This chapter demonstrated how the ILO was established to promote social justice, improving and supervising social conditions globally. The chapter further outlined the organisation's fundamental role in creating international labour standards, which are either conventions that are binding on member states upon ratification or recommendations that serve as guidelines for implementing conventions. Member states that ratify these instruments are obliged, under article 22 of the ILO

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<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

Constitution, to report regularly on measures they have taken to implement the conventions. Persistent non-compliance or violation is met with high-level exposure by the CEACR and the Conference Committee on the Application of Standards and includes discussion of failure to comply during the ILC.

The ILO has powers to recommend the imposition of international sanctions on member states that persistently refuse to comply with conventions they have ratified, as was the case in the Myanmar. However, there is an obligation on the ILO to provide technical assistance to member states to comply with their obligations through training and other means of support.

Conventions that are applicable to the labour dispute resolution system have been analysed. They have been found to encourage member states to make mechanisms for the voluntary and compulsory resolution of labour disputes available. These mechanisms include conciliation and arbitration, and litigation as a last resort, in labour dispute resolution. Many countries have thus far ratified these conventions and introduced ADR systems in their labour legislation. The ADR system has proved to be effective and efficient in labour dispute resolution and provides easier access to justice than traditional litigious methods of labour dispute resolution.

For these systems to be credible, the institutions created to resolve labour disputes must be independent, although largely state-funded. Its personnel must be persons of appropriate standing and with the moral authority to guarantee users' confidence.

## CHAPTER 3

### THE NAMIBIAN LABOUR DISPUTE RESOLUTION SYSTEM

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### 3.1 INTRODUCTION

The history of Namibian labour legislation can be traced back to 1879 when the country was under British rule. In 1885, the country became a German Protectorate<sup>1</sup> and thereafter, in 1919, was entrusted to the Union of South Africa as a C mandate after South African forces defeated the German forces.<sup>2</sup> This mandate perpetuated despite international pressure for South Africa to relinquish its control over the territory.<sup>3</sup> On 21 March 1990, after several years of sustained efforts and an armed struggle led by the South West Africa People's Organisation,<sup>4</sup> Namibia gained independence under the leadership of Sam Shafishuna Nujoma, who became the first democratically elected President of the Republic of Namibia.<sup>5</sup>

During the *apartheid* era, the country had no comprehensive labour legislation in place. However, there was a series of fragmented labour laws fundamentally based on racial discrimination against black workers, who were largely excluded from the application of many of these laws.<sup>6</sup> With mounting local and international pressure, the regime appointed a Commission of Inquiry into Labour Matters in South West Africa. The Commission recommended, amongst other things, that at independence Namibia should:

- become a member of the ILO;
- ratify and adopt relevant international labour standards; and
- consolidate all the fragmented labour legislation into one single Namibian Labour Code.<sup>7</sup>

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<sup>1</sup> Fenwick "Labour law reform in Namibia: Transplant or implant" in Lindsay *Labour reform in developing and transitional States* (2007) 319.

<sup>2</sup> Wiehahn Commission – Namibia 3.

<sup>3</sup> Fenwick *Labour law in Namibia* 5.

<sup>4</sup> Hereinafter referred to as "SWAPO".

<sup>5</sup> Van Rooyen *Portfolio of Partnership* 8.

<sup>6</sup> LaRRi *Labour Rights in Namibia: Promoting Workers Rights and Labour Standards*(2003) 4.

<sup>7</sup> Bauer *Labour and Democracy in Namibia* 104.

This was realised by the adoption of the first post-independence Namibian Labour Act of 1992, which was followed by another progressive Labour Act in 2007, effectively introducing the ADR system and attempted to position Namibia in line with international standards.

Given the above, this chapter analyses the Namibian labour dispute resolution system from the colonial era to the enactment of the 1992 Act. The conciliation boards and the District Labour Courts created under the 1992 Act are discussed extensively as mechanisms intended for the resolution of labour disputes. Thereafter, the chapter details the labour law reform that led to the current Labour Act, 2007, which introduced conciliation and arbitration processes under the office of the Labour Commissioner, and the role of the Labour Court in labour dispute resolution. The chapter concludes with an outline of other labour related legislation in relation to their effects on labour dispute resolution.

### **3.2 HISTORICAL BACKGROUND IN THE CONTEXT OF LABOUR RELATIONS**

To understand the present Namibian labour dispute resolution system, it is important to first understand the country's labour law history.<sup>8</sup> It is submitted that labour matters can only be properly analysed and understood by referring to all factors that influence the labour relations systems in a given country.<sup>9</sup> The Wiehahn Commission of Namibia points to factors such as political, economic, legal and social dynamics.<sup>10</sup> However, for the purpose of this study, only political, economic and legal factors that played major roles in Namibian labour law reform are discussed.<sup>11</sup>

Namibia was colonised by Britain in 1879, when the country annexed the Port of Walvis Bay, attaching it to its Cape Colony. This was followed by the declaration of the Territory as a German Protectorate<sup>12</sup> in 1885.<sup>13</sup> Germany ruled the territory for 30

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<sup>8</sup> LaRri *Labour Rights In Namibia* (2003)4.

<sup>9</sup> The Wiehahn Commission - Namibia 3.

<sup>10</sup> *Ibid.*

<sup>11</sup> The Wiehahn Commission – Namibia 1-3.

<sup>12</sup> This was after Germany defeated Britain.

<sup>13</sup> Fenwick "Labour Law Reform in Namibia" 319.

years, until 1915, when the country was defeated by South African and British forces.<sup>14</sup> After the end of the First World War, the country's political status was decided by the 1919 Treaty of Versailles,<sup>15</sup> which allowed the Allied Powers to expropriate all former German colonies.<sup>16</sup> Namibia thus acquired its colonial name, South West Africa, at the establishment of South Africa's trusteeship over the territory.<sup>17</sup> South West Africa was entrusted to the Union of South Africa as a C mandate on 17 December 1920,<sup>18</sup> in terms of the Peace Treaty of Versailles and article 22 of the Covenant of the League of Nations. Article 22 of the mandate states as follows:

"The mandatory shall have full powers of administration and legislation over the territory subject to the present mandate as an integral portion of the Union of South Africa and may apply the laws of the Union of South Africa to the territory subject to such local modification as circumstances may require. The Mandatory shall promote to the utmost the material and moral wellbeing and the social progress of the inhabitants of the territory subject to the present Mandate."

This mandate remained in force until 21 March 1990<sup>19</sup> when the Black Nationalist Government came to power and declared the Republic of Namibia a sovereign state.<sup>20</sup>

Meanwhile, various political forces continued to influence the colonial occupancy in Namibia. After the League of Nations was dissolved in 1946,<sup>21</sup> it was succeeded by the United Nations Organization, formed in October 1945.<sup>22</sup> With the United Nations coming into existence after the Second World War, all the mandatory holding powers under the League of Nations were expected to transfer their mandate to the Trusteeship Council of the United Nations.<sup>23</sup> However, South Africa refused to place South West Africa under the United Nations Trusteeship system. It disputed the

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<sup>14</sup> Bauer *Labour and Democracy in Namibia 1971-1996* (1998) 19.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Wiehahn Commission – Namibia 2.

<sup>18</sup> Bauer *Labour and Democracy in Namibia* 19.

<sup>19</sup> Fenwick *Labour Law in Namibia* (2005) 5.

<sup>20</sup> Van Rooyen *Portfolio of Partnership* 8.

<sup>21</sup> Wiehahn Commission – Namibia 3 par 4.8.

<sup>22</sup> Bauer *Labour and Democracy in Namibia* 20.

<sup>23</sup> *Ibid.*

United Nations' jurisdiction over the former League of Nations' mandate territories.<sup>24</sup> With this refusal to transfer its mandate over the territory, South Africa continued to subject the territory and its people to *apartheid*.<sup>25</sup>

Having refused to transfer its powers, the colonial government favoured the direct incorporation of South West Africa into South Africa. The referendum of 1946 showed that the white electorate<sup>26</sup> supported this incorporation, amid reports that native commissioners were also in support.<sup>27</sup> The *apartheid* situation was further aggravated when the National Party came to power in South Africa on 31 August 1950. The National Party government employed a new strategy that transformed South West Africa into a *de facto* but not *de jure* fifth province of South Africa.<sup>28</sup> Having made the territory the fifth province, the territory's white population was given the right to representation in the South African Parliament. This recognition placed the territory on par with the South African provinces for legislative purposes. However, although judicial structures were established in Namibia, there was little scope for input from the indigenous population.<sup>29</sup>

In 1949, in an effort to sustain colonial oppression over the territory, the government extended South African citizenship to all persons born in South West Africa. Subsequently, in 1955, Native Affairs were transferred from the territorial administrator to the South African Minister of Bantu Administration and Development.<sup>30</sup>

There were waves of pressure from the international community for South Africa to relinquish its control over Namibia. The South African government defied the advisory opinion of the ICJ<sup>31</sup> to formally revoke its mandate over the territory and

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<sup>24</sup> Naldi *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (1995)3.

<sup>25</sup> Fenwick *Labour Law Reform in Namibia* 319.

<sup>26</sup> White electorate of Namibia and South Africa.

<sup>27</sup> Bauer *Labour and Democracy in Namibia* 21.

<sup>28</sup> *Ibid.*

<sup>29</sup> Erasmus "The Namibian Constitution and the Application of International Law" (1990) 15 *The South African Yearbook of International Law* 81-110.

<sup>30</sup> Bauer *Labour and Democracy in Namibia* 21.

<sup>31</sup> International Court of Justice.

ignored the resolution<sup>32</sup> of the United Nations Security Council to transfer South West Africa.<sup>33</sup> There was continued resistance from all angles, including the liberation struggle waged by SWAPO, which was established in 1960 from the Ovambo People's Organisation.<sup>34</sup> The OPO was formed in 1957, initially to fight the draconian working conditions imposed on Namibian workers by the colonial government.<sup>35</sup>

Consequently, that Namibia was South Africa's fifth province meant that whatever laws were enacted in South Africa were applicable in the territory, with modification as prescribed in the mandate.

A possible reason why South Africa was loathe to lose Namibia to the United Nations was the strength of Namibia's economy. While Namibia had been predominately dependant on primary sectors, such as mining, fishing and commercial agriculture,<sup>36</sup> the country also had abundant natural resources that made it one of the richest countries in Africa.<sup>37</sup> In 1977, the ILO described the country's economy as having "substantial natural resources both mineral and agricultural; rapid growth; uneven distribution as between different sectors of the economy; a dualistic policy of development; [and] heavy reliance on the export of primary commodities".<sup>38</sup>

Given the country's rich economy, the colonial regime enacted various types of labour legislation to facilitate the economic exploitation of the territory by its colonial masters.<sup>39</sup> Like many other Southern African countries, Namibia was regarded by the colonial powers mainly as a source of primary commodities for exports in which black workers provided cheap labour to the primary sectors of the economy.<sup>40</sup> South African companies largely controlled the territory's economy, while Namibians

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<sup>32</sup> The Security Council Resolution to transfer South West Africa under the United Nations.

<sup>33</sup> Johnstone "The Namibian Dispute: The Transitional Government of National Unity and the Problems of Enforcing Resolution" 435 (1985) *Melbourne University Law Review* 342.

<sup>34</sup> Hereinafter referred to as "OPO".

<sup>35</sup> Bauer *Labour and Democracy in Namibia* 22.

<sup>36</sup> *Ibid*, see also *Bank of Namibia Annual Report* (2011)206-209.

<sup>37</sup> ILO *Labour and Discrimination in Namibia* (1977) 21.

<sup>38</sup> ILO *Labour and Discrimination in Namibia* 22.

<sup>39</sup> Fenwick *Labour Law in Namibia* 9.

<sup>40</sup> Fenwick, Kalula and Landau "Labour Law: A Southern African Perspective" in Tekle *Labour Law and Worker Protection in Developing Countries* (2010)177.

consumed little of their produce.<sup>41</sup> The country's economy was segmented into two divisions, namely the productive areas of the country, which were designated as the Police Zone for white commercial farms and mines, and Ovamboland and other northern areas as reserves for supplying migrant labour.<sup>42</sup> The Bank of Namibia records that Namibia had, and continues to have, a relatively high *per capita* income, but has the worst income inequality in the world.<sup>43</sup>

### **3.3 SIGNIFICANT DISCRIMINATORY LABOUR LAWS**

Prior to independence, Namibia had no comprehensive labour statute in place.<sup>44</sup> However, by virtue of being the fifth province of the Union of South Africa, most laws passed in South Africa were either immediately duplicated in Namibia<sup>45</sup> or at least resembled those of South African origin.<sup>46</sup> The labour laws that prevailed, particularly, were intended exclusively for the administration and control of black employees and their dependants.<sup>47</sup>

#### **3.3.1 MASTER AND SERVANTS PROCLAMATION 24 OF 1920**

Historically, the Master and Servants Proclamation of 1920 was the first significant labour legislation to be promulgated in colonial Namibia<sup>48</sup> during the German era. The proclamation was derived from the Cape Colony, where slavery was abolished by the enactment of a similar statute in 1841.<sup>49</sup> It was the Master and Servants Proclamation that amended and consolidated the earlier versions of the 1907, 1916 and 1918 Proclamations.<sup>50</sup> The Proclamation was considered to be the first piece of industrial legislation regulating conditions of employment in Namibia<sup>51</sup> and remained

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<sup>41</sup> Bauer *Labour and Democracy in Namibia* 23. See also Fenwick *Labour Law Reform in Namibia* 329.

<sup>42</sup> LaRRi *Labour Rights Report in Namibia* 4.

<sup>43</sup> Bank of Namibia Report (2002) 7.

<sup>44</sup> LaRRi *Labour Rights Report in Namibia* 4.

<sup>45</sup> Fenwick *Labour Law in Namibia* 5.

<sup>46</sup> ILO *Labour and Discrimination in Namibia* 71.

<sup>47</sup> Van Rooyen *Portfolio of Partnership* 132.

<sup>48</sup> Proclamation 1907.

<sup>49</sup> Wiehahn Commission-Namibia 28.

<sup>50</sup> Fenwick *Labour Law Reform in Namibia* 320.

<sup>51</sup> Wiehahn Commission-Namibia 28.

in force until 1975.<sup>52</sup> It was developed to regulate the relative rights and duties of masters, servants and apprentices in the Protectorate.<sup>53</sup> It defined a servant as any person employed for remuneration to perform physical labour or various types of handcraft, as well as any black worker in any capacity in the employ of the state. “Master”, on the other hand, was defined as anybody employing any person falling within the definition of servant or apprentice.

Although the Master and Servants Proclamation was one of the few statutes that applied to the type of work that was made available to the black African workforce, it had its own shortcomings. The proclamation made it a criminal offence, punishable by fines or imprisonment or both, for workers in the agricultural or domestic service or those engaged in manual tasks to fail to comply with any condition of their employment.<sup>54</sup> The statute failed to provide forums for dispute resolution in respect of allegations relating to either under-performance or deviation from contractual obligations. Instead, the available courts were the avenues for the resolution for all labour related contraventions, sanctioning non-compliance of contractual obligations with criminal penalties.

### **3.3.2 VAGRANCY PROCLAMATION, 1920 (PROCLAMATION 25 OF 1920)**

The Vagrancy Proclamation<sup>55</sup> was enacted to supplement the Master and Servants Proclamation and to secure indigenous workers for settlers’ enterprises by legalising and facilitating forced-labour mechanisms in the Police Zones. This proclamation’s overall purpose was to curb and suppress trespass, idleness and vagrancy.<sup>56</sup> Essentially, the Proclamation restricted indigenous black people to homelands and excluded them from the Police Zone unless they could establish that they had employment or other means of support while in these demarcated areas.<sup>57</sup>

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<sup>52</sup> Wiehahn Commission–Namibia 29.

<sup>53</sup> Van Rooyen *Portfolio of Partnership* 135.

<sup>54</sup> Fenwick *Labour Law Reform in Namibia* 320.

<sup>55</sup> Proclamation 25 of 1920.

<sup>56</sup> Van Rooyen *Portfolio of Partnership* 135.

<sup>57</sup> Fenwick *Labour Law in Namibia* 6.

Trespassing on designated land constituted a criminal offence and any person so convicted was liable to imprisonment with or without hard labour, with spare diet or with solitary confinement.<sup>58</sup> The available court had optional powers to sentence convicted persons to terms of service in public works or to employment in any municipality or private enterprise to substitute regular penalty.<sup>59</sup>

This practice was rebuked by the United Nations-ILO Ad Hoc Committee on Forced Labour, convened in 1953. The Committee found that the state, through the operation of this Proclamation, was pressurising the native population to engage in conditions of indirect compulsion similar to that of forced labour for economic purpose.<sup>60</sup> The Committee further considered the question of sanctions imposed upon Africans for breaches of contracts of employment and arrived at the following:<sup>61</sup>

“There can, however, be no doubt ...that the fact that it is impossible for the worker to terminate his contract unilaterally before the expiration of its term, without running the risk of heavy penalties, constitutes a serious restriction of his personal liberty.”<sup>62</sup>

Consequently, the Committee held that given the total number of Africans working under such contracts of employment being very large, this legislation, if abused or vigorously implemented, could lead to a system of forced labour for economic purpose.<sup>63</sup>

Although the Vagrancy Proclamation was not explicitly limited to indigenous inhabitants of the territory, Van Rooyen (1996)<sup>64</sup> points out that it was obvious from its provisions or objectives that it was intended to coerce black workers to place their labour at the disposal of white employers or public enterprises.

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<sup>58</sup> Ss 1-4 of the Proclamation 25 of 1920.

<sup>59</sup> S 14 of the Proclamation 25 of 1920.

<sup>60</sup> ILO *Labour and Discrimination in Namibia* 83.

<sup>61</sup> *Ibid.*

<sup>62</sup> Report of the United Nation-ILO ad hoc Committee on forced labour (1953) 77 par 320.

<sup>63</sup> *Ibid.*

<sup>64</sup> Van Rooyen. *Portfolio of Partnership* 135.

Meanwhile, other legislation was promulgated that provided slightly better working conditions, namely the Shop Hours and Shop Assistant Ordinance.<sup>65</sup> However, this ordinance explicitly limited its application to European persons employed by other persons in or about a shop.

Other statutes, such as the Factory, Machinery and Building Works Ordinance<sup>66</sup> and the Mines and Minerals Ordinance,<sup>67</sup> regulated the conditions of employment of a very small number of employees.<sup>68</sup> The rest of the workforce, such as those in hotels, offices, transport, agriculture and domestic services, remained covered by the Master and Servants Proclamation of 1920.<sup>69</sup>

### **3.3.3 NATIVE PROCLAMATION, 1952 (PROCLAMATION 56 OF 1951) AND REGULATIONS MADE THEREUNDER**

The Native Proclamation Act 1952 is considered to be the first major piece of legislation passed by the colonial National Party government when it assumed power in Namibia.<sup>70</sup> The Proclamation typified the extensive segregation approach of the new rulers and had a significant impact on the employment circumstances of black workers. The preamble of the statute declares that it envisaged better control of contracts of employment of natives in certain areas and better regulation of the ingress into and residence of natives in such areas.<sup>71</sup>

The Proclamation applied to all areas of Namibia, except the homelands.<sup>72</sup> The statute empowered Native Commissioners, by warrant addressed to the South African Police, to order the repatriation of an African worker with his family from urban areas to his homeland unless the African could prove that he was entitled to

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<sup>65</sup> Ordinance 15 of 1939.

<sup>66</sup> Ordinance 34 of 1952.

<sup>67</sup> Ordinance 26 of 1954.

<sup>68</sup> Fenwick *Labour Law in Namibia* 6.

<sup>69</sup> *Ibid.*

<sup>70</sup> Van Rooyen *Portfolio of Partnership* 153.

<sup>71</sup> *Ibid.*

<sup>72</sup> ILO *Labour and Discrimination in Namibia* 58.

remain in the proclaimed area.<sup>73</sup> Section 10 of the Proclamation provided reasons for which an African would be repatriated. These include that:

- an African cannot be offered suitable employment;
- an African is refused employment by the employment officer;
- an African's contract of service has been cancelled by the employment officer;
- an African is deemed to be in the area concerned unlawfully;
- an African has unlawfully broken an employment agreement;
- on three consecutive occasions an African has refused or failed without lawful cause to take up suitable employment which has been offered to him.

The associated removal costs were ordered to be recovered from the money owed to the worker concerned.<sup>74</sup> The statute was supplemented with regulations that established complaints procedures.<sup>75</sup> In terms thereof, a worker who was dissatisfied with his employment could lay a complaint with an employment officer, who in turn would refer the matter to the Native Commissioner for investigation. Where the complaint was found to be legitimate, the Native Commissioner would ordinarily cancel the employment agreement and allow the African to apply to the bureau for other employment.<sup>76</sup>

Employers too had recourse to the Native Commissioner to lodge complaints against African employees on various grounds including<sup>77</sup> misconduct, unsatisfactory service, refusal or failure to obey a lawful order, and conduct prejudicial to the interest of the employer. The Native Commissioner had a reciprocal duty to

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> ILO *Labour and Discrimination in Namibia* 58-59.

<sup>76</sup> Regulation 3(5) and 4(4), 5 and 6.

<sup>77</sup> ILO *Labour and Discrimination in Namibia* 58-59.

investigate the complaint of the employer and, if well founded, he had the power to declare the employment agreement void and issue a removal order against the African worker in terms of the regulation.<sup>78</sup>

Breach of the regulations or principal statute was a criminal offence punishable by payment of a R100 fine or by imprisonment for six months. First (1988)<sup>79</sup> argues that such fines were not in proportion to African income. Thus many innocent men found themselves behind bars or forced to join the convict gangs on public works.<sup>80</sup>

### **3.3.4 WAGES AND INDUSTRIAL CONCILIATION ORDINANCE, 1952 (ORDINANCE 35 OF 1952)**

This was the first statute that constituted the major source of collective labour relations law in Namibia and remained so until 31 October 1992.<sup>81</sup> The statute contemplated the following labour relations processes.<sup>82</sup>

- registration of trade unions and employers' organisations;<sup>83</sup>
- establishment, function, composition and proceedings of conciliation boards;<sup>84</sup>
- mediation;<sup>85</sup>
- voluntary arbitration and compulsory arbitration (in essential services);<sup>86</sup>
- putting into operation the effect of conciliation boards' agreements and arbitration awards.<sup>87</sup>

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<sup>78</sup> Regulation 3(5).

<sup>79</sup> First "The Dignity of Labour" in Wood (ed) *Namibia 1884-1984 Readings on Namibia's History and Society*(1988) 329.

<sup>80</sup> *Ibid.*

<sup>81</sup> The Wages and Industrial Conciliation Ordinance 1952, was repealed by the Labour Act, 1992 (Act No1992) which came into operation on 1 November 1992.

<sup>82</sup> Van Rooyen *Portfolio of Partnership* 154.

<sup>83</sup> Ss 21 and 22 of the Ordinance.

<sup>84</sup> Ss 33-77 of the Ordinance.

<sup>85</sup> S 42 of the Ordinance.

<sup>86</sup> Ss 43-45 of the Ordinance.

Fenwick <sup>88</sup> notes that although the statute was significant in Namibia's labour relations, it was mainly about labour relations amongst white workers. Thus, from the outset, it was internationally declared discriminatory legislation against Africans<sup>89</sup> as it excluded from its application farm workers and domestic servants, who were mainly black.<sup>90</sup>

Chapter Two of the Ordinance provided for the settlement of industrial disputes. However, the procedure did not distinguish between disputes of interest and disputes of rights, nor did it make provision for referring labour disputes to a labour tribunal.<sup>91</sup> Although the statute made provision for arbitration, disputes relating to the interpretation and application of the Ordinance were submitted to the Supreme Court for determination.<sup>92</sup> Also, although the Ordinance provided for the registration of trade unions and employers' organizations,<sup>93</sup> African workers were not allowed to register a trade union in terms of the Ordinance.<sup>94</sup>

Inasmuch as African workers were free under the law to form trade unions, they operated as unregistered bodies and hence were excluded from making use of the dispute settlement machineries and statutory rights and protection provided for in the Ordinance.<sup>95</sup> This situation meant that unregistered (black workers') trade unions could not enter into legally binding collective agreements on behalf of their members and were thus not allowed to participate in lawful industrial actions.<sup>96</sup> This situation lasted until 1978 when the Ordinance was amended and black workers were allowed to register trade unions and enjoy the full protection of the Ordinance.<sup>97</sup>

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<sup>87</sup> Ss 46-47 of the Ordinance.

<sup>88</sup> Fenwick *Labour Law in Namibia* 7. See also s2(2) which excluded persons employed by the South African Government or the territorial government, volunteer workers for charitable organizations and certain employees at educational institutions.

<sup>89</sup> ILO *Labour and Discrimination in Namibia* 71.

<sup>90</sup> S 2(2) of the Ordinance.

<sup>91</sup> Van Rooyen *Portfolio of Partnership* 155.

<sup>92</sup> *Ibid.*

<sup>93</sup> S 20(1) of the Wages and Industrial Conciliation Ordinance 35 of 1952.

<sup>94</sup> Fenwick *Labour Law in Namibia* 7.

<sup>95</sup> Van Rooyen *Portfolio of Partnership* 155.

<sup>96</sup> Fenwick *Labour Law in Namibia* 7.

<sup>97</sup> *Ibid.*

Registered trade unions had access to statutory conciliation procedures provided for in the Ordinance. The statute permitted any party to an industrial dispute to apply to the administrator for the establishment of a conciliation board. On approval and the establishment of the conciliation board, the other party was obliged to participate in the negotiations, which were chaired by a person from either side agreed upon by the parties.<sup>98</sup> The parties were obliged to reach an agreement, failing which recourse could be had to mediation, arbitration, lockout or strikes.<sup>99</sup> On reaching agreement over the dispute, a representative party in the industry concerned could request that the terms of the collective agreement be extended to all other employers and employees in the industry.<sup>100</sup>

Van Rooyen<sup>101</sup> claims that it took almost a year for the first application to be received after the Wages and Industrial Conciliation Ordinance came into effect on 1 August 1953. In most cases, authorities declined to grant approval and instead dispatched an official to settle the dispute by informal mediation.<sup>102</sup> Although the colonial authorities were hesitant to approve the establishment of conciliation boards, where they were approved the handling of the dispute was usually rapid and highly successful (11 out of 14 instances). These situations were attributed to the fact that all registered trade unions were for the limited white minority groups and therefore the conciliation machinery was generally only accessible to white employees.<sup>103</sup>

### **3.3.5 CONDITIONS OF EMPLOYMENT ACT, 1986 (ACT 12 OF 1986)**

The Namibian Basic Conditions of Employment Act<sup>104</sup> was modelled on the South African Basic Conditions of Employment Act.<sup>105</sup> The Act introduced significant

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<sup>98</sup> Van Rooyen *Portfolio of Partnership* 169.

<sup>99</sup> Ss 42,43-45 and 58 of the Ordinance.

<sup>100</sup> S 46(2) of the Wages and Wages and Industrial Ordinance 35 of 1952.

<sup>101</sup> Van Rooyen *Portfolio of Partnership* 169.

<sup>102</sup> Van Rooyen *Portfolio of Partnership* 170.

<sup>103</sup> *Ibid.*

<sup>104</sup> Act 12 of 1986.

<sup>105</sup> Act 3 of 1983.

protective changes with respect to conditions of employment.<sup>106</sup> Although the statute resembled that of South Africa, it departed significantly from its counterpart in a number of respects. These include, amongst other important provisions, the provisions of basic working conditions related to aspects such as annual leave, sick leave, public holidays and payment of remuneration, a minimum employment age and termination of employment.<sup>107</sup>

The statute was significant in that it was the very first law regulating basic conditions applying to agricultural and domestic services.<sup>108</sup> However, not all the conditions of employment applied to these sectors. The two sectors were still excluded with regard to a fixed maximum of working hours and overtime payment.<sup>109</sup> Moreover, the Act did not cover employees in managerial positions, professionals, administrative and public servants from its application, making it discriminatory.<sup>110</sup>

Given the limitation of the Master and Servants Proclamation of 1920 and the limited participation in the statutory industrial-conciliation system made available by the Wages and Industrial Conciliation Ordinance, the Basic Conditions of Employment Act was enacted as an urgent remedial measure to ameliorate the prevailing situation.<sup>111</sup> In a similar vein, the Act amended or repealed most of the other former conditions of employment legislation limited and applicable to homelands, such as the Ovambo Labour Act,<sup>112</sup> Kavango Labour Act,<sup>113</sup> and Labour Enactment for Eastern Caprivi.<sup>114</sup>

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<sup>106</sup> Fenwick *Labour Law in Namibia* 8.

<sup>107</sup> Van Rooyen *Portfolio of Partnership* 188.

<sup>108</sup> Fenwick *Labour Law in Namibia* 8.

<sup>109</sup> Van Rooyen *Portfolio of Partnership* 188-189.

<sup>110</sup> *Ibid.*

<sup>111</sup> Wiehahn Commission – Namibia 29.

<sup>112</sup> Enactment 6 of 1972.

<sup>113</sup> Act 2 of 1974.

<sup>114</sup> Enactment 3 of 1973.

### 3.4 WIEHAHN COMMISSION OF INQUIRY INTO LABOUR MATTERS IN NAMIBIA

A Commission of Inquiry into labour matters in Namibia was appointed<sup>115</sup> on the recommendation of the Cabinet of the Administrator General of Namibia. The appointment was occasioned by developments on the labour front that the government of the day was confronted with.<sup>116</sup> The *apartheid* government came to the realisation that the time had come for an in-depth inquiry into existing labour laws, policies and practices in Namibia.<sup>117</sup> This was further necessitated by the fact that the existing structures and systems were no longer capable of handling and resolving new labour issues and disputes, which were rapidly becoming part of the Namibian system.<sup>118</sup>

Van Rooyen<sup>119</sup> outlines the terms of reference of the Commission in a broader context to include an inquiry, report and recommendations on all aspects of labour in Namibia, with special reference to existing legislation, and to adjust the existing system for the regulation of labour relations to meet the needs of changing times.

These terms of reference were later re-defined and demarcated by the Commission itself before it adopted its *modus operandus* and included its operational methods. The Commission decided to limit the investigation to the basic principles or points of departure that would underlie the Commission's investigation and upon which the report was to be based.<sup>120</sup> The redefined terms of reference included:

- That the existing system should be de-South Africanised to accommodate the country's needs and culture.

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<sup>115</sup> The Commission was appointed on 2 September 1987 by the Administrator General. The appointment of which was made known by Government Notice AG 1 of 1987, read with Proclamation AG 32 of 1987 which was published in official Gazette Extra-ordinary No 5432 of 15 September 1987.

<sup>116</sup> Wiehahn Commission–Namibia ii.

<sup>117</sup> *Ibid.*

<sup>118</sup> Wiehahn Commission–Namibia ii.

<sup>119</sup> Van Rooyen *Portfolio of Partnership* 216.

<sup>120</sup> Wiehahn Commission–Namibia ii.

- That the new system should in the greatest degree comply with and conform to international labour standards and practices.
- That the new system should be flexible and allow for maximum future growth and development.

Van Rooyen<sup>121</sup> points out that the Wiehahn Report of Namibia constitutes one of the most exhaustive and in-depth research documents to have been published on Namibia's labour relations. The report (extensively cited in this research) represents a comprehensive portrayal and analysis of labour relations' status in the interim administration era.<sup>122</sup> The report foreshadowed numerous post-independence developments on the labour front; thus the report will benefit the country and its people for years to come.<sup>123</sup>

The Commission's work culminated over a period of two years,<sup>124</sup> during which it was established that Namibia's existing system of industrial relations was underdeveloped and unsophisticated. It was discovered that the system lagged behind that of South Africa on whose legislation most, if not all, of Namibia's labour system was based. The Commission submitted that Namibia's dire situation could be attributed to the uncertainty that surrounded the country's political and constitutional positions since the Second World War.<sup>125</sup>

Bauer<sup>126</sup> summarises the Commission's recommendations as follows:

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<sup>121</sup> Van Rooyen *Portfolio of Partnership* 217. Take note that Dr J WF van Rooyen was himself a member of the Wiehahn Commission in his official capacity as the Director of Labour Services in the then Ministry of Manpower.

<sup>122</sup> This period extends from late 1977 when an Administrator General, Mr Justice M.T. Steyn, was appointed to govern Namibia and includes the tenure of Mr Louis A. Pienaar, the subsequent Administrator General for the territory of South West Africa up to 1990.

<sup>123</sup> Van Rooyen *Portfolio of partnership* 217.

<sup>124</sup> The Commission was appointed on 2 September 1987 and completed its report, which was published on 2 February 1989. See Wiehahn Commission – Namibia (ii) and (v).

<sup>125</sup> Bauer *Labour and democracy in Namibia* 103.

<sup>126</sup> Bauer *Labour and Democracy in Namibia* 104.

- That Namibia become a member of the ILO, ratify and adopt the relevant ILO conventions and recommendations and conform to international labour standards;
- that in terms of the need for protective conditions of employment legislation, improvements to the existing 1986 legislation be made;
- that a Wage Commission to set minimum wages in certain sectors be established;
- that a further system of collective bargaining as the cornerstone of labour relations in Namibia be developed and the principle of Freedom of Association be adhered to for all categories of employees;
- that workers have the right to strike and the notion of an unfair labour practice be adopted;
- that an Industrial Council, a Labour Court and an Office of the Labour Commissioner be established;
- that all labour-related legislations be consolidated into a single Namibian Labour Code; and
- that the prohibition on trade unions' affiliation to political parties be repealed.

The second volume of the report dealt with employment, the development of human resources, social security and labour administration.<sup>127</sup>

The Commission's report emphasised the importance of the resolution of labour disputes.<sup>128</sup> In this respect, the report points to the five internationally recognised dispute resolution mechanisms that have been developed over years, namely negotiation, mediation, arbitration, conciliation and adjudication.<sup>129</sup> These

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<sup>127</sup> See Part 2 of the Wiehahn Commission - Namibia 1-60.

<sup>128</sup> Wiehahn Commission Namibia 111.

<sup>129</sup> *Ibid.*

mechanisms were discussed extensively in Chapter Two. For the purposes of this section the discussion is not repeated, but, instead, the study considers the Commission's findings and recommendations in respect of the labour dispute resolution system.

The Commission recommended the following:<sup>130</sup>

- that the five labour dispute procedures of negotiation, mediation, arbitration, conciliation and adjudication be afforded full recognition in the new labour relations system in Namibia;
- that negotiation as a labour dispute resolution procedure be vigorously promoted between employers and employees through training;
- that mediation be retained as a distinct dispute resolution mechanism based on voluntarism and be utilised at all bargaining levels;
- that arbitration be retained in legislation as one of the important procedures to settle labour disputes. Furthermore, that there should be a distinction between voluntary and compulsory arbitration;
- that arbitration awards be binding upon parties, where failure to comply with an award no longer constitutes a criminal offence, but rather be determined or adjudicated by the proposed Labour Court;
- notice of arbitration awards be published in the Official Gazette;
- that parties to voluntary arbitration be required to bear their own expense, whereas expense incurred through compulsory arbitration be redeemed out of public funds; and
- that the provisions in the Wage and Industrial Conciliation Ordinance 1952, relating to conciliation boards be retained on the following conditions:

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<sup>130</sup> *Ibid.*

- notice of conciliation board agreements be published in the Official Gazette;
- the competent minister be empowered to approve the establishment of a conciliation board on the advice of the proposed Labour Commissioner;
- the criteria for the establishment of a conciliation board include principles such as:
  - o the existence of a *bona fide* labour related dispute; and
  - o greater flexibility regarding the competent authority's discretion to establish conciliation boards.

In respect of the Labour Court, the Commission made the following recommendations:

- that a specialised judicial body for the adjudication and determination of labour-related matters be created by statute and be designated "Labour Court of Namibia";
- that the Labour Court be autonomous, but form part of the establishment of the Department of Labour for administrative purposes;
- that the presiding officer of the Labour Court bear the title of President of the Labour Court of Namibia and be a person of sound knowledge and experience in the application and practice of labour law and labour relations;
- that various judicial functions be assigned to the Court, of which the following were considered most important:
  - o the adjudication of rights disputes and the determination of disputes of interests by means of voluntary and compulsory arbitration;

- the interpretation of the provisions of labour legislation, industry agreements, wage determinations, awards, exemptions, order and other such instruments;
- the hearing and deciding of urgent applications;
- the adjudication of alleged cases of unfair labour practices on the part of employers and employees and their organisations; and
- the adjudication of other labour related disputes as may arise from the employer/employee relationship.
- that the Labour Court should have no jurisdiction to decide criminal cases;
- that the Labour Court be empowered to award compensatory damages, to issue orders or interdict, to order reinstatement or restoration of terms or conditions of employment, and to award costs in exceptional matters;
- that there shall be a right of appeal to the Supreme Court against a decision of the Labour Court, which can also order execution of its order in appropriate cases, pending appeal;
- that the procedures of and processes before the Labour Court be kept as informal and uncomplicated as possible, with the rules of natural justice constituting the main guidelines;
- that the Labour Court be a refuge of last resort and parties to disputes be required to negotiate other conciliatory machineries for the settlement of their differences before permitted recourse to the Labour Court;
- that parties be permitted to be represented in the Labour Court by legal representatives, representatives of employers' organisations and trade unions, persons who have knowledge of labour relations matters, or by parties themselves.

### 3.5 NAMIBIA, INTERNATIONAL LABOUR STANDARDS AND THE ROLE OF THE ILO

The relationship between Namibia and international labour standards is associated with the precarious labour situation that existed since the Second World War.<sup>131</sup> There were numerous uncertainties that clouded Namibia's position. The conflict between the United Nations and South Africa had a direct influence on the labour situation in the country.<sup>132</sup> Given Namibia's trusteeship as mandated by the League of Nations,<sup>133</sup> the labour laws, policies and practices that applied to and were developed in Namibia were largely South African in letter, spirit and character.<sup>134</sup> This situation was sanctioned by Article 22 of the mandate that provided that the Union of South Africa had full mandate or authority to administer, legislate or apply its own laws in the territory as if it were an integral part of the mandatory power.<sup>135</sup>

Given the above situation, the question that arises is whether the different ILO conventions and recommendations, including the codes of labour standards that South Africa ratified while a member of the ILO up to 1964, could become applicable in Namibia. In attempting to answer the question, Van Rooyen<sup>136</sup> submits that in the context of the mandate that South Africa had over Namibia, it would be automatic that such conventions applied in the territory. This certainly seems to be the case as the authority of Article 35 of the ILO Constitution stipulates that a member state that ratifies conventions undertakes to apply them to its colonies, protectorates and possessions that are not fully self-governing, except where local conditions made them inapplicable.

Moreover, under the same trusteeship mandate, South Africa had the obligation to promote the utmost material and moral well-being and social progress of the people of the territory. Therefore, the ratifications and any adoptions that South Africa effected on its own behalf were automatically effected in Namibia.<sup>137</sup> The Wiehahn

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<sup>131</sup> Wiehahn Commission - Namibia 20.

<sup>132</sup> *Ibid.*

<sup>133</sup> Van Rooyen *Portfolio of Partnership* 78.

<sup>134</sup> Wiehahn Commission - Namibia 20.

<sup>135</sup> Van Rooyen *Portfolio of Partnership* 78.

<sup>136</sup> *Ibid.*

<sup>137</sup> Wiehahn Commission – Namibia 21.

Commission of Namibia accepted this view and arrived at a similar conclusive position that all eleven of the conventions of the ILO that South Africa had ratified from 1921 to 1963 were also ratified on behalf of Namibia and applicable up to 1966.<sup>138</sup>

The Wiehahn Report of Namibia details the full relationship that Namibia had with the ILO prior to independence. Based on that background, the Commission recommended the following:<sup>139</sup>

- that after independence Namibia apply to become a member state of the ILO, as well as other relevant international (particularly African) labour bodies;
- that an in-depth analysis be made of the ILO conventions and recommendations, with a view to ratifying and adopting those that are most appropriate to and accommodative of the economic, social and industrial climate of the country; and
- that employers, employees and their respective organisations in both the public and private sectors be informed of and educated in international labour standards and be encouraged to implement them and comply with them as far as possible, within the parameters of national law, policies and practices.

The ILO carried out a study that analysed Namibia's labour law position<sup>140</sup> and, consequent to the findings, the ILO recommended significant changes to the prevailing labour law system. These included:<sup>141</sup>

- that considering the entrenchment of injustice through the policy of separate development, profound administrative, social and economic reorganisation take place for a fairer and more equitable enjoyment of territory resources;

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<sup>138</sup> *Ibid.*

<sup>139</sup> Wiehahn Commission – Namibia 24.

<sup>140</sup> ILO *Labour and Discrimination in Namibia* 90.

<sup>141</sup> ILO *Labour and Discrimination in Namibia* 90-92.

- that for the above recommendation to be achieved, the policy of *apartheid* as practiced in Namibia be replaced by policies that embraced international labour standards objectives and machineries;
- the study noted that Namibia was a territory for which the international community was charged with responsibility, thus observance of international labour-standards would contribute to the successful overcoming of past wrongs and the welfare of its people as members of a free and independent nation.

In the latter years of South Africa's occupancy of Namibia, the ILO accepted SWAPO representation for Namibia at its Annual Conference and deliberated on the Namibian situation during its deliberations on the status of workers under apartheid.<sup>142</sup> It was during these international forums that the ILO repeatedly condemned the *apartheid* regime in Namibia, calling for a new industrial relations system based on a process of independent collective bargaining and for the embracement of the principle of tripartism in labour relations.<sup>143</sup>

The ILO was further involved in the vocational training of exiled Namibians in preparation for independence. This involved the promotion of workers' education and trade unions and the compilation of relevant documentary materials.<sup>144</sup> Similarly, since independence, the ILO has provided technical assistance to the Namibian Government on a range of issues. These include work on labour market policy, analysis of labour-market statistics, and training conciliators and arbitrators for the labour dispute resolution system.<sup>145</sup>

The ILO also played an instrumental role in the realisation of the following interventions:

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<sup>142</sup> Fenwick *Labour Law in Namibia* 13.

<sup>143</sup> Fenwick *Labour Law in Namibia* 14.

<sup>144</sup> Van Rooyen *Portfolio of Partnership* 79.

<sup>145</sup> Fenwick *Labour Law in Namibia* 14.

- Improving labour standards in Southern Africa<sup>146</sup> from 2004 to 2008. This project was launched in Namibia during October 2004 to achieve the following objectives:
  - to increase compliance with national labour laws and improve labour management relations achieved through a strategy of better knowledge among employers and workers of their rights, obligations and services under national labour laws; and
  - to promote more effective use of the labour administration and inspection system and increased use of the labour dispute prevention and resolution processes.

Other assistance includes:<sup>147</sup>

- the elimination of child labour TECL Phase 1 (2004 to 2008) and TECL Phase 2 (2009 to 2011);
- the Youth Employment Network;
- technical support for the Labour Advisory Council;
- the San development programme (2009 to 2011);
- the HIV/AIDS workplace policy for public service; and
- labour market information systems.

Other significant assistance rendered by the ILO included the drafting of the 1992, 2004 and 2007 Labour Acts.<sup>148</sup>

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<sup>146</sup> Hereinafter referred to as "ILSSA".

<sup>147</sup> Government Republic of Namibia (GRN) Namibia Decent Work Country Programme (DWCP) 2010-2014 – *ILO Country programme for Namibia* (2010)32-24.

<sup>148</sup> Fenwick *Labour Law in Namibia* 14.

### 3.6 THE NAMIBIAN CONSTITUTIONAL LABOUR PROVISIONS

At independence in 1990, Namibian workers expected the SWAPO-led government to introduce or adopt a constitution and a Labour Act that replaced the oppressive colonial legislation and labour practices.<sup>149</sup> Government responded by enacting the post-independence labour legislation espoused in the country's new democratic constitution.<sup>150</sup> The adoption of the democratic constitution brought about significant changes to the country's labour system.<sup>151</sup>

The Constitution contains provisions that seek to protect basic labour rights, as well as others that are significant to government policy in regulating labour rights.<sup>152</sup> It guarantees fundamental freedoms, including the freedom of association to form and join trade unions.<sup>153</sup> This proclaimed freedom includes the right to withhold labour without being exposed to criminal penalties.<sup>154</sup> However, these fundamental freedoms are not absolute, but subject to the law of Namibia. Government may impose reasonable restrictions on the exercise of rights and freedoms as are required in the interest of the sovereignty and integrity of Namibia.<sup>155</sup>

In addition to the aforementioned fundamental freedoms, Chapter 11 of the Constitution provides for the principles of state policy. Fenwick<sup>156</sup> posits that although these principles are not legally enforceable by the courts, they guide government in its law-making methods and, as such, the courts have recourse to them in interpreting the applicable law. In terms of Article 95 of the Constitution, the state is obliged to promote the welfare of the people by adopting, *inter alia*, policies aimed at the following:

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<sup>149</sup> LaRRi *Labour Rights Report in Namibia* 5.

<sup>150</sup> The Constitution of the Republic of Namibia art 95.

<sup>151</sup> Daniels, Katjuanja, Ndauedapo, Kerck and Murray "Dispute Resolution in Namibia: Conciliation, Mediation and Arbitration" in Kerck, Murray and Sycholt (eds) *Continuity and Change- Labour Relations in Independent Namibia* (1997) 323.

<sup>152</sup> Fenwick "Labour Law Reform in Namibia" 327.

<sup>153</sup> Art 21(1)(e) of the Namibian Constitution.

<sup>154</sup> Art 21(1)(f) of the Namibian Constitution.

<sup>155</sup> Art 21(2) of the Namibian Constitution.

<sup>156</sup> Fenwick "Labour Law Reform in Namibia" 326.

- “(a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; further, the Government shall seek, through appropriate legislation, to provide maternity and related benefits for women;
- (b) enactment of legislation to ensure that the health and strength of the workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength;
- (c) active encouragement of the formation of independent trade unions to protect workers’ rights and interest and to promote sound labour relations and fair employment practices;
- (d) membership of the International Labour Organization (ILO) and, where possible, adherence to and action in accordance with International Conventions and Recommendations of the ILO.”

These principles, together with the fundamental freedoms, serve as part of the set of responses introduced by the Government to address Namibia’s previous colonial and *apartheid* labour practices, which were discriminatory and repressive of black workers.<sup>157</sup>

### 3.7 THE 1992 LABOUR ACT

In terms of Article 95 of the Namibian Constitution, the Government of the Republic of Namibia enacted the 1992 Labour Act, which was described as the most important achievement in the history of the workplace in Namibia.<sup>158</sup> The Act was passed by the National Assembly in mid-March 1992, signed into law by the President on 26 March 1992 and thereafter promulgated as the Labour Act, 1992.<sup>159</sup> However, it only came into operation on 1 November 1992. LaRRi<sup>160</sup> points out that the delay in bringing the 1992 Act into force was occasioned by the government’s efforts to balance the interests of workers and employers. Unfortunately, this delay led to the interim perpetuation of the colonial labour legislation and practices and thereby set a regrettable tone for the nature of labour dispute resolution in the new state.

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<sup>157</sup> *Ibid.*

<sup>158</sup> Government Republic of Namibia (GRN) Ministry of Labour Annual Report (1997) 57.

<sup>159</sup> Act No 6 of 1992.

<sup>160</sup> LaRRi *Labour Rights Report in Namibia* 5.

The extensive negotiations and consultations between major interest groups, labour lawyers in Namibia and experts from South Africa delayed the implementation of the 1992 Act. A range of procedures and mechanisms had to be put in place to bring about the desired resolution of labour disputes.<sup>161</sup> Although the enactment of this statute was prolonged, it was still considered to have broken new ground in its quest to provide basic labour rights to all Namibians regardless of race.<sup>162</sup> According to Van Rooyen<sup>163</sup> the 1992 Act represented a major step for all workers in Namibia and provided an important stage in the development of Namibian labour law.

The Preamble of the 1992 Act declares, amongst other things, the following: the furtherance of labour relations conducive to economic growth, stability and productivity through the promotion of an orderly system of collective bargaining. Furthermore, the Preamble mirrored some of the Constitution's principles of state policy.<sup>164</sup> These principles include, *inter alia*, the formation of trade unions and employers' organisations and, where possible, the adherence to and implementation of ILO conventions and recommendations.<sup>165</sup>

### **3.8 LABOUR DISPUTE RESOLUTION IN TERMS OF THE 1992 LABOUR ACT**

The 1992 Act provided the mechanisms to resolve labour disputes in the workplace. These mechanisms include conciliation, mediation and arbitration, and adjudication in the District Labour Court.<sup>166</sup> Similarly, the Act provided for the regulated use of strikes and lock-outs as invaluable methods of labour dispute resolution in interest disputes.<sup>167</sup>

The establishment of these formal labour dispute resolution procedures formed an integral part of the process of collective bargaining, envisaging the inevitability of disagreement and the resultant disputes in workplaces. However, although a

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<sup>161</sup> Daniels *et al* "Dispute Resolution in Namibia" 323.

<sup>162</sup> Van Rooyen *Portfolio of Partnership* 229.

<sup>163</sup> *Ibid.*

<sup>164</sup> Fenwick *Labour Law in Namibia* 15.

<sup>165</sup> Preamble to the 1992 Act.

<sup>166</sup> Part IX of the 1992 Act.

<sup>167</sup> S 81 of the 1992 Act.

workplace disagreement does not constitute a labour dispute, a dispute manifests once negotiation on a disagreement (conflict) has broken down. Therefore, the declaration and the resolution of the dispute was seen as an integral part of collective bargaining.<sup>168</sup>

Access to a labour dispute resolution system made available by the 1992 Act was often dependent on the nature of the dispute in question.<sup>169</sup> The Act defined a dispute as follows:<sup>170</sup>

“for the purpose of Part IX, means any dispute in an industry in relation to any labour matter between:

- (a) on one hand:
  - (i) one or more registered trade unions;
  - (ii) one or more employers;
  - (iii) one or more registered trade unions and one or more employers, and
- (b) on the other hand:
  - (i) one or more registered employers;
  - (ii) one or more employers;
  - (iii) one or more registered employers’ organization and one or more employers and included any dispute relating to:
    - (aa) the application or the interpretation of any provision of the Act or of any term and conditions of a contract of employment or a collective agreement, including the denial or infringement of any right conferred by or under any provision of the Act or any right conferred by any term and condition of a contract of employment or a collective agreement, or the recognition of a registered trade union as an exclusive bargaining agent or the refusal to so recognize any such trade union.
    - (bb) the existence or the non-existence of a contract of employment or a collective agreement.”

The Act classified labour disputes into two categories, namely disputes of interest and disputes of rights.<sup>171</sup> A dispute of interest was defined to mean any dispute in relation to any labour matter other than a matter referred to in the preceding paragraphs (aa) and (bb) of the definition of dispute. Daniels *et al*<sup>172</sup> expand this definition to include demands for wage increase, a medical aid scheme and involvement in decision-making in the workplace. This infers that the subject matter

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<sup>168</sup> Daniels *et al* “Dispute Resolution in Namibia” 324.

<sup>169</sup> *Ibid.*

<sup>170</sup> S 1 of the 1992 Act.

<sup>171</sup> S 1 of the 1992 Act.

<sup>172</sup> Daniels *et al* “Dispute Resolution in Namibia” 324.

of a dispute of interest is not regulated by any law, contract, wage determination, arbitration award or collective agreement.

On the other hand, a dispute of right was defined to mean any dispute in relation to a matter referred to in paragraphs (aa) and (bb) of the definition of dispute. Such a dispute was usually not subject to negotiations, but rather to adjudication or arbitration.<sup>173</sup>

Dispute resolution under the 1992 Act was contextualised within specific socio-economic and political conditions.<sup>174</sup> The reasons for this approach included the following: first, the maintenance of industrial peace and prevention of undue or excessive damage to the economy by industrial actions was crucial for the political success of the new democratic Government. Second, the Government directly shaped the climate of labour relations in the country through legislation. This was achieved by preventing industrial actions that arise from disputes of rights and by compelling the use of conciliation before industrial action was taken in disputes of interests.<sup>175</sup> Third, Government always has a direct and indirect interest in the outcome of negotiations. This is because wage negotiations raise a number of fiscal, inflationary and other concerns for Government. Thus, inadequate dispute resolution procedures can seriously undermine Government's fiscal and income policies.<sup>176</sup>

During the existence of the 1992 Act, the Namibian Government allowed the parties to labour disputes to embark on various options available to resolve their disputes. These included voluntary machineries and compulsory procedures and simultaneously provided criminal and civil sanctions for non-implementation of the settlements.<sup>177</sup> The following prevailed:

- The Office of the Labour Commissioner,<sup>178</sup> a ministerial appointee was central to the administration of the 1992 Act.

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<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> S 79 of the 1992 Act.

<sup>176</sup> Daniels *et al* "Dispute Resolution in Namibia".

<sup>177</sup> *Ibid.*

<sup>178</sup> S 3 of the 1992 Act.

- The Labour Commissioner received notices of labour disputes<sup>179</sup> and determined or categorised the disputes as either of right or interest.
- The notice had to contain full details of the parties, grounds of the alleged dispute and all steps taken by the parties to try to resolve the dispute.<sup>180</sup>
- The Labour Commissioner was empowered to establish the conciliation board<sup>181</sup> once he was satisfied that the disputants had taken all reasonable steps to resolve or settle the dispute in question.<sup>182</sup>
- The conciliation board was chaired by a chairperson mutually agreed on by the disputants or appointed by the Labour Commissioner in the absence of such nomination.<sup>183</sup> Moreover, the conciliation board was constituted of an equal number of people chosen by the disputing parties.<sup>184</sup>
- The Labour Commissioner, in consultation with the disputants, determined the terms of reference of conciliation boards<sup>185</sup> and thereafter all subsequent meetings were determined by the whole board.<sup>186</sup>
- If the dispute was one of right, any party to the dispute could approach the District Labour Court or Labour Court. However, failure by the party to participate in conciliation without good cause disqualified such a party from referring the dispute to the Labour Court.<sup>187</sup> Besides the Court, parties were at liberty to refer their dispute to arbitration at any given time by mutual agreement.<sup>188</sup>

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<sup>179</sup> S 74 of the 1992 Act.

<sup>180</sup> S 74(2) of the 1992 Act.

<sup>181</sup> S 75 of the 1992 Act.

<sup>182</sup> S 75(3) of the 1992 Act.

<sup>183</sup> S 75(1)(a) of the 1992 Act.

<sup>184</sup> S 75(1)(b) of the 1992 Act.

<sup>185</sup> S 76 of the 1992 Act.

<sup>186</sup> S 76 of the 1992 Act.

<sup>187</sup> S 79 of the 1992 Act.

<sup>188</sup> S 79(4) of the 1992 Act which was conducted in term of the Arbitration Act 42 of 1965.

- Unresolved disputes of interests gave parties various options. They could refer the dispute to voluntary mediation or arbitration,<sup>189</sup> embark on industrial action or let the status quo remain.<sup>190</sup> However, if it was a dispute of right a party could not embark on industrial action. The matter had to be referred to the Labour Court.

### 3.8.1 CONCILIATION BOARDS

Conciliation boards primarily dealt with disputes of interest. The 1992 Act required that after a deadlock was reached between the disputing parties, the matter must be referred to the Labour Commissioner who had statutory powers to establish a conciliation board to attempt to settle the dispute.<sup>191</sup> The Labour Commissioner had the flexibility to decide whether to establish a conciliation board or to refer the matter to the disputing parties to continue negotiations.<sup>192</sup> There were no prescribed time limits within which the conciliation board should be concluded. It was left to the parties to make rules in relation to the holding of and procedure at conciliation board meetings.<sup>193</sup> The proceedings of the conciliation board were confidential; therefore, the outcome could not be used as admissible evidence in any subsequent court proceeding instituted in terms of the Act, except with written consent of the person who made the communication in question.<sup>194</sup>

Following the meetings of the conciliation board, where the parties resolved the dispute, the board was required to prepare a memorandum of agreement in which the terms and conditions agreed upon were set out. A copy of such an agreement could be submitted to the Labour Commissioner for registration as if it was a collective agreement.<sup>195</sup> Settlement agreements originating from conciliation boards were treated in the same manner as collective agreements for the purpose of compliance and enforcement. The Act provided that collective agreements deposited

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<sup>189</sup> S 79(c)(i) of the 1992 Act.

<sup>190</sup> S 79(c)(ii) of the 1992 Act.

<sup>191</sup> Ss 74, 75 and 76 of the 1992 Act.

<sup>192</sup> S 75(b) of the 1992 Act.

<sup>193</sup> S 77(1) and (2) of the 1992 Act.

<sup>194</sup> S 77(3) of the 1992 Act.

<sup>195</sup> S 78 of the 1992 Act.

with the Labour Commissioner for registration, which included settlement agreements between the parties, were binding upon the parties thereto.<sup>196</sup>

In this respect, the Labour Court held in the *Golin t/a Golin Engineering v Cloete*<sup>197</sup> that where it was satisfied that the settlement agreement was voluntary, without duress or coercion, unequivocal and with full knowledge of its terms and implications, the Court would accept that a full and final settlement was reached, thus disposing of the dispute. Similarly, in *Mbome and Another v Foodcon Fishing Product*<sup>198</sup> the court held that in the absence of any arguments before it that the agreement had been induced by fraud, duress or misrepresentation, the settlement agreement was conclusive, consequently constituting full and final settlement of the dispute.

### **3.8.2 ARBITRATION IN TERMS OF THE 1992 ACT**

The 1992 Act made provision for voluntary resolution of labour disputes by arbitration. However, for this to happen it required the mutual agreement of the disputing parties.<sup>199</sup> The parties to the dispute, whether there was a dispute of interest or right, could at any time before or after the institution of the proceedings in the Labour Court refer the dispute to arbitration by mutual agreement. The process was voluntary and conducted in terms of the Arbitration Act.<sup>200</sup> The Labour Commissioner had powers to appoint an arbitrator, upon any application in writing by a party to a dispute, to arbitrate the dispute. His powers included the authority to determine the terms and conditions of arbitration.<sup>201</sup>

The award emanating from the arbitration process was final and binding on all parties to the arbitration agreement.<sup>202</sup> However, this was not conclusive of the dispute, as any of the parties dissatisfied with the arbitration award had recourse to the Labour Court to seek to set aside the award and substitute it with an order couched in

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<sup>196</sup> See s 68 read with s 72 of the 1992 Act.

<sup>197</sup> NLLP (1) 1998 121 NLC – Case No 7/94.

<sup>198</sup> NLLP (2002) (2) 202 NLC – Case No 7/99.

<sup>199</sup> S 79(1)(b) of the 1992 Act.

<sup>200</sup> Act No 42 of 1965.

<sup>201</sup> S 79(4)(b) of the 1992 Act.

<sup>202</sup> S 79(4)(c) of the 1992 Act.

different terms. This position was accepted in *Erongo Mining and Exploration Company Ltd t/a Navachab Gold Mine v Mineworkers Union of Namibia and Another*.<sup>203</sup>

Daniels *et al* <sup>204</sup> submits that conciliation and arbitration in terms of the 1992 Act undoubtedly assisted the parties to resolve their disputes. This was evident in the character of parties who had always abided by the terms of the agreements that were reached and the few challenges of arbitration awards in court. A possible challenge to this might be that the utilisation of the arbitration process in Namibia was rare.

### 3.8.3 RULE 6 PRE-TRIAL CONFERENCE BY LABOUR INSPECTORS

Labour inspectors<sup>205</sup> not only dealt with the general enforcement and administration of the 1992 Act, but played a vital role in the settlement of labour disputes. They investigated complaints and served as mediators or conciliators in the process of labour dispute resolution.<sup>206</sup> Labour inspectors were tasked to investigate and endeavour to resolve all labour complaints lodged with the Ministry of Labour. In addition, they were required in terms of the Rules of the District Labour Court to convene a conference before the trial started in the District Labour Court.<sup>207</sup> The purpose of such a conference was to endeavour to narrow the issues in dispute or to agree on certain issues in dispute to resolve the matter. They had powers to assist an employee in presenting an application or appeal to the Labour Court or complaint to the District Labour Court.<sup>208</sup>

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<sup>203</sup> NLLP (1) 12 NLC – Case No 2/93.

<sup>204</sup> Daniels *et al* “Dispute Resolution in Namibia” 332.

<sup>205</sup> Labour Inspectors appointed in terms of s 3 of the 1992 Act.

<sup>206</sup> S 104 of the 1992 Act.

<sup>207</sup> Daniels *et al* “Dispute Resolution in Namibia” 330.

<sup>208</sup> S 104(2)(J) of the 1992 Act.

### 3.8.4 DISTRICT LABOUR COURTS

The 1992 Act established the District Labour Courts as courts of first instance in labour matters on a magisterial level<sup>209</sup> in various magisterial districts of Namibia.

The Court had broader jurisdiction and powers, which included amongst others:<sup>210</sup>

“to hear all complaints lodged with such District Labour Court by an employee or employer (referred to as the complainant) against an employer or employee (referred to as respondent) for an alleged contravention of or alleged failure to comply with, any provision of the Act or any terms and conditions of a contract of employment or a collective agreement;

to make any order against, or in respect of the respondent or the complainant as the case may be, which it is empowered to make under any such provision of the Act”.

Appeals against the decisions of the District Labour Court were allowed on the question of law to the Labour Court, established at the same level as the High Court.<sup>211</sup> The Labour Court had exclusive jurisdiction to hear and determine any appeal from any District Labour Court. Moreover, the Court had to consider and give a decision on:

- any application made to the Labour Court in accordance with the provisions of the Act;
- any application to review and set aside or correct any decision taken by the Minister<sup>212</sup> or the Permanent Secretary,<sup>213</sup> the Commissioner, any inspector or any officer involved in the administration of the provisions of the Act; and
- to review the proceedings of any District Labour Court brought under review.

In *Northern Fishing (Pty) Ltd v Tsuseb*<sup>214</sup> the Labour Court delineated its powers and jurisdiction from that of the District Labour Court. The systems of litigation in the

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<sup>209</sup> S 15 of the 1992 Act.

<sup>210</sup> S 19 of the 1992 Act.

<sup>211</sup> Ss 15 and 16 of the 1992 Act.

<sup>212</sup> Minister of Labour as defined in s 1 of the 1992 Act.

<sup>213</sup> Permanent Secretary of the Ministry of Labour.

<sup>214</sup> NLLP 2002 (2) 253 NLC – Case LCA 9/99.

Labour Court were to a certain extent seen as user friendly.<sup>215</sup> This view is supported by the fact that litigants were allowed to appear in person or be represented by a legal practitioner.<sup>216</sup> Moreover, both the District Labour Courts and the Labour Court itself allowed assessors appointed by the Minister of Labour on the basis of their knowledge and experience in the field of labour law and in the interest of justice to participate in the proceedings.<sup>217</sup> Costs in the District Labour Court and the Labour Court were minimal. In the District Labour Court, for instance, the only cost involved for lodging a complaint was N\$25.00 in the form of a revenue stamp.<sup>218</sup> Neither the District Labour Court nor the Labour Court was empowered by statute to make any cost order against any party in relation to any proceeding instituted in these courts, except for frivolous and vexatious conduct by a party.<sup>219</sup> This proposition was reaffirmed in *Kaumbi v Tax Free Warehouse*<sup>220</sup> where the court ordered costs against the complainant's representative for failing to withdraw the case after having been advised that the appellant case had no merits, notwithstanding his failure to appear in court. Similarly, in *Anguwo and Others v Northern Fishing Company*<sup>221</sup> the Court ordered costs for both proceedings in the Court *a quo* and in the superior court against the respondent for failure to appear without good cause.

The 1992 Act treated contravention or failure to comply with an order of the Labour Court or District Labour Court as an offence and a person guilty of such an offence, on conviction, was liable to the penalties imposed by law for contempt of court.

Despite the daunting task of both the District Labour Court and the Labour Court, the court system was confronted by major challenges relating to:<sup>222</sup>

- the application of the rules and procedures in the District Labour Court;

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<sup>215</sup> Fenwick *Labour Law in Namibia* 17.

<sup>216</sup> S 18(2) of the 1992 Act.

<sup>217</sup> Ss 15(2), (3) and 4 of the 1992 Act.

<sup>218</sup> Daniels *et al* "Dispute Resolution in Namibia" 332.

<sup>219</sup> S 20 of the 1992 Act.

<sup>220</sup> NLLP 2002 (2) 273 NLC – Case No 26/99.

<sup>221</sup> NLLP 1998 (1) 196 NLC – Case No 1/97.

<sup>222</sup> Daniels *et al* "Dispute Resolution in Namibia" 332.

- the ineffectiveness and lack of competencies of the presiding officers;
- inexperience and lack of understanding of the dynamics in labour disputes and principles, such as fairness in labour disputes, by presiding officers;
- the process was seen as time-consuming in that insufficient facilities were allocated to the Court;
- cases were not allocated sufficient court days, coupled with unnecessary delays due to postponements and non-appearance.
- presiding officers were magistrates entrusted with other cases.

### **3.9 CHALLENGES OF THE 1992 ACT**

A few years after the implementation of the 1992 Act it became the subject of debate by social partners in the country. The Namibian Employers' Federation<sup>223</sup> argued that the 1992 Act failed to address the problems of the labour market. The NEF submitted that the 1992 Act had stifling effects on the labour market in that it failed to create an environment for job creation and lacked international competitiveness.<sup>224</sup> Premised on the above shortfalls, the NEF called for a labour legislative reform that places attention on job creation and economic growth.

Likewise, organised labour, under the umbrella of the National Union of Namibian Workers (NUNW),<sup>225</sup> pointed out that the existing labour legislation provided ineffective labour dispute resolution systems and that the whole Act was ineffective, requiring an overhaul. The NUNW advanced the following reasons to back their position:

- that the labour dispute resolution process took too long to resolve disputes;

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<sup>223</sup> Hereinafter referred to as "NEF".

<sup>224</sup> Musukubili *A Comparative Namibian Labour Dispute Resolution* 5.

<sup>225</sup> Hereinafter referred to as "NUNW".

- that the system was costly and was not accessible to those who do not have the resources to bring their complaints to the Labour Court (workers were not an exception);
- interdicts were granted by the Labour Court without affording the other party an opportunity to be heard and state its case;
- that the process was frustrating rather than promoting finality of the dispute;
- that the labour dispute system was adversarial and not user-friendly to the majority of workers; and
- that the labour dispute resolution system was full of loopholes that were abused by the parties to achieve their individual goals.

Government acknowledged the need to improve the 1992 Act, agreeing to allow for amendments to provisions relating to labour dispute resolution and other aspects that needed improvement. The Government conceded that the 1992 Act was drafted in a legal language that made it comprehensible only for lawyers. Furthermore, the Government agreed that the existing labour dispute prevention and resolution processes were cumbersome for users and thus accepted that, in drafting a new system, it was obliged to take into account the suggestions and proposals of social partners. However, these suggestions and proposals had nothing to do with dispute prevention and resolution.<sup>226</sup>

LaRRi<sup>227</sup> points out various weaknesses in the labour dispute resolution system under the 1992 Act. This author contends that the 1992 Act:

- was adversarial and fuelled confrontation instead of conciliation;
- was too bureaucratic and legalistic with very slow reaction times;

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<sup>226</sup> LaRRi *Labour Rights Report in Namibia* 9.

<sup>227</sup> *Ibid.*

- was not equally accessible to employers and employees, and appeared to disadvantage less well-off employees;
- undermined the process of collective bargaining in good faith through its adversarial nature and perpetuated a winner/loser concept;
- resulted in the District Labour Courts losing credibility due to severe backlogs, compounded by the difficulties in implementing orders and decisions of the District Labour Courts;
- revealed a lack of division of responsibility between court officials and labour inspectors in implementing and enforcing court orders;
- through the early involvement of third parties, such as lawyers, labour consultants and the police, complicated procedures, delaying the resolution of conflicts and provoking violence; and
- lacked the continued presence of mediators and conciliators.

Despite the above shortfalls, the 1992 Act was described as the “best compromise achievable”<sup>228</sup> resulting from the lengthy process of consultation. However, Thompson<sup>229</sup> offers it less praise. He submits that although the new law represented a significant advance, creating a break with the past and providing a framework of clear rights and duties coupled with a viable model of labour dispute resolution, there was not sufficient consultation with social partners; hence it was “superimposed”. He suggests that it was later necessary for Namibia to return to the drawing board for a less ambitious, but possibly more indigenous solution.<sup>230</sup>

For the reasons above and pursuant to the ILO sponsored Wiehahn Namibia Report,<sup>231</sup> the Cabinet instructed the Minister of Labour to redraft the whole Act in

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<sup>228</sup> Bauer “The Namibian Labour Act best Compromise Achievable” (1992) 1 *Namibia Review* 18.

<sup>229</sup> Thompson “Namibia New Labour Code” (1991) Vol. 7 *Employment law* 98 at 101.

<sup>230</sup> Fenwick *Labour Law in Namibia* 3 and 20.

<sup>231</sup> The Wiehahn Commission Namibia recommended that the new labour system when put in place, be flexible and allow maximum growth and development. (ii).

plain language, accommodating the new labour dispute prevention and resolution system and other agreed amendments by social partners.

### 3.10 DEVELOPMENT OF THE NEW LABOUR-POLICY FRAMEWORK

Given numerous submissions by social partners on the state of the 1992 Act, the Namibian Government accepted that the Act needed to be revised. The reason for such a revision was to simplify the labour dispute resolution system and thereby limit the role of the Labour Courts in regulating harmful industrial actions.<sup>232</sup> The revision process took several years of intensive negotiations between social partners. It was only after the devastating strike at Tsumeb Corporation Limited, including Tsumeb, Kombat and Otjihase Mines,<sup>233</sup> that all stakeholders<sup>234</sup> in labour relations came to full realisation that the 1992 Act required an urgent and complete overhaul.<sup>235</sup>

The revision process started in January 1998.<sup>236</sup> Government approached the ILO for assistance and secured funding from the ILO Swiss-Project.<sup>237</sup> A taskforce team was appointed, comprising of social partners with strong inputs or influence from outside, essentially in the form of South African-based labour-law experts with excellent knowledge of the CCMA.<sup>238</sup>

The taskforce was given the requirements that the proposed labour dispute resolution system be efficient yet simple, impartial with high-quality outcomes, and user-friendly and cost-effective.<sup>239</sup> Fenwick<sup>240</sup> points out that the taskforce exhaustively deliberated the development of the new labour dispute prevention and resolution system that culminated in the agreement that the envisaged system should retain basic features, such as the Labour Court, the Labour Commissioner and the

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<sup>232</sup> Fenwick "Labour Law Reform in Namibia" 336.

<sup>233</sup> The Copper mine is situated in Tsumeb, in Oshikoto Region of Namibia.

<sup>234</sup> The Ministry of Labour's stakeholders includes: Employers' group, Trade unions, International Organisations(ILO) private sectors, and other Ministries. See GRN Ministry of Labour and Social Welfare Strategic Plan 2011/12- 2015-2016. 29.

<sup>235</sup> Musukubili *A Comparative Namibia Labour Dispute Resolution* 6.

<sup>236</sup> Fenwick *Labour Law in Namibia* 21.

<sup>237</sup> Musukubili *A Comparative Namibia Labour Dispute Resolution* 6.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

<sup>240</sup> Fenwick *Labour Law in Namibia* 22.

compulsory conciliation and arbitration of disputes. The author further states that the taskforce agreed on other aspects that required analysis, such as the operation of the District Labour Court, the prospects for arbitration-of-rights disputes, the insufficient use of conciliation procedures, and the concern that the dispute resolution mechanism that prevailed was primarily reactive in nature and adversarial.

Collectively, Government and social partners agreed on a new system with the following characteristics:<sup>241</sup> easily accessible by ordinary workers; simple, quick and user-friendly; sufficiently flexible to deal with the different nature of labour disputes; independent, legitimate and impartial; and a system that is free from technical problems,<sup>242</sup> which promotes representation by trade unions and employers as well as the involvement of other interest groups.

Ultimately, the taskforce agreed on a number of principles that underpinned changes to the 1992 Act. These principles include:<sup>243</sup> first, that the Minister should play a greater role in respect of the power to issue codes of good practice to guide the parties in exercising their rights and duties. LaRRi <sup>244</sup> submits that these proposed codes should not be merely informative, but that conciliators, arbitrators and the Labour Court take them into account in determining any labour dispute. Moreover, that the Minister shall have power to intervene in “pathological situations”.<sup>245</sup> Second, that the role of the Labour Advisory Council be expanded to include drafting the codes of good practice, a consultative role in relation to the appointment of members of the Labour Court, and to conciliation and arbitration in the office of the Labour Commissioner.

Third, that the role of the Labour Commissioner be expanded to include the suggestion that rights disputes must first be referred to the Labour Commissioner for conciliation together with all interest disputes. The process envisaged was that,

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<sup>241</sup> LaRRi *Labour Rights Report in Namibia* 10.

<sup>242</sup> My emphasis, this is one of the bases of the study.

<sup>243</sup> Fenwick *Labour Law in Namibia* 22.

<sup>244</sup> LaRRi *Labour Rights Report in Namibia* 10.

<sup>245</sup> Fenwick *Labour Law in Namibia* 22. The author argues that “pathological situation” is undefined. My assumption would be that these are the situations contemplated under section 80 of the Labour Act, 2007 in respect of disputes that affect national interests.

where conciliation was unsuccessful, the dispute had to proceed to arbitration or parties had to resort to industrial action. The taskforce suggested that conciliation and arbitration be within the domain of the Labour Commissioner who will coordinate and centralise the process. It was contemplated that by doing so a high proportion of disputes would be resolved at conciliation level before or without resorting to adversarial procedures, such as industrial action or litigation in courts.<sup>246</sup> Lastly, the task team proposed a dedicated team of Labour Court judges and that the Labour Court primarily hears appeals, reviews and cases of urgent interdicts.

The activities of the taskforce team were coordinated by the ILO, with the technical drafting assisted by Professor Halton Cheadle and Mr Charles Nupen.<sup>247</sup> The draft Labour Bill was transmitted to ILO headquarters for technical comments on its compliance with international labour standards.<sup>248</sup> Ultimately, the process gave birth to the 2004 Labour Act, which laid the foundation for the new system of labour dispute resolution through conciliation and arbitration by the Labour Commissioner.<sup>249</sup>

The 2004 Act was, however, not put into full operation. Social partners submitted that the Act was coupled with typographical flaws that could cause ambiguity in its interpretation and application.<sup>250</sup> This led to the redrafting the Act into a simplified version, acceptable to all social partners. The result was the Labour Act of 2007.<sup>251</sup>

### **3.11 THE NEW SCHEME OF LABOUR DISPUTE PREVENTION AND RESOLUTION IN TERMS OF THE LABOUR ACT, 2007**

The Labour Act, 2007, was signed into law on 31 December 2007,<sup>252</sup> but only came into operation on 1 November 2008,<sup>253</sup> a year after its promulgation. The Act proclaims in its preamble,<sup>254</sup> among other things, to:

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<sup>246</sup> Fenwick *Labour Law in Namibia* 22.

<sup>247</sup> Professor Halton Cheadle is a Labour-Law Expert from the University of Cape Town.

<sup>248</sup> Fenwick *Labour Law in Namibia* 22.

<sup>249</sup> Musukubili *A Comparative Namibian Labour Dispute Resolution* 7.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> *Government Gazette* of the Republic of Namibia No 3971 Notice No 236.

<sup>253</sup> *Government Gazette* of the Republic of Namibia No 4151 Notice No 260.

- envisage consolidation of and amend the labour laws;
- establish a comprehensive labour law for all employers and employees;
- entrench fundamental labour rights and protection;
- regulate basic terms and conditions of employment;
- regulate collective labour relations;
- provide for the systematic prevention and resolution of labour disputes;<sup>255</sup>
- establish the LAC, the Labour Court, the Wages Commission and the Labour Inspectorate; and
- provide for the appointment of the Labour Commissioner.

The new scheme of labour dispute prevention and resolution is central to the Labour Act, 2007.<sup>256</sup> Labour disputes are no longer resolved through the District Labour Courts,<sup>257</sup> but through compulsory conciliation and arbitration by the Labour Commissioner. The Act classifies labour disputes into two categories. The first, a dispute of interest, is defined to mean any dispute concerning a proposal for or changes to conditions of employment, but does not include a dispute that the Act or any other Act requires to be resolved by adjudication in the Labour Court or other court of law or arbitration.<sup>258</sup>

A dispute of right, on the other hand, is defined to include a complaint relating to the breach of a contract of employment or a collective agreement; a dispute referred to

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<sup>254</sup> Preamble to the Labour Act, 2007.

<sup>255</sup> My emphasis.

<sup>256</sup> See chapter 8 of the Labour Act, 2007.

<sup>257</sup> Labour Research Services and LaRRi *Namibia Country Review of Collective Bargaining* (2010) 10.

<sup>258</sup> S 1 of the Labour Act, 2007.

the Labour Commissioner in terms of section 46 of the Affirmative Action Act;<sup>259</sup> any dispute referred in terms of section 82(16) of the Act; or any dispute that is required to be referred to arbitration in terms of the Act.<sup>260</sup>

The Act requires all labour disputes to be conciliated before resorting to arbitration.<sup>261</sup> The conciliation process must attempt to resolve the dispute within 30 days from the date of referral,<sup>262</sup> however the parties may agree to a longer period.<sup>263</sup> Where conciliation does not resolve the dispute and where it is a dispute of right, such a dispute is subject to arbitration.<sup>264</sup> Conversely, disputes of interests are pursued further by embarking on industrial action or referred to arbitration by agreement.<sup>265</sup> The Labour Commissioner is central to the new process of labour dispute prevention and resolution, and is the officer to whom notices of disputes must be referred.<sup>266</sup> He or she is required to oversee the process of conciliation and arbitration as provided for in the Act.

### **3.12 POWERS AND FUNCTIONS OF THE LABOUR COMMISSIONER**

The Labour Act, 2007 provides for the appointment of the Labour Commissioner and the Deputy Labour Commissioner, each of whom must be a person who is competent to perform the functions of a conciliator and arbitrator.<sup>267</sup> Although the social partners had recommended that the Labour Commissioner and the Deputy Labour Commissioner be appointed outside of the Public Service, the Minister of Labour appoints the Labour Commissioner and the Deputy Labour Commissioner in terms of the laws governing the Public Service.<sup>268</sup> Hence the Labour Commissioner and his deputy are not independent of the State.

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<sup>259</sup> Act No 29 of 1998.

<sup>260</sup> S 84 of the Labour Act, 2007.

<sup>261</sup> S86(5) of the Labour Act, 2007 provides that ...[u]nless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.

<sup>262</sup> S 82(10)(a) of the Labour Act, 2007.

<sup>263</sup> S 82(10)(b) of the Labour Act, 2007.

<sup>264</sup> S 86 of the Labour Act, 2007.

<sup>265</sup> S 74 of the Labour Act, 2007.

<sup>266</sup> S 82(8) and section 86(3) of the Labour Act, 2007.

<sup>267</sup> S 120(1) of the Labour Act, 2007.

<sup>268</sup> See Public Service Act No 13 of 1995.

Despite their appointment as civil servants, the Labour Commissioner and all conciliators and arbitrators under the office are required to be independent of any influence and be impartial in the performance of their duties.<sup>269</sup> The Labour Commissioner has national jurisdiction and maintains offices in all 13 political regions of Namibia and other proclaimed towns.<sup>270</sup> A dispute must be referred to the Labour Commissioner in any of the regional labour offices.<sup>271</sup> However, the dispute must be conciliated or arbitrated in the region in which the cause of action arose unless the Labour Commissioner directs otherwise.<sup>272</sup>

Conciliators and arbitrators are appointed by the Minister,<sup>273</sup> either on a full-time or part-time basis, and the Labour Commissioner may designate them to conciliate or arbitrate a dispute.<sup>274</sup> The Labour Commissioner is the head of the Office and is responsible for its day-to-day running and overseeing the process of conciliation and arbitration.<sup>275</sup>

Section 121 of the Labour Act, 2007 outlines the statutory functions of the Labour Commissioner, including various prescribed forms for referring different types of disputes for either conciliation or arbitration.

These functions include:

- (a) to register disputes from employees and employers over contraventions, the application, interpretation or enforcement of this Act and to take appropriate action;
- (b) to attempt, through conciliation or by giving advice, to prevent disputes from arising;

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<sup>269</sup> S 85(6) of the Labour Act, 2007.

<sup>270</sup> Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner *Government Gazette* of the Republic of Namibia No 4151 Notice No 262(hereinafter referred to as the "Rules of the Labour Commissioner") See Annexure 1.

<sup>271</sup> S 86(1)(a) and (b) of the Labour Act, 2007.

<sup>272</sup> Rule 24 of the Rules of the Labour Commissioner.

<sup>273</sup> Ss 82(1)and (2) and 85(3)and(4) of the Labour Act, 2007.

<sup>274</sup> Ss 82(3) and 85(5) of the Labour Act, 2007.

<sup>275</sup> GRN –Office of the Labour Commissioner: Annual Report (2011/12) 10.

- (c) to attempt, through conciliation, to resolve disputes referred to the Labour Commissioner in terms of this Act or any other law;
- (d) to arbitrate a dispute that has been referred to the Labour Commissioner if the dispute remains unresolved after conciliation, because
  - (i) this Act requires arbitration; or
  - (ii) the parties to the dispute have agreed to have the dispute resolved through arbitration; and
- (e) to compile and publish information and statistics of the Labour Commissioner's activities and report to the Minister.

Moreover, the Labour Commissioner may-

- (a) if asked, advise any party to a dispute about the procedure to follow;
- (b) offer to resolve a dispute that has not been referred to the Labour Commissioner through conciliation;
- (c) intervene in any application made to the Labour Court in terms of section 79;  
or
- (d) apply on the Labour Commissioner's own initiative, to the Labour Court for a declaratory order in respect of any question concerning the interpretation or application of any provision of this Act.

In the pursuance of these functions, the Labour Commissioner, conciliators and arbitrators do not incur any personal civil liabilities for acts or omissions in good faith.<sup>276</sup>

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<sup>276</sup> S 134 of the Labour Act, 2007.

### 3.13 COMMITTEE FOR DISPUTE PREVENTION AND RESOLUTION

The Labour Act, 2007<sup>277</sup> creates a tripartite Committee for Dispute Prevention and Resolution as a subordinate structure of the LAC. The overall functions of this Committee include recommending to the LAC:

- the rules for conducting conciliation and arbitration;
- policy and guidelines on dispute prevention and resolution for application by the Labour Commissioner;
- the code of ethics for conciliators and arbitrators;
- the qualification and appointment of conciliators and arbitrators; and
- to review the overall performance of the dispute prevention and resolution performed by the Labour Commissioner on a regular basis and report to the LAC.

### 13.14 CONCILIATION BY THE LABOUR COMMISSIONER

Section 86 of the Labour Act, 2007 extensively regulates the resolution of labour disputes through conciliation. The Act defines “conciliation” to include mediating a dispute; conducting a fact-finding exercise; and making an advisory award if it will enhance the prospect of settlement or if the parties to the dispute agree.<sup>278</sup> In an elaborative context, “conciliation” is defined to mean to reconcile or bring together, especially opposing sides in a labour dispute.<sup>279</sup> It is intended to allow the parties to arrive at their own solution with the assistance of the conciliator rather than through enforcement of the law.<sup>280</sup>

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<sup>277</sup> S 101 of the Labour Act, 2007.

<sup>278</sup> S 1 of the Labour Act, 2007.

<sup>279</sup> Du Toit, Bosch, Woolfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law – A Comparative Guide*(2006) 110.

<sup>280</sup> *Ibid.*

The Court held that conciliation is not a court or tribunal within the meaning of Article 12(1)(a) of the Constitution. Consequently, conciliation proceedings lack the trappings of a court or tribunal and are rather an informal avenue for resolving labour disputes. Moreover, the Court held that a conciliator has no competence to make a legally binding award against a party against whom a dispute has been referred and who fails to attend a conciliation meeting.<sup>281</sup>

The rules of the Labour Commissioner prescribe conciliation proceedings to be private and confidential and to be conducted without prejudice on any party to the dispute.<sup>282</sup> In terms of the new scheme of dispute prevention and resolution, the following disputes go through the conciliation process:

- disputes that allege discrimination;<sup>283</sup>
- disputes regarding the non-compliance with, contravention, application or interpretation of Part A, B, or C<sup>284</sup> of the Labour Act, 2007, except for disputes relating to the recognition of trade unions as exclusive bargaining agents that proceed to arbitration;
- disputes provided for in section 80,<sup>285</sup> namely those affecting national interests;
- disputes of interest;<sup>286</sup>
- disputes referred in terms of section 45 of the Affirmative Action Act;<sup>287</sup>
- disputes referred to the Minister;<sup>288</sup> and

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<sup>281</sup> *Purity Manganese (Pty) Ltd v Tjeripo Katzao and Other* Case No LC 80/2010 at par 29, delivered on 11 July 2011 “reportable”.

<sup>282</sup> Rule 13 of the Labour Commissioner's Rules.

<sup>283</sup> S 7(4)(a) of the Labour Act, 2007.

<sup>284</sup> S 69(1) of the Labour Act, 2007.

<sup>285</sup> Labour Act, 2007.

<sup>286</sup> S 81(a) of the Labour Act, 2007.

<sup>287</sup> S 81(b) of the Labour Act, 2007.

<sup>288</sup> S 81(c)(i) of the Labour Act, 2007.

- disputes referred to the Labour Court.<sup>289</sup>

### 3.14.1 THE CONCILIATION PROCESS

The Labour Act, 2007<sup>290</sup> requires that a dispute must be referred to the Labour Commissioner for conciliation on a prescribed Form LC 21<sup>291</sup> and that copies of the referral be served on the other parties to the dispute using the prescribed Form LG36.<sup>292</sup> The Labour Commissioner designates conciliators using the prescribed Form LC 22,<sup>293</sup> set out in Annexure 2,<sup>294</sup> to attempt to resolve the dispute and issues a notice<sup>295</sup> of conciliation meeting on the prescribed Form LC23.<sup>296</sup>

The conciliator has a 30-day period from the date of referral, unless the parties agree to a longer period, within which to resolve the dispute.<sup>297</sup> At the end of the conciliation meeting, the conciliator must issue a certificate of outcome on Form LC 24<sup>298</sup> for resolved disputes and Form LC 25<sup>299</sup> for unresolved disputes. The certificate must state whether the dispute has been resolved.<sup>300</sup> If the dispute is not resolved, the conciliator remains bound to the dispute until it is settled or disposed of on expiration of the prescribed time period allotted.<sup>301</sup> The conciliator is required to call several meetings within the 30-day period if he entertains the prospect of settlement.<sup>302</sup> The

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<sup>289</sup> S 81(c)(ii) of the Labour Act, 2007.

<sup>290</sup> S 82(7) of the Labour Act, 2007.

<sup>291</sup> *Government Gazette* of the Republic of Namibia No 4181 Notice No261: Labour General regulations(hereinafter referred to as the "Labour Regulations") No18.

<sup>292</sup> *Government Gazette* of the Republic of Namibia No 4181 Notice No262 – Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (hereinafter referred to as the "Rules of the Labour Commissioner").

<sup>293</sup> Labour Regulations 18(2).

<sup>294</sup> Of the Rules of the Labour Commissioner.

<sup>295</sup> The Labour Commissioner is required to give at least seven days' written notice of the conciliation meeting or unless the parties agree to a shorter period. Rule 12 of the Rules of the Labour Commissioner.

<sup>296</sup> Labour Regulation 18(2).

<sup>297</sup> S 82(10)(b) of the Labour Act, 2007.

<sup>298</sup> Labour Regulations 18(3).

<sup>299</sup> Labour Regulations 18(4).

<sup>300</sup> S 82(15) and (16) of the Labour Act, 2007.

<sup>301</sup> S 82(a) of the Labour Act, 2007.

<sup>302</sup> *Purity Manganese (Pty)Ltd v Tjeripo Katzao and Others* L/C 80/2010 dated 11 July 2011 at par 27.

Labour Act, 2007<sup>303</sup> requires that where the conciliator considers no prospect of settlement at the end of the 30-day period, he must refer the matter to arbitration with the agreement of the parties. It is submitted that the expiration of the 30-day period or an agreed longer period automatically terminates the conciliator's jurisdiction.<sup>304</sup>

During conciliation, the conciliator has wider statutory powers, which include, amongst others, to subpoena any person to give evidence, administer an oath, and to question the witnesses.<sup>305</sup> Failure to comply therewith is an offence, making the person failing to do so liable to a fine not exceeding N\$10,000 or to imprisonment for a period not exceeding two years or to both a fine and imprisonment.<sup>306</sup> In *Purity Manganese (Pty) Ltd v Tjeripo Katzao and Others*,<sup>307</sup> Damaseb JP held that conciliation procedures produce no binding legal effect. It is therefore unnecessary for the conciliator to administer an oath and receive evidence. This decision has led to the alteration of section 82(18) of the Labour Act, 2007, by the introduction of a new amendment to the Act.<sup>308</sup>

Neither the labour regulations nor the Act make any provision for the enforcement of a settlement agreement, except for the wording appearing on Form LC 24 that the "parties reached a full and final settlement".<sup>309</sup> In the event of breach by either party it is unclear whether the aggrieved party may cancel the agreement and revive the dispute and which forum has the jurisdiction to enforce the settlement agreement. Section 90 of the Labour Act does not apply to settlement agreements, but only to the enforcement of arbitration awards.<sup>310</sup>

In the absence of any directive provision in the Act, the appropriate forum appears to be the Labour Court. Parties can approach the Labour Court with an application to

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<sup>303</sup> S 82(16) of the Labour Act, 2007.

<sup>304</sup> Du Toit *et al Labour Relations Law* 111.

<sup>305</sup> S 82(18) of the Labour Act, 2007.

<sup>306</sup> S 82(19) of the Labour Act, 2007.

<sup>307</sup> *Purity Manganese (Pty)Ltd v Tjeripo Katzao* par 11.

<sup>308</sup> Labour Act, 2007, relating to the powers of the conciliator.

<sup>309</sup> See preface of Form LC 24.

<sup>310</sup> *Purity Manganese (Pty) Ltd v Tjeripo Katzao* at par 22.

pronounce the settlement an order of court<sup>311</sup> under the provision of sections 117(1)(d) or (h) of the Labour Act, 2007.

### 3.14.2 FAILURE TO ATTEND CONCILIATION

Section 83 of the Labour Act, 2007 provides for the consequences for failing to attend conciliation meetings. The Act empowers the conciliator to dismiss the matter if the party who referred it fails to attend the conciliation meeting,<sup>312</sup> or that the conciliator may determine the matter if a party to the dispute fails to attend the conciliation meeting.<sup>313</sup> However, dismissal or unqualified determination may be reversed on application made to the Labour Commissioner by an affected party, only if he is satisfied that there were good grounds for failure to attend the conciliation meeting.<sup>314</sup>

In *Purity Manganese (Pty) Ltd v Tjeripo Katzao*<sup>315</sup> the Court held that conciliation is not a tribunal, and, consequently, that any determination made by a conciliator shall have no legal binding effect. Moreover, the Court stated that the exclusion from the definition of conciliation of any punitive or coercive measure is further proof that no binding effect is contemplated in respect of a determination under Part B section 83(2)(b) of the Labour Act, 2007.<sup>316</sup> The Court inferred that the determination contemplated in section 83(2)(b) of the Labour Act, 2007 includes that the conciliator remains bound to the matter and can call further meetings if there is a prospect of settlement before the expiry of the 30-day period. Further that if the conciliator considers that there are no prospects of settlement or the 30-day period has expired, the matter must be referred for arbitration. Therefore, no other determination is contemplated in the section.<sup>317</sup>

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<sup>311</sup> In this case, *Afrideca Construction (Pty) Ltd v Alfons Iiyambo and another* Case No 89/2010 delivered on 24 February 2012 (reportable). The settlement agreement between the parties was made an order of court.

<sup>312</sup> S 83(3)(a) of the Labour Act, 2007.

<sup>313</sup> S 83(3)(b) of the Labour Act, 2007.

<sup>314</sup> S 83(3) of the Labour Act, 2007.

<sup>315</sup> Par 22.

<sup>316</sup> *Purity Manganese (Pty) Ltd v Tjeripo Katzao* par 24.

<sup>317</sup> *Purity Manganese (Pty) Ltd v Tjeripo Katzao* par 27.

### 3.15 ARBITRATION OF LABOUR DISPUTES BY THE LABOUR COMMISSIONER

Chapter 8, Part C of the Labour Act, 2007 provides for the arbitration procedure and establishes arbitration tribunals for the purpose of resolving labour disputes as contemplated in the Namibian Constitution.<sup>318</sup> The Constitution states the following:

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

The Labour Court has since affirmed that the arbitration procedure envisaged in Part C of Chapter 8 of the Labour Act, 2007 is a tribunal and is accorded the trappings of a judicial forum. Further, that as a constitutionally established tribunal, decisions emanating from these forums are given binding effect and made enforceable.<sup>319</sup>

To this end, the Act defines “arbitration” to mean arbitration proceedings conducted before an arbitration tribunal established in terms of section 85 of the Labour Act, 2007.<sup>320</sup> Bosch *et al*<sup>321</sup> describes arbitration as a process whereby a dispute is referred by one or all of the disputing parties to a neutral third party, the arbitrator, who hears the respective cases fairly by receiving and considering evidence and submissions from the parties before making a final and binding decision.

Du Toit *et al*<sup>322</sup> submit that arbitration is similar to litigation, but less formal. Arbitration originated as a consensual and often expedited process to finally resolve factual disputes. Given the nature of arbitration, processes are either compulsory or voluntary, with compulsory arbitration being a key feature of the Labour Act, 2007.<sup>323</sup> The purpose of arbitration is to dispose of a dispute finally through an award,<sup>324</sup> which is, however, subject to appeal or review on the question of law or its merits.<sup>325</sup>

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<sup>318</sup> Article 12(1)(a) of the Namibian Constitution.

<sup>319</sup> *Purity Manganese (Pty) Ltd v Tjeripo Katzao* par 21.

<sup>320</sup> S 1 of the Labour Act, 2007.

<sup>321</sup> Bosch *et al Conciliation and Arbitration* 83.

<sup>322</sup> Du Toit *et al Labour Relations Law* 117.

<sup>323</sup> S 86 of the Labour Act, 2007.

<sup>324</sup> Du Toit *et al Labour Relations Law* 117.

<sup>325</sup> S 89 of the Labour Act, 2007.

Besides compulsory arbitration, the Act also provides for private or voluntary arbitration.<sup>326</sup> Arbitration is usually a hearing *de novo* of all disputed issues and, although resembling adjudication, it remains a quasi-judicial process rather than adjudication.<sup>327</sup>

Arbitration under the Labour Act, 2007 provides the framework for easily accessible, public-funded and efficacious means to deal with labour disputes of rights, irrespective of whether of a collective or individual nature.<sup>328</sup> Arbitration takes over the functions of the former District Labour Courts and seeks to remove the shortcomings of the previous system, thereby resolving labour disputes as soon as possible in the best interest of all parties.<sup>329</sup>

The following disputes are referred to arbitration in terms the Labour Act, 2007:

- disputes about the application of fundamental rights as described in Chapter 2 of the Labour Act, 2007,<sup>330</sup> except for discrimination disputes that are referred for conciliation;<sup>331</sup>
- disputes about the application of the provisions of Chapter 3 of the Labour Act, 2007, which prescribes basic conditions of employment;<sup>332</sup>
- disputes about the application of Chapter 4 of the Labour Act, which provides the obligation relating to occupational health and safety;<sup>333</sup>
- disputes about unfair labour practices;<sup>334</sup>

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<sup>326</sup> S 90 of the Labour Act, 2007.

<sup>327</sup> Du Toit *et al Labour Relations Law* 117.

<sup>328</sup> Van Rooyen *Namibian Labour Lexicon* (2011)12.

<sup>329</sup> *Ibid.*

<sup>330</sup> S 7(3) of the Labour Act, 2007.

<sup>331</sup> S 7(4) of the Labour Act, 2007.

<sup>332</sup> S 38(1) and (3) of the Labour Act, 2007.

<sup>333</sup> S 47(1) and (3) of the Labour Act, 2007.

<sup>334</sup> S 51(1) and (3) of the Labour Act, 2007.

- disputes about recognition of a registered trade union as an exclusive bargaining agent;<sup>335</sup>
- disputes arising from designated essential-services sectors;<sup>336</sup>
- disputes referred to in section 84 of the Labour Act, 2007 relating to disputes about contracts of employment, or collective-agreement disputes referred in terms of section 46 of the Employment Equity Act, 1998; and
- disputes referred under section 82(16) by agreement after unsuccessful conciliation.

### 3.16 ARBITRATION PROCEDURE AND MAIN FORMS

The Labour Act, 2007 prescribes that a dispute must be referred to the Labour Commissioner or any labour office of the Ministry, in writing<sup>337</sup> on Form LC 21<sup>338</sup>. The Act further requires that a dispute be referred for arbitration within six months in disputes arising from dismissals from employment,<sup>339</sup> or within one year in other cases.<sup>340</sup> Although the Rules of the Labour Commissioner provide for condonation (failure to comply with the rules), the Court has held that if a dispute is referred to the Labour Commissioner after the expiration of six months, the referral is out of time and in fact prescribed in terms of section 86(2) of the Labour Act, 2007. At such a point the Labour Commissioner has no jurisdiction and if the dispute continues to be entertained, the Commissioner acts *ultra vires*.<sup>341</sup>

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<sup>335</sup> S 69(4) of the Labour Act, 2007.

<sup>336</sup> S 78(3) of the Labour Act, 2007.

<sup>337</sup> S 86(1) of the Labour Act, 2007.

<sup>338</sup> Rule 14(1)(b) of the Rules of the Labour Commissioner. Form LC 21 contains information on the nature of the dispute and the particulars of the applicant and respondent. Further, it requires a summary of the dispute to be attached giving the facts and circumstances that gave rise to the dispute and the steps that have been taken by the parties to resolve the dispute.

<sup>339</sup> S 86(1)(a) of the Labour Act, 2007.

<sup>340</sup> S 86(1)(b) of the Labour Act, 2007.

<sup>341</sup> *Standard Bank Namibia v Romeo Mouton* Case No LCA 04/2011 delivered on 29 July 2011 par 9.

Similarly, in *Nedbank Namibia Limited v Jaqueline Wandl*<sup>342</sup> the Court held that a dismissal claim launched out of the prescribed time limit in terms of section 86(2)(a) of the Labour Act, 2007 could not be considered. Furthermore, that the arbitrator was not authorised to consider the issue at all, as doing so constitutes acting *ultra vires* of the arbitrator's authority and the results are consequently a nullity.

Once the Labour Commissioner is satisfied with the requirements set out above, he must give the parties at least 14 days' notice of the arbitration hearing on Form LC 28.<sup>343</sup> The Labour Commissioner must appoint an arbitrator<sup>344</sup> who will attempt to resolve the dispute by conciliation, unless that process was already exhausted and the dispute remained unresolved.<sup>345</sup> It is clear that the Labour Act, 2007 does not provide a specific right to a party to object to an arbitrator continuing to deal with a matter after unsuccessful conciliation.<sup>346</sup> In this respect, the court has held that the ADR mechanism provided by the Labour Act, 2007 requires the same arbitrator to attempt to resolve the dispute through conciliation before embarking on arbitration, should conciliation be unsuccessful in resolving the dispute. The Court further held that any arguments against such system held no merits and that it had to be rejected.<sup>347</sup> Rule 20<sup>348</sup> provides the purpose of such a conciliation-arbitration<sup>349</sup> process as to assist the parties to reach consensus on issues in order to shorten the proceeding. These include:

- (a) facts that are agreed to between the parties;
- (b) facts that are in dispute;
- (c) the issues that the arbitrator is required to decide;

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<sup>342</sup> LCA 66/2010.

<sup>343</sup> Rule 15 of the Rules of the Labour Commissioner.

<sup>344</sup> S 86(4)(a) of the Labour Act, 2007.

<sup>345</sup> S 86(5) of the Labour Act, 2007.

<sup>346</sup> Fenwick *Labour Law in Namibia* 33.

<sup>347</sup> *Old Mutual Life Assurance Company Namibia Limited v Linda Schultz* Case No 84 /2010 delivered on 27May 2011 parr 15 & 16.

<sup>348</sup> Rules of the Labour Commissioner.

<sup>349</sup> Hereinafter referred to as "Con-Arb".

- (d) the precise relief claimed and, if compensation is claimed, the amount of the compensation and how it is calculated;
- (e) the sharing and exchange of relevant documents;
- (f) whether an on-site visit is needed;
- (g) whether evidence on affidavit will be admitted with or without the right of any party to cross-examine the person who made the affidavit;
- (h) which party must present its case first;
- (i) the resolution of any preliminary points that are intended to be taken; and
- (j) any other means by which the proceedings may be shortened.

### **3.16.1 ARBITRATION PROCESS**

The Labour Act, 2007<sup>350</sup> gives the arbitrator discretion to conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly and to deal with the substantial merits of the dispute with minimal legal formalities.<sup>351</sup> The Labour Court held that this provision allows much latitude to arbitrators with regard to the conduct of the arbitration proceedings before them.<sup>352</sup> The Court further stated that arbitrators had to take into account Rule 18 of the Labour Commissioner's rules stated above. The Court further encouraged arbitrators, where appropriate, to rely on common sense and personal experience in arbitration proceedings, particularly in order to accept the truth of facts that are so well known that to prove them would be completely unnecessary or even absurd.<sup>353</sup>

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<sup>350</sup> S 86(7)(a) and (b) of the Labour Act, 2007.

<sup>351</sup> Rule 18 of the Rules of the Labour Commissioner.

<sup>352</sup> *Namibia Power Corporation (Pty) Ltd v Gerald Nantinda* Case No38/2008 delivered on 22 March 2012 par 33.

<sup>353</sup> *Atlantic Chicken Company (Pty)Ltd v Philip Mwandingi(Arbitrator) and Another* Case No LC 105/2011delivered on 25 April 2012.

Similarly, the Court<sup>354</sup> held that the aim of a labour tribunal hearing was not to require the strict procedure of a court of law, but rather to make it more flexible. However, in doing so, the Labour Act has placed specific responsibility on the arbitrator, which includes impartiality and independence.<sup>355</sup> In this respect, Miller J points out that the manner in which the proceedings of the arbitration were conducted should never create any perception of partiality or doubt of neutrality on the side of the arbitrator.<sup>356</sup> The Court went on to emphasise that an arbitration hearing remained a tribunal that had to comply with the requirements of the Namibian Constitution in respect of fair hearings and that this had to remain paramount. The court thus outlined the following guidelines for conducting a fair arbitration hearing in the absence of statutory guidelines:<sup>357</sup>

- “(a) the arbitrator must abreast himself with what the dispute(s) of the complainant is;
- (b) the arbitrator has to be aware on whom the onus rests and determine who should commence;
- (c) the arbitrator should ensure that the parties are properly informed and understand how the proceedings will be conducted;
- (d) the arbitrator should always remain independent and impartial and he/she cannot allow that any party gain the perception that he/she is not a neutral and impartial adjudicator. In this regard the arbitrator:
  - (i) does not descend into the arena;
  - (ii) does not cross-examine any witness;
  - (iii) only asks questions for clarification or to provide guidance;
  - (iv) does not interrupt or stop cross-examination, unless it is clear that the question being asked in cross-examination is repetitive, has already been answered, or does not have any relevance;
  - (v) never gives any indication how he/she may decide;
  - (vi) allows closing arguments by all the parties.
- (e) the arbitrator should never refer to his/her personal circumstances or experience and thereby give an indication that he/she may be influenced by that in the decision he/she has to make;
- (f) although the arbitrator sometimes is obliged to make rulings in respect of the conduct of witness, or specific matters during the hearing, he/she should always be cautious that no perception of partiality should be created that the parties, or any of them, will not receive a fair hearing;
- (g) in his/her award the arbitrator should deal with the evidence and his or her interpretation thereof. At that stage the arbitrator has the opportunity to decide and adjudicate;
- h) the arbitrator should have a thorough knowledge of the provisions of the Labour Act and its Rules and the parties appearing before him should feel comfortable in this regard.”

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<sup>354</sup> *Roads Contractor Company v Victoria Nambahu and Others* Case No 97/2009 delivered on 12 August 2011 par 30.

<sup>355</sup> S 85(6) of the Labour Act, 2007.

<sup>356</sup> *Roads Contractors Company v Nambahu* par 31.

<sup>357</sup> *Roads Contractors Company v Nambahu* par 32.

During arbitration, arbitrators are given powers by the Labour Act, 2007 to: subpoena any person to attend an arbitration hearing<sup>358</sup> if the person's attendance will assist in the resolution of the dispute, to administer an oath, to accept an affirmation and to question the witnesses.<sup>359</sup> Any person failing to comply with a subpoena issued by an arbitrator or who refuses to answer any question from the arbitrator commits an offence and may be liable on conviction to a maximum fine of N\$10,000 or two years' imprisonment.

The question that arises from this criminal provision of the Labour Act is how such a conviction can be secured by the arbitrator. This question relates equally to all other provisions in the Labour Act, 2007 that provide for criminal offences and the implied convictions. There are no guidelines in either the Labour Act, 2007 or in the Labour Regulations and the Rules of the Labour Commissioner providing for such a procedure. Given this predicament, the author is inclined to make reference to cases decided during the reign of the District Labour Court, which has since been replaced by arbitration.

The District Labour Court convicted an employer based on section 50(b) of the 1992 Act, which reads:

"Any employer who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and on conviction be liable to a fine not exceeding R4000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment".

On appeal, the Labour Court<sup>360</sup> took into account the jurisdiction and powers of the District Labour Court in relation to the 1992 Act, and inferred that the District Labour Court had no criminal jurisdiction. The Court further examined the criminal offence and conviction created by the 1992 Act in relation to the Criminal Procedure Act,<sup>361</sup> which provides:

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<sup>358</sup> S 86(a) of the Labour Act, 2007 read with Rule 35 of the Rules of the Labour Commissioner. Witness summons are done on Form LC 43.

<sup>359</sup> S 86(8) of the Labour Act, 2007.

<sup>360</sup> *HS Contractors v Vihanga NLLP* 2002 (2) 138 NLC Case No LCA 18/98.

<sup>361</sup> Act 51 of 1977 s 84(1).

“S 84(1) subject to the provisions of this Act and any **other law**<sup>362</sup> relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place which the offence is alleged to have been committed... as may be reasonably sufficient to inform the accused of the nature of the crime.”

Premised on the above provision, the Court held that there was no charge whatsoever preferred against the appellant and that the provisions of section 84(1) of the Criminal Procedure Act were not complied with. Moreover, the Court held that the District Labour Court was faced with a labour matter that called for the ordinary standard of proof applicable in civil matters, namely the proof of preponderance, and not the proof beyond reasonable doubt required in criminal cases.<sup>363</sup> In the circumstance, the Court found that the appellant’s conviction was not competent; hence it was set aside with its accompanying sentence.

Applying this judgment to the present provision that permits the arbitrator to convict any person for failing to satisfy those aspects mentioned in section 86(8) of the Labour Act, 2007, arbitrators are not competent to convict persons during arbitration hearings. The appropriate approach would be that of the recent Court judgment in *Maureen Brown and Others v Pep Stores Namibia (Pty) Ltd*,<sup>364</sup> wherein Van Niekerk J ordered, after it appeared to the judge from the available evidence placed before the Court that possible offences were committed, that copies of the judgment be forwarded to the relevant authorities, including the Inspector-General of the Namibian Police, for consideration and for the taking of any further steps that appear to be necessary, which include the filing of criminal charges against the party at fault.

### **3.16.2 THE RIGHTS OF THE PARTIES**

Parties in the arbitration proceedings have the right to give evidence, call witnesses, question witnesses of the other side and address concluding arguments.<sup>365</sup> These rights were reinforced in *Namibia Power Corporation (Pty) Ltd v Gerald*

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<sup>362</sup> My emphasis.

<sup>363</sup> *HS Contractor v Vihanga* Case No LCA 18/98.

<sup>364</sup> Case No LCA 97/2010 delivered 30 March 2012 par 17.

<sup>365</sup> S 86(10) of the Labour Act, 2007.

*Nathinda*,<sup>366</sup> where the Court held that the arbitrator had to consider opening statements, any documentary evidence and concluding submissions in determining whether a dismissal was procedurally and substantively unfair. Similarly, the Court held that the arbitrator had to take into account closing arguments addressed to him before arriving at a given decision.<sup>367</sup>

### 3.16.3 REPRESENTATION

Compulsory arbitration is intended to be user-friendly and relatively informal in that parties generally represent themselves.<sup>368</sup> The Labour Act, 2007 provides that in an arbitration proceeding, a party may appear in person if the party is an individual or be represented only by<sup>369</sup>-

- (i) an office-bearer or official of that party's registered trade union or of a registered employers' organisation;
- (ii) if a party is an employee, a co-employee; or
- (iii) if the party is a juristic person, any employee of that person.

Legal presentation is also permitted, but with leave of the arbitrator or on agreement by the parties.<sup>370</sup> The arbitrator must be satisfied that the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; however, such representation should not prejudice the other party to the dispute.<sup>371</sup> Representation requests must be made on the prescribed Form LC 29.<sup>372</sup> This includes representation of any individual stated in the Labour Act, 2007.<sup>373</sup> These individuals may be permitted by the arbitrator on agreement by the parties and only if the arbitrator considers that representation will facilitate the effective resolution of the

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<sup>366</sup> Case No LC 38/ 2008 par 38.

<sup>367</sup> *Roads Contractors Company v Victoria Nambhahu* par 23.

<sup>368</sup> Fenwick *Labour Law in Namibia* 33.

<sup>369</sup> S 86(12) of the Labour Act, 2007.

<sup>370</sup> S 86(13) of the Labour Act, 2007.

<sup>371</sup> S 86(14) of the Labour Act, 2007.

<sup>372</sup> Labour Regulations No 22, read with Rule 25 of the Rules of the Labour Commissioner.

<sup>373</sup> S 13(b) of the Labour Act, 2007.

dispute, without prejudice to the other party and provided the individual meets the prescribed requirements. However, these requirements are yet to be developed and published and were not available at the time of writing.

#### **3.16.4 ARBITRATION AWARD**

The arbitrator is required to issue a written award, signed and giving concise reasons for the decision arrived at within 30 days after concluding the arbitration proceeding.<sup>374</sup> There is, however, no time limit prescribed from the date of the referral to the date of concluding the arbitration proceeding. Thus, delays may be experienced before the conclusion of the proceedings that lead to the issuing of the written award within 30 days. In formulating the award, the arbitrator must take into account the code of good practice or guidelines as published by the Minister of Labour.<sup>375</sup> However, at the time of writing, no such code of good practice were promulgated and published by the Ministry of Labour. Irrespective thereof, the award must specify the date by which it must be complied with and the arbitrator must allow such time as may be deemed reasonable in the circumstance of the case.<sup>376</sup> Ultimately, the award is binding<sup>377</sup> and, where possible, final<sup>378</sup> unless it is an advisory award. In addition to its binding nature, either party to an award or the Labour Commissioner may file it in the Labour Court, thereby allowing it to become a court order.<sup>379</sup>

The Labour Act, 2007 provides the scope for appropriate awards to be made by arbitrators. This includes the following:<sup>380</sup>

- (a) an interdict;
- (b) an order directing the performance of any act that will remedy a wrong;

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<sup>374</sup> S 86(18) of the Labour Act, 2007.

<sup>375</sup> S 86(17) of the Labour Act, 2007.

<sup>376</sup> Rule 21(2) of the Rules of the Labour Commissioner.

<sup>377</sup> S 87(1)(a) of the Labour Act, 2007.

<sup>378</sup> Fenwick *Labour Law in Namibia* 33.

<sup>379</sup> S 87(1)(b)(i) and (ii) of the Labour Act, 2007.

<sup>380</sup> S 86(15) of the Labour Act, 2007.

- (c) a declaratory order;
- (d) an order of reinstatement;
- (e) an award of compensation; and
- (f) an order of cost only if a party or the person who represented that party in the arbitration proceedings acted in a frivolous or vexatious manner.

All monetary awards earn interest automatically from the date of the award, unless the arbitration award provides otherwise,<sup>381</sup> at the same rate prescribed from time to time in respect of a judgment debt in terms of the Prescribed Rates of Interest Act.<sup>382</sup> The Labour Court has reinforced this provision in *JB Cooling and Refrigeration CC v Kasho Kavendjua*,<sup>383</sup> where the Court ordered payment of a specified interest rate at 20 percent per annum, the prevailing rate at the time, calculated from the date of judgment to the date of payment.

The Rules of the Labour Commissioner require every award to be sent out to the parties with an accompanying notice informing the parties of their right to appeal the award or apply to the Labour Court for review of the arbitration award.<sup>384</sup> Generally, an appeal with regard to an award is limited only to a question of law. Review, on the other hand, must be based on allegations of defect in the arbitration proceedings.<sup>385</sup> Appeals and reviews of arbitration awards are exhaustively discussed under the role of the Labour Court in labour dispute resolution in section 3.19 below.

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<sup>381</sup> S 87(2) of the Labour Act, 2007.

<sup>382</sup> Act No 55 of 1975.

<sup>383</sup> Case No LCA 15/2010 delivered on 3 April 2012 par 32.

<sup>384</sup> Rule 21(4) of the Rules of the Labour Commissioner read with s 89 of the Labour Act, 2007.

<sup>385</sup> S 89(4) of the Labour Act, 2007.

### 3.16.5 VARIATION AND RESCISSION OF AWARDS

An arbitrator is permitted under the Labour Act, 2007<sup>386</sup> to vary or rescind an award at his or her own instance or upon an application<sup>387</sup> by any of the parties made within 30 days of service of the award. The following are grounds for such action:

- it was erroneously sought or made in the absence of any party affected by that award;
- it is ambiguous or contains an obvious error or omission; or
- it was made as a result of a mistake common to the parties to the proceedings.

In this respect, the Labour Court has set aside an award erroneously sought and made by the Labour Commissioner in terms of section 86(2) of the Act. The Court found that the Labour Commissioner lacked jurisdiction to entertain the matter, although the Labour Commissioner dismissed the rescission application.<sup>388</sup>

### 3.17 PRIVATE ARBITRATION

The Labour Act, 2007<sup>389</sup> provides for the use of private arbitration in labour disputes as an alternative to compulsory arbitration by the Labour Commissioner.<sup>390</sup> Section 3 of the Arbitration Act<sup>391</sup> is another statutory authority that applies to private arbitration contemplated in the Labour Act, 2007 and governs private arbitration in Namibia.

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<sup>386</sup> S 88 of the Labour Act, 2007.

<sup>387</sup> Rule 32 of the Rules of the Labour Commissioner provides that – An application for variation or rescission of an arbitration award or ruling must be made on Form LC 38 within 30 days after service of the award or within 30 days after the applicant has become aware of a mistake common to the parties to the proceedings.

<sup>388</sup> *Standard Bank Namibia v Romeo Mouton* parr 5 & 9.

<sup>389</sup> S 91 of the Labour Act, 2007.

<sup>390</sup> Van Rooyen *Namibian Labour Lexicon* 18.

<sup>391</sup> Act 42 of 1965.

In terms thereof, parties to the dispute may agree in writing to refer the dispute to private arbitration.<sup>392</sup> The agreement also provides for the appointment of the arbitrator or, where the parties are not at *ad idem* on the arbitrator, the Act provides that the parties may apply to the Labour Court to designate an arbitrator on their behalf.<sup>393</sup> Once the arbitrator is appointed, his service can only be terminated or set aside by the Labour Court on good cause shown by the parties.<sup>394</sup>

An arbitrator conducting private arbitration has similar powers to an arbitrator in compulsory arbitration to subpoena any person to appear at an arbitration hearing, administer an oath or accept an affirmation.<sup>395</sup> In respect to the representation of the parties, the representation provision applicable in compulsory arbitration equally applies in private arbitration.<sup>396</sup> The award of the arbitrator is subject to the provisions in the agreement and may include any relief listed in section 86(15)(a)-(e) of the Labour Act, as well as an order of cost where appropriate.<sup>397</sup>

In *Erongo Mining and Exploration Company Ltd t/a Navachab Gold Mine v Mine Workers Union of Namibia and Another*,<sup>398</sup> the Labour Court held that the arbitrator's award in a private arbitration must not exceed the terms of reference envisaged in the agreement. Consequently, the award was remitted to the arbitrator to reconsider the extent of his award and to correct it accordingly as per his terms of reference.

The award of an arbitrator in private arbitration has effects largely identical to the award of an arbitrator in compulsory arbitration.<sup>399</sup> These include the effect of award<sup>400</sup> variation and rescission<sup>401</sup> and appeal provisions.<sup>402</sup> The Act equally

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<sup>392</sup> S 91(2) of the Labour Act, 2007.

<sup>393</sup> S 91(4) of the Labour Act, 2007.

<sup>394</sup> S 91(5) and (6) of the Labour Act, 2007.

<sup>395</sup> S 91(7)(a), (b) and (c) of the Labour Act, 2007.

<sup>396</sup> Ss 86(9)-(11) of the Labour Act, 2007.

<sup>397</sup> S 91(9)(a) and (b) of the Labour Act, 2007.

<sup>398</sup> NLLP (1) (12) NLC- Case No 2/93.

<sup>399</sup> Fenwick *Labour Law in Namibia* 34.

<sup>400</sup> S 87 of the Labour Act, 2007.

<sup>401</sup> S 88 of the Labour Act, 2007.

<sup>402</sup> S 89 of the Labour Act, 2007.

permits review applications of arbitration agreements<sup>403</sup> on the grounds listed under sections 89(4) and (5) of the Labour Act, 2007. The Labour Commissioner has the power to refer disputes erroneously referred to his office to compulsory arbitration where an arbitration agreement provides as such.<sup>404</sup>

An arbitrator's agreement terminates only by the consent of all parties to the agreement or by an order of the Labour Court. It does not terminate through the death, sequestration or winding up of any party. However, in these circumstances and where arbitration has commenced it must be kept in abeyance until an executor, administrator, curator, trustee, liquidator or judicial manager has been appointed.<sup>405</sup>

Undoubtedly, private arbitration has been introduced to encourage the parties to take responsibility for the resolution of their own disputes in order to limit the possibility of industrial action or recourse to the courts.<sup>406</sup> An arbitration agreement is a fairly simple and straightforward document of intent. It encompasses terms of reference of the arbitrator in making an award, time limit, discovery and other procedural aspects to be complied with or allowed, choice of venue, confidentiality, possibility of appeal, and duration. By virtue of the agreement, the parties accept to be bound by the award.<sup>407</sup> However, private arbitration does not follow the prescribed Labour Regulations, the Rules of the Labour Commissioner or the official forms prescribed for that purpose. The process must simply comply with the dictates of section 91 of the Labour Act, 2007.<sup>408</sup>

Although it may be seen as a simple and straight forward process, private arbitration is unattractive for a number of reasons. These include that the parties pay for it, while public conciliation and arbitration is free of charge;<sup>409</sup> and the award is kept confidential and may not become known to the public even if it is a precedent that

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<sup>403</sup> S 91(12) of the Labour Act, 2007.

<sup>404</sup> S 91(13) of the Labour Act, 2007.

<sup>405</sup> S 91(4) of the Labour Act, 2007.

<sup>406</sup> Fenwick *Labour Law in Namibia* 34.

<sup>407</sup> Van Rooyen *Namibian Labour Lexicon* 23.

<sup>408</sup> *Ibid.*

<sup>409</sup> Fenwick *Labour Law in Namibia* 34.

others may benefit from.<sup>410</sup> However, one significant advantage of private arbitration is the possibility of streamlining the labour dispute resolution process in certain cases, such as where parties may consider it more appropriate and efficient to refer disputes to private arbitration instead of taking recourse to industrial action.<sup>411</sup>

### **3.18 THE ROLE OF LABOUR INSPECTORATE IN LABOUR DISPUTE RESOLUTION**

Chapter 9, Part F of the Labour Act, 2007 established the labour inspectorate. Labour inspectors are appointed by the Minister of Labour, in terms of the Public Service Act,<sup>412</sup> to enforce the Act or any decision, award or order made in terms of the Labour Act, 2007.<sup>413</sup> On appointment by the Minister, labour inspectors are issued with certificates of appointment by the Permanent Secretary. Although the Act does not specify grounds, the Minister has discretion to withdraw the appointment of any labour inspector.<sup>414</sup>

The Labour Act, 2007 gives labour inspectors wider powers,<sup>415</sup> which are to some extent seen as duplication of authority with the office of the Labour Commissioner.<sup>416</sup> The most significant powers of the labour inspectorate relevant to labour dispute resolution include a number of factors. First, where a complaint has been lodged with the labour inspectorate, the labour inspector has the power to order, using the prescribed Form LS21,<sup>417</sup> any individual to appear before him at a specified date and time in order to question that individual in relation to the alleged complaint.<sup>418</sup> Failure to comply with such an order constitutes an offence and the person may be liable to conviction.<sup>419</sup>

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<sup>410</sup> Van Rooyen *Namibian Labour Lexicon* 22.

<sup>411</sup> Fenwick *Labour Law in Namibia* 35.

<sup>412</sup> Act No 13 of 1995.

<sup>413</sup> S 124 of the Labour Act, 2007.

<sup>414</sup> S 124(3) of the Labour Act, 2007.

<sup>415</sup> S 125 of the Labour Act, 2007.

<sup>416</sup> De Beer *Comments, Interpretation and Manuals on the Labour Act, 2007*. Available on <http://www.namibia-law.com> accessed on 01 June 2012.

<sup>417</sup> The Labour Regulation 22 provide for Form LS 31 set out in the annexure thereto as an order to appear before a labour inspector.

<sup>418</sup> S 125(2)(b) of the Labour Act, 2007.

<sup>419</sup> S 127(1)(b) and (2) of the Labour Act, 2007

Second, labour inspectors are empowered to assist any person in any application, referral or complaint arising under the Labour Act, 2007 and to settle any such application, referral or complaint.<sup>420</sup> The power to assist in any application includes all those applications listed under Rules 10, 17, 28, 30 and 32 of the Labour Commissioner.<sup>421</sup> Referral, on the other hand, includes situations where labour inspectors attempt to resolve the complaint, but fail to do so. They may opt to refer the dispute to the Labour Commissioner by assisting the complainant to complete Form LC 21 and providing a summary of the dispute with his report for the attempted resolution of the dispute. Such intervention includes filing in the Proof of Service Document<sup>422</sup> and having had it certified by the Namibian Police before referral is made to the Labour Commissioner.<sup>423</sup>

Settling applications and complaints includes complaints of alleged non-compliance with the basic conditions of employment, for example non-payment of remuneration, which labour inspectors are empowered to enforce.<sup>424</sup> Labour inspectors normally issue an order to defaulting employers to pay remuneration owed. However, there are no punitive measures<sup>425</sup> for non-compliance. It is in these circumstances that the labour inspectorate would assist with the referral of the dispute to the Labour Commissioner in terms of section 38 of the Labour Act, 2007.

Another mechanism available to labour inspectors is the power to issue a compliance order<sup>426</sup> to compel employers to comply with any provision of the Labour Act, 2007. However, an appeal against a compliance order automatically suspends its operation pending the outcome of the appeal, thus leaving the dispute or complaint in abeyance subject to the finalisation of the compliance order appeal in the Labour

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<sup>420</sup> S 125(2)(i) of the Labour Act, 2007.

<sup>421</sup> Rule 10 refers to any referral or application for condonation for late delivery of documents to be made on Form LC 38, Rule 17 relates to the application for class certification, Rule 28 relates to the manner in which applications may be brought, Rule 30 relates to applications for joinder of parties while Rule 32 relates to application for variation and rescission. In all these applications, it appears that labour inspectors have the power to assist the applicants.

<sup>422</sup> Form LG 36.

<sup>423</sup> Ss 82(8) and (86)(3) of the Labour Act, 2007 read with Rules 7, 23 and 35 of the Commissioner's Rules.

<sup>424</sup> S 11 read with s 125(2)(f) of the Labour Act, 2007.

<sup>425</sup> As at the time of writing, The order to pay remuneration owed was is the process of Gazetting.

<sup>426</sup> S 126 of the Labour Act, 2007.

Court.<sup>427</sup> Referral of disputes to arbitration is therefore preferred on the basis that an appeal or review application of an award made in favour of the employee does not stop the execution of the award<sup>428</sup> unless a stay order is granted by the Labour Court, suspending its operation.<sup>429</sup>

The Labour Act, 2007 has created a new responsibility for labour inspectors to enforce arbitration awards.<sup>430</sup> Section 90 of the Labour Act, 2007 provides:

“A party to an arbitration award made in terms of this part may apply to a labour inspector in a prescribed form requesting the inspector to enforce the award by taking such steps as are necessary to do so, including the institution of execution proceedings on behalf of that person”.

The applicant must apply to the labour inspector on Form LS30, as stipulated in Regulation 22 of the Labour Regulations. Although there are currently no clear regulations or guidelines for this purpose, it has proven to be successful, particularly where respondents are willing to comply with the award without necessarily challenging it in the Labour Court. The dilemma exists where parties appeal against awards or awards are reviewed in the Labour Court, making enforcement unachievable. It is hoped that enforcement guidelines will be developed in future in terms of section 137 of the Labour Act, 2007<sup>431</sup> to guide labour inspectors in fulfilling this function successfully.

### **3.19 THE ROLE OF THE LABOUR COURT IN LABOUR DISPUTE RESOLUTION**

Section 115 of the Labour Act, 2007 provides for the continuation of the Labour Court, which was established by section 15 of the repealed 1992 Act. Part D, Chapter 9 of the Labour Act, 2007 provides for the establishment, composition,

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<sup>427</sup> S 126(2) and (3) of the Labour Act, 2007.

<sup>428</sup> S 89(6)(a) of the Labour Act, 2007.

<sup>429</sup> S 89(7) of the Labour Act, 2007.

<sup>430</sup> S 125(2)(g) of the Labour Act, 2007.

<sup>431</sup> S 137(1) of the Labour Act, 2007 – empowers the Minister to issue guidelines for the proper administration of the 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.

jurisdiction and rules of the Court.<sup>432</sup> The Labour Court, under the 1992 Act, was presided over by judges of the High Court, who were called “presidents”, and was primarily a Labour Appeal Court, which heard appeals from the District Labour Courts that were presided over by magistrates.<sup>433</sup> The Judge President assigns suitable judges to the Labour Court, each of whom must be a judge or an acting judge of the High Court.<sup>434</sup> Parker (2012)<sup>435</sup> submits that this assignment of judges or acting judges of the High Court is done within the meaning of Article 78, read with Articles 80 and 82 of the Namibian Constitution. Section 117 of the Labour Act, 2007 vests the Labour Court with exclusive review and appellate jurisdiction.

### 3.19.1 JURISDICTION OF THE LABOUR COURT

Section 117 of the Labour Act, 2007 provides for the exclusive jurisdiction of the Labour Court to:

- (a) determine appeals from –
  - (i) decisions of the Labour Commissioner made in terms of this Act;
  - (ii) arbitration tribunals’ awards, in terms of section 89; and
  - (iii) compliance orders issued in terms of section 126;
- (b) review-
  - (i) arbitration tribunals’ awards in terms of this Act; and
  - (ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of –
    - (aa) this Act; or
    - (bb) 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 any body or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act;
- (d) grant a declaratory order in respect of any provision of this 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;
- (f) to grant an order to enforce an arbitration agreement;
- (g) to determine any other matter which it is empowered to hear and determine in terms of this Act;
- (h) make an order which the circumstances may require in order to give effect to the objects of this Act;

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<sup>432</sup> S 115 of the Labour Act, 2007.

<sup>433</sup> Parker *Labour Law in Namibia* (2012) 205.

<sup>434</sup> S 116 of the Labour Act, 2007.

<sup>435</sup> Parker *Labour Law in Namibia* 206.

- (i) generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any law or the common law.
- (2) The Labour Court may –
  - (a) refer any dispute contemplated in subsection (1)(c ) or (d) to the Labour Commissioner for conciliation in terms of Part C of Chapter 8; or
  - (b) request the Inspector General of the Namibian Police to give a situation report on any danger to life, health or safety of persons arising from any strike or lockout.

Section 118 of the Labour Act, 2007 further provides that the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting proceedings or defending those proceedings.

### **3.19.2 APPEAL OF ARBITRATION AWARDS**

Section 89 of the Labour Act, 2007 provides the right of appeal and review of arbitration awards. The section provides:

- “89(1) A party to a dispute may appeal to the Labour Court against an arbitrator’s award made in terms of section 86:
- (a) on any question of law alone; or
  - (b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law or mixed fact and law”.

The Labour Court Rules<sup>436</sup> require an appellant to note the appeal by delivering the notice of appeal on Form 11, thereby setting out concisely and distinctively which part of the decision or order is being appealed against, the grounds for appeal and setting out the relief sought. The notice must be delivered to the Labour Court within 30 days of the award being served on the parties.<sup>437</sup> This rule is, however, not trite, in that the Court may condone the late noting of an appeal on good cause shown.<sup>438</sup>

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<sup>436</sup> Rules of the Labour Court published in the Government Republic of Namibia Gazette No 4175 Notice No.279 dated 2 December 2008 (“hereinafter referred to as the Rules of the Labour Court”) Rule 17.

<sup>437</sup> S 89(2) of the Labour Act, 2007.

<sup>438</sup> S 89(2) of the Labour Act, 2007 read with Rule 17(4) of the Rules of the Labour Court.

Appeals against arbitration awards are provided for statutorily to meet with the constitutional requirement that arbitration tribunals be conducted in a fair manner<sup>439</sup> to ensure fairness. However, the Court has held that if discretion has been exercised at the arbitration proceedings on judicial grounds and for sound reasons that are without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to interfere and substitute its own decision. The Court pointed out that it requires the applicant to show that the arbitration award was wrong and that the decision ought to have been in his favour.<sup>440</sup>

The Labour Court has extensively addressed what should constitute grounds of appeal, for example “the question of law alone”.<sup>441</sup> In *Shoprite Namibia (Pty) Ltd v Faustino Moses Paulo and Others*<sup>442</sup> the Court held that the phrase “question of law alone” means a question of law alone without anything else present, for example, opinion or fact. Consequently, it was held that it is a requirement that a notice of appeal specify the grounds of the appeal and that the notice had to be carefully framed as an appellant had no right in the hearing of an appeal to rely on any grounds not specified in the notice of appeal. Therefore, specifying grounds of appeal was not a matter of form, but a matter of substance necessary to enable the appeal to be justly disposed of. In the case mentioned, the Court established that the appellant’s notice of appeal contained grounds other than questions of law alone. Accordingly, the Court found that there was no proper appeal before it and duly dismissed the appeal.

In a related matter, *JB Cooling and Refrigeration CC v Kastro Kavendjaa and Another*,<sup>443</sup> the Court found the appeal to be defective because it contained other grounds than the “predicative adjective” question of law alone without others present. Similarly, in *Patrick Geilop v Commercial Investments Corporation (Pty) Ltd v Emma N. Nikanor (Arbitrator) NO*,<sup>444</sup> Hoff J distinguished between the questions of facts capable of proof and for which the subject of evidence is adduced. The judge

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<sup>439</sup> Art 12(1)(a) of the Namibian Constitution.

<sup>440</sup> *Edgars Stores v Olivier & Another* Case No LCA 67/2009 delivered 18 June 2009.

<sup>441</sup> S 89(1)(a) of the Labour Act, 2007.

<sup>442</sup> Case No LCA 12/2010 delivered on 7 March 2011 par 3.

<sup>443</sup> Case No LCA 15/2010 delivered on 3 April 2012 paras 7 & 8.

<sup>444</sup> Case No LCA 45/2011 delivered 18 November 2011 par 12, 13, 14 and 16.

emphasised that a question of law means a question in which the true rule of law is to be determined. Moreover, Smut J accepted that a question of law amounts to one where a finding of fact made by a lower court (arbitration tribunal in this case) is one which no other court could reasonably have made.<sup>445</sup> It follows that for an appeal application to succeed it has to meet the requirements stated above.

### 3.19.3 REVIEW OF ARBITRATION AWARDS

Section 89(4) provides that:

“A party to a dispute who alleges a defect in any arbitration proceedings in terms of this part may apply to the Labour Court for an order reviewing and setting aside the award –

- (a) within 30 days after the award was served on the party, unless the alleged defect involves corruption; or
- (b) if the alleged defect involve corruption, within six weeks after the date that the applicant discovers the corruption.
- (5) A defect referred to in subsection (4) means –
  - (a) that the arbitrator –
    - (i) committed misconduct in relation to the duties of an arbitrator;
    - (ii) committed gross irregularities in the conduct of the arbitration proceedings; or
    - (iii) exceeded the arbitrator's powers; or
  - (c) that the award has been improperly obtained”.

The Court<sup>446</sup> has held that judicial review is not concerned with the decision, but with the decision-making process. It was required that the applicant's grievance had to be against the procedure followed in the arbitration. Therefore, the onus does not rest on the respondent whose conduct was the subject of review (arbitrator) to justify his or her conduct; the onus rests on the applicant to satisfy the Court that good grounds exist to review the award made by the respondent. The Court stated further that a ground for review had to find support in section 89(4) of the Labour Act, 2007. Accordingly, in order to succeed with a review application, each ground raised had to establish a defect in the sense that a ground had to be proven on the basis of one or more of the items outlined in section 89(5) of the Labour Act, 2007.<sup>447</sup>

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<sup>445</sup> *Namibia Power Corporation (Pty) Ltd v Gerald Nantinda* par 28

<sup>446</sup> *Atlantic Chicken Company (Pty) Ltd v Philip Mwandangi and Another* par5.

<sup>447</sup> *Ibid.*

Notwithstanding the appeal and review provisions discussed above, section 89(6) of the Labour Act, 2007 provides that –

- (6) When an appeal is noted in terms of subsection (1) or an application for review is made in terms of subsection (4) the appeal or review application –
  - (a) operates to suspend any part of the award that is adverse to the interest of an employee; and
  - (b) does not operate to suspend any part of the award that is adverse to the interest of an employee.

However, section 89(7) of the Labour Act, 2007, provides relief to the employers against whom adverse awards have been made in that they can apply to the Labour Court for orders varying the effects of subsection 6. The court may, if satisfied after having considered various factors, make an appropriate order. The following are factors that the court will regard:<sup>448</sup>

- (a) irreparable harm that would result to the employee and employer respectively if the award, or any part of it, is suspended or is not suspended;
- (b) if the balance of irreparable harm favours neither the employer nor employee conclusively, determine the matter in favour of the employee.

Having arrived at the appropriate decision, the court will regard section 89(9), which provides for it to order all or any part of the award to be suspended and to attach conditions to its order, including but not limited to:

- (i) conditions requiring the payment of a monetary award into court; or
- (j) the continuation of the employer's obligation to pay remuneration to the employee pending the determination of the appeal or review, even if the employee is not working during that time.

Section 89(10) of the Labour Act, 2007 states that if the award is set aside, the Labour Court may:

- (a) in the case of an appeal, determine the dispute in the manner it considers appropriate;
- (b) refer it back to the arbitrator or direct that a new arbitrator be assigned; or

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<sup>448</sup> S 89(8)(a) and (b) of the Labour Act, 2007.

- (c) make any order it considers appropriate about the procedure to be followed to determine the dispute.

Parker J exhaustively describes the provision set out above in *Hardap Regional Council v Sankwasa James Sankwasa and Another*<sup>449</sup> where the Court pointed out that an application for stay of an arbitration award contemplated in section 89(7) of the Act by its very nature qualifies as an urgent matter to be brought and heard on an urgent basis, unless the execution is not reasonably imminent or unless blameable conduct of the applicant renders it otherwise. However, in doing so, the Court will require that a stay application must be brought duly and promptly after becoming aware of the order (award). Further, that by the time the application for staying is filed, the appeal should be noted as a requirement for the application to stay and for the Court to examine the prospect of success of such an appeal.<sup>450</sup>

Moreover, the Court has held that in exercising the discretion as to whether to grant or refuse the application for stay, relevant factors must be considered. These include whether the appeal is frivolous or vexatious, or that the appeal has been noted without genuine intentions of seeking to reverse the judgment/order/award, but for some indirect purpose, such as delaying tactics or as means of delaying action regarding the judgment/order/award. Therefore, the Court should ensure that the appeal, if successful, is not invalid.<sup>451</sup> However, where the Court is satisfied that the appeal has been brought with *bona fide* intentions to seek reversal of the award, the court will examine the potentiality of irreparable harm to the applicant and respondent respectively and find where the balance lies. The Court held that such a decision does not replace the common law position, but embraces it.<sup>452</sup>

### **3.20 DISPUTE RESOLUTION IN TERMS OF OTHER LABOUR RELATED STATUTES**

Section 4 of the Labour Act, 2007 provides:

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<sup>449</sup> Case No LC 15/2009 delivered 28 May 2009 par 7.

<sup>450</sup> *Namibia Breweries (Pty) Ltd v Kaeka* Case No LCA 34/10 delivered 28 May 2010.

<sup>451</sup> *Hardap Regional Council v Sankwasa J Sankwasa* par 11.

<sup>452</sup> *Ibid.*

“if there is a conflict between a provision of this Act and a provision of a law listed in subsection (5), in respect of which the Minister has not made a declaration contemplated in subsection (3) –

- (a) the provision of that other law prevails to the extent of the conflict, if it is more favourable to the employee; or
- (b) the provision of this Act prevails to the extent of the conflict, in any other case.
- (5) The laws referred to in subsection (3) and (4) are –
  - (a) the Apprenticeship Ordinance, 1938 (Ordinance No 12 of 1938);
  - (b) the Merchant Shipping Act, 1951 (Act No57 of 1951); or
  - (c) any law on the employment of persons in the service of the State”.

Moreover, the Labour Act, 2007<sup>453</sup> asserts that should a conflict arise between the provision of Chapter 3, relating to the basic conditions of employment, and the provisions of any other law, the law that provides the more favourable terms and conditions for the employee prevails. It is in this context that other labour-related legislation is discussed below in terms of its application in labour dispute resolution.

### **3.20.1 THE MERCHANTS SHIPPING ACT, 1951 (ACT NO. 57 OF 1951)**

This Act applies to the owners, masters, seamen and apprentice-officers of ships.<sup>454</sup> Section 102 of the Act provides for entering into an employment agreement with crew members by the Master. The Master has the power to discharge a seaman, but where the seaman does not consent to his discharge, it has to be done before a proper officer.<sup>455</sup> The discharged seaman must be issued with a certificate of his discharge and be given his certificate of competency or qualification belonging to him, which may have been in the custody of the Master. In the event of a wage dispute, the seaman is entitled to be paid his wages or the balance thereof in the manner directed by the proper officer.<sup>456</sup>

In terms of section 355 of the Act, seamen enjoy the protection accorded by the Labour Act, 2007. This relates to, in particular, the right to the labour dispute resolution system provided in section 82 and 86 of the Labour Act, 2007.

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<sup>453</sup> S 9(3) of the Labour Act, 2007.

<sup>454</sup> S 1 of the Merchants Shipping Act 57 of 1951.

<sup>455</sup> S 113(1) of the Merchants Shipping Act 57 of 1951.

<sup>456</sup> S 120 of the Merchants Shipping Act 57 of 1951.

### 3.20.2 SOCIAL SECURITY ACT, 1994 (ACT NO. 34 OF 1994)

The Social Security Act<sup>457</sup> was enacted to provide for the establishment, constitution and powers, duties and functions of the Social Security Commission, and to provide for the payment of maternity-leave benefits, sick leave benefits and death benefits to employees. Moreover, this Act provides for the establishment of the Maternity Leave, Sick Leave and Death Benefits Fund to provide for the payment of medical benefits to employees. It also established the National Medical Benefit Fund to provide for the funding of training schemes for disadvantaged, unemployed persons and to establish for the above purpose, the Development Fund to provide for incidental matters.<sup>458</sup>

Part V, section 29 of the Social Security Act of 1994 stipulates the structuring of the Maternity Leave, Sick Leave and Death Benefit Fund. The Fund provides maternity-leave benefits to every female employee; sick-leave benefits to every employee; and death benefits to the dependants of every employee who is a member of the Fund by virtue of section 21 of the Act and who has complied with the provisions of that section.<sup>459</sup> Employers are absolved from paying employees for sick leave to the extent that the employee is entitled to payment in terms of this Act if the employee is absent from work during any period of incapacity arising from an accident or a scheduled disease.<sup>460</sup> Any dispute thereto is referred to the Labour Commissioner in terms of sections 84(d) and 86 of the Labour Act, 2007.

Section 45 provides for appeals against any decision of the Social Security Commission. In terms thereof:

- aggrieved persons (employees) may appeal against decisions of the Commission taken in the performance of their functions in terms of this Act, within a period of 60 days from the date he or she was notified of such

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<sup>457</sup> Act No 34 of 1994 (hereinafter referred to as the "Social Security Act of 1994")

<sup>458</sup> Preamble to the Social Security Act of 1994.

<sup>459</sup> S 28(4) of the Social Security Act of 1994.

<sup>460</sup> S 24(4) (b) of the Labour Act, 2007.

decision, to the Labour Court established by section 117 of the Labour Act, 2007;<sup>461</sup>

- the Labour Court may, on good cause shown, condone an appeal noted outside the prescribed 60 days period;<sup>462</sup>
- appeals herein are subject to the provisions of the Labour Act, 2007 and its regulations and will be deemed to be appeals from arbitration tribunals in terms of section 85 of the Labour Act, 2007.<sup>463</sup>

### **3.20.3 PUBLIC SERVICE ACT, 1995 (ACT NO. 13 OF 1995)**

The Public Service Act<sup>464</sup> provides for the establishment, management and efficiency of the Public Service, the regulation of the employment, conditions of service, discipline, retirement and discharge of staff members in the Public Service, and other incidental matters.<sup>465</sup> Section 22 provides for the appointment of staff members to the Public Service on a 12-calendar- months' probation,<sup>466</sup> unless otherwise approved by the Prime Minister.<sup>467</sup> A staff member on probation may be appointed if he or she successfully completes his or her probation period.<sup>468</sup> However, the Act provides that a staff member serving on probation may be discharged from the Public Service during, on or after the expiry of the period of probation by giving him or her a month's notice; or if his or her conduct is unsatisfactory, without any prior notice, but by giving him or her one month's salary in lieu of such notice.<sup>469</sup>

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<sup>461</sup> S 45(1) of the Social Security Act of 1994.

<sup>462</sup> S 45(2) of the Social Security Act of 1994.

<sup>463</sup> S 45(3) of the Social Security Act of 1994.

<sup>464</sup> Act No 13 of 1995 *Government Gazette* of the Republic of Namibia No1121 Notice No 135.

<sup>465</sup> Preamble to the Public Service Act No 13 of 1995.

<sup>466</sup> S 22 (1) and (2) of the Public Service Act No 13 of 1995.

<sup>467</sup> Prime Minister of the Republic of Namibia provided for in s 5 of the Public Service Act, No 13 of 1995.

<sup>468</sup> S 22(3) of the Public Service Act No 13 of 1995.

<sup>469</sup> S 22(4) of the Public Service Act No 13 of 1995.

In practice, the Court<sup>470</sup> has held that a Public Service employee on probation's employment can be terminated by a notice informing him that he would not receive permanent appointment. In this case, the employee drove a vehicle of the employer under the influence of alcohol and caused an accident, resulting in damages and several other charges related to the driving of the vehicle without permission. The Public Service Act provides that if an employee on probation is guilty of serious misconduct, the employment can be terminated without a hearing. However, it is stipulated that the employee must be given the opportunity to reflect on what happened through completing a performance report and be advised that the employer is contemplating to terminate the employment. Moreover, that a valid and fair reason for dismissal is founded on facts, conduct and circumstances that are independently raised from the procedure followed, making the continuation of the employment relationship impossible. Consequently, the Court found that it would be a travesty of justice to compel the employer to reinstate or re-employ the employee.

Section 25 of the Act details conduct that constitutes misconduct, followed by taking such disciplinary measures deemed necessary and appropriate in the circumstance by the permanent secretary of a particular ministry.<sup>471</sup> All amendments to the Public Service Act are subject to a process of negotiation and collective bargaining with the representative trade unions, except for matters outside of the labour relations scope.<sup>472</sup>

The Public Service Act No. 13 of 1995 provides recourse to legal action regarding anything done or omitted in terms of the Act. Such legal action against the Government must, however, be brought within 12 calendar months from the date on which the claimant had knowledge or might reasonably have been expected to have knowledge of what is alleged to have been done or omitted.<sup>473</sup> This includes taking the Public Service (Government) to an arbitration tribunal in disputes of non-compliance with the Public Service Act.<sup>474</sup>

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<sup>470</sup> *HS Limbo v Ministry of Labour* Case No LCA 01/08.

<sup>471</sup> S 26 of the Public Service Act No 13 of 1995.

<sup>472</sup> S 32 of the Public Service Act No 13 of 1995.

<sup>473</sup> S 33 of the Public Service Act No 13 of 1995.

<sup>474</sup> Act No 13 of 1995.

The Act<sup>475</sup> makes provision for regulations relating to:

- (a) the manner of and conditions, including contracts of employment, for the appointment, promotion and transfer of staff members;
- (b) the discipline, powers and duties, and hours of attendance of staff members;
- (c) conditions of service and entitlement, including the occupation of official quarters, of staff members and members of the services;
- (d) the establishment and management of and control over a medical-aid scheme for the Public Service;
- (e) the circumstances under which medical examination shall be required for the purpose of this Act, and the form of medical report and certificates so required;
- (f) the procedure to be observed in the process of negotiations and collective bargaining with recognised trade unions;
- (g) the procedure to be observed in investigating and dealing with grievance of staff members;
- (h) a code of conduct with which staff members shall comply;
- (i) any matter which in terms of this Act is required or permitted to be prescribed;
- (j) generally, any matter in respect of which the Prime Minister, on recommendation of the Commission, considers it necessary or expedient to make regulations in order to achieve the object of this Act.

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<sup>475</sup> S 34(1) of the Public Service Act No 13 of 1995.

### **3.20.4 AFFIRMATIVE ACTION (EMPLOYMENT) ACT, 1998 (ACT NO. 29 OF 1998)**

This Act was promulgated<sup>476</sup> to ensure the achievement of equal opportunities in employment in the pursuance of Articles 10 and 23 of the Namibian Constitution. The Act provides for the establishment of the Employment Equity Commission; to redress, through appropriate affirmative-action plans, the conditions of disadvantages in employment experienced by persons in designated groups arising from past discriminatory laws and practices; and to institute procedures to contribute towards the elimination of discrimination in employment and to provide for matters incidental thereto.<sup>477</sup>

Disputes between employees, their representatives and relevant employers arising from non-compliance with the Affirmative Action Act, 1998 are to be brought to the attention of the Employment Equity Commission<sup>478</sup> by the allegedly aggrieved party.<sup>479</sup> The Equity Commission will, if deemed necessary, refer the complaint or dispute to the Labour Commissioner for conciliation<sup>480</sup> or arbitration<sup>481</sup> as provided for in sections 45 and 46 of the Affirmative Action Act, 1998.

### **3.21 CONCLUSION**

This chapter extensively discussed the labour dispute resolution reforms that exited from colonial South West Africa to the present practices. It become crystal clear that before independence, Namibia was under various colonial rulers with fragmented labour legislations deployed to discriminate against and exploit black workers. Moreover, the prevailing legislation provided no machineries for labour dispute resolution to black workers except for criminal sanctions for breach of contracts of employment.

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<sup>476</sup> *Government Gazette* of the Republic of Namibia No1962 Notice 242.

<sup>477</sup> Preamble to the Affirmative Action Act, 1998(hereinafter referred to as the "Affirmative Action Act,1998).

<sup>478</sup> Hereinafter referred to as the "Equity Commission".

<sup>479</sup> S 45(1) of the Affirmative Action Act, 1998.

<sup>480</sup> Ss 81(b) and 82 of the Labour Act, 2007.

<sup>481</sup> Ss 84(b) and 86 of the Labour Act, 2007.

It was the findings of the Wiehahn Commission Namibia that resulted in the adoption of the all inclusive post-independence 1992 Labour Act. This Act made conciliation boards and District Labour Courts available as machineries for labour dispute resolution. However, the system could not stand the demands of the labour market; hence its overhaul, leading to the introduction of the ADR system of conciliation and arbitration under the Labour Commissioner and adjudication in the Labour Courts. Conciliation and arbitration have been widely embraced in Namibia; however, it is complicated by legal technicalities leading to appeals or reviews by the Labour Court.

The provisions of other labour-related statutes were discussed to show their relevance and reach in relation to labour-dispute resolution. Essentially, where these statutes provide for better conditions of employment they will prevail, otherwise the conditions set out in the Labour Act, 2007 prevail in all labour matters.

## CHAPTER 4

### SOUTH AFRICAN LABOUR DISPUTE RESOLUTION

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## 4.1 INTRODUCTION

South Africa's labour relations system has evolved over time. Its origin can be traced to the discovery of diamonds and gold, which later developed as the mining sector.<sup>1</sup> The development of the mining sector led to rapid urbanisation, industrialisation and uncontrolled labour unrest that required some sort of regulation.

The turmoil created labour unrest in the mining sector, leading to the enactment of the first comprehensive piece of legislation, the Industrial Conciliation Act 11 of 1924. The Act provided for the regulation of labour relations and for dispute resolution between trade unions and employers, who were predominately white.<sup>2</sup> African workers were excluded from its application.<sup>3</sup> Various other acts were promulgated in an attempt to stabilise the ongoing discontent, but to no avail. As a result, the Government enacted the Industrial Conciliation Act 28 of 1956, which repealed most of the prevailing statutes. This statute further entrenched the racial division of workers by prohibiting the registration of black and mixed trade unions.<sup>4</sup>

With the growth of a dualistic labour relations system and the inevitable socio-political turbulence, the Wiehahn Commission was appointed to rationalise the existing labour legislation, which led to significant reforms that are considered a watershed in the history of the South African labour relations system.<sup>5</sup>

Before November 1996, labour litigation took place in the erstwhile Industrial Court and in the Labour Appeal Court, established as a result of the Wiehahn Commission's recommendations. The resolution of labour disputes under the LRA 1956 was complex, inefficient, protracted, expensive and highly legalistic.<sup>6</sup> This system was eliminated with the demise of these tribunals in 1995.<sup>7</sup> The democratic, rational and all inclusive LRA 66 of 1995 was enacted and this Act contemplated the

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<sup>1</sup> Venter and Levy *Labour Relations in South Africa* 4<sup>th</sup> ed (2011) 34.

<sup>2</sup> Grogan *Collective Labour Law* (2010) 3.

<sup>3</sup> Grogan *Collective Labour Law* 4.

<sup>4</sup> S 4(6) of the Industrial Conciliation Act 28 of 1956.

<sup>5</sup> Finnemore *Introduction to Labour Relations in South Africa* 10<sup>th</sup> ed (2010) 35.

<sup>6</sup> Brand *et al Labour Dispute Resolution* 1.

<sup>7</sup> Grogan *Labour Litigation and Dispute Resolution* (2010) 2.

introduction of inexpensive, accessible, expeditious and simple dispute resolution mechanisms.<sup>8</sup> The LRA established a tailor-made dispute resolution institution that operates separately from the ordinary courts. This institution, the CCMA, is described as an administrative tribunal and was conceived to resolve some, but not all, labour disputes.<sup>9</sup> The CCMA performs its functions by way of conciliation and when conciliation fails, by arbitration.<sup>10</sup> Arbitration awards made pursuant to the arbitration process under the LRA are final and binding<sup>11</sup> and may be enforced as if they were orders of the Labour Court.<sup>12</sup> Besides the CCMA, the LRA established specialised Labour Courts to adjudicate labour disputes.<sup>13</sup>

The LRA does not provide for appeal rights against an arbitration award issued by the CCMA. However, the LRA permits review to the Labour Court based on allegations of “defect”, thereby setting aside the award.<sup>14</sup> The LRA operates within the dictates of the Constitution of the Republic of South Africa and was enacted to give effect to and regulate the constitutional rights pertaining to fair labour practices.<sup>15</sup>

In the framework of the aforementioned, this chapter analyses and discusses the historical development of the South African labour dispute resolution system leading up to the end of the dualistic system that operated during the *apartheid* era. Thereafter, an analysis of the constitutional labour provisions is provided, followed by a further detailed analysis of the dispute resolution system under the auspices of the CCMA and the Labour Court. The chapter concludes with an overview of other labour related statutes.

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<sup>8</sup> Brand *et al Labour Dispute Resolution* 1. See also s 1(d)(iv) of the LRA 66 of 1995.

<sup>9</sup> Ss 112 and 115 of the LRA 66 of 1995.

<sup>10</sup> *Ibid.*

<sup>11</sup> S143 of the LRA 66 of 1995.

<sup>12</sup> S 145 of the LRA 66 of 1995.

<sup>13</sup> Ss 151 and 167 of the LRA 66 of 1995.

<sup>14</sup> S 145(1) of the LRA 66 of 1995.

<sup>15</sup> S 23 of the Constitution of the Republic of South Africa.

## 4.2 HISTORICAL DEVELOPMENT OF THE SOUTH AFRICAN LABOUR RELATIONS SYSTEM

South Africa's labour relations system has its origin in the discovery of diamonds and gold, which consequently developed as the mining sector.<sup>16</sup> The development of the mining sector led to rapid urbanisation and industrialisation.<sup>17</sup> There were two types of labour available at the mines: the unskilled and inexperienced, mainly black Africans and the skilled mine workforce brought in from countries abroad, such as Britain and Australia, due to the unavailability of their skills in the country.<sup>18</sup>

As the mining sector started growing it caused an acute demand for unskilled labour, which the black population was hesitant to engage in because of their dependency on subsistence farming. This was addressed by the Kruger Government's formation of the Chamber of Mines, which aimed to force black African workers to the mines in an attempt to alleviate the acute shortage of unskilled labour, thereby creating a ready labour supply.<sup>19</sup> The black African workers gradually became skilled and were reinforced with Chinese labourers after the Anglo-Boer War. This created fear among the skilled white workforce. The result was a violent strike by the skilled white workforce in fear of competition, increased poverty among whites and the erosion of the colour bar.<sup>20</sup>

This situation led to the turmoil of labour unrest, with white workers calling on Government to actively protect their interests. Government responded by passing the Mines and Works Act,<sup>21</sup> which provided for the exclusion of non-Europeans from certain kinds of work. Although the Act brought about greater safety and working conditions on the mines, it was highly discriminatory in its creation due to job-

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<sup>16</sup> Venter and Levy *Labour Relations in South Africa* 34.

<sup>17</sup> Finnemore *Introduction to Labour Relations in South Africa* 23.

<sup>18</sup> Cunningham and Slabbert "The Historical Development of South African Industrial Relations" in Slabbert, Prinsloo and Becker (eds) *Managing Industrial Relation in South Africa* (1990) 4.

<sup>19</sup> *Ibid.*

<sup>20</sup> Williams *South Africa's War against Capitalism* (1989) 51.

<sup>21</sup> Act 12 of 1911.

reservation for skilled white workers only and its exclusion of skilled African workers from these jobs.<sup>22</sup>

Meanwhile, the Native Labour Regulation Act of 1911 was passed, which made it a crime for African workers to break their contracts of employment on the mines or refuse to obey any lawful command from their employer or his representative. The statute further prohibited strikes on the mines.<sup>23</sup> However, despite this prohibition, labour unrest intensified. The situation highlighted the need for a conciliatory framework to regulate the increasing conflict.<sup>24</sup> Subsequently, the Industrial Dispute Prevention Act<sup>25</sup> was passed to assist in the prevention of strikes and lockouts. The Act provided for the settlement of any disputes by conciliation after investigation of these disputes.<sup>26</sup>

The Industrial Dispute Prevention Act required the parties in an employment relationship to give a month's notice for any change in working conditions. However, in the event of deadlock, no strike or lockout was permitted until the dispute was thoroughly investigated by a government-appointed conciliation board and then only after a month had elapsed after the publication of the board's report. The Act did not regard a labour dispute involving fewer than 10 workers as a ground to appoint a conciliation board. Where a conciliation board was constituted, its finding was binding only if both parties agreed to the settlement.<sup>27</sup>

Given the inadequacy of the Industrial Dispute Prevention Act, a Mining Capital Policy was introduced to supplement it. The Policy provided for the substitution of unskilled black labour for white labour and, equally, white unskilled and semi-skilled labour by black labour on the basis that it was cheap. A decrease in the price of gold led to the introduction of drastic measures to cut costs. These measures included replacing costly white workers with cheap black labour, wage cuts, changing working

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<sup>22</sup> Finnemore *Introduction to Labour Relations in South Africa* 26.

<sup>23</sup> *Ibid.*

<sup>24</sup> Venter *et al Labour Relations in South Africa* 36.

<sup>25</sup> Act 20 of 1909.

<sup>26</sup> Davies "From Contract to Administrative Law- The Changing Face of South African law" in Visser (ed) *Essays on the History of Law* (1989) 82.

<sup>27</sup> Venter *et al Labour Relations in South Africa* 36.

conditions and included massive retrenchments.<sup>28</sup> The white workforce responded by embarking on the Rand Revolt of 1922. This resulted in an unsuccessful armed insurrection staged in support of their demands to maintain racial job reservations and to protest against dismissals.<sup>29</sup> Grogan<sup>30</sup> submits that the participants of that riot were put down with some vigour by the Prime Minister, General Smuts. Grogan argues that even at that early stage, Government acknowledged that labour discontent could not be controlled by using extreme force.<sup>31</sup>

#### 4.2.1 THE INDUSTRIAL CONCILIATION ACT 11 OF 1924

The tumult of the Rand Revolt led to the first comprehensive piece of labour legislation of national application,<sup>32</sup> the Industrial Conciliation Act,<sup>33</sup> introduced by General Smuts' government. The Act provided for the registration of employers' organisations and trade unions, which excluded pass-bearing Africans and indentured Indian workers.<sup>34</sup> The Act established a collective bargaining framework through industrial councils and conciliation boards, which were utilised by agreement between employers and trade unions.<sup>35</sup> Industrial councils were envisaged as being self-governing.

The Minister of Labour was empowered to gazette the agreement reached by the parties, making it legally binding. Where it was deemed appropriate, the Minister had the power to extend the agreement to all employers and employees within the jurisdiction of the council.<sup>36</sup> Non-compliance thereto was enforced by criminal sanction,<sup>37</sup> thus compelling parties to settle disputes between them.<sup>38</sup>

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<sup>28</sup> Venter *et al Labour Relations in South Africa* 37.

<sup>29</sup> Benjamin "The Challenge of Labour Law Reform in South Africa" (2009) 240.

<sup>30</sup> Grogan *Collective Labour Law* 3.

<sup>31</sup> *Ibid.*

<sup>32</sup> Benjamin "The Challenge of Labour Law Reform in South Africa" 240.

<sup>33</sup> Act 11 of 1924.

<sup>34</sup> Grogan *Collective Labour Law* 4.

<sup>35</sup> S 2(1) of the Industrial Conciliation Act 11 of 1924.

<sup>36</sup> S 9(1)(b) of the Industrial Conciliation Act 11 of 1924.

<sup>37</sup> S 9(3) of the Industrial Conciliation Act 11 of 1924.

<sup>38</sup> Ss 9(1)(a) and 2(1) of the Industrial Conciliation Act 11 of 1924.

The Industrial Conciliation Act also created an *ad hoc* conciliation board for bargaining and dispute resolution. However, the Minister had to be satisfied that the parties were sufficiently representative before appointing a conciliation board.<sup>39</sup> Agreements arising from conciliation boards had the same effects as Industrial Council agreements.<sup>40</sup>

The other significant feature of the Industrial Conciliation Act was its focus on collective labour rights or disputes rather than individual disputes.<sup>41</sup> The resolution of individual rights or disputes was only provided for in the Wages Act<sup>42</sup> that was enacted and promulgated in the following year.

The Wages Act provided for the unilateral determination of wages and working conditions in the absence of agreements under the jurisdiction of the Industrial Conciliation Act. The key feature of the Act was its support for voluntary centralised collective bargaining between the parties and organised labour (mainly white workers).<sup>43</sup> Black African workers were excluded from the definition of employee and hence the Act's application. Consequently, they were excluded from membership of registered trade unions, representation on industrial councils and from using conciliation boards.<sup>44</sup>

Racial segregation was entrenched in the Wages Act, thereby perpetuating the exclusion of black workers from the mainstream of industrial relations. The exclusion was accompanied by racially-based job reservations that prevented black African workers from obtaining key qualifications, notably "blasting certificates" that were an essential requirement for a supervisory position in the mine.<sup>45</sup> This situation meant that African workers could only be employed on terms inferior to those set by

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<sup>39</sup> S 4 of the Industrial Conciliation Act 11 of 1924.

<sup>40</sup> S 9(3) of the Industrial Conciliation Act 11 of 1924. See also Du Toit *et al Labour Relation Law* 6.

<sup>41</sup> S 2(1) of the Industrial Conciliation Act 11 of 1924, restricted the dispute settlement function of industrial councils to the parties. While in certain circumstances conciliation boards could be appointed for certain disputes involving individual employees (s 4(1)).

<sup>42</sup> Wages Act 27 of 1925.

<sup>43</sup> Grogan *Collective Labour Law* 4.

<sup>44</sup> Grogan *Collective Labour Law* 7.

<sup>45</sup> Benjamin "The Challenge of Labour Law Reform in South Africa" 240.

industrial councils or conciliation boards.<sup>46</sup> This state of affairs<sup>47</sup> ultimately created a dualistic industrial relations system that entrenched racial separation as a dominant feature of South Africa's labour relations for decades and remained largely intact until the end of the *apartheid* era.<sup>48</sup>

#### 4.2.2 VAN REENEN AND BOTHA COMMISSIONS OF INQUIRY

In the aftermath of the Second World War, labour unrest and persistent disruptive strikes<sup>49</sup> led to the appointment of both the Van Reenen Commission of 1935 and the Botha Commission of 1948 to 1950.<sup>50</sup>

The Van Reenen Commission highlighted a number of concerns. First, that the Industrial Conciliation Act did not provide for National Councils, therefore the commission proposed the establishment of National Councils with national scope. Second, the commission observed the wider wage gap between skilled (mainly white) and unskilled (mainly African) workers. The Commission noted that these wage gaps were entrenched in council agreements, while in others the agreements excluded workers in the lower grades.<sup>51</sup> Third, the commission noted the widespread non-compliance with agreements, although without any deterrent sanctions.

In response to the Van Reenen report, Government enacted a consolidated statute, the Industrial Conciliation Act of 1937.<sup>52</sup> Although this statute repealed the 1924 Act, it did not make major changes and had very little impact on the labour relations system.<sup>53</sup> Therefore, it did not solve the major problems inherent in the dual industrial relations caused by its predecessor. The new Act created a provision for a labour inspector from the Department of Labour to attend industrial councils meetings to

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<sup>46</sup> Du Toit *et al Labour Relations Law* 7.

<sup>47</sup> Godfrey, Maree, Du Toit and Theron *Collective Bargaining in South Africa- Past, Present and Future* (2010)44.

<sup>48</sup> Benjamin "The Challenge of Labour Law Reform in South Africa" 241.

<sup>49</sup> Van Jaarsveld and Van Eck *Principles of Labour Law* 3<sup>rd</sup>ed (2005) 7.

<sup>50</sup> Godfrey *et al Collective Bargaining in South Africa* 46.

<sup>51</sup> Godfrey *et al Collective Bargaining in South Africa* 47.

<sup>52</sup> Act No 36 of 1937.

<sup>53</sup> Godfrey *et al Collective Bargaining in South Africa* 48.

represent unorganised and African workers,<sup>54</sup> thus watching over the interest of the “pass-bearing” workers.<sup>55</sup>

The National Party government assumed power in South Africa in 1948 on an unashamedly racist platform, which included the complete separation of the race groups and the relegation of Africans to political dependency.<sup>56</sup> Soon after the National Party government came to power, it appointed the Botha Commission to examine existing labour legislation in order to bring it in line with its policy of *apartheid*.<sup>57</sup> The Commission noted the continued wage gap between skilled and unskilled workers remained a problem and pointed out that the attendance of labour inspectors at industrial councils’ negotiations had been ineffectual.<sup>58</sup>

Based on the Commission’s findings, it recommended the establishment of a coordinating body as an alternative, to which all industrial councils’ agreements would be submitted for scrutiny prior to their referral to the Minister<sup>59</sup> for ratification and extension in the industry.<sup>60</sup> The intention was to take into account the interest of all the parties concerned, namely the employer and employees party to the draft agreement, including non-parties directly affected by the draft agreement and including the general public. It was envisaged that doing so would achieve coordinated wages and improved conditions of employment.<sup>61</sup>

Government did not immediately act on the Commission’s report. Its priority was rather to enforce the *apartheid* system, which led to a number of legislative changes that had a bearing on the industrial relations system.<sup>62</sup> This included the enactment of the Native Law Amendment Act,<sup>63</sup> which extended influx control to African women, thereby closing the loophole that allowed them the status of employees in terms of

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<sup>54</sup> *Ibid.*

<sup>55</sup> Grogan *et al Collective Labour Law* 4.

<sup>56</sup> *Ibid.*

<sup>57</sup> Godfrey *et al Collective Bargaining in South Africa* 50.

<sup>58</sup> *Ibid.*

<sup>59</sup> Godfrey *et al Collective Bargaining in South Africa* 51.

<sup>60</sup> Du Toit *et al Labour Relations Law* 8.

<sup>61</sup> *Ibid.*

<sup>62</sup> Godfrey *et al Collective Bargaining in South Africa* 51.

<sup>63</sup> Act 54 of 1952.

the Industrial Conciliation Act.<sup>64</sup> Consequently, African women were forced to resign from registered trade unions and their right to direct representation on Industrial Councils was taken away.<sup>65</sup>

Another statute that the Government immediately enacted was the Native Labour Settlement of Disputes Act.<sup>66</sup> The Act introduced a very circumscribed system of consultative committees, namely plant-based workers' committees, regional native labour committees and central native labour boards.<sup>67</sup> This separate dispensation for African workers was created as an alternative to collective bargaining in Industrial Councils.<sup>68</sup> The ultimate aim was to ensure that trade unions for African workers would die a natural death.<sup>69</sup>

#### **4.2.3 THE INDUSTRIAL CONCILIATION ACT 28 OF 1956**

Although the enactment of the Industrial Conciliation Act repealed the 1937 Act, it failed to provide for the proposed coordinating body recommended by the Botha Commission.<sup>70</sup> The National Party government largely ignored the problems identified by the Botha Commission, including the aberration the Industrial Council system was causing in the labour market. Instead, Government refined its system of *apartheid*.<sup>71</sup> Apart from the statute's racial divide, it established an Industrial Tribunal with powers to investigate and arbitrate disputes referred to it by the Industrial Council or conciliation boards. The Tribunal had powers to hear appeals from decisions of the registrar, arbitrate disputes emanating from essential service and determine disputes.<sup>72</sup> It further had jurisdiction to make recommendations on the desirability of "job reservation" determinations.<sup>73</sup> Grogan<sup>74</sup> submits that it was this

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<sup>64</sup> Act 36 of 1937.

<sup>65</sup> Godfrey *et al Collective Bargaining in South Africa* 51.

<sup>66</sup> Act 48 of 1953.

<sup>67</sup> Ss 3,4 and 7 of the Native Labour Settlement of Disputes Act 48 of 1953.

<sup>68</sup> Du Toit *et al Labour Relations Law* 8.

<sup>69</sup> Godfrey *et al Collective Bargaining in South Africa* 52.

<sup>70</sup> *Ibid.*

<sup>71</sup> Godfrey *et al Collective Bargaining in South Africa* 53.

<sup>72</sup> Grogan *Collective Labour Law* 4.

<sup>73</sup> S 17 of the Industrial Conciliation Act 28 of 1956.

<sup>74</sup> Grogan *Collective Labour Law* 4.

modest beginning that later developed into the Industrial Court, the CCMA, Labour Court and the Labour Appeal Court.

The entrenchment of *apartheid* did not go unopposed. In the 1950s there was a considerable increase in political militancy on the part of the black population and a small but active minority of white people associated with the African National Congress.<sup>75</sup> The increased state repression culminated in the Sharpeville massacre of 1960, where at least 69 innocent people were killed.<sup>76</sup> More actions were taken by the state, which led to the banning of the ANC and the Pan Africanist Congress.<sup>77</sup> The ANC responded by turning to an armed struggle with the launch of *Umkhonto-we-Sizwe* (MK) in 1961. This was followed by mass arrests and increased repressive measures, thus this is described as the darkest decade in the history of South Africa.<sup>78</sup>

#### 4.2.4 THE WIEHAHN COMMISSION REFORMS

The years 1973 to 1977 signalled the growth of a dualistic labour relations system, during which black workers, because of their lack of power base, were restricted to mainly employer-initiated committees without any bargaining power. This situation continued despite the amendment of the Industrial Conciliation Act in 1977. Although the amended Act recognised agreements negotiated by committees, it was still impossible to enforce the resultant agreement in the event of a dispute with the employer.<sup>79</sup> By the late 1970s, the dual system of labour relations had proved unworkable.<sup>80</sup> It became obvious that the provisions of the Black Labour Relations Regulation of 1973 had not addressed the problem of black workers' militancy.

As a result, South Africa's image created investment doubts with its major trading partners, who became concerned about the position of black workers. Various

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<sup>75</sup> Hereinafter referred to as the "ANC".

<sup>76</sup> Venter *et al Labour Relations in South Africa* 43.

<sup>77</sup> Hereinafter referred to as the "PAC".

<sup>78</sup> Godfrey *et al Labour Relations in South Africa* 43.

<sup>79</sup> Finmore *Introduction to Labour Relations in South Africa* 34.

<sup>80</sup> Du Toit *Labour Relations Law* 10.

representations were made to overseas bodies by local trade unions.<sup>81</sup> There were international calls for sanctions and disinvestment in South Africa<sup>82</sup> and Government recognised the need to improve the climate and its image in the eyes of the international community.<sup>83</sup> The backdrop of the socio-political turbulence proved to be a key turning point for South African labour relations.<sup>84</sup> It led to the appointment of a Commission of Inquiry, headed by Professor Nicholas Wiehahn, to investigate the status of black workers within the labour relations legislation system.<sup>85</sup>

Bendix<sup>86</sup> submits that the Commission's original brief was to "rationalise the existing labour legislation; to seek where possible means of adapting the industrial relations system to changing needs and to... eliminate bottlenecks and other problems experienced in the labour sphere". Bendix argues, however, that although the aforesaid may have been the framework of reference, in retrospect, it appeared highly probable that the Commission was specifically instructed to consider a method that will control black trade unions and to incorporate them into the industrial relations system without creating great disruption.<sup>87</sup>

The Commission reported its findings in early 1979 and made significant proposals including, *inter alia*, that:

- full freedom of association be granted to all employees regardless of race, sex and creed;
- trade unions, irrespective of composition in terms of colour, race or sex, be allowed to register;
- stricter criteria be adopted for trade unions' registration;

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<sup>81</sup> Bendix *Industrial Relations in South Africa* 5<sup>th</sup> ed (2010) 77.

<sup>82</sup> Finnemore *Introduction to Labour Relations in South Africa* 34.

<sup>83</sup> Bendix *Industrial Relations in South Africa* 77.

<sup>84</sup> Venter *et al Labour Relations in South Africa* 44.

<sup>85</sup> Finnemore *Introduction to Labour Relations in South Africa* 34.

<sup>86</sup> Bendix *Industrial Relations in South Africa* 77.

<sup>87</sup> *Ibid.*

- a system of financial inspection of trade unions be introduced;
- prohibition of political activities by trade unions be extended;
- liaison committees be renamed as workers councils;
- where no industrial councils had jurisdiction, workers' councils and workers' committees be granted full collective bargaining rights;
- statutory job reservation be phased out;
- safeguards be introduced to protect minorities previously protected by job reservations;
- the Industrial Tribunal be replaced by the Industrial Court;
- fair employment practices be developed by the Industrial Court; and
- a tripartite National Manpower Commission be established.

The Wiehahn Commission was considered to be a watershed in the history of the South African labour relations system.<sup>88</sup> Government was hesitant to consider all the recommendations of the Commission and responded with caution.<sup>89</sup> The result was the introduction of a number of amendments taking into account some of the Commission's recommendations, while rejecting or diluting others.<sup>90</sup>

The most significant feature of the amendments included the following:

- All migrants and commuters were excluded from the new definition of "employee", thus denying a large number of workers access to the Industrial Conciliation machinery.

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<sup>88</sup> Godfrey *et al Collective Bargaining in South Africa* 57.

<sup>89</sup> Finmore *Introduction to Labour Relations in South Africa* 35.

<sup>90</sup> The amendments includes: The Industrial Conciliation Amendments Acts 94 of 1979 and 95 of 1980, and the Labour Relations Amendments Acts 57 of 1981, 51 of 1982 and 2 of 1983.

- Provisional registration of trade unions was at the discretion of the registrar, who also had the power to withdraw registration without giving reasons.
- Registration of mixed trade unions was still forbidden, except in specific cases allowed by the Minister, which only happened during the 1980s.<sup>91</sup>

The amendments also heralded the launch of the Industrial Court, which commenced functioning in 1980. The Court was empowered to arbitrate matters referred to it by Conciliation Boards under the guideline of unfair labour practice.<sup>92</sup> The Industrial Court was granted a remarkably wide discretion in interpreting the concept of “unfair labour practice”. Unfair labour practice was first defined as<sup>93</sup> “any labour practice which in the opinion of the Industrial Court is an unfair labour practice”.

In terms of its “unfair labour practice” jurisdiction, the Industrial Court began eroding the past discriminatory practices that were regarded as part of the national order in South Africa. In the same manner, it lay down and developed the principle of fair collective bargaining and protected collective rights.<sup>94</sup> The Industrial Court premised its functioning on a distinction between “disputes of rights” and “disputes of interest”. Disputes of interest were considered unsuitable for adjudication and were thus left to the parties to resolve by negotiation and, ultimately, through the exercise of power.<sup>95</sup> However, as for justiciable or arbitrable disputes commonly accepted as “disputes of rights”, the Industrial Court used the “unfair labour practice” concept to fashion and develop an extensive body of law on individual employment rights as well as collective labour law. A coherent system of labour law was developed in South Africa, leading to freedom.<sup>96</sup>

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<sup>91</sup> Godfrey *et al Collective Bargaining in South Africa* 57.

<sup>92</sup> Grogan *Collective Labour Law* 5.

<sup>93</sup> Industrial Conciliation Amendment Act 94 of 1979.

<sup>94</sup> Grogan *Collective Labour Law* 5.

<sup>95</sup> Du Toit *et al Labour Relations Law* 11.

<sup>96</sup> *Ibid.*

#### 4.2.5 THE LABOUR RELATIONS AMENDMENT ACT 83 OF 1988

The Labour Relations Amendment Act codified the concept of “unfair labour practice” and included unprocedural strikes and lockouts in the definition of unfair labour practice. The Act permitted the Industrial Court to grant interdicts to prohibit actions that constituted unfair labour practices. The Act further introduced a presumption of liability on the part of trade unions, office bearers and officials for damages caused by unlawful industrial action. A Labour Appeal Court was also introduced by the statute, presided over by Supreme Court Judges.<sup>97</sup>

The amendment had serious implications for workers’ and trade unions. Employers, on the other hand, took advantage of utilising interdicts against unlawful strikes held to be unfair, while the Labour Court prolonged the finalisation of disputes to the detriment of workers.<sup>98</sup> This caused massive opposition, stay-aways and political protests from organised labour mobilised by the Congress of South African Trade Unions<sup>99</sup> and other political organisations. As a result, organised labour and the Employers’ Consultative Committee on Labour Affairs agreed to meet with Government to discuss the crisis.<sup>100</sup> The discussion led to the withdrawal of the presumed liability of trade unions for unlawful strikes and the codification of the “unfair labour practice” concept.<sup>101</sup> This historic meeting paved the way for all future negotiations as it was resolved that any future changes to the labour legislation should be negotiated collectively by social partners.

These progressive developments in the labour arena and other political influences were followed by the unbanning of the African National Congress.<sup>102</sup> Nelson Mandela and other political leaders were released from prison and emergency restrictions were lifted, leading to the dawn of a new political era.<sup>103</sup> Government finally

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<sup>97</sup> Du Toit *et al Labour Relations Law* 14.

<sup>98</sup> *Ibid.*

<sup>99</sup> Hereinafter referred to as “COSATU”.

<sup>100</sup> Du Toit *et al Labour Relations Law* 15.

<sup>101</sup> Grogan *Collective Labour Law* 6.

<sup>102</sup> The ANC.

<sup>103</sup> Du Toit *et al Labour Relations Law* 15.

recognised the agreement reached between COSATU, the National Council of Trade Unions<sup>104</sup> and the South African Consultative Committee on Labour Affairs,<sup>105</sup> which was officially named the “*Laboria Minutes of 14 September 1990*”.<sup>106</sup>

#### 4.2.6 THE OLD DUALISTIC SYSTEM’S SHORTCOMINGS

The dispute settlement agencies under the old dispensation, namely the Industrial Council, Conciliation Board and Industrial Court, proved to be unequal to their task. Industrial Councils and Conciliation Boards had miserable records, with a 20 percent success rate for conciliation boards and a 30 percent success rate for Industrial Councils.<sup>107</sup> These poor success rates were accompanied by a number of negative consequences. First, the failure of the statutory machineries to make headway in reducing adversarialism in industrial relations; similarly, the cumbersome procedures for settling disputes contributed to a high rate of strikes and lockouts. Second, the poor performance of Conciliation Boards and Industrial Councils added to the case-load of the poorly resourced and inadequately staffed Industrial Courts, which resulted in an enormous backlog of cases.<sup>108</sup>

The Industrial Court was therefore not the ideal institution for settling disputes quickly and inexpensively. This was because its focus was more on adjudication and rule-making after the manifestation of the dispute than proactive intervention.<sup>109</sup> Disputes often got bogged down in technicalities and the associated costs of litigation made the Court relatively inaccessible to individuals and small businesses. In addition, the cumbersome process of appeal, the two levels of appeal of the Labour Appeal Court and the Appellate Division, caused several years of waiting for the outcome of litigation.<sup>110</sup>

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<sup>104</sup> Hereinafter referred to as “NACTU”.

<sup>105</sup> Herein after referred to as “SACCOLA”.

<sup>106</sup> Finnemore *et al Contemporary Labour Relations* 34.

<sup>107</sup> Du Toit *et al Labour Relations Law* 22.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

The above was the state of labour law up to 1994, when South Africa's *apartheid* regime became a fully democratic constitutional order.<sup>111</sup> Given the role played by trade unions in bringing down *apartheid* and the rapid and large-scale movement from trade unions' leaders into politics and government, it is not surprising that trade unions contributed immensely to giving full attention to labour rights in the new dispensation.<sup>112</sup>

### 4.3 CONSTITUTIONAL LABOUR LAW PROVISIONS

Following the 1994 elections, the Government of National Unity undertook a comprehensive reformation of South Africa's labour policy, which historically reflected the racial disparities and inequalities of the *apartheid* era.<sup>113</sup> Government envisaged a comprehensive legal framework that would give effect to various constitutionally entrenched labour rights and regulate all facets of labour relationships. The intention was to create an environment free from conflict that is conducive to and promotes harmonious labour relations.<sup>114</sup>

To this end, section 23 of the South African Constitution is titled "Labour Relations" and establishes a set of broad labour rights that accrue to a variety of parties in employment, including, but not limited to, employers and workers and their representative organisations.<sup>115</sup>

Section 23 provides as follows:

"labour relations:

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right –
  - (a) to form and join a trade union;
  - (b) to participate in the activities and programmes of a trade union and
  - (c) to strike.
- (3) Every employer has the right –
  - (a) to form and join an employers' organisation; and

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<sup>111</sup> Grogan *Collective Labour Law* 6.

<sup>112</sup> *Ibid.*

<sup>113</sup> Venter *et al Labour Relations in South Africa* 179.

<sup>114</sup> *Ibid.*

<sup>115</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck 2<sup>nd</sup>ed (2012) *Law@Work* 35.

- (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right –
  - (a) to determine its own administration, programmes and activities;
  - (b) to organize; and
  - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employers has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).
- (6) National legislation may recognize union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1)".

Section 23 of the Constitution guarantees labour rights and the rights to fair labour practices. This section is regarded as the most important for the application of law in the workplace.<sup>116</sup> However, there are other sections of the Constitution that have an impact on labour relations, including the right to freedom of association guaranteed by section 18. In the *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd*<sup>117</sup> the Constitutional Court<sup>118</sup> held that freedom of association will be impaired or negatively affected where workers are not permitted to have their own trade union representing them in workplace discipline and grievance issues, but are instead required to be represented by a rival union that they have not chosen to join.

Section 22 enshrines the right of all citizens to choose their trade, occupation and profession freely. Another provision is found in section 9 of the Constitution, which provides for equality and freedom from discrimination. This provision creates a framework for any discussion of employment equity, discrimination in employment and even affirmative action.<sup>119</sup>

Besides these fundamental rights, section 33 of the Constitution provides for fair administrative action that is lawful, reasonable and procedurally fair as has been

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<sup>116</sup> Van der Walt, Le Roux and Govindjee *Labour Law in Context* (2012) 5.

<sup>117</sup> *NUMSA V Bader Bop (Pty) Ltd* 2003 (2) BCLR 182 (CC); 2003 (3) SA 513 (CC).

<sup>118</sup> Hereinafter referred to as the "CC".

<sup>119</sup> Basson, Christianson, Dekker, Garbes, Le Roux, Mischke and Strydom *Essential Labour Law* 5<sup>th</sup>ed (2009) 11.

highlighted in a number of cases<sup>120</sup> that have examined the relationship between labour law and administrative law.<sup>121</sup>

Section 8 of the Constitution, on the other hand, provides ways in which fundamental rights that are protected by the Constitution are to be applied:

“Application

- (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or a juristic person in terms of subsection (2) a court –
  - (a) In order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person”.

The fundamental rights provided for in the Bill of Rights are not absolute and may be limited. However, this limitation must comply with the provisions of section 36 of the Constitution, which sets out the conditions that must be complied with before a fundamental right can be limited.

Section 36 reads:

“Limitation of rights:

- (1) The right in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity and freedom, taking into account all relevant factors including-
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose”.

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<sup>120</sup> Such cases includes but not limited to: *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC); *Chirwa v Transnet Ltd and Other* [2008] 2 BLLR 97 (CC) and *Gcaba v Minister for Safety and Security and Others* [2009] 12 BLLR 1145 (CC).

<sup>121</sup> Van Niekerk *et al* *Law@Work* 35.

Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Premised on the above, constitutional rights have the potential to affect labour law in three ways.<sup>122</sup> They can be used to:

- test the validity of legislation that seeks to give effect to fundamental rights;<sup>123</sup>
- interpret legislation enacted to give effect to fundamental rights;<sup>124</sup>
- develop the common law.<sup>125</sup>

#### 4.4 SOUTH AFRICA AND INTERNATIONAL LABOUR STANDARDS

Article 232 of the Constitution of the Republic of South Africa provides that customary international law is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament. Further, Article 233 requires that “when interpreting any legislation, every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

Moreover, Article 39 of the Constitution places a premium on the value of international law in relation to the interpretation of the Bill of Rights. Given this provision, the Constitutional Court (CC) continues to make specific reference to ILO standards, for example, in *SA National Defense Union v Minister of Defense & Another*<sup>126</sup> the Court made specific reference to Article 2 of Convention 87<sup>127</sup> and, in

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<sup>122</sup> Van Niekerk *et al* *Law@Work* 36.

<sup>123</sup> In *SA National Defense Union v Minister of Defense & Another* (1999) 29 *ILJ* 2265 (CC), the Constitutional Court considered whether the absence of a justiciable duty to bargain in the LRA infringed the constitutional right to engage in collective bargaining.

<sup>124</sup> In *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*, the Constitutional Court relied on the constitutional right to fair labour practices to define the role of the CCMA Commissioners when they make decisions on fair sanctions for misconduct.

<sup>125</sup> In *Old Mutual Life Assurance Co-SA Ltd v Gambi* [2007] 8BLLR 699 (SCA) the Supreme Court of Appeal held that the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing.

<sup>126</sup> (1999) 20 *ILJ* 2265 (CC).

<sup>127</sup> The Right to Organize Convention, 1948 (No 87).

particular, its provision that workers and employers without distinction have the right to establish and join organisations of their own choosing without prior authorisation. The Court further referred to Article 9 of the same Convention, which extends these rights to the armed forces and the police to the extent determined by national laws and regulations.

In the above case, the Court concluded that the convention, which South Africa has ratified and is binding on it, included armed forces within its scope. It further pointed out that the ILO has specifically considered members of the armed forces to be workers for the purpose of the Convention. Consequently, the Court struck down the statutory prohibition on union activity and membership contained in Defence Force legislation as unconstitutional.

In another related case, *NUMSA & Others v Bader BOP (Pty) Ltd & Another*,<sup>128</sup> the CC had to consider the right of a minority trade union to strike in support of a demand that the employer recognises the union's shop steward. The Court upheld the appeal and affirmed the union's right to strike. The decision was based largely on the interpretation of Conventions 87 and 98,<sup>129</sup> both relating to the right of minority unions and the right to strike.

In the recent case of *Minister of Defence & Others v SA National Defence Force Union & Others*,<sup>130</sup> the Supreme Court of Appeal<sup>131</sup> considered the provisions of ILO Conventions 87, 98 and 154 to decide on the duty to bargain with reference to the obligation to promote voluntary collective bargaining. The Court concluded that the LRA did not infringe the constitutional right to engage in collective bargaining by failing to incorporate a compulsion to bargain.

The LRA extends specific recognition to the international law obligation incurred by South Africa by virtue of its membership of the ILO. Section 1 of the LRA provides:

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<sup>128</sup> [2003] 2 BLLR 103 (CC).

<sup>129</sup> The Collective Bargaining Convention, 1949 (C98).

<sup>130</sup> (2006) 27 ILJ 2276 (SCA).

<sup>131</sup> Hereinafter referred to as the "SCA".

“The purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are

...

- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organization;...”

Section 3 of the LRA further states:

Any person applying this Act must interpret its provisions -

- (a) to give effect to its primary objects;
- (b) in compliance with the Constitution; and
- (c) in compliance with the public international law obligations of the Republic.

The Labour Court has not only limited itself to conventions and recommendations as its only ILO frames of references. In *Modemany v Unilevar PLC & Another*,<sup>132</sup> the Labour Court held that it was obliged to consider the ILO Declaration of Principles Concerning Multinational Enterprise and Social Policy although it is not binding on member states. The Court relied on this declaration to determine a jurisdictional issue in a dismissal dispute where the employer was a multinational enterprise.

Since becoming a member of the ILO, South Arica has ratified a number of ILO conventions.

#### 4.4.1 RATIFICATION OF INTERNATIONAL LABOUR STANDARDS

##### Fundamental

Convention	Date	Status
<b>C029</b> - Forced Labour Convention, 1930 (No. 29)	05 Mar 1997	In Force
<b>C087</b> - Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)	19 Feb 1996	In Force
<b>C098</b> - Right to Organize and Collective Bargaining Convention, 1949 (No. 98)	19 Feb 1996	In Force
<b>C100</b> - Equal Remuneration Convention, 1951 (No. 100)	30 Mar 2000	In Force
<b>C105</b> - Abolition of Forced Labour Convention,	05 Mar 1997	In Force

<sup>132</sup> [2006] 12 BLLR 1167(LC).

Convention	Date	Status
1957 (No. 105)		
<b>C111</b> - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	05 Mar 1997	In Force
<b>C138</b> - Minimum Age Convention, 1973 (No. 138) <i>Minimum age specified: 15 years</i>	30 Mar 2000	In Force
<b>C182</b> - Worst Forms of Child Labour Convention, 1999 (No. 182)	07 Jun 2000	In Force
<b>Governance (Priority)</b>		
Convention	Date	Status
<b>C144</b> - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)	18 Feb 2003	In Force
<b>Technical</b>		
Convention	Date	Status
<b>C002</b> - Unemployment Convention, 1919 (No. 2)	20 Feb 1924	In Force
<b>C004</b> - Night Work (Women) Convention, 1919 (No. 4)	01 Nov 1921	Denunciation 20 Oct 1935
<b>C019</b> - Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)	30 Mar 1926	In Force
<b>C026</b> - Minimum Wage-Fixing Machinery Convention, 1928 (No. 26)	28 Dec 1932	In Force
<b>C027</b> - Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27)	21 Feb 1933	Conditional ratification
<b>C041</b> - Night Work (Women) Convention (Revised), 1934 (No. 41)	28 May 1935	Automatic 02 Mar 1950 by C089
<b>C042</b> - Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 (No. 42)	26 Feb 1952	In Force
<b>C045</b> - Underground Work (Women) Convention, 1935 (No. 45)	25 Jun 1936	In Force
<b>C063</b> - Convention concerning Statistics of Wages and Hours of Work, 1938 (No. 63) <i>Excluding Parts II and IV</i>	08 Aug 1939	In Force
<b>C080</b> - Final Articles Revision Convention, 1946	19 Jun 1947	In Force

Convention	Date	Status
(No. 80)		
<b>C089</b> - Night Work (Women) Convention (Revised), 1948 (No. 89)	02 Mar 1950	In Force
<b>C116</b> - Final Articles Revision Convention, 1961 (No. 116)	09 Aug 1963	In Force
<b>C155</b> - Occupational Safety and Health Convention, 1981 (No. 155)	18 Feb 2003	In Force
<b>C176</b> - Safety and Health in Mines Convention, 1995 (No. 176)	09 Jun 2000	In Force

#### 4.5 LABOUR DISPUTE RESOLUTION IN TERMS OF THE LABOUR RELATIONS ACT 66 OF 1995

The LRA's new approach to labour dispute resolution must be seen in the context of the failures of the old system of Industrial Councils and the Industrial Court. The old dispensation was characterised by its failure to provide fast and efficient relief to parties involved in labour disputes.<sup>133</sup> Moreover, the old system was complex, technical and not user-friendly. It relied heavily on formal and technical knowledge and compliance with procedures, coupled with long delays in the appeal process.<sup>134</sup>

For the aforementioned reasons, the LRA is a substitute designed to provide simplified procedures for the resolution of labour disputes by means of statutory conciliation, mediation and arbitration. However, these processes are not as simple and straightforward in practice as they were intended.<sup>135</sup> The LRA was enacted to provide a new system of labour dispute resolution that is meant to be fast, efficient, relatively informal, accessible, easy for the parties to use and inexpensive.<sup>136</sup>

The LRA came into full operation on 11 November 1995,<sup>137</sup> after successful development and deliberation by a task team comprising of social partners, led by

<sup>133</sup> Basson et al *Essential Labour Law* 358.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> Basson et al *Essential Labour Law* 359.

<sup>137</sup> Botha *The Guide to the New Labour Relations Act* 1.

Professor Halton Cheadle.<sup>138</sup> The LRA was enacted to give effect to section 23 of the South African Constitution.

One of the central purposes of the LRA is to promote the effective resolution of labour disputes.<sup>139</sup> In keeping with its primary objective of promoting constructive and harmonious labour relations, the LRA creates a comprehensive framework for the resolution of labour disputes in the workplace.<sup>140</sup> In this respect, the LRA introduces a two-phase procedure to resolve labour disputes. In phase one all disputes must be conciliated, and in phase two, if conciliation fails, the dispute must be referred to arbitration by the CCMA or a bargaining council. Ultimately, adjudication on rights disputes must take place in the Labour Court.<sup>141</sup>

The LRA assigns the CCMA to resolve labour disputes and replaces many of the functions of the old Industrial Court system. The emphasis is placed on ADR through conciliation and arbitration instead of adjudication. Parties are encouraged to settle their disputes through dialogue and consensus-seeking.<sup>142</sup> In addition to the CCMA, the LRA creates and mandates bargaining and statutory councils<sup>143</sup> to resolve disputes in order to complement the functions of the CCMA. This approach is consistent with the philosophy of autonomy and self-regulation within organised sectors.<sup>144</sup> Moreover, the Act accords significant recognition to privately agreed dispute resolution procedures and gives support to dispute resolution by accredited private agencies.<sup>145</sup> The LRA also establishes specialist Labour Courts to adjudicate various disputes within their jurisdiction and empowers them to award damages and interim relief, as well as any specific performance that may be sought.<sup>146</sup>

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<sup>138</sup> Van Niekerk *Law@Work* 12.

<sup>139</sup> S 1(d)(iv) of the LRA 66 of 1995.

<sup>140</sup> Venter *et al Labour Relations in South Africa* 423.

<sup>141</sup> *Ibid.*

<sup>142</sup> Venter *et al Labour Relations in South Africa* 245.

<sup>143</sup> Part C ss 27 and 28, Part E ss 39 and 43 of the LRA 66 of 1995.

<sup>144</sup> Van Niekerk *et al Law@Work* 429.

<sup>145</sup> S 24(1) of the LRA provides that each collective agreement, except an agency-shop agreement and a closed-shop agreement, must provide for a procedure to settle any dispute regarding the interpretation or application of the collective agreement.

<sup>146</sup> Part E Ss 167-183 of the LRA 66 of 1995.

Helga and Grossett (2005)<sup>147</sup> summarise the aims of the LRA's dispute resolution as follows:

- to create a legal framework in which the employer and trade-union parties will be able to regulate conflict and resolve their disputes;
- to establish a simple, non-technical and non-judicial approach to dispute resolution;
- to avoid lengthy delays in resolution; and
- to reduce the level of strike actions.

#### 4.6 DISPUTES AND THEIR PROCESSES

To understand and appreciate the functioning of the statutory dispute resolution mechanism, it is important to understand the manner in which labour disputes are differentiated.<sup>148</sup> The LRA does not define dispute in detail. It only states that a "dispute" includes "an alleged dispute"<sup>149</sup> and does not provide any further details. A dispute has its origin in the existence of a grievance, which is distinguished from a dispute, although sometimes these terms are used interchangeably.<sup>150</sup> A grievance could be a formalised expression of individual or collective conflict, usually dissatisfaction in respect of a workplace-related matter, while a dispute is a highly formalised manifestation of conflict in relation to workplace-related matters, which may include the failure to address a grievance.<sup>151</sup>

A dispute arises where conflict has come into the open by the formulation of an issue on which there is disagreement and occurs when an underlying conflict has become obvious. Therefore, once a dispute arises parties should consider resolving that

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<sup>147</sup> Helga and Grossett *Employment Law* 2<sup>nd</sup>ed (2005) 396.

<sup>148</sup> *Ibid.*

<sup>149</sup> S 213 of the LRA 66 of 1995.

<sup>150</sup> Bosch *et al* *The Conciliation and Arbitration Handbook* 5.

<sup>151</sup> Brand *et al* *Labour Dispute Resolution* 10.

dispute to avoid the dispute aggravating the conflict.<sup>152</sup> Further, for a dispute to exist there should be a demand communicated to another party and that party should be given the opportunity to comply.<sup>153</sup> To this end, the Court has held that a dispute had to, at a minimum, postulate the notion of the expression by the parties, opposing each other in controversy, of conflicting views, claims or contentions.<sup>154</sup> Moreover, in *Edgars Stores (Pty) Ltd v SACCAWU*<sup>155</sup> the Court held that “an alleged dispute” defined in section 213 of the LRA means that an actual impasse was not necessary for there to be a dispute. The Court concluded that it was sufficient that there was a demand made on a party that, given an opportunity to comply with it, did not comply.

Given the failure of the LRA to distinguish between disputes of rights and disputes of interest<sup>156</sup> the Court suggested that such a distinction was necessary.<sup>157</sup> Against this shortfall, Bosch<sup>158</sup> provides a meaningful differentiation. The author provides that a *dispute of right* relates to those disputes in which the parties assert rights that they may be entitled to through statutory law, common law or agreement, and that they include:

- a dismissal, where a party relies on rights established in the LRA;
- an unfair labour practice, where a party also relies on the LRA;
- non-compliance with terms of a contract.

Although the LRA does not use the term “dispute of right”, it generally uses the term *dispute about a matter of mutual interest*<sup>159</sup> to mean a *dispute of interest*.<sup>160</sup> The LRA distinguishes three sub-categories of disputes of mutual interest and categorises

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<sup>152</sup> *Ibid.*

<sup>153</sup> Du Toit *et al Labour Relations Law* 100.

<sup>154</sup> *Durban City Council v Minister of Labour* 1953 (3) SA 708 (D).

<sup>155</sup> [1998] 5 BLLR 447 (LAC) see also Van Niekerk *et al Law@Work* 430.

<sup>156</sup> *Eskon v Marshall* [2003] 1 BLLR 12 (LC) at par 20.

<sup>157</sup> *Department of Justice & Constitutional Development v Van de Merwe NO & others* (2010) 31 ILJ 1184 (LC) at par 23.

<sup>158</sup> Bosch *et al The Conciliation and Arbitration Handbook* 6.

<sup>159</sup> S 134 of the LRA 66 of 1995.

<sup>160</sup> *Ibid.*

them based on the dispute resolution mechanisms by which they must ultimately be resolved. These are:<sup>161</sup>

- disputes that are arbitrable, which must be arbitrated by the CCMA or a bargaining council having jurisdiction;
- disputes that are justiciable, which must be adjudicated by the Labour Court; and
- disputes that must be resolved by the exercise of economic power where parties can either strike or institute a lockout in support of their demand.

The LRA provides the process involved to resolve each dispute in detail. Below is an overview of the most important dispute resolution processes and reference to the relevant sections in the LRA.<sup>162</sup>

<b>Disputes that are resolved by arbitration at the CCMA or a bargaining / statutory council</b>	
Nature of dispute	Statutory provision
Dispute about the disclosure of information	Section 16
Exercise of organisational rights (except if the union has elected to strike in terms of section 65 (2))	Sections 21 and 22
Disputes about the interpretation and application of collective agreements	Section 24
Mutual interest disputes in essential services	Section 74
Dispute about workplace forums	Section 94
Disputes agreed upon by the parties in writing to be referred to a council or the CCMA if the Labour Court would normally have jurisdiction	Section 141
Disputes about alleged unfair dismissal for misconduct or incapacity	Section 191 (5) (a)
Dispute about constructive dismissal	Section 191 (5) (a)
Disputes over dismissals if the employee does not know the reason for the dismissal	Section 191 (5) (a)
Dispute about the dismissal if the employer provided the employee with substantively less favourable terms and conditions of employment after transfer in terms of section 197 or 197A	Section 191 (5) (a)
Dispute about alleged unfair labour practices	Section 191(5) (a)

<sup>161</sup> Van Niekerk *et al Law@Work* 430.

<sup>162</sup> Basson *et al Essential Labour Law* 379.

A single employee disputes the fairness of a dismissal for operational requirements (may elect to refer the dispute either to the Labour Court or arbitration)	Section 191 (12)
<b>Disputes that are referred to the Labour Court for adjudication</b>	
Dispute about freedom of association	Section 9
Refusal to admit a party to a bargaining council	Section 56
Disputes about the right to picket	Section 69
Disputes about alleged automatically unfair dismissals	Section 191 (5)(b)
Disputes about dismissals if the reason for the dismissal is the employees' participation in an unprotected strike	Section 191 (5)(b)
Disputes about dismissals – the employee was dismissed because he or she refused to join, was refused membership or was expelled from a trade union party to a closed shop	Section 191 (5)(b)
Dispute arising from an allegation by an employee that he or she has been subjected to an occupational detriment by the employer in contravention of the Protected Disclosure Act 26 OF 2000.	Section 191 (13)
Disputes about dismissal for operational requirements(a trade union may also embark on a strike in respect of substantive fairness)	Section 191 and 189 A
A single employee disputes the fairness of a dismissal for operational requirements( the employee may also refer the dispute to arbitration)	Section 191 (12)
<b>Disputes that are resolved by means of economic power (Strike or lockout)</b>	
Matters of mutual interest	Section 64 and 134
Refusal to bargain	Section 64 (2)
Unilateral change to terms and conditions of employment by the employer	Section 64 (4)
Disputes over organisational rights (Except where the union has elected to refer to arbitration in terms of section 21 and 22	Section 65 (2)
Disputes over dismissal for operational reasons – the trade union has a right, in terms of section 189 A, to resort to a strike about the substantive fairness of a large-scale dismissal	Section 189 A.

#### 4.7 DISPUTE RESOLUTION BY THE CCMA

The LRA creates the CCMA as the “centrepiece”<sup>163</sup> for the labour dispute resolution system.<sup>164</sup> It is the institution on which the LRA pivots.<sup>165</sup> The CCMA came into effect by Government Proclamation in December 1995.<sup>166</sup> Unlike the Labour Court, the

<sup>163</sup> Landis and Grossett *Employment and the Law- A Practical Guide for the Workplace* (2005) 396.

<sup>164</sup> S 112 of the LRA 66 of 1995.

<sup>165</sup> Van Rensburg *Participation and Progress: Labour Relations in South Africa* (1998) 10-8. See also *Deutsch v Pinto & Another* (1997) 18 ILJ 1008 (LC) par 10111, in which the Labour Court asserted the pivotal role of the CCMA in the LRA. See also Brassey *Employment and Labour Law- Commentary on the Labour Relations Act* (1999) A7-1.

<sup>166</sup> Proclamation R112 in GG16880 of 22 December 1995.

CCMA has no status of a court of law and has no judicial authority within the contemplation of the South African Constitution. It has been held that the CCMA is an administrative tribunal and an organ of state under section 239 of the Constitution.<sup>167</sup> Thus, it is directly bound by the Bill of Rights and subject to the basic values and principles governing public administration.<sup>168</sup>

Moreover, the CCMA is an autonomous statutory body<sup>169</sup> with legal personality<sup>170</sup> or is established as a juristic person.<sup>171</sup> Although largely funded by the state, it is independent of the state, political parties, trade unions, employers, employers' organisations, and federations of employers' organisations.<sup>172</sup> Ultimately, the Constitution obliges the CCMA to act in an impartial, equitable and unbiased manner.<sup>173</sup>

Structurally, the CCMA has national jurisdiction and maintains offices in all nine provinces of the Republic of South Africa.<sup>174</sup> Despite national jurisdiction, the CCMA rules require that a dispute must be conciliated or arbitrated in the province where the cause of action arose,<sup>175</sup> unless a senior commissioner in the CCMA head office<sup>176</sup> directs otherwise.

The CCMA is governed by a governing body.<sup>177</sup> It is this body that appoints the director of the CCMA, who is required to be skilled and experienced in labour relations and dispute resolution.<sup>178</sup> He or she automatically holds the office of a

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<sup>167</sup> *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 LAC par 1430 F-G.

<sup>168</sup> S 195(2)(b) of the South African Constitution .

<sup>169</sup> S 113 of the LRA 66 of 1995.

<sup>170</sup> S 112 of the LRA 66 of 1995

<sup>171</sup> A juristic person is translated to mean as body treated by law as a person and, as a result, it can acquire its own rights and duties. See *Brassey Employment and Labour Law A7-2*. See also in *SACCAWU v Specialty Stores Ltd* (1998) 18 ILJ 557 (LAC) par 560B in which case juristic person was determined.

<sup>172</sup> S 113 of the LRA 66 of 1995.

<sup>173</sup> *Brassey Employment and Labour law A7-2*.

<sup>174</sup> S 114 of the LRA 66 of 1995.

<sup>175</sup> CCMA Rule 24(1).

<sup>176</sup> The CCMA's head office is located in Johannesburg, Gauteng Province.

<sup>177</sup> The Governing Body consists of a chairperson, a director and nine other members who represent the interest of organized business, organized labour and the State. See s 116 of the LRA 66 of 1995.

<sup>178</sup> S 118(1)(a) of the LRA 66 of 1995.

senior commissioner.<sup>179</sup> The director is charged with the overall responsibility to manage the activities of the CCMA and to appoint and supervise the organisation's staff.<sup>180</sup> The CCMA has a National Registry component, which is responsible for the administration of the institution. The Registry provides a number of support services to the CCMA, such as the Case Management System and Information Services.<sup>181</sup> A Provincial Registrars oversees the administration of the CCMA in each province.<sup>182</sup>

Besides the registry, an equally important component of the CCMA is the commissioners. The dispute resolution work of the CCMA is performed by commissioners who are appointed either on a full-time or part-time basis by the Governing Body.<sup>183</sup> The more qualified and experienced commissioners are appointed as senior commissioners.<sup>184</sup> The LRA does not prescribe the qualifications of the commissioners, except that they should be adequately qualified.<sup>185</sup> Most commissioners are persons with tertiary qualifications in disciplines such as law, psychology and industrial relations, coupled with practical experience in labour dispute resolution and industrial relations.<sup>186</sup> CCMA commissioners do not enjoy the security of tenure<sup>187</sup> as they are appointed for a fixed term determined by the Governing Body.<sup>188</sup>

Commissioners are subject to a code of conduct,<sup>189</sup> which places emphasis on integrity and independence. Any deviation from the code of conduct may constitute serious misconduct and be sufficient reason to remove a commissioner from his or her office.<sup>190</sup> Commissioners are represented at the head office by three National Senior Commissioners, who are responsible for overseeing all conciliation, mediation and arbitration that the CCMA undertakes as well as planning and development

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<sup>179</sup> S 118(4) of the LRA 66 of 1995.

<sup>180</sup> S 118(2) of the LRA 66 of 1995.

<sup>181</sup> Van Rensburg *Participating and Progress* 10-10.

<sup>182</sup> *Ibid.*

<sup>183</sup> S 117(1) and (2) of the LRA 66 of 1995.

<sup>184</sup> S 117(2)(a)(ii) of the LRA 66 of 1995.

<sup>185</sup> Brand *et al Labour Dispute Resolution* (2011) 45.

<sup>186</sup> *Ibid.*

<sup>187</sup> Du Toit *et al Labour Relations Law* 90.

<sup>188</sup> S 117(2)(b) of the LRA 66 of 1995.

<sup>189</sup> S 117(6) of the LRA 66 of 1995.

<sup>190</sup> S 117(7) of the LRA 66 of 1995.

functions. Besides National Senior Commissioners, there are Convening Senior Commissioners in each province. Their role is to monitor the professional standards of the CCMA and, in collaboration with the Registrars, to assist in the allocation of cases to commissioners.<sup>191</sup>

Section 115 of the LRA describes the obligatory function of the CCMA to include:

- to conciliate workplace disputes;
- to arbitrate disputes that remain unresolved after conciliation;
- to facilitate the establishment of Workplace Forums and Statutory Councils;
- to compile and publish information and statistics about its activities; and
- to consider applications for accreditation and subsidy by bargaining councils and private agencies.

The CCMA may also:

- supervise ballots for unions and employers' organisations; and
- provide training and advice on:
  - the establishment of collective bargaining structures;
  - workplace restructuring;
  - the consultation process;
  - termination of employment;
  - employment equity programmes; and
  - dispute prevention.

#### **4.7.1 CCMA JURISDICTION**

A dispute that arises in a sector or area where an accredited bargaining council has jurisdiction must be referred to that council for conciliation and arbitration. In the

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<sup>191</sup> Van Rensburg *Participation and Progress* 10-10.

absence of a council having jurisdiction over the matter, the dispute must be referred to the CCMA.<sup>192</sup> In some instances the CCMA has exclusive jurisdiction and a council is not authorised to conciliate and arbitrate those disputes.<sup>193</sup>

A number of factors determine whether the CCMA has jurisdiction.<sup>194</sup> Although the list below is not exhaustive, it is submitted that these jurisdictional facts must be present:<sup>195</sup>

- (i) there must be a dispute or an alleged dispute;<sup>196</sup>
- (ii) the dispute must result from an employer-employee relationship, given the exclusion of independent contractors from the definition of employee;
- (iii) the dispute must fall within the area of the CCMA, in that the CCMA has no international jurisdiction over disputes emanating outside the borders of South Africa;<sup>197</sup>
- (iv) the dispute must fall within one of the specified categories of labour disputes over which the CCMA has jurisdiction. In other words, the dispute is not subject to collective agreement;
- (v) the dispute must not be subject to a bargaining council with jurisdiction<sup>198</sup> or privately agreed upon dispute resolution procedures;<sup>199</sup>

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<sup>192</sup> Bosch *et al* *The Conciliation and Arbitration* 23.

<sup>193</sup> *Ibid.*

<sup>194</sup> Van Jaarsveld *et al* *Principles of Labour Law* 347.

<sup>195</sup> *Ibid.*

<sup>196</sup> In this respect, s 213 of the LRA defines the terms “dispute” to include an alleged dispute.

<sup>197</sup> S 114 of the LRA provides that a labour dispute must be conciliated and arbitrated in the province in which the cause of action arose, unless the Senior Commissioner in head office directs otherwise. See also Rule 24(1) for the Conduct of Proceedings before the CCMA (GNR1448 in GG 25515 dated 10 October 2003) as corrected by GNR 1512 in GG25607 dated 17 October 2003. Hereinafter referred to as “the CCMA Rules”.

<sup>198</sup> S 28(1)(c)-(d), of the LRA provides that the Bargaining Councils also have the functions of preventing and resolving labour disputes. Secondly, s 30(1)(l) of the LRA provides that the Constitution of every Bargaining Council must at least contain procedures to be followed if a dispute arises between the parties in the Bargaining Council.

<sup>199</sup> S 191(1)((b)(i) of the LRA 66 of 1995.

(vi) the referral to the CCMA must be made within the prescribed time limit,<sup>200</sup>

Generally the CCMA has jurisdiction in disputes listed below despite the existence of a council.<sup>201</sup>

- disputes concerning organisational rights;
- disputes concerning workplace forums;
- disputes concerning Ministerial determinations;
- disputes about the interpretation or application of agency-shop or closed-shop agreements;
- disputes concerning the demarcation of sectors and areas of councils;
- disputes about the interpretation or application of collective agreements where the agreement does not contain a dispute procedure, where the procedure is inoperative or where the procedure is frustrated by a party;
- disputes about collective agreements of a council whose registration has been cancelled;
- disputes about the interpretation or application of Parts A and C-F of Chapter 3 of the LRA; and
- disputes about picket rules during strikes and lockout.

To this end, the Court has inferred that it would be “*over-technical*” to find that the CCMA lacked jurisdiction to conciliate and arbitrate a dispute that was subject to a Bargaining Council’s jurisdiction.<sup>202</sup> In addition, the Court held that jurisdictional facts

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<sup>200</sup> S 191(1)(b)(ii) of the LRA 66 of 1995. See also ss 10(2) and 10(4) of the Employment Equity Act 55 of 1998 (hereinafter referred to as the “EEA”).

<sup>201</sup> Bosch *et al The Conciliation and Arbitration* 23.

<sup>202</sup> *Spilhaus & Co Ltd v CCMA* [1997] 8 BLLR 116 (LC) at 1119.

must actually exist and not be created by the consent of the parties. It becomes obligatory on the CCMA to decide whether it has jurisdiction to determine the dispute without having to rely on a ruling made in a different forum.<sup>203</sup>

However, despite the aforementioned jurisdictional considerations, a party can object to the CCMA's jurisdiction based on the grounds listed below:<sup>204</sup>

- the party referring the dispute is not a party to the dispute, or is not empowered by statute to refer the dispute;
- there is no employer-employee relationship;
- there is no dispute;
- there is no valid referral, by reason of not complying with the referral requirements or the referral has not been properly signed;
- the dispute is referred to an incorrect forum;
- the referral was late and condonation has not been granted;
- the dispute arose before the commencement of the LRA;
- the dispute is subject to a collective agreement, requiring its own procedure to be followed; and
- the dispute has already been determined.

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<sup>203</sup> *Zeuna-Starker Bop (Pty) Ltd v NUMSA* [1998] 11 BLLR 1110 (LAC) in this case, the court went further to find that where the jurisdiction of a tribunal was dependent on the existence of a particular condition, it might not give itself jurisdiction by incorrectly determining that those conditions existed. See also Du Toit *et al Labour Relations Law* 100.

<sup>204</sup> *Bosch et al Conciliation and Arbitration* 248.

#### 4.7.2 CONCILIATION PROCESS BY THE CCMA

The LRA does not define conciliation. However, the Act gives the commissioner latitude and a framework within which to determine the process to be used in terms of section 135 of the LRA. This may include mediation, conducting a fact-finding exercise and making a recommendation to the parties, including an advisory award.<sup>205</sup>

In the absence of a statutory definition, Van Niekerk<sup>206</sup> provides a useful definition of conciliation:

“an intervention by an independent third party, who assists parties to a dispute to arrive at a mutually agreed outcome”.

As per the definition, the conciliator’s role is to assist parties to reach their own agreement and makes no binding determination on them.<sup>207</sup> It is therefore submitted that conciliation and mediation have no mechanisms to resolve disputes other than through agreements. Subsequently, the conciliator has no adjudicative or decision-making power or power to make a final and binding award.<sup>208</sup> Conciliating commissioners have no prescriptive powers<sup>209</sup> other than the power to subpoena persons for questioning, to seize and inspect documents and enter premises.<sup>210</sup> Their functions are limited solely to assisting the parties to settle on their own without exerting force on them.<sup>211</sup>

Overall, the values of conciliation are twofold:<sup>212</sup> first, it is beneficial to the employer and employee involved in an employment relationship to settle their disputes through agreement rather than resolving it by means of a final decision with a winner-loser

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<sup>205</sup> Van Niekerk *et al Law@Work* 435.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> Govindjee “Labour Dispute Resolution” in Van der Walt, Le Roux and Govindjee (eds) *Labour Law in Context* (2012) 223.

<sup>209</sup> Grogan *Workplace Law* 8<sup>th</sup> ed (2004) 444.

<sup>210</sup> Ss 142(1) and (2) of the LRA 66 of 1995.

<sup>211</sup> Grogan *Workplace Law* 444.

<sup>212</sup> *Ibid.*

outcome. Second, the filtering out of disputes has the advantage of lessening the burden on the CCMA and other dispute resolution mechanisms.

#### 4.7.3 REFERRAL OF DISPUTES

A party<sup>213</sup> to a dispute contemplating referral to the CCMA for conciliation<sup>214</sup> is required to complete and sign<sup>215</sup> LRA Form 7:1.<sup>216</sup> The referral document requires the referring party to state the names of the parties to the dispute, the nature of the dispute, the date of the dispute and the result of arbitration. On providing these particulars, the referral document must be served on all parties to the dispute by hand-delivery, registered post, telegram, telex or telefax.<sup>217</sup> After service, the referral document must be served on the CCMA bearing proof of service on the other party to the dispute.

The LRA dictates the time limits for referring labour disputes to the CCMA. For instance, unfair dismissal disputes must be referred to the CCMA within 30 days of the dismissal or within 30 days of the employer making the final decision about dismissal.<sup>218</sup> Unfair labour practice disputes must be referred within 90 days of the act or omission that allegedly constituted the unfair labour practice.<sup>219</sup> As for unfair discrimination disputes in terms of the EEA, disputes must be referred within 6 months after the act or omission constituting unfair discrimination.<sup>220</sup>

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<sup>213</sup> Dismissal disputes and unfair labour practices disputes can be referred for conciliation or arbitration **only** by an employee and not by an employer. See s 191(5) of the LRA 66 of 1995. See also, Bosch *et al Conciliation and Arbitration* 249.

<sup>214</sup> S 134(1) of the LRA 66 of 1995.

<sup>215</sup> CCMA Rule 4(1) provides that the referral from may be signed by a party to the dispute or by a person who may represent the party in terms of the LRA or the CCMA rules.

<sup>216</sup> Hereinafter referred to as "the referral document". CCMA Rule 10(1).

<sup>217</sup> S 191(3) of the LRA 66 of 1995, uses the term "serve" and defines it in s 213 to mean to send by registered post, telegram, telex, telefax or to deliver by hand. Moreover, CCMA rules 5-6 set out in details the various options for service by hand. Rule 5 provide for proof of service to include a written statement or receipt, proof of mailing, a copy of the telegram or telex or fax report indicating successful transmission.

<sup>218</sup> S 191(1)(b)(i) of the LRA 66 of 1995 includes instances where there is an appeal pending. For example, where the employee has appealed against the employer's decision. The date for the referral would be the date of the decision of the appeal.

<sup>219</sup> S 191(1)(b)(ii) of the LRA 66 of 1995.

<sup>220</sup> S 10(2) of the EEA 55 of 1998.

Notwithstanding the above prescribed time limits, the LRA permits late referral of the dispute on good cause shown.<sup>221</sup> However, late referral must be accompanied by an application for condonation or the CCMA will lack jurisdiction.<sup>222</sup> The application for condonation must set out grounds for seeking condonation including:<sup>223</sup>

- the degree of lateness;
- the reason for lateness;<sup>224</sup>
- the referring party's prospect of succeeding with the referral and obtaining the relief sought against the other party;<sup>225</sup>
- any prejudice to the other party; and
- any other relevant factors.<sup>226</sup>

Govindjee<sup>227</sup> demonstrates that there is no requirement that the application be heard orally. Therefore, the application can be considered through written submission. In these instances, it is required that the application for condonation be comprehensive, as the CCMA is not obliged to convene a hearing to enable an applicant for condonation to make a submission not included in the affidavit.<sup>228</sup> There is no requirement either in the LRA or in the CCMA rules for parties to agree to condonation for late referral. It is left to the CCMA or the commissioner to be satisfied that good cause for late referral has been proven.<sup>229</sup> Therefore, if one party intends to

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<sup>221</sup> S 191(2) of the LRA 66 of 1995.

<sup>222</sup> Govindjee "Labour Dispute Resolution" 224. See also with the authority in *Van Rooy v Nedcor Bank (Ltd)* [1998] 5 BLLR 540 (LC) wherein the Court held that "the fatality of a late referral is cured by condonation if granted and only then will the CCMA have jurisdiction to conciliate the dispute. Seemingly, the Court will equally have jurisdiction to deal with the dispute. Otherwise, the Court held further, that where the CCMA lacked the necessary jurisdiction, so will be the Court.

<sup>223</sup> CCMA Rule 9.

<sup>224</sup> In *NUMSA v Duro Pressing (Pty) Ltd* [2002] 11 BLLR 1087 (LC), Tsebeza AJ, held that, where the applicant failed to provide a satisfactory explanation for delay, no inquiry into the prospects of success was necessary.

<sup>225</sup> Bosch *et al Conciliation and Arbitration* 261 point out that the prospect of success refers to the referring party's prospects of succeeding with the referral and obtaining the relief sought against the other party and must provides reasons why the case will likely succeed.

<sup>226</sup> *Ibid* – points out that other relevant factors could include the importance of the matter and the number of employees affected.

<sup>227</sup> Govindjee "Labour Dispute Resolution" 224.

<sup>228</sup> Bosch *et al Conciliation and Arbitration* 261.

<sup>229</sup> *Ibid*.

challenge the ruling on condonation it should apply to the Labour Court for review of the decision to condone.<sup>230</sup>

#### 4.7.4 SET-DOWN AND CONCILIATION PROCESS

Once the dispute has been properly referred to the CCMA, a commissioner must be appointed to attempt to resolve the dispute through conciliation. This must happen within 30 days of the date the CCMA received the referral.<sup>231</sup> Alternatively, the parties can agree to extend this period.<sup>232</sup> The CCMA rules prescribe that the parties must be given 14 days' notice of the conciliation hearing.<sup>233</sup> Once the parties have received this notice they are required to attend in person and not to merely send a representative.<sup>234</sup> If a party to a dispute fails to attend or appear, the commissioner has the discretion to dismiss the matter, postpone it or continue in the absence of that party.<sup>235</sup>

The primary role of the commissioner during conciliation is to assist the parties to resolve the dispute themselves by devising a process that the commissioner deems appropriate. As stated earlier, under the definition set out in the LRA this may include mediation, fact-finding or making an advisory award.<sup>236</sup> To that end, conciliation proceedings are private and confidential and are conducted on a “*without-prejudice*” basis.<sup>237</sup> It is for this reason that conciliation proceedings are regarded as informal and off the record. Nothing that was revealed or said during conciliation can be used as evidence in a later process where conciliation failed.<sup>238</sup>

In respect to representation during conciliation proceedings, the LRA places restrictions on the right to representation at conciliation and arbitration.<sup>239</sup> It has been

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<sup>230</sup> *Ibid.*

<sup>231</sup> Ss 133(1) and 135(1)-(2) of the LRA 66 of 1995.

<sup>232</sup> S 135(2) of the LRA 66 of 1995.

<sup>233</sup> CCMA rule 11.

<sup>234</sup> CCMA rule 13.

<sup>235</sup> CCMA rule 30.

<sup>236</sup> S 135(3) of the LRA 66 of 1995.

<sup>237</sup> CCMA rule 16(1) and (2).

<sup>238</sup> Govindjee “Labour Dispute Resolution” 224.

<sup>239</sup> Van Jaarsveld *et al Principles of Labour Law* 353.

argued that allowing legal representation at this forum will cause the proceedings to become legalistic and expensive.<sup>240</sup> Thus parties have no right to legal representation during conciliation. Their right to representation is limited to directors or employees of the employer party to a dispute or a member of a close corporation, and a member, office bearer, official of a trade union representing the employee party or an employers' organisation representing the employer party.<sup>241</sup> The restriction is not only limited to legal practitioners as defined in section 213 of the LRA, but extends to include labour consultants, paralegals and officials of an unregistered trade union who wish to act in a representative capacity during conciliation.<sup>242</sup>

During the conciliation and arbitration process, conciliators have wider powers. Although seldom utilised,<sup>243</sup> these powers include the power to:<sup>244</sup>

- subpoena any person for questioning;
- subpoena a person who is believed to be in possession of books, documents or objects which might be required for the resolution of a dispute;
- call an expert witness;
- administer and oath;
- enter premises and retain for a reasonable period, any book, document or object after obtaining the necessary written authorisation.

The LRA provides that a person is in contempt of the CCMA if, for instance, the person disregards the subpoena, if the commissioner is belittled or if the conciliation or arbitration procedure is disrupted.<sup>245</sup> Although the LRA makes provision for the offence of contempt of the Commission, commissioners themselves lack the

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<sup>240</sup> *Ibid.*

<sup>241</sup> See the repealed s 135(4) Schedule 7 Item 27 of the LRA read with the CCMA rule 25.

<sup>242</sup> Van Jaarsveld *et al Principles of Labour Law* 353. See also *Som Garment (Pty) Ltd v Van Dokkum* [1997] 9 BLLR 1234 (LC) wherein the Labour Court held that the CCMA has no jurisdiction to permit persons not designated in the LRA to represent parties. Moreover, *the Court in Netherbern Engineering CC v Mudau* (2003) ILJ 1712 (LC) held that it was not unconstitutional to deny legal representation before an administrative tribunal.

<sup>243</sup> Van Jaarsveld *et al Principles of Labour Law* 353.

<sup>244</sup> S 142(1)(a)-(b) of the LRA 66 of 1995.

<sup>245</sup> S 142(8) of the LRA 66 of 1995 provides a complete list of acts that may constitute contempt.

jurisdiction to convict and punish persons for this offence.<sup>246</sup> The only appropriate way to secure conviction is to make a finding of contempt of the CCMA, and refer the finding, together with the record of the proceeding, by way of application to the Labour Court to have the order confirmed, varied or set aside.<sup>247</sup> Contempt is traditionally treated as a criminal offence; thus it is assumed that before convicting the offender, the Labour Court will hold a hearing similar to a criminal trial.<sup>248</sup>

This assumption is based on the premise that the Labour Court has criminal jurisdiction as it appears from section 151(2) of the LRA, in that it has the authority, inherent powers and standing equal to those which a court of a provincial division of the High Court possesses. The reason for an order to be preceded by a criminal trial is based on the fundamental right to a fair trial before conviction.<sup>249</sup> The courts generally have the power to summarily convict and sentence a person committing contempt.<sup>250</sup> This power has not been retained for the CCMA, and quite rightly so as the Commission would be complainant, prosecutor and judge in the case.<sup>251</sup> Moreover, the accused may be unrepresented and may have committed contempt in an emotionally charged state.<sup>252</sup>

#### **4.7.5 CERTIFICATE OF OUTCOME**

At the end of a conciliation meeting, the commissioner who conciliated the dispute is required to issue a certificate of outcome,<sup>253</sup> using Form LRA 7.13. If conciliation was successful, the conciliating commissioner must record that the dispute has been resolved.<sup>254</sup> Where the dispute remains unresolved, the commissioner must issue a certificate of outcome recording that conciliation has failed.<sup>255</sup> The commissioner is

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<sup>246</sup> Grogan *Workplace Law* 444.

<sup>247</sup> S 143(9)(a)and(b) of the LRA 66 of 1995.

<sup>248</sup> Brand *et al Labour Dispute Resolution* 158.

<sup>249</sup> S 35(3) of the South African Constitution.

<sup>250</sup> Brand *et al labour Dispute Resolution* 158.

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

<sup>253</sup> Ss 64(1)(a)(i), 135(5)(a), 136(1)(a) of the LRA 66 of 1995.

<sup>254</sup> Grogan *Workplace Law* 444.

<sup>255</sup> Van Niekerk *et al Law@Work* 437.

required to file the original certificate with the CCMA and the CCMA in turn serves copies on all parties.<sup>256</sup>

The effect of a certificate of non-resolution is to establish that the conciliation has failed.<sup>257</sup> It does not determine the dispute or the nature of the dispute.<sup>258</sup> However, the commissioner is cautioned as to how he or she describes the dispute in the certificate as the parties have the right to examine it and verify that their dispute has been correctly formulated.<sup>259</sup> In a settled dispute, the conciliator drafts a settlement agreement that should be signed by both parties. A settlement agreement is a written agreement in settlement of a dispute that a party had the right to refer to arbitration or the Labour Court.<sup>260</sup> It should be signed by both parties as evidence of full and final settlement of a dispute that has been properly referred to the CCMA.<sup>261</sup> Once the agreement has been signed it becomes binding on both parties.<sup>262</sup>

Finally, a settlement agreement between the parties may, on application by any of the parties, be made an arbitration award by the CCMA and becomes enforceable in terms of section 143 of the LRA.

#### **4.8 ARBITRATION BY THE CCMA**

Arbitration is described as a process in which a neutral person makes a decision on a specified range of disputed issues.<sup>263</sup> It is the direct intervention<sup>264</sup> of a third party, the arbitrator, who plays a decisive role by listening to the evidence of the parties or their representatives to a dispute, weighing arguments and evidence presented and

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<sup>256</sup> S 135(5)(a)-(c) of the LRA 66 of 1995. See also Du Toit *et al Labour Relations Law* 114.

<sup>257</sup> Van Niekerk *et al Law@Work* 437.

<sup>258</sup> Du Toit *et al Labour Relations Law* 114.

<sup>259</sup> *Ibid.*

<sup>260</sup> Govindjee "Labour Dispute Resolution" 225.

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> Du Toit *et al Labour Relations Law* 117.

<sup>264</sup> Venter *et al Labour Relations in South Africa* 427.

thereby making a final and binding decision.<sup>265</sup> Arbitration is a hearing *de novo*, where evidence presented is repeated or re-presented to the arbitrator.<sup>266</sup>

It is submitted that arbitration is an expedited process to resolve factual labour disputes once and for all. The ultimate object, whether compulsory under the LRA or private, is to dispose of the dispute finally, through an award, which is subject to review only and not an appeal as provided for by the LRA.<sup>267</sup> Arbitration under the LRA is compulsory, in that once an employee or, in some instances, an employer has referred a dispute to the CCMA or a bargaining council with jurisdiction, the other party must attend if it wishes to defend the matter. It is necessary to do so even if the party has not consented to arbitration.<sup>268</sup> Similarly, it becomes compulsory in terms of a collective agreement that mandates arbitration as part of the collective bargaining process<sup>269</sup> or in terms of section 136 of the LRA.

Arbitration proceedings before the CCMA are regulated by sections 136 to 144 of the LRA, read with the CCMA rules issued as part of the LRA package, and are regarded as soft law.<sup>270</sup> The LRA provides that a dispute may be arbitrated only if a commissioner has issued a certificate of unresolved dispute.<sup>271</sup> Therefore, an arbitration proceeding has to be preceded by a failed conciliation.<sup>272</sup> Besides a failed conciliation, the lapse of the prescribed 30-day period of conciliation is a sufficient ground to warrant or cause arbitration.<sup>273</sup> The arbitrator is required to ensure that the dispute referred to arbitration is the same dispute or at least substantially the same as the one referred to conciliation.<sup>274</sup> The referral must comply with the time limit,

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<sup>265</sup> Govindjee "Labour Dispute Resolution" 229.

<sup>266</sup> *Ibid.*

<sup>267</sup> Du Toit *et al Labour Relations Law* 117.

<sup>268</sup> Grogan *Labour Litigation and Dispute Resolution* (2010) 125.

<sup>269</sup> Venter *et al Labour Relations in South Africa* 428.

<sup>270</sup> Basson *et al Essential Labour Law* 361.

<sup>271</sup> S 136(1)(a) of the LRA 66 of 1995.

<sup>272</sup> Grogan *Labour Litigation and Dispute Resolution* 126.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*

which is 90 days of the date on which the certificate was issued,<sup>275</sup> unless an application for condonation was made and granted.<sup>276</sup>

#### 4.8.1 REFERRAL, APPOINTMENT OF COMMISSIONERS AND SET-DOWN

The LRA provides that a party wishing to refer a dispute for arbitration to the CCMA must complete and sign LRA Form 7.13, which must be served<sup>277</sup> on the other party to the dispute and the CCMA. The referral document must contain a statement of the issue in dispute and the section of the LRA under which relief is sought.<sup>278</sup> The referral document must disclose, although not in great detail, a cause of action within the boundaries of the CCMA. This is premised on the fact that a party cannot alter the stated cause of action during the course of the proceedings or amend it later, thereby creating a different dispute to that which was referred to conciliation.<sup>279</sup>

Unlike in private arbitration, in compulsory arbitration before the CCMA disputing parties have little say in the appointment of the commissioner.<sup>280</sup> It is the duty of the CCMA to appoint a commissioner to arbitrate the dispute.<sup>281</sup> The LRA allows the same commissioner appointed by the CCMA who conciliated the dispute to be the arbitrator where appropriate.<sup>282</sup> It has been argued, however, that the continuation of the dispute by the same commissioner may not be desirable. Thus the LRA allows the parties to the dispute to submit written objections within seven days of the issuing of the certificate of failure to conciliate, objecting to the same commissioner arbitrating the dispute.<sup>283</sup> The objection must be filed with the CCMA after a copy has been served on the other party to the dispute.<sup>284</sup> The objection must provide or suggest the appointment of another commissioner to arbitrate the dispute and may

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<sup>275</sup> S 136(1)(b) of the LRA 66 of 1995.

<sup>276</sup> CCMA rule 9 read with rule 31.

<sup>277</sup> Serve is defined in s 213 of the LRA 66 of 1995 and is done by hand, registered post, telegram, telex or telefax. See CCMA rule 6.

<sup>278</sup> Grogan *Labour Litigation and Dispute Resolution* 127.

<sup>279</sup> *Ibid.*

<sup>280</sup> Brand *et al Labour Dispute Resolution* 149.

<sup>281</sup> S 136(1) of the LRA 66 of 1995.

<sup>282</sup> S 136(2) of the LRA 66 of 1995.

<sup>283</sup> S 136(3) of the LRA 66 of 1995.

<sup>284</sup> *Ibid.*

request the CCMA to take into account their stated preference to the extent that it is reasonably practicably in the circumstances.<sup>285</sup> The LRA requires that the stated preference must be:<sup>286</sup>

- in writing;
- list no more than five commissioners;
- state that the request is made with the agreement of all the parties to the dispute; and
- be submitted within 48 hours of the date of the certificate issued in terms of section 136 (1) of the LRA.

Brand *at al*<sup>287</sup> question whether the CCMA should be bound to appoint a commissioner amongst names on the list of preferred commissioners submitted by the parties. Irrespective of this observation, the CCMA must appoint another commissioner to resolve the dispute through arbitration and not necessarily from the submitted list.

A party may also request the CCMA to appoint a senior commissioner to resolve the dispute.<sup>288</sup> Such an application must be made in the prescribed Form LRA 7.15. In considering the application for a senior commissioner, the director is required to hear the parties to the dispute as well as the commissioner who conciliated the dispute.<sup>289</sup> In doing so, the CCMA director must take into considerations the following factors:<sup>290</sup>

- the nature of the question of law raised by the dispute;
- the complexity of the dispute;

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<sup>285</sup> S 136(4) of the LRA 66 of 1995.

<sup>286</sup> S 136(5)(b) of the LRA of 1995.

<sup>287</sup> Brand *et al Labour Dispute Resolution* 149.

<sup>288</sup> S 137(1) of the LRA 66 of 1995.

<sup>289</sup> S 137(2) of the LRA 66 of 1995.

<sup>290</sup> S 137(3) of the LRA 66 of 1995.

- whether there are conflicting arbitration awards that are relevant to the dispute; and
- the public interest.

Thereafter, the director must inform the parties of the outcome.<sup>291</sup> The ruling is final and binding on the parties.<sup>292</sup> The LRA restrains any review of the director's decision until the dispute has been finally arbitrated.<sup>293</sup> Once the CCMA is satisfied with the referral, the matter will be set down for arbitration.<sup>294</sup> Thereafter, the CCMA must give the parties at least 21 days' notice<sup>295</sup> of the hearing, unless the parties have agreed to a shorter period.<sup>296</sup>

#### 4.8.2 CON-ARB

Con-arb<sup>297</sup> was introduced to expedite dispute resolution in a limited range of disputes with the amendment of the LRA of 2002<sup>298</sup>. The new amendment provides for an expedited process, whereby specific disputes automatically proceed to arbitration if conciliation efforts fail to resolve the dispute.<sup>299</sup> The same conciliating commissioner arbitrates the matter unless there is an objection on record.<sup>300</sup> It has been submitted that con-arb has the benefit of saving time in that no time is lost between conciliation and arbitration and that the dispute resolution agency is visited only on one occasion, particularly where there no postponements in the matter.<sup>301</sup>

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<sup>291</sup> S 137(4) of the LRA 66 of 1995.

<sup>292</sup> S 137(5) of the LRA 66 of 1995.

<sup>293</sup> S 137(6) of the LRA 66 of 1995.

<sup>294</sup> Bosch *et al Conciliation and Arbitration* 142.

<sup>295</sup> CCMA rule 3 –states that (a) a day means calendar day; (b) the first day is excluded and the last day included, subject to sub-rule (2), if it falls on a Saturday, Sunday public holiday or on a day during the period 16 December to 7 January.

<sup>296</sup> CCMA rule 21.

<sup>297</sup> Con-arb is a hybrid system of conciliation proceeding immediately with arbitration.

<sup>298</sup> Van Niekerk *et al Law@Work* 440.

<sup>299</sup> Brand *et al Labour Dispute Resolution* 150.

<sup>300</sup> Jordaan *et al Labour Arbitration* 91.

<sup>301</sup> Rycroft “ Rethinking the Con-arb Procedure” (2003) *ILJ* 699.

The LRA<sup>302</sup> empowers the CCMA to commence with arbitration immediately after certifying that the dispute remains unresolved in the following instances:

- the dismissal of an employee for any reason relating to probation;
- any unfair labour practice relating to probation;
- in all unfair dismissals and unfair labour practices disputes, where no party objects to the matter being subjected to the con-arb procedure and at least seven days' prior notice to the date of the process is given.<sup>303</sup>

The CCMA rules regulating con-arb provides as follows:<sup>304</sup>

- The parties to the dispute must be given at least 14 days' notice of the date of the con-arb.<sup>305</sup>
- The party wishing to object to the con-arb process must deliver a written notice to the CCMA and the other party of the objection. The objection notice must be delivered at least seven days prior to the date scheduled for the con-arb.
- The objection provision does not apply to a dispute concerning the dismissal of an employee for reasons related to probation or an unfair labour practice relating to probation.
- Con-arb must be conducted irrespective of whether an objection has been lodged and a party or his or her representative fails to attend.
- Where arbitration does not commence on the date stipulated on the con-arb notice, the CCMA is required to re-schedule the matter either in the presence of the parties or by using a further notice.

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<sup>302</sup> S 191(5A) of the LRA 66 of 1995.

<sup>303</sup> S 191(5)(a)-(c) of the LRA 66 of 1995.

<sup>304</sup> CCMA rule 17.

<sup>305</sup> CCMA rule 17(1).

### 4.8.3 ATTENDANCE AND REPRESENTATION

Parties are required to attend an arbitration hearing in person unless a postponement of the matter has been requested and granted.<sup>306</sup> Generally, the duty is on the referring party to attend because it is the party that is expected to establish and present its case. However, in the case of a juristic person it will be regarded to be present if represented by an employee or a director.<sup>307</sup> The consequence of non-attendance by the referring party is that the LRA permits the arbitrator to dismiss the matter by a written ruling.<sup>308</sup> Where the respondent or its representative fails to attend, the matter may be postponed or continued in the absence of the respondent.<sup>309</sup> However, where parties give compelling excuses for their absence, the matter should be postponed even if no formal application has been filed.<sup>310</sup> Ultimately, it is the duty of the arbitrator to ensure that all interested parties have been adequately informed of the proceedings.<sup>311</sup>

In respect to representation at arbitration it has been pointed out that there is no constitutional right to legal representation in relation to an administrative action.<sup>312</sup> However, it has been argued that, in certain cases, legal representation may be essential to ensure procedurally fair administrative proceedings.<sup>313</sup> Representation in arbitration hearings, such as conciliation, is governed by CCMA Rule 25, which provides that a party may be represented at arbitration only by:

- a legal practitioner (except in dismissal disputes where a party has alleged that the reason for dismissal relates to the employee's conduct or capacity);

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<sup>306</sup> Bosch *et al Conciliation and Arbitration* 143.

<sup>307</sup> Grogan *Labour Litigation and Dispute Resolution* 134.

<sup>308</sup> S 138(5)(a) of the LRA 66 of 1995.

<sup>309</sup> S 138(5)(b)(i) of the LRA 66 of 1995.

<sup>310</sup> S 138(b) of the LRA 66 of 1995.

<sup>311</sup> Grogan *Labour Litigation and Dispute Resolution* 134.

<sup>312</sup> Van Jaarsveld *et al Principles of Labour Law* 357 par 987.

<sup>313</sup> *Hamata v Chairperson, Pensula Technikon Internal Disciplinary Committee* (2002) ILJ 1531 (SCA) par 8-9. The Court held that neither the common law nor the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as "PAJA") accords or recognize such right.

- a director or employee of that party and, if a close corporation, also a member thereof;
- a member, office bearer or official of that party's registered trade union or registered employers' organisation.

In exceptional cases, such as dismissals on account of conduct or capacity of the employee, legal representation is excluded in the arbitration proceedings.<sup>314</sup> In these instances, legal representation may only be permitted if:<sup>315</sup>

- the commissioner and all the parties consent thereto;
- the commission decides that it would be unreasonable to expect, under the given circumstances, a particular party to appear without representation.<sup>316</sup>

Consent to legal representation alone is not sufficient. The commissioner is required to apply his or her mind independently to an application for representation and therefore must exercise his or her discretion judicially. In exercising their discretion, commissioners must take into considerations the following factors:<sup>317</sup>

- the nature of the question of law raised by the dispute;
- the complexity of the dispute;
- the public interest;
- the comparative ability of the opposing parties or their representatives to deal with the dispute.

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<sup>314</sup> This provision was previously regulated in terms of the repealed s 140(1) of the LRA. The LRA Amendment Act of 2002 gives the Governing Body of the CCMA the power to regulate legal representation through the CCMA rules. Rule 25 thereof provides that the principles of the repealed s 140(1) of the LRA still apply.

<sup>315</sup> CCMA rule 25(1)(c).

<sup>316</sup> See Grogan *Labour Litigation and Dispute Resolution* 135.

<sup>317</sup> CMMA rule 25(1)(c)(2)(a)and (b).

Where no representation is sought, an arbitrator is under a duty to inform unrepresented applicants of the rules of evidence.<sup>318</sup> Moreover, an arbitrator must inform the applicants of their right to adduce evidence personally, calling witnesses and cross examining the witness of the respondent and the consequences of not doing so.<sup>319</sup>

#### 4.8.4 ARBITRATION PROCESS

The LRA asserts that every arbitrator should conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but with the least possible legal formalities.<sup>320</sup> Given this wider discretion, neither the LRA nor the CCMA rules offer any guidance on how arbitration should be conducted.<sup>321</sup> It could be on this basis that commissioners have been directed to record the proceedings electronically, and preserve and safeguard documentary and other evidence.<sup>322</sup> The Labour Court has held that failing to keep a record of the arbitration proceedings is contemptuous.<sup>323</sup> Subject to the discretion of the commissioner regarding the form of the proceedings, a party to a dispute may:<sup>324</sup>

- give evidence;
- call witnesses;
- cross-examine the witnesses of the other party; and
- address concluding arguments to the commissioner.

In conducting arbitration hearings, arbitrating commissioners have two options or approaches available to them. They may choose the “adversarial” or inquisitorial approach,<sup>325</sup> which involves an arbitrator asking questions and calling for

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<sup>318</sup> *Klassen v CCMA* [2005] 10 BLLR 964 (LC).

<sup>319</sup> Govindjee “Labour Dispute Resolution” 230.

<sup>320</sup> S 138(1) of the LRA 66 of 1995.

<sup>321</sup> *Grogan Labour Litigation and Dispute Resolution* 140.

<sup>322</sup> *Ibid.*

<sup>323</sup> *Ndlovu v Mullins NO& another* (1999) 20 ILJ 177 (LC).

<sup>324</sup> S 138(2) of the LRA 66 of 1995.

<sup>325</sup> *Grogan Labour Litigation and Dispute Resolution* 141.

documentation in an attempt to decide the matter speedily.<sup>326</sup> Using this method, the commissioner descends into the arena of questioning witnesses and even cross-examines them.<sup>327</sup> In accusatorial mode, the commissioner adopts a relatively passive stance and leaves it to the parties to conduct their respective cases, only intervening to seek clarity of points and making rulings on procedure.<sup>328</sup> The choice of procedure largely depends on the nature of the issues before the commissioner.<sup>329</sup>

The Court has pointed out that when adopting an inquisitorial approach, the commissioner must take control and is responsible for directing the proceedings. This approach includes calling for evidence and witnesses and asking relevant and searching questions to get to the truth.<sup>330</sup> However, this intervention should not deny a party the right to cross-examine as this conduct may go beyond the latitude accorded to commissioners in inquisitorial proceedings.<sup>331</sup> Given the spectrum made available to commissioners to expedite the proceedings with less legal formalities, commissioners are prohibited from “browbeating”<sup>332</sup> parties into complying with the arbitration time limits.<sup>333</sup> Nevertheless, a commissioner is allowed to draw the attention of the parties to the time allocated for the hearing at its commencement.<sup>334</sup> Lastly, the LRA provides that commissioners may at any time suspend arbitration hearings and attempt to resolve disputes by conciliation.<sup>335</sup> However, such a change in the process must be with consent of both parties. Should conciliation efforts fail to resolve the dispute, arbitration may be revived given that it was merely suspended.<sup>336</sup>

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<sup>326</sup> Govindjee “Labour Dispute Resolution” 231.

<sup>327</sup> Grogan *Labour Litigation and Dispute Resolution* 141.

<sup>328</sup> *Ibid.*

<sup>329</sup> *Naraindath v CCMA & others* (1999) 20 *ILJ* 2568 (LC) par 32.

<sup>330</sup> *Armstrong v Tee & Others* (1999) 20 *ILJ* 2568 (LC) par 33.

<sup>331</sup> *Ibid.*

<sup>332</sup> See Grogan *Labour Litigation and Dispute Resolution* 142.

<sup>333</sup> *Dairybelle (Pty) Ltd v CCMA & others* [1999] 10 *BLLR* 1033 (LC).

<sup>334</sup> *Cementation (Africa Contracts) (Pty) Ltd v CCMA & others* [2000] 5 *BLLR* 573 (LC).

<sup>335</sup> S 138(3) of the LRA 66 of 1995.

<sup>336</sup> Grogan *Labour Litigation and Dispute Resolution* 145.

#### 4.8.5 THE ARBITRATION AWARD

The LRA<sup>337</sup> provides that at the end of an arbitration hearing, the commissioner must issue an award within 14 days<sup>338</sup> of completing the process, providing brief reasons<sup>339</sup> for his or her decision. The award must be signed.<sup>340</sup> Grogan<sup>341</sup> submits that an unsigned award is not binding.<sup>342</sup>

The LRA provides a framework for commissioners to make appropriate arbitration awards, including, but not limited to awards that give effect to collective agreements and the provisions and primary purpose objects of the LRA, and may include declaratory orders.<sup>343</sup> Having made the award, it must be served on each party to the dispute,<sup>344</sup> while the original must be filed with the Registrar of the Labour Court.<sup>345</sup> In writing the award, the commissioner is required to take into account any Code of Good Practice issued by NEDLAC that may be relevant to the matter under consideration.<sup>346</sup>

The Court, in *Country Fair Foods (Pty) Ltd v CCMA*,<sup>347</sup> interpreted brief reasons required by section 138(7) of the LRA as follows-

“ though desirable... it is not expected of 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,

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<sup>337</sup> S 138(7) of the LRA 66 of 1995.

<sup>338</sup> *Bosch et al Conciliation and Arbitration* 115, submits that the failure to issue the award within 14 days or extended period does not invalidate the award. See also *AA Ball (Pty) Ltd v Kolisi* [1998] 6 BLLR 560 (LC) where Judge Revelas held that issuing an award a few days late does not constitute a defect for review as envisaged in s 145 of the LRA. Moreover, in *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU* (1999) 3 BLLR 223 (LC) par 16. The Court inferred that the 14 day rule is not peremptory, but rather a guideline. This is the reason why s 138(8) of the LRA permits the director to extend the 14 day period within which the award must be issued.

<sup>339</sup> In *Coetzee v Lebea* (1999) *ILJ* 129 (LC), the Court held that full reasons need not be given.

<sup>340</sup> S 138(7)(a) of the LRA 66 of 1995.

<sup>341</sup> *Grogan Labour Litigation and Dispute Resolution* 154.

<sup>342</sup> *In Meyer v CCMA & Others* (2002) 23 *ILJ* par 154. The Court held that, where the award was not signed and there was no prospect of it ever being signed, it would be declared a nullity.

<sup>343</sup> S 138(9) of the LRA 66 of 1995.

<sup>344</sup> S 138(7)(b) of the LRA 66 of 1995.

<sup>345</sup> *Ibid.*

<sup>346</sup> S 138(6) of the LRA 66 of 1995.

<sup>347</sup> [1999] 11 BLLR 1117 (LAC) par 39.

depending on the circumstance of the case, provide evidence that the commissioner did not apply his/her mind to that particular facet.”

Grogan<sup>348</sup> expands the above statement by pointing out that commissioners should give their awards sufficient contents to inform the parties how they arrived at a given conclusion. Factors and evidence taken into account should be provided where possible. Thus, this may require:

- identification of issues in dispute and the questions that the commissioner was required to answer;
- a synopsis of the relevant evidence;
- the authority (if any) and legal principles the arbitrator applied; and
- an explanation of how the conclusion was drawn from the facts and the law.

Once the commissioner has issued the award, his or her mandate terminates. This means that he or she becomes *functus officio* in respect of the matter. Consequently, the commissioner cannot later change his or her mind and alter the award unless there are grounds for variation or rescission.<sup>349</sup> An award of compensation automatically accrues interest from the date of issue,<sup>350</sup> unless the award indicates otherwise. However, the liability for interest terminates when the debtor makes an unconditional offer to pay.<sup>351</sup>

#### **4.8.6 REMEDIES FOR UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE DISPUTES**

The LRA provides specific remedies to an aggrieved party to a labour dispute where the commissioner or the Labour Court finds that the dismissal of an employee is unfair. The following are the remedies available to an aggrieved employee:

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<sup>348</sup> Grogan *Labour Litigation and Dispute Resolution* 155.

<sup>349</sup> *Ibid.*

<sup>350</sup> S 143 of the LRA 66 of 1995.

<sup>351</sup> *Top v Top Rienzen CC* (2006) 27 ILJ 1948 (LC).

- An employer may be ordered to reinstate or re-employ the employee with effect from a date not earlier than the date of dismissal.<sup>352</sup>
- The alternative is that the employer may be ordered to pay compensation to the employee.<sup>353</sup>

Reinstatement and re-employment are the primary remedies provided by the LRA.<sup>354</sup>

The commissioner or the Labour Court must require the employer to reinstate or re-employ the employee unless:

- the employee does not wish to be reinstated;
- the circumstances surrounding the dismissal make the continuation of the employment relationship intolerable;
- it is not reasonably practicable for the employer to reinstate the employee; or
- the dismissal is unfair only because the employer did not follow a fair procedure.

There are, however, limitations placed on compensation to guide commissioners and the Labour Court in determining the appropriate compensation for unfair dismissal or an unfair labour practice. In an unfair dismissal, where the employer failed to prove that the dismissal was for a fair reason or where the employer did not follow a fair procedure, the award for compensation must be “*just and equitable*”. However, compensation may not be more than 12 months’ remuneration on the date of dismissal.<sup>355</sup> In an automatically unfair dismissal, the employee is also entitled to *just and equitable* compensation. The compensation may be equivalent to 24 months’ remuneration calculated at the employee’s rate of remuneration.<sup>356</sup> Compensation for

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<sup>352</sup> S 193(1)(a)-(c) of the LRA 66 of 1995.

<sup>353</sup> *Ibid.*

<sup>354</sup> S 193(2) of the LRA 66 of 1995.

<sup>355</sup> S 194(1) of the LRA 66 of 1995.

<sup>356</sup> S 194(3) of the LRA 66 of 1995.

unfair labour practice must be equally *just* and *equitable*, but not more than 12 months' remuneration.<sup>357</sup>

The remedy for compensation stated above is in addition to and not in substitution for any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.<sup>358</sup> The terms "*just and equitable*" are defined by the LRA, but the Act does not provide a formula to calculate compensation. Jaarsveld<sup>359</sup> provides a general definition of compensation as compensation for something lost and to make amends for the wrongdoing. The Court has held that it is more akin to a delictual than a contractual claim<sup>360</sup> and that to assist in calculating *just and equitable* compensation the employee is required to prove his or her losses.<sup>361</sup>

The following factors have been found to be relevant and of assistance in calculating compensation:<sup>362</sup>

- patrimonial loss that is fair and reasonable in relation to both the employer and the employee;<sup>363</sup>
- the length of service;<sup>364</sup>
- substantial redress by the employer;
- conduct of the employer; and

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<sup>357</sup> S 194(4) of the LRA 66 of 1995.

<sup>358</sup> S 195 of the LRA 66 of 1995.

<sup>359</sup> Jaarsveld *et al Principles of Labour Law* 360.

<sup>360</sup> *Alert Employment Personnel v Leech* (1993) ILJ 655 (LAC).

<sup>361</sup> Cohen "Exercising a Judicial Discretion – Awarding Compensation for Unfair Dismissals" (2003) ILJ par 741.

<sup>362</sup> Jaarsveld *et al Principles of Labour Law* 360.

<sup>363</sup> *HM Liebowitz v Fernandes* (2002) ILJ 278 (LAC) par 287. The Labour Appeal Court held that although patrimonial loss is relevant, it does not mean that in the absence of patrimonial loss that the Court would be banned from awarding compensation.

<sup>364</sup> *Alpha Plant & Services v Simmonds* (2001) ILJ 359 (LAC), the Court held that it is appropriate to consider length of service in determining compensation in respect of procedurally unfair dismissal.

- conduct of the employee.

#### 4.8.7 COST

The repealed section 138(10) of the LRA, which now forms part of the CCMA rules,<sup>365</sup> provides that a commissioner could not order cost in an arbitration award. The only exception to the rule is where a party, or a person who represented that party in the arbitration proceedings, acted in a frivolous or vexatious manner when proceeding with or defending the dispute in the arbitration proceedings.<sup>366</sup> The Court has inferred that a matter is deemed “frivolous” if it is entirely without merit, while “vexatious” is where proceedings are pursued or defended solely to annoy or inconvenience the other party.<sup>367</sup>

Given the above, commissioners are permitted to make an order as to cost in terms of the requirements of law and fairness, taking into account the CCMA rules.<sup>368</sup> However, costs are not easily awarded by the CCMA as commissioners tend to consider the ongoing relationship between the employer and employee. In addition, the CCMA does not wish to discourage an individual employee from using the services of the CCMA.<sup>369</sup> Where costs are awarded, the CCMA is limited to taxing cost in accordance with Schedule A of the prescribed Magistrates’ Courts tariff, unless the parties have agreed to a higher tariff.<sup>370</sup>

#### 4.8.8 VARIATION AND RESCISSION OF AWARDS

Upon the completion of the arbitration proceedings and once the commissioner has made the award, the commissioner is said to have discharged his or her office and cannot reconsider or change the decision or outcome later. The commissioner is regarded to be *functus officio*, meaning he or she is no longer in office or officiating the matter and the commissioner’s responsibility regarding the case ceases to

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<sup>365</sup> CCMA rule 39.

<sup>366</sup> Grogan *Labour Litigation and Dispute Resolution* 156.

<sup>367</sup> *Ibid*, cited in *Cronje v Bloemfontein* (1997) 18 ILJ 862 (CCMA).

<sup>368</sup> CCMA rule 39(3).

<sup>369</sup> Jaarsveld *et al Principles of Labour Law* 361.

<sup>370</sup> CCMA rule 39(3).

exist.<sup>371</sup> However, the commissioner may only revert to the award in circumstances where it has to be varied or rescinded.<sup>372</sup>

The following are the statutory grounds under which the commissioner may vary or rescind the award:

- The award was erroneously sought or made in the absence of any party affected by that award.<sup>373</sup>
- The award is ambiguous, or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission.<sup>374</sup>
- The award was granted as a result of a mistake common to the parties to the proceedings.<sup>375</sup>

The CCMA rules require that an application for variation or rescission must be made in writing within 14 days from the date that the applicant become aware of the arbitration award, ruling or common mistake.<sup>376</sup> Thereafter, variation or rescission may be ordered by the commissioner who issued the original award or ruling, or by another commissioner appointed by the director of CCMA for that purpose. The rescission or variation may be occasioned either at the instance of the commissioner or on application by the affected party.<sup>377</sup>

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<sup>371</sup> Bosch *et al Conciliation and Arbitration* 123.

<sup>372</sup> S 144 read with s 51(8) of the LRA 66 of 1995.

<sup>373</sup> S 144(a) of the LRA 66 of 1995. In *Shoprite Checker (Pty) Ltd v CCMA & Others* [2005] 8 BLLR 816 (LC) where the Labour Court held that a party seeking to cure its own inefficiency should not be allowed to affect the efficiency of either the CCMA or the Labour Court which is trammeling under great cost to the taxpayers to operate efficiently. Moreover, in *Northern Province Local Government Association v CCMA & Others* [2001] 5 BLLR 539 (LC) par 17, the Court held that an application for rescission of an award granted in the absence must show “first that it has a *bona fide* case to place before the tribunal and that it had not lost interest in having its case heard, and secondly, its absence at the hearing has been reasonably explained”.

<sup>374</sup> S 144(b) of the LRA 66 of 1995. See also *Day and Night Investigators cc v Ngoasheng & Others* [2000] 4 BLLR 398 (LC), where the Court interpreted “[e]rror” to mean that the judgment does not reflect the intention of the judicial officer concerned and therefore that it does not refer to the correctness or otherwise of the decision.

<sup>375</sup> S 144(c) of the LRA 66 of 1995.

<sup>376</sup> CCMA rule 32.

<sup>377</sup> S 144 of the LRA 66 of 1995.

#### 4.8.9 ENFORCEMENT OF THE AWARD

The LRA provides that a CCMA or council award that has been certified by the CCMA Director be final and binding and may be enforced as if it were an order of the Labour Court.<sup>378</sup> This means that the award may be executed in the same manner as an order of Court. Therefore, it is unnecessary to approach the Labour Court to make the award an order of Court.<sup>379</sup> The party seeking enforcement must allege that there is an arbitration award and that, despite the respondent's knowledge thereof, it remains outstanding.<sup>380</sup>

Enforcement takes various forms. For example, where the award orders reinstatement and not the payment of money or compensation, the party may enforce it by way of contempt proceedings in the Labour Court.<sup>381</sup> A monetary award is enforced by a writ of execution through the sheriff service, just as a judicial order can be executed.<sup>382</sup> Moreover, an award may also be made an order of the Labour Court and executed as a Court Judgment.<sup>383</sup> For an award to be made an order of Court the application must be brought within three years of the award, otherwise it will prescribe in terms of the Prescription Act.<sup>384</sup> Grogan<sup>385</sup> submits that the "final and binding" nature of the award does not necessarily exempt the award from review. However, the launching of a review application against an award does not necessarily suspend its operation. The Labour Court will invariably stay the execution of an award on filing a review application as a stay order requires a special application.<sup>386</sup> Without ruling out the possibility of the enforcement of the award being stayed pending the review application, the application for enforcement will normally

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<sup>378</sup> S 143 of the LRA 66 of 1995.

<sup>379</sup> Grogan *Labour Litigation and Dispute Resolution* 160.

<sup>380</sup> *Chiloane v Nhlumato Agricultural Project* [2000] 4 BLLR 392 LC par 14.

<sup>381</sup> S 143(4) of the LRA 66 of 1995.

<sup>382</sup> Jaarsveld *et al Principle of Labour Law* 361.

<sup>383</sup> S 158(1)(c) of the LRA 66 of 1995.

<sup>384</sup> Prescription Act 68 of 1969. See also *Mpanzama v Fedelity Guards Holdings (Pty)Ltd* [2000] 12 BLLR 1459 (LC) wherein the Court held that an award is a debt, and as such is subject to the Prescription Act.

<sup>385</sup> Grogan *Labour Litigation and Dispute Resolution* 161.

<sup>386</sup> *Ibid.*

be set together with the review application. Where the review application fails the award will be enforced accordingly.<sup>387</sup>

#### 4.9 DISPUTE RESOLUTION BY BARGAINING COUNCILS

A bargaining council is defined as a corporate body established by mutual agreement between employers or employers' organisations and by a registered trade union or trade unions for the purpose of practising self-government over the sector in which the parties represent the interests of their respective members regarding the determination of conditions of employment.<sup>388</sup> This study demonstrates that bargaining councils are the statutory successors to the Industrial Councils that operated under the 1956 LRA and the earlier Industrial Conciliation Acts. However, their powers, functions and responsibilities have changed and expanded in several respects.<sup>389</sup> This shows that the legislature in the post-*apartheid* era intended to retain bargaining councils, although in a different form.<sup>390</sup>

Bargaining councils are established on a voluntary basis. The LRA permits one or more registered trade union or one or more registered employers' organisation to establish a bargaining council for a sector or area.<sup>391</sup> The establishment is sanctioned by adopting a valid constitution and by obtaining registration of the bargaining council in terms of section 29 of the LRA.<sup>392</sup>

Bargaining councils in the public sector are established for a particular department, with the general Public Service Coordinating Bargaining Councils<sup>393</sup> having the overall power to deal with general matters and those parts of the public sector not governed by their own councils.<sup>394</sup> Notwithstanding this provision, the state may still be a party to any established bargaining council if it is an employer in that sector and

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<sup>387</sup> *Ibid.*

<sup>388</sup> Jaarsveld *et al Principles of Labour Law* 240.

<sup>389</sup> Grogan *Collective Labour Law* 83.

<sup>390</sup> See *Adonis v Western Cape Education Department* (1998) ILJ 806 (LC).

<sup>391</sup> S 27(1) of the LRA 66 of 1995.

<sup>392</sup> S 27(1)(a) and (b) of the LRA 66 of 1995.

<sup>393</sup> Hereinafter referred to as the "PSCBC".

<sup>394</sup> Grogan *Collective Labour Law* 84.

area.<sup>395</sup> For that purpose, any reference to a registered employers' organisation will include reference to the state as a party.<sup>396</sup> Bargaining councils can be established for more than one sector.<sup>397</sup>

Bargaining councils earn their recognition upon registration with the Registrar of Labour Relations and upon approval and gazetting of its constitution.<sup>398</sup> Bargaining councils must be accredited by the Governing Body of the CCMA to perform any of their statutory dispute resolution functions.<sup>399</sup> The purpose of the accreditation of bargaining councils and private agencies is to establish that the body applying for accreditation conforms to acceptable standards.<sup>400</sup> Once accredited,<sup>401</sup> the bargaining council acquires powers and can perform the following functions:<sup>402</sup>

- conclude collective agreements and enforce them;
- prevent and resolve labour disputes;
- perform dispute resolution functions and establish and administer a fund to be used for resolving disputes.

Bargaining Councils can, where appropriate, appoint an accredited agency to perform the above functions on their behalf.

The LRA requires the constitution of every registered council to provide for procedures to resolve disputes between the parties concerning the interpretation and application of the council's constitution.<sup>403</sup> This includes disputes between parties falling within the council's registered scope and disputes between organisations and

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<sup>395</sup> S 27(2) of the LRA 66 of 1995.

<sup>396</sup> S 27(3) of the LRA 66 of 1995.

<sup>397</sup> S 27(10) of the LRA 66 of 1995.

<sup>398</sup> S 29 of the LRA 66 of 1995.

<sup>399</sup> Ss 52 and 127 of the LRA 66 of 1995.

<sup>400</sup> S 127 of the LRA 66 of 1995. See also Van Niekerk *et al Law@Work* 441.

<sup>401</sup> The general provisions relating to accreditation are to be found in s 128 of the LRA 66 of 1995.

<sup>402</sup> S 28 of the LRA 66 of 1995.

<sup>403</sup> S 30(1)(b) of the LRA 66 of 1995.

their members.<sup>404</sup> However, the LRA does not prescribe how the council's constitution or dispute resolution procedure must deal with disputes.<sup>405</sup> Therefore, the LRA permits bargaining councils to establish dispute resolution procedures by collective agreements.<sup>406</sup> Given this leeway, it is acknowledged that in reality most councils have modelled their dispute resolution procedures along the lines of the CCMA rules.<sup>407</sup>

Bargaining councils primarily have jurisdiction over disputes arising from the parties falling within their registered scope. Their jurisdiction is therefore not open ended, but may be extended to non-parties in certain circumstances where they are accredited by the CCMA.<sup>408</sup> Where the council is not accredited, non-parties may consent to the jurisdiction of a council.<sup>409</sup> A bargaining council also assumes jurisdiction where a council's collective agreement has been extended to non-parties by the Minister of Labour.<sup>410</sup> In all other cases, disputes between non-parties to a bargaining council must be referred to the CCMA, including disputes arising from a party or parties who do not fall within the registered scope of the council.<sup>411</sup>

Although the LRA permits councils to resolve most disputes concerning "matters of mutual interest" between the parties to a dispute, the LRA expressly reserves certain disputes for the CCMA.<sup>412</sup> The following disputes must, however, be conciliated and arbitrated by bargaining councils:

- disputes relating to the interpretation of Chapter II of the LRA regarding freedom of association;<sup>413</sup>

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<sup>404</sup> S 30(1)(j) of the LRA 66 of 1995.

<sup>405</sup> Grogan *Labour Litigation and Dispute Resolution* 46.

<sup>406</sup> S 51(9) of the LRA 66 of 1995.

<sup>407</sup> Grogan *Labour Litigation and Dispute Resolution* 46.

<sup>408</sup> *Ibid.*

<sup>409</sup> S 51(3) of the LRA 66 of 1995.

<sup>410</sup> S 32 of the LRA 66 of 1995.

<sup>411</sup> S 51(4) of the LRA 66 of 1995.

<sup>412</sup> Grogan *Labour Litigation and Dispute Resolution* 46. See also ss 51(3) and 127(2) of the LRA for the complete list of disputes that the Bargaining Council may not adjudicate.

<sup>413</sup> See s 9 of the LRA 66 of 1995.

- disputes relating to matters giving rise to a strike or lock-out;<sup>414</sup>
- disputes in relation to essential services;<sup>415</sup>
- disputes concerning unfair dismissals and unfair labour practices;<sup>416</sup>
- disputes concerning the entitlement of severance pay;<sup>417</sup> and
- disputes about unfair labour practices.<sup>418</sup>

#### **4.9.1 APPOINTMENT AND POWERS OF DESIGNATED AGENTS OF BARGAINING COUNCILS**

The Minister of Labour may, at the request of a bargaining council, appoint any person<sup>419</sup> as the designated agent of a bargaining council, who may promote, monitor and enforce compliance with the provisions of its collective agreements.<sup>420</sup> A designated agent may be authorised to issue a compliance order requiring any person bound by a collective agreement to comply with its provisions within a specified period.<sup>421</sup> It is submitted that these powers vested in designated agents allow them to act as “labour inspectors” with access to workplaces and to all necessary information while investigating adherence to the terms of a collective agreement.<sup>422</sup>

The LRA provides that a council may refer any unresolved dispute regarding the compliance with a collective agreement to arbitration by an arbitrator.<sup>423</sup> An arbitrator conducting arbitration for this purpose has the same powers as a commissioner of

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<sup>414</sup> See s 64(1) of the LRA 66 of 1995.

<sup>415</sup> S 74 of the LRA 66 of 1995.

<sup>416</sup> S 191 of the LRA 66 of 1995.

<sup>417</sup> S 196 of the LRA 66 of 1995 as repealed by s 95 of the BCEA 75 of 1997.

<sup>418</sup> S 191 of the LRA 66 of 1995.

<sup>419</sup> S 63 of the BCEA 75 of 1997.

<sup>420</sup> S 33(1) of the LRA 66 of 1995.

<sup>421</sup> S 33(3) of the LRA 66 of 1995.

<sup>422</sup> Govindjee “Labour Dispute Resolution” 236.

<sup>423</sup> S 33A(4) of the LRA 66 of 1995.

the CCMA and the general provisions for arbitration proceedings apply.<sup>424</sup> An arbitrator conducting such arbitration may make an appropriate award, including:<sup>425</sup>

- ordering any person to pay any amount owing in terms of a collective agreement;
- imposing a fine for a failure to comply with a collective agreement;
- charging a party an arbitration fee;
- ordering a party to pay the costs of arbitration;
- confirming, varying or setting aside a compliance order issued by a designated agent; and
- making an appropriate arbitration award that gives effect to the collective agreement and to the provisions and primary objects of the LRA and may include a declaratory order.

The award is final and binding and is enforced in the same manner as an award of the CCMA, as if it were an order of the Labour Court.<sup>426</sup> Statutory councils have the same powers and functions as bargaining councils, thus this will not be discussed separately.

#### **4.10 PRIVATE ARBITRATION**

Private arbitration is governed by the provisions of the Arbitration Act.<sup>427</sup> The parties to a dispute enter into an arbitration agreement to arbitrate the dispute in such a way

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<sup>424</sup> S 33A(5) of the LRA 66 of 1995.

<sup>425</sup> S 33A(8) of the LRA 66 of 1995.

<sup>426</sup> S 33A(10) of the LRA 66 of 1995.

<sup>427</sup> Act 42 of 1965.

that the principles in the LRA are excluded or will not apply.<sup>428</sup> In terms of the Arbitration Act,<sup>429</sup> an arbitration agreement is defined to mean:

“a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not”.

Private arbitration is regarded as an important form of dispute resolution as an alternative to litigation in a civil court.<sup>430</sup> Once the parties to a dispute choose to resolve their dispute in terms of the Arbitration Act, the parties relinquish the rights they would have had to pursue the matter in a civil court.<sup>431</sup> Private arbitration proceedings rest on the initial agreement between the parties to the dispute.<sup>432</sup> To this end, an agreement may be reached in relation to a particular dispute, or reached in advance by means of a provision in the contract of employment.<sup>433</sup> The agreement must be in writing<sup>434</sup> and, once reduced to writing, it is submitted that it acquires binding force and the parties are committed to the process and subject only to the right of review. Thus, they accept to be bound by the outcome.<sup>435</sup>

The following are the usual terms of an arbitration agreement:<sup>436</sup>

- the name of the parties;
- the name of the arbitrator;
- in case of an *ad hoc* arbitration agreement, the issue in dispute that the arbitrator must determine (referred to as the terms of reference);

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<sup>428</sup> Govindjee “*Labour Dispute Resolution*” 237.

<sup>429</sup> S 1 of the Arbitration Act 42 of 1965.

<sup>430</sup> Grogan *Labour Litigation and Dispute Resolution* 47.

<sup>431</sup> *Ibid.*

<sup>432</sup> S 1 of the Arbitration Act 42 of 1965.

<sup>433</sup> Grogan *Labour Litigation and Dispute Resolution* 47.

<sup>434</sup> S 1 of the Arbitration Act 42 of 1965.

<sup>435</sup> Grogan *Labour Litigation and Dispute Resolution* 47.

<sup>436</sup> Bosch *et al Conciliation and Arbitration* 150.

- provisions regarding the arbitrator's powers, such as the remedies to be awarded, the power to determine the procedure to be followed, and the cost of award;
- a statement that the dispute must be arbitrated;
- who will pay for the arbitration, the venue and any interpretation and if the costs are to be shared between the parties, in what proportion are they to be shared

Further provisions that may be considered include:<sup>437</sup>

- whether the proceedings should be recorded;
- who may represent the parties;
- whether the arbitration hearing should be held in private;
- how the arbitrator must deliver the award to the parties;
- how soon the arbitrator must issue the award; and
- any other appropriate terms and conditions.

Against the background of private arbitration, the LAC has pointed out some of the dangers of resorting to private arbitration.<sup>438</sup> In *Volkswagen SA (Pty) Ltd v Koots NO*, the Court confirmed that agreeing to private arbitration is a contract and that a party cannot opt out of it without the other party's agreement. The implication of this decision is that by agreeing to private arbitration, the agreement tends to limit the Court's power to interfere with an award in regard to circumstances where there were procedural irregularities.<sup>439</sup> Consequently, it is asserted that the dissatisfied party will have difficulties in overturning a private award.<sup>440</sup>

Despite the above observation noted by the Court, it is submitted that there are advantages in using private arbitration. First, the parties choose a preferred arbitrator

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<sup>437</sup> *Ibid.*

<sup>438</sup> *Volkswagen SA (Pty) Ltd v Koots NO* [2011] 6 BLLR 561 (LAC).

<sup>439</sup> Govindjee "Labour Dispute Resolution" 238.

<sup>440</sup> *Ibid.*

and bind him or her to the terms of reference. Second, there are benefits of flexibility, which may result in a speedier resolution of the dispute.<sup>441</sup> The disadvantages, however, include the fact that the losing party is restricted to the very narrow grounds of review contained in the Arbitration Act, and cannot rely on the wider grounds for review provided by the LRA,<sup>442</sup> and costs are involved.<sup>443</sup>

The other consequence of private arbitration is that an arbitration agreement can only be terminated with the consent of all the parties to such an agreement.<sup>444</sup> Therefore, where one party withdraws from arbitration the arbitrator must continue and determine the dispute referred to him or her.<sup>445</sup> The agreement remains in force even where there is death, sequestration or liquidation of a party since such an intervening factor does not terminate the agreement.<sup>446</sup> However, the Court has jurisdiction at any time to set aside the arbitration agreement or order that a particular dispute should not be arbitrated on the application of a party to an arbitration agreement, on good cause shown.<sup>447</sup>

#### **4.11 THE ROLE OF THE LABOUR INSPECTORATE IN LABOUR DISPUTE RESOLUTION**

The BCEA<sup>448</sup> and the EEC<sup>449</sup> established a labour inspectorate as the first level of labour dispute resolution.<sup>450</sup> The post-1995 labour statutes demonstrated the decriminalisation of the enforcement of labour laws and established a rationalised enforcement system administered by labour inspectors. Their role has been transformed to persuasion rather than a punitive one.<sup>451</sup>

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<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid.*

<sup>443</sup> Grogan *Labour Litigation and Dispute Resolution* 47.

<sup>444</sup> S 3(1) of the Arbitration Act 42 of 1965.

<sup>445</sup> Bosch *et al Conciliation and Arbitration* 157.

<sup>446</sup> S 4(1) of the Arbitration Act 42 of 1965, provides that in such cases, the arbitration proceedings are stayed(subject to the court order) until an executor is appointed.

<sup>447</sup> S 3(2) of the Arbitration Act 42 of 1965.

<sup>448</sup> Act 75 of 1997.

<sup>449</sup> Act 55 of 1998.

<sup>450</sup> Van Niekerk *et al Law@Work* 433.

<sup>451</sup> *Ibid.*

The Minister of Labour appoints any person in the public service as a labour inspector, to perform the functions of a labour inspector.<sup>452</sup> Upon appointment, labour inspectors may promote, monitor and enforce compliance with an employment law by:<sup>453</sup>

- advising employers and employees of their rights and obligations in terms of an employment law;
- conducting workplace inspections;
- investigating complaints made to a labour inspector;
- endeavouring to secure compliance with an employment law by securing undertakings or issuing compliance orders; and
- performing any other prescribed functions, for example ensuring compliance orders with provisions of the EEA.

The broad structure of the functions of the labour inspector entails that an inspector must first seek to obtain a written undertaking from the employer to comply with the provision of an Act.<sup>454</sup> Thereafter, a compliance order may be issued explaining the actions required to rectify the contravention.<sup>455</sup>

In order to monitor and enforce compliance with an employment law, a labour inspector has the power, without the need for a warrant or notice, at any reasonable time, to enter workplaces or employment premises.<sup>456</sup> In the execution of these powers, labour inspectors have a range of mechanisms at their disposal, including questioning persons, inspecting documents and records and making relevant copies, and inspecting the premises, and are allowed to be assisted by an interpreter.<sup>457</sup>

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<sup>452</sup> S 63(1)(a) and (b) of the BCEA 75 of 1997.

<sup>453</sup> S 64 of the BCEA 75 of 1997.

<sup>454</sup> Ss 68(1) and (1A)(2) of the BCEA 75 of 1997.

<sup>455</sup> S 69 of the BCEA 75 of 1997.

<sup>456</sup> S 65 of the BCEA 75 of 1997.

<sup>457</sup> S 66 of the BCEA 75 of 1997.

A labour inspector who has reasonable grounds to believe that an employer has not complied with a provision of the BCEA and EEA may issue the employer concerned with a compliance order.<sup>458</sup> The compliance order sets out the relevant details of the matter including any steps that the employer is required to take.<sup>459</sup> An employer may also be fined for failure to comply with a provision of the BCEA.<sup>460</sup> However, there are some statutory limitations to issue a compliance order in respect of any amount payable to an employee as a result of a failure to comply with a provision of the BCEA.<sup>461</sup>

The BCEA provides the employer with recourse to the Director-General of the Department of Labour. An employer disputing the compliance order issued by a labour inspector may, within 21 days<sup>462</sup> of receiving it, make a written representation to the Director-General objecting to it.<sup>463</sup> The Director-General may, after receiving and considering a written representation, confirm, vary or set aside the order.<sup>464</sup>

Upon receipt of the Director-General's decision, the employer, if not content with the outcome, has an option, within 21 days, to appeal to the Labour Court against such an order. Where an appeal is noted with the Labour Court, it suspends the operation of the compliance order.<sup>465</sup> In contrast, where an employer does object and does not comply with the order, the Director-General may apply to the Labour Court for the compliance order to be made an order of Court.<sup>466</sup>

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<sup>458</sup> S 69(1) of the BCEA 75 of 1997.

<sup>459</sup> S 69(2)(f) of the BCEA 75 of 1997.

<sup>460</sup> S 70 of the BCEA 75 of 1997. See also Govindjee "Labour Dispute Resolution" 243.

<sup>461</sup> *Ibid.*

<sup>462</sup> Unless the D-G has condoned a late objection on good cause demonstrated.

<sup>463</sup> S 71(1) of the BCEA 75 of 1997.

<sup>464</sup> S 71(3) of the BCEA 75 of 1997.

<sup>465</sup> S 72 of the BCEA 75 of 1997.

<sup>466</sup> S 73 of the BCEA 75 of 1997.

## 4.12 THE ROLE OF THE LABOUR COURT IN LABOUR DISPUTE RESOLUTION

Other than the less formal process of labour dispute resolution created by the LRA, the Act establishes a Court structure for the formal litigation of disputes and for development of jurisprudence in labour law.<sup>467</sup> This court structure replaces the former Industrial Courts system, which was established as part of the Wiehahn reforms and introduced in the early 1980s to adjudicate labour disputes until 1995.<sup>468</sup>

The Labour Court established under the new dispensation is a court of law and equity. It is the superior court of record, which has authority, inherent powers and standing, in relation to matters under its jurisdiction.<sup>469</sup> The Court structure comprises of a Judge President, a Deputy Judge President and as many judges as the President considers necessary on advice of NEDLAC and in consultation with the Minister of Justice.<sup>470</sup> The Labour Court judges are required to be Judges of the High Court or legal practitioners who must possess knowledge, experience and expertise in labour law.<sup>471</sup> The LRA provides for the Labour Court to sit as a single court<sup>472</sup> and may sit in separate courts as required.<sup>473</sup>

### 4.12.1 JURISDICTION OF THE LABOUR COURT

Subject to the Constitution and unless otherwise provided for by the LRA, the Labour Court has exclusive jurisdiction in respect of all matters that are to be determined by the Court, either in terms of the provisions of the LRA or any other law.<sup>474</sup> The LRA, however, provides for the dual jurisdiction of the Labour Court and that of the High Court in respect to any alleged or threatened violation of any fundamental rights enshrined in Chapter 2 of the South African Constitution arising from employment and labour relations. In addition, there is concurrent jurisdiction in disputes about the

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<sup>467</sup> Govindjee "Labour Dispute Resolution" 238.

<sup>468</sup> Van Niekerk *et al Law@Work* 442.

<sup>469</sup> S 151(1),(2)and (3) of the LRA 66 of 1995.

<sup>470</sup> S 152 of the LRA 66 of 1995.

<sup>471</sup> S 153(2) of the LRA 66 of 1995.

<sup>472</sup> S 152 (2) of the LRA 66 of 1995.

<sup>473</sup> S 152(3) of the LRA 66 of 1995.

<sup>474</sup> S 157(1) of the LRA 66 of 1996.

constitutionality of executive or administrative acts performed by the state as an employer and where there is an allegedly irregular application of any law for which the Minister of Labour is responsible.<sup>475</sup>

Numerous interpretations and applications of section 157 of the LRA have generated conflicting views on the approach to be taken in a review application. First, there is a view that is inclined to give effect to the purpose of the LRA. In this context, it is demonstrated that labour disputes are to be adjudicated solely within the structures created by the LRA. Second, there is the opinion that takes the section of the Act should be interpreted literally. The question that arises is whether to regard only those matters specifically assigned to the Labour Court by the LRA as being excluded from the High Court's jurisdiction.<sup>476</sup> These varying views have been subject to key judgments of the CC that are discussed below.

In *Gcaba v Minister of Safety and Security*<sup>477</sup> the CC pointed out that the term "jurisdiction" means the power or competence of a court to hear and determine an issue between parties. It is therefore submitted that jurisdiction is a matter that is determined on the basis of pleadings, which constitute the written summaries of a dispute before the Courts.<sup>478</sup> In *Chirwa v Transnet Limited and Others*<sup>479</sup>, the CC emphasised the specialist nature of the Labour Court and the LRA's aims of establishing a "one-stop-shop" dispute resolution structure in the labour arena. In this case, Ngcobo J noted that allowing a parallel jurisdiction between the Labour Court and the High Court would be permitting an "astute litigant" to by-pass the whole conciliation and dispute resolution machinery created by the LRA and as such would rob the Court of its need to exist.<sup>480</sup>

The Court has attempted to reconcile sections 157(1) and (2) of the LRA by focusing on the primary objective of the LRA. Van Niekerk (2011)<sup>481</sup> summarises the Court's

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<sup>475</sup> S 157(2) of the LRA 66 of 1995.

<sup>476</sup> Van Niekerk *et al Law@Work* 448.

<sup>477</sup> [2009] 12 BLLR 1145 (CC).

<sup>478</sup> Govindjee "Labour Dispute Resolution" 239.

<sup>479</sup> [2009] 12 BLLR 97 (CC).

<sup>480</sup> *Chirwa v Transnet Limited* par 95.

<sup>481</sup> Van Niekerk *et al Law@Work* 450.

inference as follows: that the legislature intended to avoid a multiplicity of laws and to eliminate overlapping and competing jurisdictions by creating a specialised set of forums and tribunals to deal with labour related matters. The Court therefore held that section 157(2) of the LRA was enacted with limited constitutional jurisdiction on the Labour Courts. The Court further held that the purpose was not to confer jurisdiction on the High Court to deal with labour and employment related disputes, but that it was to empower the Labour Court to deal with causes of action that arise from employment and labour relations and are founded on the provisions of the Bill of Rights.<sup>482</sup>

To this end, the Court<sup>483</sup> has pointed out that section 157(2) of the LRA must be given a narrow meaning, while section 157(1) must be interpreted broadly. Consequently, the Court held that an employee alleging non-compliance with the provisions of the LRA must seek a remedy in the LRA. Therefore, such an employee cannot avoid the dispute resolution mechanism established by the LRA by alleging a violation of a constitutional right.<sup>484</sup>

Gcaba's case, therefore, reinforces the role of the Labour Court as the sole forum for the resolution of labour disputes. However, it is submitted that although the Labour Court has exclusive jurisdiction in respect to matters referred in terms of the LRA, in disputes involving the violation or breach of a constitutional right related to employment and labour relations, the High Court assumes concurrent jurisdiction.<sup>485</sup> This means that either Court (but not both) may be approached to hear the dispute.<sup>486</sup>

Besides the LRA provisions, the BCEA<sup>487</sup> confers dual jurisdiction to the Labour Court and civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. It is therefore noted that the High Court and the Labour Court

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<sup>482</sup> *Chirwa v Transnet Limited* par 120.

<sup>483</sup> *Gcaba v Minister for Safety and Security* [2009] 12 BLLR 1145 (CC).

<sup>484</sup> Van Niekerk *et al* *Law@Work* 450.

<sup>485</sup> Govindjee "Labour Dispute Resolution" 239.

<sup>486</sup> *Ibid.*

<sup>487</sup> S 77(3) of the BCEA 75 of 1997.

have equal power to enforce common-law rights.<sup>488</sup> The Labour Court also has jurisdiction in respect of disputes that are subject to the Arbitration Act, as referenced in section 157(3) of the LRA. Lastly, the LRA provides that the Labour Court may not adjudicate disputes that must be referred to arbitration, unless the parties have agreed in terms of section 158(2) to arbitration by the Court, allowing the Court to act as arbitrator.<sup>489</sup>

#### **4.12.2 POWERS OF THE LABOUR COURT**

The LRA<sup>490</sup> empowers the Labour Court to make any appropriate order, including:

- granting urgent interim relief;
- an interdict;
- an order of specific performance;
- a declaratory order;
- an award of compensation;
- an award of damages;
- an order for costs.

The Labour Court may also:

- order compliance with any provisions of the LRA;
- make an arbitration award or a settlement agreement an order of Court;
- request the CCMA to conduct an investigation and submit a report;
- determine a dispute between any registered trade union and registered employers' organisation and any of its members;

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<sup>488</sup> Govindjee "Labour Dispute Resolution" 239.

<sup>489</sup> Van Niekerk *et al Law@Work* 451.

<sup>490</sup> S 158 of the LRA 66 of 1995.

- condone the late filing of documents or the late referral of a dispute to the Court;
- subject to section 145, review the performance of any function provided for in the LRA in terms of section 158(1)(g) on any ground that is permissible in law;
- review any decision taken by the state as an employer;
- deal with all matters necessary to perform its functions in terms of the LRA or any other law.

#### 4.12.3 REVIEW OF ARBITRATION AWARDS

As was discussed in 4.12.1 above, the Labour Court has exclusive jurisdiction to review CCMA and bargaining councils' arbitration awards.<sup>491</sup> Moreover, the Labour Court may review private arbitration awards in matters that could otherwise have been referred for arbitration under the LRA.<sup>492</sup> The Labour Court also has jurisdiction to review the actions of officials charged with performing functions under diverse labour legislation<sup>493</sup> and actions by the state in its capacity as an employer.

A discussion of judicial review for this purpose is important as it separates reviews from appeals. Grogan<sup>494</sup> describes judicial review as a process in terms of which a court is called upon to determine and provide the legality and validity of the actions of an organ of the state or, in some cases, private bodies or individuals exercising statutory powers. This assertion suggests a distinction between reviews and appeals.

The Court has explained the distinction as follows: that judicial review focuses on the process by which the 'impugned' administrative decision is reached, whereas

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<sup>491</sup> S 145, read with s 157(1) of the LRA 66 of 1995.

<sup>492</sup> S 145(3) of the LRA 66 of 1995.

<sup>493</sup> S 158(9) of the LRA 66 of 1995; s 51(b) of the BCEA; s 77A(a) of the EEA; s 31(2) of the Skills Development Act, 97 of 1998.

<sup>494</sup> Grogan *Labour Litigation and Dispute Resolution* 278.

appeals focus on the conclusion reached in the judgment under appeal.<sup>495</sup> The SCA has illustrated the difference as follows-

“In a review, the question is not whether the decision is capable of being justified... but whether the decision-maker properly exercised the power entrusted to him or her. The focus is on the process and on the way in which the decision-maker came to the challenged conclusion”.

Consequently, it is submitted that the function of the reviewing court should be to determine whether the arbitrator committed an irregularity during the course of the proceedings, which, it is alleged, denied a party a fair hearing. Therefore, if the Court finds no such irregularity or error, or if it is insufficient to warrant a different conclusion, the decision must stand.<sup>496</sup> In the absence of a reviewable irregularity it is asserted that a reviewing court may not overrule an arbitration decision on the simple basis of disagreeing with it.

Notably, an arbitration award issued by a CCMA commissioner is not subject to an appeal.<sup>497</sup> This means that an aggrieved party to an award may not have the matter re-heard by a higher court and the higher court may not make a decision based on the record of evidence led at arbitration.<sup>498</sup> In terms of the Explanatory Memorandum to the LRA, it is clear that the legislature took into account the provisions of section 1(d)(iv) of the LRA to limit the power of the Labour Court to review CCMA arbitration awards and to prohibit appeals against these awards. The intention was to ensure that labour disputes were both expeditiously and efficiently resolved.<sup>499</sup>

Against this backdrop, the LRA provides that a party who alleges a defect in respect of arbitration proceedings under the CCMA may apply to the Labour Court for an order setting the award aside.<sup>500</sup> The application for review must be filed within six

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<sup>495</sup> *Ibid.*

<sup>496</sup> Grogan *Labour Litigation and Dispute Resolution* 278.

<sup>497</sup> Jordaan *et al Labour Arbitration* 100.

<sup>498</sup> *Ibid.*

<sup>499</sup> Fergus “The Distinction between Appeals and Review- Defining the Limits of the Labour Court’s powers of Review” (2010) *ILJ* (31) 1557.

<sup>500</sup> S 145(1) of the LRA 66 of 1995.

weeks of the date that the arbitration award was served on the applicant, unless condonation has been granted for late filing.<sup>501</sup>

The LRA describes the “defects” that are reviewable to include situations where commissioners:

- committed misconduct with regard to the duties of a commissioner as arbitrator;<sup>502</sup>
- committed gross irregularities in the conduct of the arbitration proceedings;<sup>503</sup>
- exceeded their powers as arbitrators;<sup>504</sup>
- an award was improperly obtained.<sup>505</sup>

The Labour Court has been granted the power to stay the enforcement of the award pending the discretion on review on these grounds.<sup>506</sup> In terms of common law the noting of an appeal ordinarily stays the order. However, a review application does not

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<sup>501</sup> S 145(1)(a) of the LRA 66 of 1995.

<sup>502</sup> Brasseley *Labour Relations Act* (2006), A7-93 submitted that for misconduct to exist, there must have been some “wrongful or improper conduct” on the part of the commissioner. In *Narraindath v CCMA & others* (2000) 21 ILJ 1151 (LC) at 1160H 1161 par 28, the court described misconduct to include mishandling of the arbitration that is likely to amount to some substantial miscarriage of justice. The Court went further to state that the arbitrator would misconduct himself if he acted contrary to public policy and where the award was obtained in violation of natural justice principle. The court concluded that some turpitude or at least impropriety on the part of the arbitrator was required. But that a *bona fide* mistake of law would not be sufficient.

<sup>503</sup> In *Mutual & Federal Insurance Co Ltd v CCMA & others* [1997] 12 BLLR 1610 (LC) par 1613 I-1614B. The Court held that a material contravention of the *audi alteram partem* rule would be prime example of a gross irregularity. Furthermore, in *Shoprite Checkers (Pty) Ltd v Ramdani NO & others* (2000) 21 ILJ 1232 (LC), the Court noted that gross irregularity ordinarily related to procedural requirements such as failure to give notice of hearing, refusing the one party an opportunity to call evidence while extending the opportunity to the other party and excluding cross-examination.

<sup>504</sup> Brasseley *Labour Relations Act* A7-96 states that the CCMA can only lawfully fulfill its function of arbitration if it has the competence and jurisdiction to do so in terms of the LRA. Further that prior performing their functions, the CCMA must comply with the substantive and procedural pre-conditions set out in the LRA.

<sup>505</sup> In *Moloi v Euijen NO* par 1377G-1380B, the Court pointed out that improper conduct include bribing of the arbitrator, or as result of a corrupt relationship.

<sup>506</sup> See s 145(3) of the LRA 66 of 1995.

have the same effect.<sup>507</sup> It is required that the Labour Court's discretion must be exercised judicially.<sup>508</sup> The LRA provides wider powers to the Court in correcting the decision it condemns on review.<sup>509</sup> In doing do, the Court may-

- determine the dispute in a manner it considers appropriate;
- make an order it considers appropriate about the procedures to be followed to determine the dispute.

In setting aside the award, the Court will either remit the matter back to the CCMA for a fresh decision, giving directions whether the same or a new arbitrator must hear the matter.<sup>510</sup> The Court will not simply substitute its own decision, unless in exceptional circumstances.<sup>511</sup>

There have been vigorous debates on whether further grounds of review exist, for example the argument that an award has to be justifiable or rational in relation to the reasons given for it.<sup>512</sup> It is argued that although a review differs from an appeal, a review brought under the grounds of justifiability and rationality has similar effects as an appeal.<sup>513</sup> In *Carephone (Pty) Ltd v Marcus NO*<sup>514</sup> the Court explained that value judgments will be made, which inevitably involve the consideration of the merits of the matter in one way or another. The Court accepted that provided the judge determining the issue was aware that he or she entered the merits, not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome was rationally justifiable, the process was in order.

In *Sidumo v Rustenburg Platinum Mines*<sup>515</sup> the Constitutional Court<sup>516</sup> held that when deciding whether an arbitrator's decision should be reviewed, the Court had to ask

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<sup>507</sup> See *Grunder v Grunder* 1990 (4) SA 680 (C) at 683G-H.

<sup>508</sup> See *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) par 851 C-F.

<sup>509</sup> S 145(4)(a) and (b) of the LRA 66 of 1995.

<sup>510</sup> *Brassey Labour Relations Act A7-98*.

<sup>511</sup> See *SA Fibre Yarn Rings Ltd v CCMA & others* (2005) 26 ILJ 921 (LC).

<sup>512</sup> *Jordaan et al Labour Arbitration* 101.

<sup>513</sup> *Ibid.*

<sup>514</sup> [1998] 11 BLLR 1011(LAC).

<sup>515</sup> [2007] 28 ILJ 2405 CC.

itself whether the decision was one that a reasonable decision-maker could not reach. The Court went further to point out that there had to be a rational connection between the evidence led in the arbitration and the arbitrator's decision and the arbitrator must not, for example, ignore relevant evidence or rely on irrelevant evidence in making his or her decision.<sup>517</sup>

In the same matter, the CC resolved the debate of whether the CCMA performed an administrative action and if the PAJA provisions applied. The majority of the CC found that arbitration by a CCMA commissioner was an administrative action within the meaning of section 33 of the South African Constitution. Nevertheless, the Court found that the PAJA provisions did not apply to review under section 145(2) of the LRA.<sup>518</sup> The Court inferred that section 145 of the LRA was a specialised provision that trumped the more generalised provisions of the PAJA.

For these reasons, review provisions on other grounds than those listed in section 145 of the LRA would refer to any other functions performed in terms of the LRA, including all rulings and decision of the CCMA, apart from arbitration awards.<sup>519</sup> The power extended to decisions regarding applications for condonation, rulings on jurisdiction and decisions by the Registrar of Labour Relations to refuse the registration of a trade union or a bargaining council. This was the scope of review under which rationality dictated by PAJA would apply.<sup>520</sup>

#### **4.12.4 THE LABOUR APPEAL COURT (LAC)**

The LRA establishes<sup>521</sup> the LAC,<sup>522</sup> comprising of the Judge President, the Deputy Judge President and a number of other judges of the High Court as may be required

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<sup>516</sup> Hereinafter referred to as "CC".

<sup>517</sup> See Jordaan *et al Labour Arbitration* 101.

<sup>518</sup> Van Niekerk *et al LAW@Work* 448.

<sup>519</sup> *Ibid.*

<sup>520</sup> *Ibid.*

<sup>521</sup> S 167 of the LRA 66 of 1995.

<sup>522</sup> Hereinafter referred to as the "LAC".

for the effective functioning of the LAC.<sup>523</sup> The judges are appointed by the President on the recommendation of NEDLAC and the Judicial Service Commission.<sup>524</sup>

The LAC is constituted by any three judges designated by the Judge President<sup>525</sup> and a decision to which any two judges agree is a decision of the Court.<sup>526</sup> The LAC has national jurisdiction and may perform its functions anywhere in the Republic.<sup>527</sup> Subject to the Constitution, the LAC may hear and determine all appeals against the final judgments and orders of the Labour Court and may decide any question of law reserved for it to decide.<sup>528</sup>

The LAC may receive further evidence, remit the matter to the Labour Court with instructions, or confirm, amend or set aside the judgment that is subject to appeal.<sup>529</sup> The judgments of the LAC are binding on the Labour Court.<sup>530</sup> Section 183 of the LRA provides that “subject to the Constitution and despite any other law, no further right of appeal lies from the LAC”. This view has been adopted by Court<sup>531</sup> prior to reversing the position by the SCA<sup>532</sup> and the CC. However, the CC has held to the contrary that where a matter was of a constitutional nature, the provisions of the LRA that gives the LAC an equal status to that of the SCA and the provisions of the Constitution that establish the LAC as the final Court of appeal have no application in matters that are within the exclusive jurisdiction of the LAC. The Court found that in a constitutional matter, there was a right of appeal from the LAC to the SCA.<sup>533</sup>

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<sup>523</sup> S 168 of the LRA 66 of 1995.

<sup>524</sup> S 169 of the LRA 66 of 1995.

<sup>525</sup> S 168(2) of the LRA 66 of 1995.

<sup>526</sup> S 173(4) of the LRA 66 of 1995.

<sup>527</sup> S 172(1) of the LRA 66 of 1995.

<sup>528</sup> S 173(1) of the LRA 66 of 1995.

<sup>529</sup> S 174 of the LRA 66 of 1995.

<sup>530</sup> S 182 of the LRA 66 of 1995.

<sup>531</sup> *Kan-Lin Fusion v Brunton & another* (2000) 23 ILJ 882 LAC, wherein the Court referred to s 167 of the LRA and concluded that there was no such right of appeal, because the Court had an equal authority and standing as the SCA.

<sup>532</sup> Hereinafter referred to as “SCA”.

<sup>533</sup> *NEHAWU v University of Cape Town & others* (2003) 24 ILJ (95) CC.

In *NUMSA & others v Fry's Metal (Pty) Ltd*<sup>534</sup> the Court pointed out that section 168(3) of the South African Constitution established the SCA as the highest court of appeal, except in constitutional matters. The Court concluded that the South African Constitution vested the SCA with the power to hear appeals from the LAC both on constitutional and non-constitutional matters. Therefore, the provisions of the LRA that conferred final appellate powers on the LAC had to be read subject to the judicial hierarchy established by the Constitution. In respect of constitutional matters, the CC had jurisdiction to hear appeals from the SCA.

## **4.13 OTHER LABOUR RELATED STATUTES**

### **4.13.1 THE BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997**

The BCEA is another pillar of South Africa's labour legislative dispensation. The Act provides for and stipulates pertinent conditions of employment and seeks to contribute to the creation of secure, equitable and harmonious working relationships.<sup>535</sup> The Preamble of the BCEA proclaims that it intends to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provisions for the regulation of basic conditions of employment, thereby complying with the obligations of the Republic as a member state of the ILO. Moreover, the BCEA seeks to advance economic development and social justice by establishing and enforcing basic conditions of employment.<sup>536</sup>

The BCEA establishes the threshold of basic conditions of employment that serves to protect all employees. It offers basic protection to employees who have little or no bargaining power to balance the superior economic power of their employers.<sup>537</sup> Although the BCEA provides for the threshold of basic conditions of employment, it permits variation of its minimum standards by means of variation provisions.<sup>538</sup>

The BCEA provides for numerous benefits. Chapter 1 relates to definitions and the purpose and application of the Act; Chapter 2 regulates working time; Chapter 3,

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<sup>534</sup> [2005] 5 BLLR 430 (SCA).

<sup>535</sup> *Venter et al Labour Relations in South Africa* 225.

<sup>536</sup> S 2 of the BCEA 75 of 1997.

<sup>537</sup> *Basson et al Essential Labour Law* 65.

<sup>538</sup> Ss 49 and 50 of the BCEA 75 of 1995.

leave; Chapter 4 sets out the particulars of employment and remuneration; Chapter 5 deals with termination of employment; Chapters 6 and 7 deal with child labour and forced-labour prohibition; Chapter 8 deals with sectoral determination; Chapter 9 deals with employment condition commission; Chapter 10 deals with monitoring, enforcement and legal proceedings; and Chapter 11 contains general provisions.

#### **4.13.2 EMPLOYMENT EQUITY ACT 55 OF 1998**

The EEA has been hailed as a landmark in South Africa's employment history as it makes a meaningful contribution to re-shaping the socio-economic and political framework of the country.<sup>539</sup> The EEA ensures the normalisation of the workplace, as well as the creation of a sense of equity and justice.<sup>540</sup>

The scheme of the EEA is achieved through:

- promoting equal opportunities and fair treatment in employment through the elimination of unfair discrimination; and
- the duty placed on designated employers to implement employment equity measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational categories and levels in the workforce.

“Designated groups” means black people, women, and people with disabilities.<sup>541</sup> Designated employers<sup>542</sup> refer to employers with 50 or more employees; employers with fewer than 50 employees, but with an annual turn-over equal to or above that of a small business;<sup>543</sup> and all municipalities and organs of state.<sup>544</sup> The EEA is divided into two sections. The first section deals with unfair discrimination<sup>545</sup> and the second

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<sup>539</sup> Chap 1 of the EEA 75 of 1995.

<sup>540</sup> Chap 2 of the EEA 55 of 1998.

<sup>541</sup> S 4(2) of the EEA 55 of 1998.

<sup>542</sup> S 12 of the EEA 55 of 1998.

<sup>543</sup> See Schedule 4 to the EEA 55 of 1998.

<sup>544</sup> Organs of the State are defined in s239 of the South African Constitution .

<sup>545</sup> Chap 2 of the EEA 55 of 1998.

details the mechanisms instituted to prevent discrimination and promote affirmative action.<sup>546</sup>

In *Crown Chickens (Pty) t/a Rocklands Poultry v Kapp & others*<sup>547</sup> the LAC described the EEA as one of the critical pieces of legislation passed after 1994 aimed at redressing the imbalances of the past. Thus the EEA provides that unfair discrimination must be adjudicated by the Labour Court after a failed attempt at conciliation by the CCMA.<sup>548</sup>

#### **4.13.3 THE SKILLS DEVELOPMENT ACT 97 OF 1998<sup>549</sup>**

The SDA was enacted to address the massive skills shortage. It seeks to create an institutional framework to devise national, sectoral and workplace strategies to develop skills of the workforce by, *inter alia*:<sup>550</sup>

- improving productivity and competitiveness;
- improving the quality of life of workers, their work prospects and labour mobility;
- promoting self-employment; and
- improving social services.

The Act seeks to achieve all the aforementioned through the creation of the National Skills Authority to oversee the implementation and realisation thereof.<sup>551</sup> Section 33 of the SDA criminalises the provision of false information, any attempt to obtain a prescribed document by false pretence, or obstructing a person acting in terms of the Act.

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<sup>546</sup> Chapter 3 of the EEA 55 of 1998.

<sup>547</sup> [2002] 6 BLLR 493 LAC par 35.

<sup>548</sup> S 10(2)-(7) of the EEA 55 of 1998. However, all parties may consent to arbitration by the CCMA after conciliation in terms of s 10(6).

<sup>549</sup> Hereinafter referred to as "SDA".

<sup>550</sup> Ss 1-4 of SDA 97 of 1998.

<sup>551</sup> S 5 of SDA 97 of 1998.

#### **4.13.4 COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASE ACT 130 OF 1993<sup>552</sup> AS AMENDED BY THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT 61 OF 1997**

The aim of COIDA is to provide compensation for losses due to occupational injuries and diseases in the workplace. COIDA applies to all employees and all casual and full-time employees who become ill or who are injured, disabled or killed as a result of a workplace accident or workplace-related diseases.<sup>553</sup>

COIDA provides employees with a no-fault compensation system for injuries arising out of and in the course of their employment. Employees are compensated regardless of whether their injuries or illnesses were caused by their own, their employers' or another person's negligence.<sup>554</sup> In these circumstances, the employee may not institute a simultaneous claim for damages against the employer or any other person for the damages suffered.<sup>555</sup> The claim made in terms of COIDA is a substitute for an employee's or dependant's right to claim damages from the employer in terms of the common-law principle.<sup>556</sup>

COIDA is administered by a Compensation Commissioner. Therefore the Act provides that a person affected or aggrieved by a decision of the Compensation Commissioner may lodge an appeal to the Labour Court.<sup>557</sup>

#### **4.13.5 UNEMPLOYMENT INSURANCE ACT 63 OF 2001<sup>558</sup> AS AMENDED BY THE UNEMPLOYMENT INSURANCE AMENDMENTS ACT OF 2003**

The purpose of the UIF is to alleviate some of the harmful economic and social effects of unemployment. Unemployed beneficiaries may withdraw funds to which

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<sup>552</sup> Hereinafter referred to as "COIDA".

<sup>553</sup> S 1 of COIDA 130 of 1993.

<sup>554</sup> Venter *et al Labour Relations in South Africa* 254.

<sup>555</sup> *Ibid.*

<sup>556</sup> Basson *et al Essential Labour Law* 398.

<sup>557</sup> S 91(5) of COIDA 130 of 1993.

<sup>558</sup> Hereinafter referred to as the "UIF".

they are entitled, thereby negating the effects of unemployment.<sup>559</sup> The Act applies to all employees other than those employed for less than 24 hours a month.<sup>560</sup>

The UIF defines an employee as a natural person who receives remuneration or to whom remuneration accrues in respect of services rendered, but excludes any independent contractor.<sup>561</sup> The Act provides for the establishment of the unemployment insurance fund for the following benefits:

- unemployment benefits;
- illness benefits;
- maternity benefits;
- adoption benefits; and
- dependants benefits.

Ultimately, it is the Labour Court that has exclusive jurisdiction in respect of all matters arising from the UIF.<sup>562</sup>

#### **4.14. CONCLUSION**

South Africa's labour relations system originated with the discovery of diamonds and gold, which later developed into the mining sector and resulted in the industrialisation of the country. The sector was confronted with continuous labour unrest among the people of different ethnicities that made up the workforce at the time. The unending labour turmoil necessitated the enactment of various labour legislations, notably the Industrial Conciliation 11 of 1924 and the subsequent Industrial Act 28 of 1956, to provide for dispute resolution between the parties. However, these statutes were discriminatory in their application on the basis that they excluded black workers and only applied to white workers and workers from other races.

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<sup>559</sup> Preamble of the UIF.

<sup>560</sup> S 3 of the UIF 63 of 2001.

<sup>561</sup> S 1 of the UIF 63 of 2001.

<sup>562</sup> S 61 of the UIF 63 of 2001.

The Wiehahn reforms were the watershed that gradually transformed the dualistic labour relations system into a unified system. These reforms further resulted in the launch of the Industrial Court to adjudicate unfair labour practice and disputes until 1995. The Industrial Court system was, however, not the ideal structure to resolve labour disputes because of its shortcomings, which had a bearing on the success rate of resolving disputes.

Following the attainment of full democracy in 1994, a democratic Constitution was adopted, which entrenches various labour rights and regulates labour relations. To this end, section 23 of the Constitution is dedicated to labour relations. The LRA was enacted to give effect to this constitutional commitment, which guarantees labour rights and the right to fair labour practices. The LRA established the CCMA to resolve labour disputes through conciliation and arbitration and replace the old Industrial Court system by providing more flexible, cost-effective and constructive mechanisms for dispute resolution. Besides the CCMA, bargaining councils are also provided for to complement the functions of the CCMA on a sectoral level.

Arbitration awards issued by the CCMA and bargaining councils are final and binding and no right of appeal against them exists. However, the LRA created the Labour Court and the LAC with review powers over defective arbitration awards. Aside from the LRA there are other labour related statutes relevant to dispute resolution that have been discussed in this chapter.

The following chapter analyses Namibia's compliance level with international labour standards relevant to labour dispute resolution. This is followed by a chapter that compares Namibia's labour dispute resolution system to that of South Africa. The final chapter addresses general conclusions and recommendations of the study.

## CHAPTER 5

### AN ASSESSMENT OF NAMIBIA'S COMPLIANCE WITH AND ENFORCEMENT OF INTERNATIONAL LABOUR STANDARDS

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#### 5.1 INTRODUCTION

This chapter brings into application Chapter Two's discussion of the ILO by undertaking a practical analysis of international labour standards relative to the Namibian labour dispute resolution system as discussed in Chapter Three. As illustrated in Chapter Two, the ILO has recognized the importance of meeting global social needs since its inception.<sup>1</sup> Within this context, the ILO's overall objective emphasizes the promotion of social justice through the development, monitoring and enforcement of international labour standards.<sup>2</sup> In addition, according to the organization's mission, the ILO aims to contribute to social justice,<sup>3</sup> an intention of

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<sup>1</sup> Standing "The International Labour Standards-Global Monitor" (2010) 15 *New Political Economy* 309.

<sup>2</sup> See Preamble of the ILO Constitution.

<sup>3</sup> Social justice is defined as "justice exercised within a society, particularly as it is exercised by and among the various social classes of that society. It is based on the principle of equality and

goodwill that it aims to achieve through a systematic and structured set of procedures formulated and enacted by the organization.<sup>4</sup>

Monitoring compliance with international labour standards is one of the organization's mandates. This is realized by accepting reports, supervising these reports and requiring conformity in the application of international labour standards by designated supervisory committees. These committees are based on tripartite structures consisting of trade unions, employers' organizations and governments.<sup>5</sup> These are the same structures that develop and adopt international labour standards in the form of conventions or recommendations.<sup>6</sup> On adopting a standard set by the ILC, such a standard becomes open for ratification by member states in terms of the Constitution of the ILO. Ratification, in turn, creates an obligation for a member state to adhere to the instrument's terms and conditions and, consequently, to submit regular reports demonstrating compliance with the ratified standard. This allows for ILO intervention in cases of non-adherence.<sup>7</sup> In most cases, conventions are accompanied by recommendations that are less formal and non-binding, but nevertheless provide detailed guidance to member states regarding ethical labour practices.<sup>8</sup>

According to the ILO's website, Namibia became a member state on 3 October 1978, represented by the South West African People's Organization (SWAPO). At the time, SWAPO was in exile while fighting for the liberation of the Namibian people from South Africa's colonialist rule.<sup>9</sup> At independence on 21 March 1990, Namibia became a sovereign state, adopting a constitution that confirms membership to the ILO and the resultant adherence to international labour standards.<sup>10</sup> Since then, Namibia has ratified all fundamental conventions, one priority convention and a number of

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solidarity, understands and values human rights, and recognizes dignity of every human being". See Encyclopedia accessed on 20 September 2012.

<sup>4</sup> Lopez and Ugarte "Analysis and Critical Assessment of the Role Played by the ILO in Developing and Securing Core Labour Standards" (2010) *Panorama Socio Economico* 201.

<sup>5</sup> Art 1(2) of the ILO Constitution.

<sup>6</sup> Art 19 of the ILO Constitution.

<sup>7</sup> Standing "The International Labour Standards-Global Monitor" 308.

<sup>8</sup> Art 19(6)(d) of the ILO Constitution.

<sup>9</sup> [Http://www.ilo.org/dyn/normle/en](http://www.ilo.org/dyn/normle/en) accessed on 09 March 2012.

<sup>10</sup> Art 95(d) of the Namibian Constitution.

technical conventions.<sup>11</sup> By virtue of ratification the country is obliged to comply with the provisions of all ratified conventions and, consequently, to subject itself to the ILO's established system for monitoring compliance with these ratified conventions.<sup>12</sup>

In light of the above, this chapter analyses Namibia's compliance level with ratified international labour standards, particularly conventions relating to labour dispute resolution, and un-ratified conventions that are nevertheless of application to the Namibian ADR system. The chapter further examines the effectiveness of the ILO's methods of securing compliance with ratified standards, and concludes with a practical examination of Namibia's ADR system with regard to compliance with international labour standards. The aim of the investigations undertaken in this chapter is to provide an overview of Namibia's compliance level with international labour standards and to outline the measures taken by the ILO to reinforce compliance with these standards.

## **5.2 THE NAMIBIAN CONSTITUTION AND THE APPLICATION OF INTERNATIONAL LABOUR STANDARDS**

Namibia became the hundred and thirty sixth (136<sup>th</sup>) member state of the ILO on 3 October 1978. At the time the country was politically dependent on South Africa and ruled under *apartheid*. Namibia's admission to the ILO was the result of the United Nations' termination of South Africa's mandate over the territory and the entrustment of the country's affairs to the United Nations Council of Namibia in 1967. In 1978, the United Nations' Council of Namibia requested the country's admission to the ILO as a full member. The Council was recognized by the ILC as Namibia's authentic government through a vote, with 368 votes in favour of this arrangement with no opposition and only 50 abstentions.<sup>13</sup>

Following Namibia's admission to the ILO, the Wiehahn Commission (Namibia) recommended that the country must become a sovereign member state of the ILO on attaining independence and that, where possible, it must ratify, adopt and comply

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<sup>11</sup> *Ibid.*

<sup>12</sup> Douglas, Ferguson and Klett "An Effective Confluence of Forces in Support of Worker Rights: ILO Standards US Trade Laws, Unions and NGOs" (2004) 26 *Human Rights Quarterly* 275.

<sup>13</sup> Available on <http://www.ncbi:nm-nib.gov> accessed on 19 September 2012.

with relevant international labour standards.<sup>14</sup> The commission further recommended that Namibia must subscribe to other African organizations, such as the Southern African Development Community (SADC).<sup>15</sup>

After gaining independence on 21 March 1990, Namibia embraced the Wiehahn Commission's recommendations by adopting a constitution and labour legislation that addressed the country's new image in the international world. The constitution asserts membership of the ILO and undertakes to comply to and act in accordance with international labour standards where possible.<sup>16</sup> To that end, the Labour Act was enacted to, amongst other things, give operational effect to the constitutional commitment of the ILO.

Tshosa<sup>17</sup> notes that the Namibian Constitution adopted a positive approach towards international law. This view is based on a number of articles contained in the constitution that deal with or relate to international law. The relevant articles include the preamble, which declares the integrity of the Namibian nation to be "among and in association with the nations of the world". Moreover, the constitution provides that the national territory of Namibia consists of the whole of the territory as "recognized by the international community through the organs of the United Nations".<sup>18</sup> Further, article 96 provides for foreign relations as follows:

"to ...

- (d) foster respect for international law and treaty obligation; and
- (e) encourage the settlement of international disputes by peaceful means".

The above provisions confirm that it was reasonable for the drafters of the Namibian Constitution to anchor it firmly on international law.<sup>19</sup> Article 144 of the Constitution provides for the unequivocal application of international law into Namibian legislation.

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<sup>14</sup> *Wiehahn Commission-Namibia* 24.

<sup>15</sup> *Ibid.*

<sup>16</sup> Art 95(d) of the Namibian Constitution.

<sup>17</sup> Tshosa "The Status of International Law in Namibian National Law - A Critical Appraisal of the Constitutional Strategy" (2010) 2 *Namibian Law Journal* 3.

<sup>18</sup> Tshosa "The Status of International Law in Namibian National Law - A Critical Appraisal of the Constitutional Strategy" 10.

<sup>19</sup> Tshosa "The Status of International Law in Namibian National Law - A Critical Appraisal of the Constitutional Strategy" 12.

Tshosa<sup>20</sup> illustrates that, in this context, the term “general rule” refers to rules that are widely supported and accepted by the majority of states. In other words, “general rules” are rules that have attracted widespread support from the international community. This, therefore, includes international labour standards adopted and accepted by the wider ILO community. However, not all general rules of international law are part of national law; only those rules that are binding upon Namibia are included.<sup>21</sup> Ultimately, all international labour standards that Namibia has ratified have the binding effects derived from the application of article 144 of the Constitution.

Article 144 of the Namibian Constitution makes further reference to international agreements that are binding on Namibia and includes these in national legislation. This means that national institutions, such as the Labour Commissioner and the Labour Court in particular, may apply and enforce international treaties that are binding on Namibia. Similarly, applicants, such as those involved in labour disputes, can rely on provisions included in international treaties to approach a labour tribunal or court to enforce their rights.<sup>22</sup>

### **5.3 THE RATIFICATION PROCESS OF INTERNATIONAL LABOUR STANDARDS BY NAMIBIA**

As discussed in Chapter Two of this study, international labour standards are the products of ILC deliberations. These standards are developed to enhance workers’ job security and are regarded as international action taken to improve labour conditions worldwide.<sup>23</sup> International labour standards take the form of conventions and recommendations. Conventions are legally binding international treaties that may be ratified by member states.<sup>24</sup> Recommendations, on the other hand, are non-binding and cannot be ratified. Their purpose is only to equip those involved in

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<sup>20</sup> Tshosa “The Status of International Law in Namibian National Law - A Critical Appraisal of the Constitutional Strategy” 13.

<sup>21</sup> *Ibid.*

<sup>22</sup> Tshosa “The Status of International Law in Namibian National Law - A Critical Appraisal of the Constitutional Strategy” 18.

<sup>23</sup> Motinga “*Should Core Labour Standards be Imposed through International Trade Policy? An Assessment of the Debate on Globalization and Labour Standards*” NEPRU (2002) 5.

<sup>24</sup> Art 19(5) of the ILO Constitution.

developing, formulating and reviewing labour legislation with tools to make social dialogue regarding labour legislation more effective.<sup>25</sup>

Conventions prescribe the basic principles with which ratifying member states must comply with. When a member state contemplates ratifying a standard, the country must follow the prescribed process leading to the ratification of standards. The process involves a member state submitting an adopted standard to its competent authority, which in most countries is the parliament or legislature. Therefore, before a convention becomes binding on Namibia it must first meet the requirements of article 144 of the Constitution and, where possible, the process must take into consideration the provisions of the Vienna Convention on the Law of Treaties (the Vienna Convention).<sup>26</sup> The Vienna Convention provides that a treaty is binding on a state once the state has expressed its consent to be bound by the treaty.<sup>27</sup> Having done so would ordinarily constitute ratification for a particular convention, hence becoming binding.

However, in Namibia the Constitution entrusts the President of the Republic of Namibia to “negotiate and sign international agreements and to delegate such powers”.<sup>28</sup> The negotiation and signing of international agreements by the State President does not in itself bring such instruments into effect as it requires the approval of Parliament.<sup>29</sup> This argument is based on the provision of article 63(2)(e) of the Namibian Constitution, which unequivocally states that the National Assembly of Namibia:

“...shall agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of article 32 (3) (e) hereof”.

With regard to labour related matters or instruments, the delegated powers of the President are vested in the Minister of Labour at the ILO level. The Minister of

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<sup>25</sup> ILO Labour legislation guideline available on <http://www.ilo.org/legacy/english/dialogue> accessed on 05March 2012.

<sup>26</sup> The Vienna Convention on the Laws of Treaties 1969 was adopted on 23 May 1969 but only came into force on 27 January 1980.

<sup>27</sup> Art 11 of the Vienna Convention 1969.

<sup>28</sup> Art 32(3)(e) of the Namibian Constitution.

<sup>29</sup> Tshosa “The Status of International Law in Namibian National Law - A Critical Appraisal of the Constitutional Strategy” 19.

Labour, with the consent of the social partners involved, must table the convention the country contemplates to ratify in Parliament. Once tabled in parliament and approved, the convention becomes binding on Namibia and the Ministry of Labour becomes obliged to inform the ILO of the formal ratification.<sup>30</sup> Negotiation and signature cannot bring the convention into force in Namibia; the approval of parliament is required.<sup>31</sup>

Following ratification and the Ministry of Labour's report thereof to the ILO, the Convention comes into force twelve months after registration of the second ratification, and for each individual member state twelve months after its ratification. However, some conventions contain different provisions.<sup>32</sup> It is only when a convention comes into force that it becomes binding on member states.<sup>33</sup> Ratification consequently commits a country to respect the instrument's terms and conditions and to submit regular reports showing compliance to them,<sup>34</sup> and to accept investigation of alleged deviation or non-compliance should either become evident.<sup>35</sup>

In addition to the ILO systems, constitutional and national statutory frameworks requiring the use of international labour standards, regional instruments of the SADC also promote the adoption of international standards.<sup>36</sup> To this end, article 95 of the Charter of Fundamental Social Rights in the SADC<sup>37</sup> requires member states to do the following in order to attain the objectives of the Charter:

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<sup>30</sup> Art 19(5)(d) of the ILO Constitution.

<sup>31</sup> Tshosa "The Status of International Law in Namibian National Law - A Critical Appraisal of the Constitutional Strategy" 19.

<sup>32</sup> Par 27 of the ILO *Handbook of Procedures relating to International Labour Conventions and Recommendations* 18.

<sup>33</sup> *Ibid.*

<sup>34</sup> Art 22 of the ILO Constitution.

<sup>35</sup> Standing "The International Labour Standards-Global Monitor" 308.

<sup>36</sup> Olivier *The End of Labour in Global Workplace Context? A South and South African Response* (2012) 33 (unpublished).

<sup>37</sup> Hereinafter referred to as the "SADC Social Charter".

- (a) to establish a priority list of ILO conventions, which includes the core conventions-forming part of the ILO Declaration on Fundamental Principles and Rights at Work of 1998<sup>38</sup> and relevant instruments;
- (b) to take appropriate actions to ratify and implement relevant ILO instruments and, as a priority, the core conventions; and
- (c) to establish regional mechanisms to assist member states in complying with the ILO reporting system.

The 1998 ILO declaration referred to in the SADC Social Charter was hailed as a triumph and welcomed by economic powerhouses due to the financial benefits it brings to ratifying developing member states.<sup>39</sup> However, Motinga<sup>40</sup> cautions against the use of the declaration for protecting trade purposes. Despite the overwhelming subscription to the declaration by member states, critics think little of its significance as it has merely a declaratory character<sup>41</sup> that is not binding on member states and lacks the specific legal requirements present in a convention.<sup>42</sup> However, undertaking to observe the provisions of the declaration allows member states to approach the ILO for assistance in realizing the principles contained therein.<sup>43</sup>

Aside from the benefits derived from adhering to the declaration, ratifying conventions, particularly core conventions, potentially benefits member states. These benefits include the prevention of member states from pursuing economic self-

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<sup>38</sup> According to Clause 2 of the Declaration, member states (including Namibia) declared that, even if they have not ratified the convention in question, they have an obligation arising from the very fact of membership of the ILO to respect, promote and realize in good faith and in accordance with the convention, the principles concerning the fundamental rights which are the subject of those conventions. These include:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced and compulsory labour;
- (c) the effective abolishment of child labour;
- (d) the elimination of discrimination in respect of employment and occupation.

<sup>39</sup> Standing "The International Labour Standards-Global Monitor" 313.

<sup>40</sup> Motinga "*Should Core Labour Standards be Imposed through International Trade Policy? An Assessment of the Debate on Globalization and Labour Standards*" 6.

<sup>41</sup> Standing "The International Labour Standards-Global Monitor" 313.

<sup>42</sup> Lopez *et al* "Analysis and Critical Assessment of the Role Played by the ILO in Developing and Securing Core Labour Standards" 201.

<sup>43</sup> Standing "The International Labour Standards-Global Monitor" 313.

interests and drafting labour law purely to protect and attract foreign investment.<sup>44</sup> Moreover, for developing countries, such as Namibia, ratifying conventions relating to core workers' rights that are similar to those of their trading partners can result in increased trade. Any deviation from labour standards could impact on the trade volumes and competitive and comparative advantage of a given country.<sup>45</sup>

Conversely, critics argue that the ratification of standards creates a cost burden on developing economies and creates precarious employment conditions.<sup>46</sup> The ILO rejects these views, pointing out the economic benefits of ratifying international labour standards. These benefits, according to the ILO, include<sup>47</sup> a positive correlation with improved economic performance, growth and productivity, and the promotion of good governance, as these principles are regarded as efficient methods to prevent corruption and the misallocation of resources.<sup>48</sup> It can be deduced that the international core-labour standards promoted by the 1998 declaration provides a remedy for world labour-market exploitation and a tool for fair income distribution, particularly in countries with active industrial relation practices. Thus, the application of international labour standards decreases unfair competition, provides security to industries willing to compete internationally, and facilitates the allocation of technical assistance and resources.<sup>49</sup>

To date, Namibia has ratified eleven international labour standards, which include all eight fundamental conventions, one priority convention and two technical conventions.<sup>50</sup> The table below illustrates these ratifications.

**FUNDAMENTAL CONVENTIONS**

Conventions	Date	Status
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<sup>44</sup> Langille “The Future of the ILO Law and the ILO” (2007) 101 *American Society of International Law* 395.  
<sup>45</sup> Motinga “Should Core Labour Standards be Imposed through International Trade Policy? An Assessment of the Debate on Globalization and Labour Standards” 8.  
<sup>46</sup> Lopez *et al* “Analysis and Critical Assessment of the Role Played by the ILO in Developing and Securing Core Labour Standards” 202.  
<sup>47</sup> ILO Rules of the Game (2005b).  
<sup>48</sup> Valticos “Fifty Years of Standard Setting Activities Band the ILO” (2000) 3 *International Labour Law Review* 201.  
<sup>49</sup> *Ibid.*  
<sup>50</sup> Government Republic of Namibia *Decent Work Country Programme* (2010-2014) 12.

1. C029 - Forced Labour Convention, 1930 (No. 29)	15 Nov 2000	In force
2. C087 - Freedom of association and protection of the Right to Organize Convention, 1948 (No. 87)	03 Jan 1995	In force
3. C098 – Right to Organize and Collective Bargaining Convention, 1949 (No. 98)	03 Jan 1995	In force
4. C100 – Equal Remuneration Convention, 1951 ( No. 100)	06 April 2010	In force
5. C105 – Abolition of Forced Labour Convention, 1957 (No. 105)	15 Nov 2000	In force
6. C111 – Discrimination (Employment and Occupation Convention, 1958 (No. 111)	13 Nov 2001	In force
7. C138 – Minimum Age Convention, 1973 (No. 138) (minimum age specified: 14 years).	15 Nov 2000	In force
8. C182 – Worst Forms of Child Labour Convention, 1999 (No. 182)	15 Nov 2000	In force
<b>GOVERNANCE (PRIORITY)</b>		
9. C144 – Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)	03 Jan 1995	In force
<b>TECHNICAL</b>		
10. C150 – Labour Administration Convention, 1978 (No. 150)	28 Jun 1996	In force
11. C158 – Termination of Employment Convention, 1982 (No. 158)	28 Jun	In force

By virtue of having ratified the above conventions Namibia has accepted the intervention of the ILO's supervisory machinery in the application of these standards. Consequently, the Government of the Republic of Namibia has modified its labour legislation<sup>51</sup> and labour-practices system,<sup>52</sup> in aspects ranging from technical details to issues of large significance, in response to the ILO's requests on a number of occasions.<sup>53</sup>

The ILO has undertaken a variety of technical activities aimed at assisting the Government of the Republic of Namibia and its social partners to fulfil their functions

<sup>51</sup> In this respect, the 1992 Labour Act was repealed with the assistance of the ILO and the Labour Act enacted to embrace the ILO concepts of ADR. See Chapter Three for a detailed discussion hereof.

<sup>52</sup> To this end, the Namibian labour legislation and practices continue to undergo modification. For example, the enactment of the Employment Relations Labour Amendment Act 2012 (Act 2 of 2012); Employment Services Act No 8 of 2011; and the Labour Amendment Act 2012 (Act 2 of 2012) took place in response to the commitment to adopt and promote sound labour relations, fair employment practices and the adherence to the ILO standards. See GRN Ministry of Labour and Social Welfare (Ministerial media statement) (26 July 2012) 3.

<sup>53</sup> Lopez *et al* "Analysis and Critical Assessment of the Role Played by the ILO in Developing and Securing Core Labour Standards" 204.

and roles in the standards-setting and supervisory system.<sup>54</sup> This is done within the context of the organization's basic aims and principles provided for in the constitution and the standards themselves.<sup>55</sup> The ILO has called upon Namibia to strengthen the working relationship with its social partners, the National Union of Namibian Workers (NUNW) and Namibian Employers' Federation (NEF), in order to ensure that the country's objectives are attended to in terms of ratified standards and technical cooperation.<sup>56</sup>

It is within this framework that the Government of the Republic of Namibia has signed a Memorandum of Understanding with the ILO and pledged to cooperate in the implementation of the Decent Work Country Programme.<sup>57</sup> The ILO has made a commitment to provide the necessary technical support to implement the programme and to support Namibian tripartite constituents in an effort to raise funds for the financing of the programme.<sup>58</sup> The programme specifically identifies three priority areas, namely employment promotion, enhancement of social protection, and the strengthening of social dialogue, tripartism, and other areas of work. The enhancement of social protection includes two sub-priorities: mitigating the impact of HIV and AIDS in the workplace and the implementation of a social security programme.<sup>59</sup>

#### **5.4 REPORTING AND SUPERVISING THE APPLICATION OF RATIFIED STANDARDS IN NAMIBIA**

The ILO conventions and recommendations are not effective only through their adoption and existence. It is their implementation and regular systematic monitoring that makes them effective in member states.<sup>60</sup> Partaking in the adoption of the ILO standard at the annual ILC, Namibia commits itself to submit such conventions,

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<sup>54</sup> ILO *Handbook of the Procedures Relation International Conventions and Recommendations* (2006) 54.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Art 1 of the Memorandum of Understanding on the Decent Work Country Programme for Namibia.

<sup>58</sup> Art 2 of the Memorandum of Understanding on the Decent Work Country Programme for Namibia.

<sup>59</sup> See GRN Decent Work Country Programme for Namibia (2010) 5.

<sup>60</sup> [Http://www.leeswepston.net/supersys](http://www.leeswepston.net/supersys) accessed on 25 September 2012.

protocols and recommendations to Parliament.<sup>61</sup> This is done to ensure that Parliament examines the instrument properly with a view to ratification.<sup>62</sup>

Once Namibia ratifies an international labour standard, article 20 of the ILO Constitution comes into effect, imposing the obligation on the country to report regularly on measures taken to implement all ratified conventions as listed in section 5.3 above. This obligation includes the duty to submit newly adopted standards to Parliament, and to submit reports to the ILO on the application of ratified conventions and measures taken to give effect to the provisions of unratified conventions.<sup>63</sup> This obligation is focused particularly on the core conventions as laid out in the ILO Declaration on Fundamental Principles and Rights at Work. To demonstrate the significance of core conventions, the Declaration has developed follow-up mechanism that can be seen as a new kind of legal tool. Although it lacks the authoritative intervention equal to that of a convention, it represents a fresh approach to encouraging ILO member states to respect the set of core values that underpins the ILO's mandate.

After the ratification of a convention, Namibia is required to submit periodic reports to the ILO detailing the steps that the country has taken to apply the convention in practice. This obligation relates to core or fundamental, priority and technical conventions. In submitting these reports to the ILO, the Namibian Government is required to furnish copies of the reports to the NEF and NUMW as these are the most representative employers' and workers' organizations in Namibia.<sup>64</sup>

Communicating the reports to social partners can be done prior to finalizing the documents in order to invite their comments, providing an opportunity to take these comments into account before settling the reports. Alternatively, social partners can direct their comments regarding the application of the ratified conventions being reported on to the ILO.<sup>65</sup> This consultation is mandatory as prescribed by article

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<sup>61</sup> ILO *A Guide to International Labour Standards* (2008) 254.

<sup>62</sup> *Ibid.*

<sup>63</sup> Art 19(5)(e) of the ILO Constitution.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

5(i)(d) of Convention No. 144.<sup>66</sup> This Convention has been ratified by Namibia, creating a duty on the government to consult social partners regarding questions arising out of the reports to be submitted to the ILO.

Article 22 of the ILO Constitution, which requires the submission of annual reports to the governing body, prescribes the reporting manner and form, and prescribes the particulars that must be contained in the report.<sup>67</sup> These reports are examined by the CEACR. Annually, usually in February, depending on the reporting circle of each country, letters are sent to member states requesting reports that may be due for submission. The letter will either request detailed or simplified reports, depending on which reply is due, and will be accompanied by copies of observations or direct requests from the CEACR. Similar copies are also sent to social partners, namely the NEF and NUNW in Namibia.<sup>68</sup>

Reports must reach the Governing Body of the ILO between 1 June and 1 September of the reporting period. Where persistent delays are experienced, the matter is referred directly to the government in order to ensure timely delivery. In extreme cases the matter can be addressed with government delegates at the annual ILC; this course of action includes an investigation into the application of these standards by standards specialists in the field.<sup>69</sup> At the time of writing, six compliance-report requests on ratified conventions<sup>70</sup> had been made in 2012 and various direct requests and observations in previous years.<sup>71</sup> As a result of outstanding requests and observations, the ILO's Pretoria field office has been charged to conduct training with the government officials responsible for standards reporting in 2011.<sup>72</sup>

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<sup>66</sup> C.144 Tripartite Consultation (International Labour Standards) Convention, 1976.

<sup>67</sup> See art 22 of the ILO Constitution.

<sup>68</sup> ILO *Handbook of Procedures relating to International Labour Conventions and Recommendations* par 41(a) 26.

<sup>69</sup> *Ibid* at par 41(b).

<sup>70</sup> These conventions includes: C029 regular report; C100 first report; C105 regular report; C138 regular report, C144 regular report and C182 regular.

<sup>71</sup> <http://ilo.org/dyn/normlex/en> accessed on 12 September 2012.

<sup>72</sup> Training conducted by Dr Chritina Holmgrem – International Labour Standards Specialist (interview held on 26 September 2012).

On receipt of a country's report, the CEACR determines whether the report contains the information and documentation required in reply to any observation or direct request made by the CEACR or the Conference Committee. If the report is found to be inadequate, the CEACR does not enter into the substance of the matter, but immediately draws the attention of the Namibian Government to the need to reply appropriately and to attach all relevant legislation, statistics or other documentation at issue.<sup>73</sup>

In terms of article 23(1) of the ILO Constitution, the Director-General is required to present a summary of the information and reports communicated to the office, including the Namibian reports in pursuance of articles 19 and 22 of the ILO Constitution, to the next meeting of the ILC. To this end, the ILO has established extensive supervisory mechanisms to oversee the implementation and application of international labour standards in pursuance of articles 19 and 22 of the ILO Constitution. These mechanisms include the routine reporting discussed above, a review process, and *ad hoc* procedures for handling complaints by workers' or employers' groups and complaints from governments regarding other governments' non-compliance.<sup>74</sup>

Articles 22 and 35 of the ILO Constitution impose a reporting obligation on the Namibian government. Failure to meet this obligation is considered an "automatic case", as the member state failing in its obligation is listed in the report of the CEACR. Consequently, the member state is listed in the Conference Committee's report relating to the sending of reports and information on international standards.<sup>75</sup> These are the cases that generate individual comments, or general observations, and direct requests by the CEACR to each country concerned.<sup>76</sup>

The ILO's supervisory system is regarded as the most developed and effective amongst the United Nations' agencies. However, it has been conceded that the

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<sup>73</sup> ILO *Handbook of Procedures relating to International Labour Conventions and Recommendations* 26 par 41.

<sup>74</sup> Elliot "The ILO and Enforcement of Core Labour Standards" 06.

<sup>75</sup> ILO *Committee on the Application of Standards of the International Labour Conference – Overview of Cases of Serious Failure to Meet Constitutional Obligations* (2011) 105.

<sup>76</sup> Elliot "The ILO and Enforcement of Core Labour Standards" 06.

system is confronted with challenges related to maintaining and improving its effectiveness, given the constant increase in the number of reports received. Similarly, the Organization's effectiveness is continually influenced by an increase in the number of new member states joining it and the continued adoption of new conventions and recommendations.<sup>77</sup>

This has led to the governing body's adoption of the revised reporting procedure, initiated in the 1950s when the governing body started simplifying reporting periods and the formulation of supervisory comments.<sup>78</sup> Prior to 1958, before Namibia became a sovereign member state, reports from member states were due annually. In 1959 the reporting period was lengthened to biennial intervals. In 1976 the periodic reports became due every four years, except for those relating to the most important conventions.<sup>79</sup> In light of these changes a number of safeguards were implemented to ensure that the lengthening of the reporting cycle did not weaken the effectiveness of the supervisory system.<sup>80</sup> The frequency of reporting was made dependent on the importance and urgency of the issues raised in the previous findings of the CEACR.<sup>81</sup> Under this new approach, detailed reports can be called for on a yearly, two-yearly or five-yearly basis.<sup>82</sup>

In November 2009, the Governing Body of the ILO evaluated the possibility of grouping conventions by subject for purposes of reporting in terms of article 22 of the ILO Constitution. The assessment was intended to address the rationalization of reporting in light of the 2008 Declaration on Social Justice and Fair Globalization.<sup>83</sup> As a result, conventions have since been grouped by strategic objectives and reporting periods increased from two to three years for fundamental and governance conventions, while a five-year reporting period was maintained on technical

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<sup>77</sup> ILO *The Committee on the Application of Standards and the International Labour Conference* (2011) 14.

<sup>78</sup> Landy *Shaping a Dynamic ILO System of Regular Supervisory – The Valticos Years* (2004) 13.

<sup>79</sup> ILO *The Committee on the Application of Standards and the International Labour Conference* 14.

<sup>80</sup> *Ibid.*

<sup>81</sup> Landy *Shaping a Dynamic ILO System of Regular Supervisory* 14.

<sup>82</sup> *Ibid.*

<sup>83</sup> ILO *The Committee on the Application of Standards and the International Labour Conference* 16.

conventions.<sup>84</sup> Namibia has an obligation to submit reports every three years for the eight fundamental conventions ratified, which includes one governance convention. Reporting remains at five-year intervals for the technical conventions ratified.

The governing body not only addressed the reporting problem, but also examined interventions that seek to strengthen follow-up procedures in cases of serious failure by member states to comply with their reporting and other standards-related obligations.<sup>85</sup> This is based on the fact that failure by member states to provide their reports is seen as undermining the functioning of the supervisory system, which is largely dependent on the information provided by governments.<sup>86</sup>

The ILO has decided that cases of serious failure to comply with the obligation to provide reports must be given the same attention as cases of non-compliance with ratified conventions. To effect this decision, the annual report of the Conference Committee lists specific cases of failure to comply with reporting obligations, namely:<sup>87</sup>

- Failure to supply reports for the past two years or more on the application of ratified conventions.
- Failure to supply first reports on the application of ratified conventions.
- Failure to supply information in reply to the comments of the CEACR.
- Failure to submit to the competent authority the instrument adopted by the conference during at least seven sessions.
- Failure to supply reports for the past five years on unratified conventions and recommendations.

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<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

The eight sessions of the ILC held in 1926 adopted a resolution bestowing regular supervision responsibility on the CEACR and the Conference Committee on the application of standards. The CEACR meetings are held at the end of November or beginning of December each year.<sup>88</sup> The Committee examines submitted reports from member states, including Namibia, to determine the extent to which countries' labour legislation and practices conform to the ratified conventions.<sup>89</sup>

Based on its findings, the CEACR prepares its own report and usually notes cases of progress as well as problems identified in the implementation process.<sup>90</sup> The CEACR has various monitoring interventions at its disposal to address potential problems. This may include using direct requests or observations and on-the-spot diplomacy to assist governments in the management of difficulties related to compliance with ratified ILO conventions.<sup>91</sup>

Observations are reserved for more serious or long-standing cases of failure to fulfil obligations. In these cases the CEACR can request full particulars of the non-compliance observed. Observations expressing satisfaction over any progress made by governments are included by the CEACR.<sup>92</sup> Direct requests are listed after the individual observations for each group of conventions. These requests are relative to matters of secondary importance or technical questions and are intended to seek clarification in order to enable the committee to make a full assessment of the nature of the effect given to the convention in question.<sup>93</sup>

An additional (relatively new) supervisory tool, introduced by Nicolas Valticos, is discreet diplomacy.<sup>94</sup> Valticos, erstwhile Assistant Director General (Director of Norms), of the ILO, had justified the necessity of diplomacy when other supervisory

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<sup>88</sup> ILO *Handbook of Procedures relating to International Labour Conventions and Recommendations* 35 par 54.

<sup>89</sup> ILO *Handbook of Procedures relating to International Labour Conventions and Recommendations* 36 par 56.

<sup>90</sup> Elliot "The ILO and Enforcement of Core Labour Standards" 06.

<sup>91</sup> Landy *Shaping a Dynamic ILO System of Regular Supervision* (2004) 16.

<sup>92</sup> ILO *Handbook of Procedures relating to International Labour Conventions and Recommendations* 36 par 56.

<sup>93</sup> *Ibid.*

<sup>94</sup> Landy *Shaping a Dynamic ILO System of Regular Supervision* 16.

efforts fail. He recognized the need to evolve from written comments and often controversial exchanges in the public arena during conferences, to a more relaxed private dialogue with the country concerned. This forum allows the country to explain its problems more fully while soliciting advice towards a solution at the same time.<sup>95</sup> In practice, it is undertaken through a visit by an ILO representative, which is either a staff member or an independent person with the consent of the government concerned, in order to address the specific problem with staff members responsible and to consult with national workers' and employers' organizations.<sup>96</sup>

Landy<sup>97</sup> points out three functions of this diplomacy-based procedure. These include bringing national policy in line with the requirements of ILO standards; establishing the facts underlying effective compliance; and providing technical assistance. Overall, the diplomacy procedure enhances the flexibility of operations and is informal, with a pragmatic approach that yields relatively rapid results.<sup>98</sup>

Simpson<sup>99</sup> holds that these procedures are part of Nicolas Valticos's<sup>100</sup> legacy, which remained intact and unchanged. For this reason, the author argues that it was necessary to adapt the system if it were to remain effective and maintain its credibility.<sup>101</sup> In 2002, the CEACR established a subcommittee to examine the working methods of the main committee, with a view to adapting the supervisory system. The sub-committee recommended useful changes regarding the manner of reporting and the rearrangement of the committee's report by grouping conventions. This has simplified labour ministries' task in relation to reporting obligations and has assisted in providing a review of the application of conventions in particular fields.<sup>102</sup>

However, Simpson<sup>103</sup> warns that although these changes are significant, they are nevertheless cosmetic. The author submits that this is due to the sub-committee's

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> Simpson *Standard-setting and Supervision* (2004) 69.

<sup>100</sup> Nicolas Valticos was Director of Norms at the ILO for 30 years (1964-1994).

<sup>101</sup> Simpson *Standard Setting and Supervision* 69.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

failure to address substantive fundamental questions related to the committee's ability to manage hundreds of cases of serious violations of ratified conventions by member states, effectively, which require the transmission of CEACR observations.

## **5.5 ANALYSIS OF THE NAMIBIAN REPORTS IN TERMS OF ARTICLES 19 AND 22 OF THE ILO CONSTITUTION**

For the purpose of this section, only those ratified conventions that are relative to the labour dispute resolution system adopted by Namibia are included in the analysis. The ILO's position in respect of all cases of serious failure to comply with the obligations imposed, specifically that the failure to provide reports is to be treated in the same manner as cases of non-compliance with ratified conventions, is taken into account.

In terms of compliance with articles 19 and 22 of the ILO Constitution, available evidence shows that Namibia's reporting obligation with the ILO is generally good, particularly in respect of supplying reports on ratified conventions; supplying first reports on the application of ratified conventions; timely submission of adopted instruments to parliament; and its commitment to submit reports on unratified conventions.<sup>104</sup> However, there is a significant continued failure to supply relevant information in reply to the comments of the CEACR on a number of conventions. One of these failures relates to the Freedom of Association and Protection of the Right to Organize Convention of 1948 (No. 87).

### **5.5.1 THE FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANIZE CONVENTION OF 1948 (NO. 87)**

The Freedom of Association and Protection of the Right to Organize Convention (Right to Organize Convention) is one of the core conventions, ratified by Namibia on 3 January 1995 and remains in force in the country.<sup>105</sup> This Convention provides workers and employers, without distinction, the right to establish and join organizations of their own choosing for the purpose of furthering and defending their

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<sup>104</sup> See Normlex Reports requested and replies to CEACR comments: Namibia available on <http://www.ilo.org/dyn/normlex/en> accessed on 12 September 2012.

<sup>105</sup> See Normlex Ratifications for Namibia, available on <http://www.ilo.org/dyn/normlex/en> accessed on 12 September 2012.

rights, without having to obtain prior authorization. These rights are, to a degree determined by national law or regulations, applicable to the armed forces and police service. The convention permits workers' and employers' organizations to formulate constitutions and rules; to elect representatives in full freedom; to organize administration and activities; and to formulate programmes.

The Right to Organize Convention cautions public authorities to refrain from any interference that could restrict the rights conferred or impede their lawful exercise. Similarly, workers and employers are urged to respect the law of the land in the exercise of their rights. The convention asserts that ratifying member states shall undertake the necessary and appropriate measures to ensure that workers and employers may freely exercise their right to organize.

The ILO places a premium on the Right to Organize Convention as embodied in article 41 of the original ILO Constitution, and re-affirmed this in the Declaration of Philadelphia<sup>106</sup> and the preamble of the revised Constitution of 1946.<sup>107</sup> It is submitted that freedom of association is a cardinal principle of the ILO on the basis that it permits workers to pursue their economic and social interests fairly.<sup>108</sup> The significance of freedom of association is manifested by the establishment and functioning of the Committee on Freedom of Association (CFA), a specialized supervisory body designed to deal with complaints related to freedom of association. To this end, the ILO recognizes freedom of association as being essential to sustained progress and lasting peace.<sup>109</sup> Adams<sup>110</sup> confirms that the primary function of the CFA is to oversee the implementation of the constitutional obligation of member states to respect and protect ILO principles regarding freedom of association and the right to collective bargaining.<sup>111</sup>

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<sup>106</sup> See arts (I)(b) and (III)(e) of the Declaration of Philadelphia.

<sup>107</sup> Gravel, Du Plessis and Gernigon *The Committee on Freedom of Association-Its Impact over 50 Years* (2001) 7.

<sup>108</sup> Fenwick *Australia's new Labour Law: An International Legal Perspective*. A paper delivered at the Castan Centre Human Rights. Year in review conference on 2 December 2005. Available on <http://www.law.monash.edu.au/castancentre/events/2005/fenwick-paper> accessed on 28 January 2012.

<sup>109</sup> See the preamble to the ILO Constitution.

<sup>110</sup> Adams "Prospects for Labour Rights to Bargain Collectively: After BC Health Services" (2009) 59 *U.N.B.L.J. Heinonline* 85.

<sup>111</sup> Gravel *et al The Committee on Freedom of Association* 7.

Given the significance of the convention, all member states have committed, under the 1998 ILO declaration, to respect, promote and realize in good faith those principles contained in the declaration that recognize freedom of association and the right to collective bargaining.<sup>112</sup> Namibia has embraced this principle since the ratification of the convention and the adoption of the declaration. However, in respect of this convention the CEACR has written five direct requests and observations to the Namibian government regarding the supplying of relevant information in reply to the comments of the CEACR. These are as follows:<sup>113</sup>

- The CEACR noted that the provisions of sections 77(1),(3),(4) and (5) of the Labour Act provides for the final decision on the determination of essential services to be reliant on the Minister of Labour as provided for in sections 77(9),(12) and 78 of the Act. The Committee requested information that explains whether the designation of an essential service by the Minister can be appealed or can be referred to the Labour Court. The government referred the CEACR to sections 78(1) and (2) of the Labour Act that provides for recourse to arbitration and subsequently to the Labour Court in terms of section 89 of the Labour Act.
- In relation to article 5 of the Convention, the CEACR took note of section 59 of the Labour Act that guarantees trade unions and employers' organizations the right to form and participate in the activities of international organizations. However, the Committee requested more details on whether federations of workers' and employers' organizations have the right to form confederations. The Namibian Government affirmed this right as provided for in both the Labour Act and the Constitution of the Republic of Namibia.
- In respect of article 2 of the convention, the CEACR observed that section 2(2)(d) of the Labour Act excludes members of the Namibian Prison Services

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<sup>112</sup> Diaye *The Annual Review and the Promotion of the 1998 ILO Declaration on Fundamental Principles and Rights at Work: Development and Initial Impact Assessment* (2004) 411.

<sup>113</sup> These comments and reports are available on Normlex.

from its application, unless the Prison Service Act 17 of 1998<sup>114</sup> provides otherwise. On this ground alone, the Committee requested the Namibian Government to undertake the necessary legislative amendments to guarantee the Prison Services the rights provided in the conventions. This observation has been recorded on more than one occasion. Government has, however, continually provided responses showing commitment in the form of engaging other stakeholders such the Ministry of Safety and Security and workers' organizations on the possibility of this type of inclusion. At the time of writing, consultations were ongoing.

- A further observation relates to the exclusion or restriction imposed by the Export Processing Zones (EPZ) Act 9 of 1995<sup>115</sup> that prohibited employees in these zones from embarking on industrial actions. However, the exclusion has since been rectified by the automatic lapse of the Export Processing Zone Amendment Act 6 of 1996, thereby the workers in the EPZ were allowed back within the scope of the Convention and the Labour Act.<sup>116</sup>

The above direct request and observations are the most prominent interventions made by the CEACR in relation to this particular Convention and to which the government has responded. Continued efforts are being made to align the provisions of the Labour Act in question with the convention. The Namibian government is making a concerted effort to include the country's Prison Services' workers within the scope of the Labour Act by consulting with role players and taking factors like state security concerns into account.

#### **5.5.2 RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING CONVENTION, 1949 (NO. 98)**

Namibia ratified the Right to Organize and Collective Bargaining Convention 98 of 1949 (Collective Bargaining Convention) on 03 January 1995 and it remains in

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<sup>114</sup> Prisons Service Act No 17 of 1998.

<sup>115</sup> Export Processing Zones Amendment Act, 2006.

<sup>116</sup> Fenwick, Kalula, Landan "Labour Law – A Southern African Perspective" in Teckle (ed) *Labour Law and Workers Protection in Developing Countries* (2010) 198.

force.<sup>117</sup> Article 4 of this convention calls upon the Namibian Government, as is the case for all ratifying member states, to take measures appropriate to national conditions to “encourage and promote the full development and utilization of machineries for voluntary negotiation between employers’ organizations and workers’ organizations”. This article is intended to aid in the regulation of the terms and conditions of employment by means of collective bargaining. In 2010 and 2011, the CEACR noted that sections 64(1) and (2) of the Labour Act provide for the threshold requirement to become an exclusive bargaining agent. The Committee requested clarity in situations where no union covers more than 50 per cent of the workers and, in such a case, whether the minority unions in the bargaining unit enjoy collective rights, at least on behalf of their members. Moreover, the CEACR wanted to know whether minority unions enjoy collective bargaining rights in cases where there are no unions representing 50 per cent of the workers concerned.

This observation appears to have been made repeatedly since the inception of the new Labour Act, and the government has failed to submit a satisfactory reply to date. The lack of clarity stems from section 64 of the Labour Act as it makes no reference to minority trade unions. This makes it seem as though minority trade unions in Namibia have no statutory protection to exercise collective bargaining rights in situations where there is no registered majority representative trade union recognized as an exclusive bargaining agent for the workers in the bargaining unit. This omission can be construed as inconsistent with the rights guaranteed to minority unions by Conventions 87 and 98 of the ILO and based on the interpretations of the Organization’s supervisory bodies.<sup>118</sup>

With reference to articles 1 and 2 of the Convention relating to protection against acts of anti-union discrimination and interference, the CEACR noted that the Labour Act prohibits and sanctions acts of anti-union discrimination as well as interference by employers in the internal affairs of trade unions.<sup>119</sup> The Committee noted the sections of the Labour Act that provide for the referral of allegations or disputes relating to anti-union discrimination and interference to the Labour Commissioner for arbitration

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<sup>117</sup> [Http://www.ilo.org/dyn/normlex](http://www.ilo.org/dyn/normlex) accessed on 13 September 2012.

<sup>118</sup> Van Niekerk *et al Law@Work* 28.

<sup>119</sup> Ss 6 and 50 of the Labour Act, 2007 (Act No11 of 2007).

or for further referral for adjudication by the Labour Court. Based on the aforementioned provisions, the CEACR requested the Namibian Government to provide detailed information on the speed of arbitration procedures in these cases and any other cases arising from the provisions of this convention.

The Committee further considered the provisions of section 86(5) of the Labour Act that provides that “unless a dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration”. This section was read with section 82(10) that refers to the conciliation of interest disputes<sup>120</sup> and provides for the conciliator to attempt to resolve the dispute within 30 days of the date the Labour Commissioner received the referral of the dispute. The committee observed that the Labour Act does not provide clear details on the rapidness of the subsequent arbitration procedure, notwithstanding section 86(7)(a) of the Labour Act. This section gives arbitrators unlimited latitude to conduct the arbitration in the manner that they may consider appropriate in order to determine the dispute fairly and quickly. The CEACR observed that the Labour Act is ambiguous and does not provide sufficient details on the speed of the arbitration process. However, the author submits that, neither does any convention nor any recommendation set out specific time lines for arbitration procedures, but the Namibian Government has stipulated specific timelines for these procedures.

Sections 70, 71 and 73 of the Labour Act are consistent with the provisions of the convention under discussion in that these provisions establish machineries for voluntary negotiations between employers’ and workers’ organizations in Namibia. Through these collective bargaining forums, terms and conditions of employment<sup>121</sup> are determined and regulated, thereby complying with the terms set out in the convention. Subsequently, all collective agreements in Namibia are required to provide for voluntary dispute procedures, including arbitration procedures, to resolve any dispute about the interpretation, application and enforcement of agreements.<sup>122</sup>

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<sup>120</sup> See s 81 of the Labour Act, 2007 (Act No11 of 2007) for the definition of dispute of interest.

<sup>121</sup> S 70(3) and (4) of the Labour Act, 2007 (Act No11 of 2007).

<sup>122</sup> S 73(1) of the Labour Act, 2007 (Act No 11 of 2007).

### 5.5.3 TRIPARTITE CONSULTATION (INTERNATIONAL LABOUR STANDARDS) CONVENTION, 1976 (NO. 144)

The Tripartite Consultation (International Labour Standards) Convention 144 of 1976 (Tripartite Convention) was ratified by Namibia on 3 January 1995 and remains in force. The Convention calls for the operation of national procedures to ensure effective consultations between governments, employers' and workers' representatives on, amongst other things:<sup>123</sup>

- questions arising from the reports to be made to the ILO on ratified conventions;
- government replies to questionnaires concerning items on the agenda of the conference and government comments on the proposed text to be discussed by the conference;
- the submission of conventions and recommendations to the competent authorities pursuant to article 19 of the ILO Constitution;
- the re-examination of unratified conventions and recommendations; and
- proposals for the denunciation of ratified conventions.

The Convention requires that these consultations must be undertaken at appropriate intervals fixed by agreements, but at least once a year.<sup>124</sup> Landy<sup>125</sup> submits that it is a constitutional requirement that governments send copies of their reports to the representative organizations of workers and employers to inform them of the information sent to the ILO and to enable them to comment, particularly in cases where the CEACR had previously raised questions concerning national laws and practices. The consultation process allows social partners to play a more active role in the supervisory process in Namibia. Where this role is ignored, the ILO transmitted letters directly to the central workers' and employers' organizations, providing them

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<sup>123</sup> Art 5 of the Convention No144.

<sup>124</sup> Art 5(2) of Convention No 144.

<sup>125</sup> Landy *Shaping a Dynamic ILO System of Regular Supervision* 14.

with background information on the reports currently due and copies of outstanding observations concerning their country.<sup>126</sup>

Given the numerous direct requests and observations by the CEACR on selected conventions and other non-related ratified conventions, compliance with observations and requests could be enhanced with the involvement of the NEF and NUNW in Namibia. From 1996 to 2012, evidence suggests that the government has repeatedly failed to provide records relating to information on the consultations held by the Labour Advisory Council on matters related to international labour standards as listed in article 5(1) of Convention No. 144. It is clear that the representatives of the Labour Advisory Council are not fulfilling their supervisory role as required by this convention. This consultation, if effectively used, has the potential of rectifying Namibia's shortcomings in respect of providing the required information on the application of conventions and recommendations in practice.

#### **5.5.4 LABOUR ADMINISTRATION CONVENTION, 1978 (NO. 150)**

This technical convention was ratified by the Namibian Government on 28 June 1996 and remains operational. The Convention urges the Namibian Government, as a member state of the ILO, to secure cooperation and negotiations between public authorities and the most representative organizations of employers and workers, the NEF and NUNW respectively, within the system of labour-administration consultation.<sup>127</sup>

In their observation the CEACR<sup>128</sup> noted that the Labour Act established a number of labour institutions in terms of Chapter 9. These are the Labour Advisory Council, Committee for Dispute Prevention and Resolution, Essential Services Committee, Wages Committee, Labour Commissioner, and Labour Inspectorate. These structures contribute immensely to the resolution of labour disputes in Namibia. Given the roles they play, particularly the Labour Commissioner and the Labour Inspectorate, the CEACR observed that the country had not provided detailed

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<sup>126</sup> *Ibid.*

<sup>127</sup> See full text of Convention No 150.

<sup>128</sup> See observation (CEACR) adopted 2011 published 101<sup>st</sup> ILC session (2012).

extracts on the activities of these bodies since the enactment of the Labour Act or any information on the practical difficulties encountered in the application in practice of the labour dispute-resolution system. In addition, the CEACR requested to be supplied with any decisions of the Labour Court involving questions of principles in relation to the application of this Convention.

The Namibian Government has failed to lodge a satisfactory response to this profound observation, despite the availability of reports detailing the work of the Labour Commissioner and the Labour Inspectorate. Only the annual reports of the Labour Advisory Council have been forwarded to the ILO regularly and reports relating to the activities of other institutions directly involved in the labour dispute resolution process, such as the Labour Commissioner and the Labour Inspectorate, have not been forwarded.<sup>129</sup> This fundamental failure is not consistent with the requirements of this Convention. In this case, dereliction of duty is the result of the failure of the members of staff responsible for soliciting these reports from the relevant offices and directorates, despite their availability.

#### **5.5.5 TERMINATION OF EMPLOYMENT CONVENTION, 1982 (NO. 158)**

The Termination of Employment Convention 158 of 1982 was ratified on 28 June 1996 and has since found application in Namibia, both in terms of the repealed Labour Act 6 of 1992 and the current Labour Act. In terms of article 4 of the convention, which addresses valid reasons for the termination of employment, the Government of the Republic of Namibia has been requested to provide the practical application of section 33(1) of the Labour Act that requires valid and fair reasons for termination of employment. Noting the absence of definitions of these concepts in the Labour Act, the Committee requested copies of leading decisions rendered by both the Labour Commissioner and the Labour Court on the criteria for determining valid and fair reasons for termination of employment.<sup>130</sup>

It should be noted that despite the insufficient provisions regarding the concepts of valid and fair reasons for dismissal as required by the Convention, there is sufficient

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<sup>129</sup> See GRN Ministry of Labour and Social Welfare report on Convention 150 (2011).

<sup>130</sup> See Direct Request (CEACR) adopted 2011, published 101<sup>st</sup> Session 2012.

jurisprudence resulting from the interpretation of these concepts by arbitrators and the Labour Court. In the absence of statutory guidelines, the courts have developed rules and principles of law applicable to the twofold requirements of section 33(1) of the Labour Act. Valid reasons and fair procedures are the fundamental principles that employers must apply in order for dismissals to be lawful.<sup>131</sup> The Convention further requires that dismissal disputes must be referred to an arbitration tribunal or the Labour Court. Namibia has complied with this provision by creating arbitration tribunals under the Labour Commissioner for the arbitration of labour disputes, including disputes related to alleged unfair dismissal<sup>132</sup> and, subsequently, granting recourse to the Labour Court.<sup>133</sup> Ultimately, there is compliance with the provisions of the convention, despite piecemeal reports submitted to the ILO.

## **5.6 ASSESSMENT OF THE EFFECTIVENESS OF THE ILO'S METHODS OF SECURING COMPLIANCE WITH RATIFIED CONVENTIONS**

Namibia has not been in serious violation of any conventions that may have warranted severe actions by the ILO. The country has essentially complied with its reporting obligations, particularly on the core-labour conventions. However, for the purpose of this study, an analysis is undertaken of the effectiveness of the ILO's methods of securing compliance with standards. The focus is on the sanctions available in case of non-compliance in order to demonstrate the consequences of a situation that warrants such an intervention by the ILO.

In principle, the ILO develops and promotes universal labour standards in order to ensure that decent working conditions are created along with global economic growth and development. Once international labour standards are ratified by member states, the ILO monitors their compliance by developing reports, supervising and securing conformity of their application with the established committees and, where possible, applying appropriate sanctions and seeking remedies in situations of non-compliance.<sup>134</sup>

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<sup>131</sup> Parker *Labour Law in Namibia* 139.

<sup>132</sup> See Part C of the Labour Act, 2007 Arbitration of Disputes.

<sup>133</sup> S 89 of the Labour Act, 2007 (Act No11 of 2007).

<sup>134</sup> Lopez *et al* "Analysis and Critical Assessment of the Role Played by the ILO in Developing and Securing Core Labour Standards" 200-212.

The CEACR examines compliance with international labour standards through information gathered from the reports submitted in terms of articles 19 and 22 of the ILO Constitution in order to determine whether member states comply with their obligations.<sup>135</sup> The purpose of such an exercise is not to assess the penalties to be imposed, but to make an appraisal of what the government needs in the way of resources, law reforms and other practical changes required to bring the country into compliance.<sup>136</sup> Given the ILO's role in monitoring member states' compliance with ratified conventions, the Organization has established various structures through the supervisory bodies, including country missions and technical assistance to ensure that all ratified conventions are applicable in the legal framework of the country.<sup>137</sup>

The monitoring process begins with the work of the CEACR, which delivers detailed reports to the annual ILC with comments on non-compliance with ILO conventions in specific countries. The CEACR is supplemented by the CFA, which focuses on complaints specifically arising from the provisions of convention 87 on the freedom of association. These structures serve as the ILO's comprehensive, effective and highly regarded systems, established to enforce the application of labour standards world-wide.<sup>138</sup> These supervisory machineries are recognized as the most sophisticated and their scrutiny the most rigorous and least politicized of any in the United Nations system.<sup>139</sup> The systems are supported by the ILO's unique and diverse tripartite structures that include governments and employers' and workers' organizations that have an equal opportunity to comment on matters.<sup>140</sup>

The reporting system is based on articles 19 and 22 of the ILO Constitution, which empower the supervisory bodies to examine national legislation and practices with regard to ILO standards, and provide the backbone of the ILO's supervisory system.

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<sup>135</sup> Mhtml:/file//G:\Enforcement and dispute resolution alliance for responsible trade.mht. accessed on 15October 2012.

<sup>136</sup> *Ibid.*

<sup>137</sup> Verma "Global Labour Standards: Can We Get From Here to There?" (2004) 19 *International Comparative Journal of Labour Law and Industrial Relations* 4, 9.

<sup>138</sup> Douglas, Ferguson and Klett "An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions and NGOs" (2004) 26 *Human Rights Quarterly* 275.

<sup>139</sup> Hansenne "International Trade and Labour Standards: The ILO Director Speaks Out" (1996) 135 *International Labour Review* 230-238.

<sup>140</sup> Verma "Global Labour Standards: Can We Get From Here to There?" 9.

Reports serve as the starting point for the regular procedure of supervision, which is where most of the supervisory work takes place.<sup>141</sup> The ILO regards compliance as the first step towards effectiveness. However, critics argue this point, questioning how it can be possible to achieve compliance if the Convention has no “intrinsic material incentives” and if there is no regulatory enforcement body.<sup>142</sup> Despite this observed shortcoming, the ILO is still responsible for managing and observing the standards’ continued application and promoting and strengthening their relevance.<sup>143</sup>

The number of ratified conventions is one of the measures used to determine the ILO’s effectiveness. Another measure of effectiveness is demanding public explanations before international forums for flagrant non-compliance with obligations from countries that refuse to comply with their obligations. An equally important measure is the publication of violations of core-labour standards in the form of the Director-General of the ILO’s Global Report.<sup>144</sup> Through these actions by the ILO, the general public and all applicable tripartite structures are informed of the situation in a given country, thereby encouraging governments to take corrective measures to change malpractices.<sup>145</sup> However, given that the supervisory bodies’ recommendations are not legally binding on member states, countries that do not align their labour systems to meet international standards are not punished for their violations.<sup>146</sup>

Karuvilla argues that, although ratification may be a performance indicator relative to effectiveness, ratification alone does not necessarily translate to enforcement.<sup>147</sup> To address this problem it is suggested that core-labour standards should be enforced

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<sup>141</sup> Romano “The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environment Agreements” (1996) 1 *International Institute for Applied Systems Analysis* 25.

<sup>142</sup> Burgermann “Mobilizing Principles of the Role of Transnational Activists in Promoting Human Rights and Principles” (1998) 20 *Human Rights Quarterly* 906.

<sup>143</sup> Somavia *Preference Contribution in Norms Internationals du Travails* (2004) x.

<sup>144</sup> Lopez “Analysis and Critical Assessment of the Roles Played by the ILO in Securing Core Labour Standards” 201.

<sup>145</sup> Karuvilla “International Labour Standards, Soft Regulations and National Government Roles” (2006) 48 *Journal of Industrial Relations* 41.

<sup>146</sup> Servais “ILO Standards of Freedom of Association and their Implementation” (1984) 123 *International Labour Review* 6.

<sup>147</sup> Karuvilla “International Labour Standards, Soft Regulations and National Government Roles” 205.

by applying sanctions.<sup>148</sup> In the absence of well-structured enforcement measures within the ILO system, it has been proposed that the answer lay in the creation of a closer working relationship between the ILO and the World Trade Organization (WTO),<sup>149</sup> where the latter would impose trade sanctions against non-compliant member states. Ultimately, this could prove to be more effective than mere voluntarism.<sup>150</sup>

This proposal was rejected by many member states as social clauses cause protectionism, with serious consequences for global trade and investments. It has been argued that the inclusion of social clauses in trade agreements will also impact negatively the ILO's present activities and its organizational image.<sup>151</sup> Accordingly, it is submitted that basing social clauses and their application on ILO conventions and investigations would turn the ILO into a weapon against many developing countries and countries that are in transition to a market economy.<sup>152</sup> The ILO has a duty to maintain the fundamental principle of universality and embrace all UN member states. Therefore, it cannot become instrumental in regulating which countries are admitted to, or excluded from, the global market.<sup>153</sup> Doing so could incite developing countries to paralyse the activities of the ILO, either by leaving or threatening to leave the organization. Developing countries have remained members of the ILO in order to use their votes to prevent ILO standard-setting, particularly standards that can be used against them.<sup>154</sup>

A closer examination of article 26 of the ILO Constitution shows that it resembles those provisions that are proposed for the WTO closely. However, the ILO lacks

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<sup>148</sup> Biffl "Globalization and Core Labour Standards: Compliance Problems with ILO Convention 87 and 98. Comparing Austria and other English-speaking Countries with EU Member States" (2005) 21 *Journal of Comparative Labour Law and Industrial Relations* 405.

<sup>149</sup> Hereinafter referred to as the "WTO".

<sup>150</sup> Biffl "Globalization and Core Labour Standards: Compliance Problems with ILO Convention 87 and 98. Comparing Austria and other English-speaking Countries with EU Member States" 405.

<sup>151</sup> Sengenberger and Campbell *International Labour Standards and Economic Interdependence* (1994) 351.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

enforcement powers.<sup>155</sup> Article 26 was drafted with care in order to avoid the imposition of penalties, except as a last resort.<sup>156</sup>

Other than monitoring the application of standards through publishing reports on violations, the ILO lacks the capacity to enforce labour standards. It is said to be “toothless”, making little difference in the labour practices of governments.<sup>157</sup> For example, the ILO does not have the power to impose fines on non-compliant nations, restrict their trade or block foreign investments in their economies.<sup>158</sup> The Organization can rely only on other institutions and role players to impose sanctions, for example other governments denying investment guarantees, and unions and NGOs organizing consumer boycotts.<sup>159</sup> In addition, article 33 of the ILO Constitution does not provide punitive measures, but was developed similarly to a “social clause” that encourages member states to take “measures of economic character” against other member states that are refusing to comply with the recommendations of a commission of the ILO.<sup>160</sup>

This situation remained largely unchanged, even after the constitutional review that broadened the scope of article 33. It has been left to the governing body’s discretion to adopt actions suitable to the circumstances, including the possibility of economic or any other sanction.<sup>161</sup> The provisions of article 33 of the ILO Constitution were applied in the Burma/Myanmar case. However, the article’s weaknesses became apparent as the ILO resolution on Burma did not directly impose sanctions; instead it allowed member states and other United Nations organizations to take appropriate actions. Unlike the WTO’s social clause that permits member governments to take action to remedy violations, the ILO does not impose sanctions directly itself. It is left to other member states to determine, within a given time frame, the cost of enforcement they are willing to impose.<sup>162</sup>

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<sup>155</sup> Elliot “The ILO and Enforcement of Core Labour Standards” 05.

<sup>156</sup> *Ibid.*

<sup>157</sup> Douglas *et al* “An Effective Confluence of Forces in Support of Workers’ Rights: ILO Standards, US Trade Laws, Unions and NGOs” 276.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> ILO Report I AND II and Constitutional questions, 29<sup>th</sup> session of the ILC 1946.

<sup>161</sup> Elliot “The ILO and Enforcement of Core Labour Standards” 05.

<sup>162</sup> *Ibid.*

In the context of the above arguments, Holsti<sup>163</sup> remarks that the presence of regulatory regimes in the absence of compliance is regarded as government without governance to such a degree that it is dysfunctional.<sup>164</sup>

Other than the lack of punitive measures in case of the contravention of international labour standards, there are various additional factors that influence non-compliance with standards. These include, but are not limited to:<sup>165</sup> the ambiguity and under-determinacy of the convention language; limitation on the capacity of parties to carry out their undertaking; and the temporal dimension of the social and economic changes contemplated by regulatory conventions. Holsti further points out that coercive enforcement measures could be the wrong means to induce behavioural change in order to improve the situation of the member state in question.<sup>166</sup> Therefore calling upon the ILO to continue providing technical assistance and tripartite consultation rather than forcing member states to comply, as such actions may be questionable.<sup>167</sup>

While regular supervision procedures enhance compliance with international obligations, the ultimate goal of this type of mechanism should be to make appropriate comments, as was demonstrated in the Namibian situation. The comments should continue to encourage dialogue and cooperation in order to assist governments to comply with standards, rather than allocating blame and criticism.<sup>168</sup> The main reason for equipping the ILO with supervisory procedures is to utilize the information obtained to adjust the organizational standards over time.<sup>169</sup>

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<sup>163</sup> Holsti "Governance without Government: Polyarch in the Nineteenth Century-European International Politics" in Rosenau and Czempel (eds) *Government without Governance* (1992) 44.

<sup>164</sup> *Ibid.*

<sup>165</sup> Chayes and Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 22.

<sup>166</sup> *Ibid.*

<sup>167</sup> Romano "The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environment Agreements" 25.

<sup>168</sup> *Ibid.*

<sup>169</sup> Romano "The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environment Agreements" 26.

## 5.7 ENFORCEMENT MECHANISMS OF THE ILO

The critical aspect of enforcement and the imposition of penalties for non-compliance should come as a result of a democratic and open process that brings about predictable and consistent results. Therefore, the use of enforcement measures should be rare and only actioned if all other avenues available to facilitate compliance (direct request, observations and diplomacy) are exhausted.<sup>170</sup> Currently, the ILO Constitution provides two main mechanisms for the enforcement of ratified conventions:<sup>171</sup> articles 24 and 33. Article 24 empowers employers' organizations or trade unions to make representation to the effect that a state has not complied with a convention it has ratified. Consequently, article 33 allows the governing body to recommend to the ILC that action be taken as may be deemed wise and expeditious in order to secure compliance by a member state that fails to act accordingly.

Article 33 was used for the first time in the case of Myanmar, where the country's government subjected its people to widespread and gross violations of basic human rights<sup>172</sup> in breach of the Forced Labour Convention 29 of 1930.<sup>173</sup> After several failed attempts to compel Myanmar to comply with the Convention, the ILO called on all member states and other international organizations to review their relations with Myanmar in order to ensure that they did not contribute to the use of forced labour in that country.<sup>174</sup> There were a number of responses before the resolution was formally adopted, including the World Bank and the International Monetary Fund<sup>175</sup> ceasing the granting of loans to Myanmar in 1988. Other governments imposed various measures, including the suspension of aid programmes and the withdrawal of tariff preferences.<sup>176</sup>

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<sup>170</sup> Mhtml:file://G:\Enforcement and dispute resolution alliance for responsible trade.mht. accessed on 15 October 2012.

<sup>171</sup> Mhtml:file://G:\Enforcement and dispute resolution alliance for responsible trade.mht. accessed on 15 October 2012.

<sup>172</sup> Davies "Global Administrative Law at the ILO: The Problems of Softer Standards" unpublished.

<sup>173</sup> Convention No 29 of 1930.

<sup>174</sup> ILC (2000) Resolution Concerning the Measures Recommended by the Governing Body under Article 33 of the ILO Constitution on the Subject of Myanmar (88<sup>th</sup> Session).

<sup>175</sup> Hereinafter referred to as the "IMF".

<sup>176</sup> Davies "Global Administrative Law at the ILO" 8.

In a case closer to home, the ILO intervened to compel Swaziland to comply with international labour standards. In this case, the CEACR noted several areas of concern with regard to the country's Labour Code. Although the Labour Code was amended in 1995 in response to outside pressure, it nevertheless kept those provisions that repressed labour movements.<sup>177</sup> ILO pressure alone was not sufficient to influence the Swaziland Government to align its Labour Code to the provisions of international labour standards. As a result, the ILO called on the United States of America<sup>178</sup> to review its trade relations under Generalized System of Preferences (GSP)<sup>179</sup> arrangements. On this basis the United States government threatened to withdraw trade privileges with Swaziland. This threat led to the drafting and implementation of a new Labour Code with the assistance of the ILO, which was passed in 2000. However, Swaziland's laws and practices conformed to GSP statutory requirements only after additional amendments to the Labour Code of 2000 were made, ensuring that the country's eligibility for GSP benefits continued.<sup>180</sup>

The two measures discussed above are supplemented by the use of technical assistance to member states. This assistance is used as an incentive for governments to be more receptive to the standard-setting work of the ILO. The withdrawal of technical assistance has not yet been used by the ILO as a sanction for failure to implement international labour standards. Similar actions could have been taken in a number of states, but the governing body has rejected this approach.<sup>181</sup> It should, however, be noted that technical assistance is only available to governments that request it, but this assistance is irrelevant to those countries that are not making any effort to comply with the ILO standards.<sup>182</sup>

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<sup>177</sup> CEACR Individual observation concerning Convention No87 Freedom of Association and Protection of the Right to Organize, 1948, Swaziland: ratification 1978; published 1997. Available at <http://www.ilo.org> accessed on 14 October 2012.

<sup>178</sup> Hereinafter referred to as the "US"

<sup>179</sup> Hereinafter referred to as the "GSP".

<sup>180</sup> Douglas *et al* "An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions and NGOs" 293.

<sup>181</sup> Romano "The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environment Agreements" 26.

<sup>182</sup> *Ibid.*

In light of these processes, it is deduced that the various ILO supervisory mechanisms create an administrative void in the ILO spectrum<sup>183</sup> to the extent that the Organization can be regarded as a purely administrative one.<sup>184</sup> Since the ILO seeks information from member states, judges that information against agreed standards, and, where a breach is found, takes steps to secure compliance, the Organization qualifies as only administrative body.<sup>185</sup>

Critics argue that the purpose of the ILO conventions should be to create binding and enforceable international norms that should prevent member states from pursuing economic self-interest and compromising their labour legislation in order to protect and attract investments.<sup>186</sup> On this basis, it is submitted that the ultimate goal of ILO standards should not be to restrain member states in the exercise of their self-interest, but to help governments to identify their interests and achieve their economic aims.<sup>187</sup> In addition, the author contends that in a social-and labour-policy framework, the model of law applicable is different from the criminal-law model of constraining self-interest. In this arena, expert legal authorities do not adjudicate compliance with detailed norms. Further, the focus should not be on enforcement and sanction, but it on education, capacity building, monitoring, learning best practices, resources, technical assistance, and incentives. The author further cautions that the ILO should not become an obstacle to the progress of member states, but should become a solution instead of a problem.<sup>188</sup>

## **5.8 INTERNATIONAL LABOUR STANDARDS AND THE NAMIBIAN ADR SYSTEM**

This section analyses the extent to which ratified conventions have been applied in practice in Namibia as required by the ILO relative to articles 19 and 22 of its constitution.

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<sup>183</sup> Kingsburg, Kisch and Steward "The Emergence of Global Administrative Law" (2004) *International Institute for Law and Justice Working Paper* 1.

<sup>184</sup> Davies *Global Administrative Law at the ILO* unpublished 8.

<sup>185</sup> *Ibid.*

<sup>186</sup> Langille "The Future of the ILO Law and the ILO" 395.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

## **The Right to Organize and Collective Bargaining Convention 98 of 1948**

In terms of articles 3 and 4 of the Right to Organize and Collective Bargaining Convention, ratifying member states, are called upon to create bodies and to establish procedures for the settlement of labour disputes that contribute to the promotion of collective bargaining. The convention envisaged that conflict is inevitable in employment relations.<sup>189</sup> For this reason, such bodies become catalysts to sound labour-relations systems, thereby providing effective and practical dispute settlement mechanisms to deal with the inevitable disagreements between workers and their employers.<sup>190</sup>

However, it is noted that the ideal situation exists where parties are able to bargain voluntarily, without the necessity for third-party intervention.<sup>191</sup> The Namibian Labour Act incorporates the provisions of this convention as it requires disputants to take all reasonable steps to resolve or settle the dispute before referral is sought with the Labour Commissioner.<sup>192</sup> The purpose of this is to encourage negotiations between the parties themselves without resorting to the intervention of government-established structures.

## **The Examination of Grievances Recommendations Convention 130 of 1967<sup>193</sup>**

Although not binding in nature, this instrument urges member states to establish mechanisms aggrieved parties in the employment relationship may resort to in the event of failure to resolve their dispute. The instrument gives workers the right to lodge grievances if the employers' actions are not consistent with the agreed norms in the collective agreement, legislative provisions, and contracts of employment or practices. Most employers in Namibia who have entered into formal recognition and procedural agreements<sup>194</sup> have included provisions addressing grievance procedures

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<sup>189</sup> Khabo *Collective Bargaining and Labour Dispute Resolution in Southern Africa* 11.

<sup>190</sup> Fashoyin *Industrial Relations in Southern Africa: The Challenge of Change* (1998) 43

<sup>191</sup> Glodman "Settlement of Disputes over Interests" in Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Economies* (2007) 723.

<sup>192</sup> S 82(9) of the Labour Act, 2007 (Act No11 of 2007).

<sup>193</sup> No 130 of 1967.

<sup>194</sup> See s 64 of the Labour Act, 2007 (Act No11 of 2007).

in their collective agreements. These provisions permit aggrieved employees to exhaust internal structures before approaching external institutions, such as the Labour Commissioner, to seek assistance for the resolution of their disputes.<sup>195</sup>

In addition, the instrument makes various recommendations on the development and implementation of workplace-dispute resolution mechanisms. It places special emphasis on the importance of preventative measures-based workplace policies and fostering cooperation between social partners in employment decision-making processes that affect workers. Moreover, the instrument encourages aggrieved parties to seek recourse outside the workplace where internal efforts fail to yield the desired results. Such recourse includes conciliation and arbitration by the public authorities or recourse to the Labour Court.<sup>196</sup> Effectively, Chapter 3 of the Labour Act deals extensively with such practices and provides for the referral of related disputes to the Labour Commissioner.<sup>197</sup>

The ILO points out that a sound labour-relations system is dependent on the provision of an effective and practical dispute-settlement machinery to resolve disputes between workers and their employers. The envisaged dispute resolution machinery should allow parties to the dispute to take adequate responsibility for resolving their disagreement without having to resort to strikes, and procedures for dispute resolution should not be cumbersome.<sup>198</sup>

### **Voluntary Conciliation and Arbitration Recommendation 92 of 1951**

This instrument recommends to member states, including Namibia, to avail themselves of voluntary conciliation processes to assist in the prevention and settlement of industrial disputes between employers and workers. The instrument points out that these processes should be free and expeditious and should allow the parties to enter into conciliation voluntarily or upon the initiation of the authority. Consequently, the instrument calls on the parties to the dispute to refrain from strikes

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<sup>195</sup> De Beer *Employers' Guideline to Fair Disciplinary Actions and Procedures* (2007) 44.

<sup>196</sup> Par 17 of R130 of 1967.

<sup>197</sup> See s 38 of the Labour Act, 2007 (Act No11 of 2007).

<sup>198</sup> Fashoyin *Industrial Relations in South Africa* 43.

or lockouts while conciliation or arbitration is in progress, without limiting the right to strike.

Although the instrument is persuasive in nature, with no binding legal force, the Labour Act has been aligned to the requirements of this instrument. In giving effect to this recommendation, the Act requires every collective agreement between employers' and workers' organizations to provide for mechanisms to resolve labour disputes that should be evoked by the parties when negotiations between them fail.<sup>199</sup> This provision, although not explicit, does not exclude the possibility of voluntary conciliation and arbitration. The process is voluntary in instances where conciliation and arbitration processes are undertaken by a mutually chosen private third party outside the machineries established by the government.<sup>200</sup> As a general rule, disputes of interpretation, application and enforcement of the agreement as set out in section 73 of the Act requires arbitration or adjudication. In this case, parties may again provide for private arbitration in their collective agreement, therefore making use of the provisions of section 90 of the Labour Act, which is a voluntary process to be decided by the parties themselves.

Despite this provision, voluntary conciliation and arbitration is not commonly used in Namibia on the basis that it is costly for the parties to hire a private third party instead of using the free service provided by the state. The government has made statutory or compulsory<sup>201</sup> conciliation and arbitration available for the resolution of labour disputes. It is mandatory to attend compulsory conciliation meetings which may, where necessary, be occasioned by a *subpoena*<sup>202</sup> with specific consequences for non-attendance.<sup>203</sup> In compliance with the ILO instrument under discussion, no strike is permitted in Namibia while conciliation has not been exhausted.<sup>204</sup> Both

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<sup>199</sup> See s 73 of the Labour Act, 2007 (Act No11 of 2007).

<sup>200</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 20.

<sup>201</sup> It is compulsory in the sense that parties are required to have recourse to it. This includes some steps of the process that are compulsory and create an obligation to attend when invited. See Steadman *Handbook on Alternative Labour Dispute Resolution* 24.

<sup>202</sup> See s 82(18)(a) of the Labour Act, 2007 (Act No11 of 2007).

<sup>203</sup> See s 83(2) of the Labour Amendment Act No. 2 of 2012 which provides "In respect of any other dispute referred in terms of this Act, the conciliator of the dispute may dismiss the matter if the party who referred the dispute fails to attend conciliation meeting".

<sup>204</sup> S 75 of the Labour Act, 2007 (Act No11 of 2007).

conciliation<sup>205</sup> and arbitration processes<sup>206</sup> are expeditious in the sense that there are time limits allocated to each process. The Labour Commissioner's services are free, with no costs to the disputants.

### **The Collective Bargaining Convention 154 of 1981**

This Convention, addressing labour-dispute resolution, calls upon Namibia as member state to provide for bodies and procedures for the settlement of labour disputes. The convention suggests that these procedures be designed in a manner intended to contribute to the promotion of collective bargaining.<sup>207</sup> Although the convention focuses on collective bargaining, it does not exclude the use of conciliation and arbitration as part of the bargaining process, particularly where such a process is undertaken voluntarily.<sup>208</sup>

### **Labour Relations (Public Service) Convention 151 of 1981**

Although not ratified by the Namibian Government, the Convention provides that the settlement of disputes over terms and conditions of employment must be sought "through independent and impartial machinery, such as mediation, conciliation and arbitration established in such a manner that it ensures the confidence of the parties involved".<sup>209</sup> The standards emphasize the independence and impartiality of the machineries created to resolve labour disputes. The Labour Act established a single institution, the Labour Commissioner, to resolve labour disputes arising from all employment sectors, including the public-service sector. There is no separate structure for isolated disputes resulting from the public sector.

The convention calls for the independence of the Labour Commissioner, but, as discussed previously, the Labour Commissioner is an office within the Ministry of

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<sup>205</sup> S 82(a) and (b) of the Labour Act, 2007 provides that conciliation must be concluded within 30 days from the date of referral, unless the parties agree to a longer date.

<sup>206</sup> In terms of the rules of the Labour Commissioner, (Reg 20(2) arbitration must be concluded within 30 days of the referral and an award be made within another 30 days of concluding the arbitration proceedings. (Section 86(18) of the Labour Act, 2007 (Act No11 of 2007).

<sup>207</sup> Art 5(2)(e) of C154 of 1981.

<sup>208</sup> ILO *Collective Dispute Resolution through Conciliation, Mediation and Arbitration* 7.

<sup>209</sup> Art 8 of C151 of 1981.

Labour and Social Welfare, within the public-service realm. However, the office is independent of any influence from employers' and workers' organizations. Similarly, the personnel of the Labour Commissioner's office (conciliators and arbitrators) are required to be independent and impartial in the performance of their duties.<sup>210</sup>

### **Labour Administration Recommendation 158 of 1978**

The Labour Administration Recommendation requires competent bodies within the system of labour administration to provide conciliation and arbitration services, with the agreement of social partners, to address collective labour disputes.<sup>211</sup> The recommendation is a subordinate instrument of the Labour Administration Convention,<sup>212</sup> ratified by Namibia. It is therefore within the scope of this Convention that various labour institutions, namely the Labour Advisory Council, the Committee for Dispute Prevention and Resolution and the Essential Services Committee, were established on a tripartite basis.<sup>213</sup>

### **The Termination of Employment Convention 158 of 1982**

This Convention urges workers who are not content with the termination of their employment to appeal against such termination through a labour tribunal or a court established for this purpose. The Convention requires the tribunal or the court to examine the reasons given for the termination and the circumstances leading to the dismissal. Namibia has ratified this Convention, thus article 33 of the Labour Act gives effect to these provisions. In terms of this section, an employer is prohibited with or without notice from dismissing an employee "without a valid and fair reason and without following a fair procedure". A dispute to that effect must be referred to the Labour Commissioner for arbitration in terms of sections 38(1), (2) and (3) of the Labour Act. As provided for in the convention, arbitration before the Labour Commissioner is a tribunal as contemplated in article 12(1)(a) of the Namibian Constitution.

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<sup>210</sup> S 85(6) of the Labour Act, 2007 (Act No11 of 2007).

<sup>211</sup> Par 10 of R158 of 1978.

<sup>212</sup> No 150 of 1978.

<sup>213</sup> See Chapter 8 and 9 of the Labour Act, 2007 (Act No11 of 2007).

However, despite this seeming compliance with the convention, the Labour Act fails to define valid and fair reasons for termination of employment. Although section 137 of the Act provides for the publication of guidelines and codes of good practice to facilitate the proper implementation of the legislative framework,<sup>214</sup> at the time of writing no code of good practice was in place. A code of good practice, such as that applicable in the LRA, could be helpful in guiding users in the interpretation or application of the Labour Act.<sup>215</sup>

In Chapter Three of this study, various events were illustrated that warranted the need to investigate the efficiency and appropriateness of the dispute resolution system in terms of the Labour Act of 1992. Mediation, conciliation and adjudication in terms of the repealed statute became inappropriate.<sup>216</sup> As a result, Namibia has since embraced the internationally recognized ILO machineries of ADR with the enactment of the Labour Act. This has led to the creation of conciliation and arbitration forums, including adjudication reserved for the Labour Court as recourse to appeals or reviews.

### **5.8.1 CONCILIATION**

A detailed theoretical and practical application of conciliation in Namibia was discussed in Chapter Three of this study. The analysis that follows draws on this discussion in order to examine the Namibian labour dispute resolution system in terms of its compliance with the substantive requirements for an effective conciliation process. Member states are required to align their conciliation processes to these requirements, although they are not clearly defined by the ILO instruments discussed above. Conventions and recommendations refer only to establishing conciliation and arbitration machineries, without providing adequate details as to the exact process involved. However, supplementary ILO literature provides useful requirements to engage in a meaningful conciliation.<sup>217</sup> A description of a number of the requirements

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<sup>214</sup> Khabo *Collective Bargaining and Labour Dispute Resolution* 11.

<sup>215</sup> S 137(3) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>216</sup> Fashoyin *Industrial Relations in Southern Africa* 43.

<sup>217</sup> Steadman *Handbook on Alternative Labour Dispute Resolution* 20.

on which this study's examination of the Namibian conciliation process is based follows.

**(a) An obligation to notify the competent authority of a labour dispute**

In terms of section 86(1)(b) of the Labour Act, disputes, including disputes of interest, must be referred<sup>218</sup> to the Labour Commissioner within one year of the dispute arising. The referring party must advise or inform the other party to the dispute of such an action by serving the party with a copy of the referral.<sup>219</sup> Given these procedures, the provisions of the Labour Act appear to comply with the ILO requirement that calls for parties to inform the state of the existence of the dispute.

**(b) A requirement to report labour disputes to the authority, which may then be empowered to initiate conciliation and to require attendance of the parties**

The Labour Act requires the Labour Commissioner, after receiving a properly referred dispute, to appoint a conciliator<sup>220</sup> who is required to attempt to resolve the dispute through conciliation.<sup>221</sup> Thereafter all parties to the dispute are informed of the place, date and time of the first meeting and are required to attend in person, unless where a representation is permitted and a representative can attend on behalf of a party. It is therefore the referral that empowers the Labour Commissioner to institute a conciliation meeting; conciliations are not conducted at random without any cause of action.

**(c) A restriction on the choice of third party called upon to conduct the conciliation**

In compulsory conciliation under the auspices of the Labour Commissioner, parties have no choice in the appointment of a conciliator. It is strictly for the Labour Commissioner to appoint a conciliator<sup>222</sup> and parties may not object to the

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<sup>218</sup> See s 82(8) of the Labour Act, 2007 (Act No11 of 2007).

<sup>219</sup> *Ibid.*

<sup>220</sup> S 82(3) of the Labour Act, 2007 (Act No11 of 2007).

<sup>221</sup> S 82(a), (b) and (c) of the Labour Act (Act No11 of 2007).

<sup>222</sup> S 82(3) of the Labour Act, 2007 (Act No11 of 2007).

appointment, unless good grounds exist for such an objection. If grounds exist for an objection it is a jurisdictional matter to be determined *in limine*.

**(d) The requirement to participate in conciliation**

Section 83 of the Labour Act provides for the consequences of failing to attend a conciliation meeting. The Act provides that “in respect of any other dispute referred in terms of this Act, the conciliator of the dispute may dismiss the matter if the party who referred the dispute fails to attend a conciliation meeting”. In some instances *subpoenas* are used to secure the attendance of parties to a conciliation meeting.<sup>223</sup> This reflects the seriousness of the requirement to attend conciliation by all parties to the dispute.

**(e) The prohibition of strikes and lockout before conciliation procedures have been exhausted and completed**

The Labour Act, 2007 prohibits strikes while conciliation is in progress and before it is finalized.<sup>224</sup> Strikes are permissible only once the entire conciliation process has been completed and the conciliator has issued a certificate of non-resolution of the dispute.<sup>225</sup> Once such a certificate has been issued the parties are required to comply with the requirements outlined in section 74 of the Labour Act. Strikes that do not pursue this route are declared unprotected and unlawful.

**(f) An obligation to adhere to an agreement concluded during a conciliation meeting**

This is one of the labour dispute resolution system’s most serious challenges as the Labour Act does not contain any provision relating to a settlement agreement resulting from a conciliation meeting. Consequently, there is no provision in the Act requiring parties to adhere to the terms of the settlement agreement. The only related provision is found in the Labour General Regulations.<sup>226</sup> The applicable regulation provides that “if parties resolve their dispute during the conciliation process, the

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<sup>223</sup> S 82(18)(a) of the Labour Act, 2007 (Act No11 of 2007).

<sup>224</sup> S 75 of the Labour Act, 2007 (Act No11 of 2007).

<sup>225</sup> S 82(15) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>226</sup> Regulation 18(3).

conciliator must issue a certificate of resolved dispute on Form LC24". The form supplements the regulation by proclaiming that "the parties have reached a full and final settlement". Therefore, the absence of a statutory provision holding the parties to the terms of the settlement agreement reached in a conciliation meeting and the failure to provide for consequence of non-compliance are contributing factors to the wide-spread non-compliance with settlement agreements in Namibia.

**(g) In cases of rights disputes, the requirement to have undergone conciliation before the dispute can be referred to a labour tribunal**

Arbitration conducted through the Labour Commissioner's office is considered a labour tribunal for the purpose of resolving labour disputes,<sup>227</sup> as contemplated in the Namibian Constitution.<sup>228</sup> In this context, it is a peremptory requirement that all disputes of rights must first attempt to be resolved through conciliation and, if that process is unsuccessful, arbitration must commence.<sup>229</sup> The only exception to this rule is where a party alleges the infringement of fundamental rights and protections within the scope of the Labour Act and Chapter 3 of the Namibian Constitution. In such an instance a party may approach the Labour Court directly for the enforcement of that right or protection or for other appropriate relief.<sup>230</sup>

## **5.8.2 ARBITRATION**

This section draws on the preceding discussions of arbitration in order to inform the examination of the rapidity of the process as raised by the ILO. ILO instruments, particularly the Voluntary Conciliation and Arbitration Recommendation, require the process to be expeditious and to be completed within a given time limit as may be prescribed by national law or regulation.<sup>231</sup>

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<sup>227</sup> S 85(1) of the Labour Act, 2007 (Act No11 of 2007).

<sup>228</sup> Art 12(1)(a) of the Namibian Constitution.

<sup>229</sup> S 85(5) and (6) of the Labour Act, 2007 (Act No11 of 2007).

<sup>230</sup> S 7(5) of the Labour Act, 2007 (Act No11 of 2007).

<sup>231</sup> Par 3 of R92 of 1951.

Labour arbitration in Namibia is limited by delays. For example, a dismissal dispute must be referred to the Labour Commissioner within six months of its occurrence.<sup>232</sup> Thereafter, arbitration must be held within 30 days of the referral or any longer period agreed to in writing by the parties.<sup>233</sup> Once this period has elapsed, the Labour Act requires the arbitrator to issue the award within 30 days of concluding the arbitration.<sup>234</sup> The process usually takes up to eight months to complete. However, where there are postponements the process may take longer than the prescribed time limit. These delays are attributed to the parties themselves and, as such, negate the possibility of the speedy resolution of labour disputes.<sup>235</sup> A thorough comparative analysis with regard to the CCMA system is carried out in the following chapter of this thesis.

## **5.9 EFFICIENCY OF THE LABOUR COMMISSIONER'S OFFICE IN TERMS OF ILO REQUIREMENTS**

The ILO asserts that in order for state machinery such as the Labour Commissioner to operate effectively, particularly in labour dispute prevention and resolution, the system must be able to display the following procedural and substantive qualities.<sup>236</sup>

- **Legitimacy**

The legitimacy requirement contemplates a labour dispute resolution system, such as that of the Labour Commissioner, to operate as a product of the consent of the parties whose interests are at stake. This requirement further indicates that the substantive standards to be applied should satisfy public interest norms and expectations. The Namibian ADR system is a product of wider consultation between social partners, developed by a tripartite task team that was assisted by ILO experts. The final ADR system was adopted only after extensive consultation with and deliberation between social partners and all stakeholders in Namibia. As such, it is submitted that the system is legitimate and in compliance with this ILO requirement.

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<sup>232</sup> S 86(2)(a) of the Labour Act, 2007 (Act No11 of 2007).

<sup>233</sup> Rule 20(2) of the Labour Commissioner.

<sup>234</sup> S 86(18) of the Labour Act, 2007 (Act No11 of 2007).

<sup>235</sup> Simpson *Labour Dispute Resolution* 62.

<sup>236</sup> Thompson *Dispute Prevention and Resolution in Public Service Labour Relations* 45.

- **Scope**

Under this requirement, the labour dispute resolution system is urged to cater for the full range of interests and rights disputes of concerned parties. The ADR system must be able to attend to all issues that give rise to conflict in the workplace. Relative to this requirement, all kinds of labour disputes, such as rights and interest disputes as defined in the Labour Act, are catered for by the Labour Commissioner. For a dispute to fall under the system, it must fall within the parameters of the definitions provided in sections 81 and 84 of the Labour Act and must result from an employment relationship.

- **Power**

Ideally, the system must be able to bring the full portfolio of ADR processes to bear, from mediation to arbitration and everything in between, as may be appropriate to the resolution of the issue at hand. The Namibian labour dispute resolution system has embraced the ADR process of conciliation fully, which includes mediation and arbitration processes as defined in the Labour Act. Adjudication is reserved purely as recourse for appeal, review and limited other circumstances, such as disputes infringing on fundamental rights.

- **Independence**

The facilitators, mediators and arbitrators of any conflict resolution scheme and any organization utilizing them must be seen to be manifestly independent and without any conflict of interest in relation to the parties or subject matter. The appointment of neutral facilitators, mediators and arbitrators must be the product of either general or specific consent. To this end, the Labour Act requires arbitrators, although appointed in terms of the Public Service Act as public servants, to be independent and impartial in the performance of their statutory duties.<sup>237</sup> However, situations where there could be a perceived conflict of interest in disputes arising from the public sector, especially where the arbitrator may be a beneficiary of the outcome, raise questions. Where a dispute over the determination of terms and conditions of employment arises in the public sector and most cases involving government, the matter would ordinarily be

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<sup>237</sup> S 85(6) of the Labour Act, 2007 (Act No11 of 2007).

arbitrated by a part-time arbitrator who is not in the employment of government.<sup>238</sup>  
This action negates the perceived conflict of interest.

- **Professionalism**

While dispute resolution styles may vary according to personalities and individual strengths, the users of services are entitled services with providers who work under an ethically sound governance structure, have experience and are competent in the field. In this respect, the Labour Act<sup>239</sup> makes provision for a code of ethics for conciliators and arbitrators appointed in terms of sections 82 and 85. Further, although there is no specified qualification, the Act requires conciliators and arbitrators to have related qualifications.<sup>240</sup> In Namibia, the appointment requirement to become a conciliator or arbitrator is a Diploma and/or Post-Graduate Diploma in Labour Dispute Resolution attained at any recognized institution of higher learning. This qualification must be coupled with relevant experience. Any deviation or breach of the code of ethics is reasonable cause for the Minister of Labour to withdraw the appointment of an arbitrator.<sup>241</sup> However, the nature of these deviations or breaches of conduct is not defined in the Labour Act, 2007.

- **Coordination and integration**

The dispute resolution process should be compatible with the wider system of workplace regulation and agreement-making applicable to or adopted by the parties. The statutory or private dispute resolution system should ideally complement, but in any event not undermine, these wider systems.<sup>242</sup> As indicated previously, the Labour Act encourages voluntary conciliation methods and sets clear perimeters for private arbitration. The purpose of these voluntarily dispute resolution machineries is to complement the compulsory mechanism made available by the state through the Labour Commissioner's office. However, private mechanisms involve costs, whereas

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<sup>238</sup> Interview held with the Labour Commissioner 3 October 2012, in Windhoek. Notes available with the author.

<sup>239</sup> S 100(iii) of the Labour Act, 2007 (Act No11 of 2007).

<sup>240</sup> S 100(iv) of the Labour Act, 2007 (Act No11 of 2007).

<sup>241</sup> S 84(9) of the Labour Act, 2007 (Act No11 of 2007).

<sup>242</sup> Thompson "Dispute Resolution in the Workplace: Public Issues, Private Trouble" (2007) 9 (8) *ADR Bulletin*141.

the Labour Commissioner's services are free, making the latter the preferred public choice.

There is a further requirement relating to the labour dispute resolution institution itself and its personnel. The ILO points out that to enhance the institution's personnel acceptability and credibility, the role players, such as conciliators and arbitrators, should be appointed through a bipartite or tripartite consultative process involving the state, employers' organizations and trade unions.<sup>243</sup> In Namibia, the Committee for Dispute Prevention and Resolution<sup>244</sup> is a tripartite sub-structure of the Labour Advisory Council. In terms of sections 82 and 85 of the Labour Act, this structure is charged with, among other things, the responsibility for making appointment recommendations to the Labour Advisory Council by examining the qualifications and experience of candidates applying for vacant posts as conciliators and arbitrators. In turn, the Labour Advisory Council approves and makes further recommendations to the Minister of Labour, who finally appoints officials in terms of the Public Service Act. Generally, to be eligible to perform conciliation and arbitration services, the appointment must be approved by these structures. Where these procedures have not been followed, a member of staff employed in the office of the Labour Commissioner may not perform any statutory conciliation and arbitration services.

The Labour Commissioner and Deputy Labour Commissioner are appointed by the Minister of Labour<sup>245</sup> in terms of the provisions of the Public Service Act. Social partners have no role or influence in their appointment. The Act prescribes that the two officials must be competent to perform the functions of a conciliator and arbitrator. Therefore, this does not rule out the possibility of candidates being appointed as conciliators and arbitrators through the normal process of the tripartite structures described above at an earlier stage. They must possess the qualifications and experience required to be appointed as conciliators or arbitrators, although they do not specifically need to be able to perform conciliation and arbitration functions.

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<sup>243</sup> *Ibid.*

<sup>244</sup> See s 100 of the Labour Act, 2007 (Act No11 of 2007).

<sup>245</sup> S 120 of the Labour Act, 2007 (Act No 11 of 2007).

While there is no specified qualification for arbitrators and conciliators, the ILO recognizes the importance for conciliators and arbitrators to be trained in the process of conciliation and arbitration.<sup>246</sup> To this end, the first training in conciliation and arbitration was conducted in 2001; courses were offered by the University of Namibia, University of Cape Town and National University of Lesotho, with Namibia as host and ILO-Swiss sponsorship. The University of Namibia has since taken over the project and offers a certificate as a foundation course and a diploma programme in labour dispute resolution. In addition to attaining these qualifications, the ILO further requires of conciliators and arbitrators to possess adequate knowledge of the legal and economic framework within which the dispute takes place; the industry situation; detailed background information of disputes; and personal qualities such as impartiality, integrity, sincerity and patience.<sup>247</sup> These requirements have been adequately provided for in the Labour Act. As a result, the appointment of conciliators and arbitrators complies with the requirements proposed by the ILO.

Lastly, the ILO calls on governments to ensure that senior staff heading the labour dispute resolution institutions, such as the Labour Commissioner in Namibia, must possess the required qualifications, for example legal qualifications in the case of judges, to be eligible for appointment. The ILO points out that this practice strengthens the independence and authority of the institution.

## **5.10 CONCLUSION**

Namibia became a member state of the ILO as early as 3 October 1978, represented by SWAPO while the organization was in exile and fighting for the liberation of the Namibian people. At independence on 21 March 1990, the country became a sovereign state, adopting a democratic constitution. The constitution assumed a positive approach towards international law, thereby asserting the incorporation of and adherence to the international labour standards of the ILO. Consequently, Namibia has ratified eleven international labour standards, ranging from the core

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<sup>246</sup> ILO Labour legislation guidelines available on <http://www.ilo.org/legacy/english/dialogue> accessed on 06 March 2012.

<sup>247</sup> *Ibid.*

conventions extensively promoted by the Declaration on Fundamental Principles and Rights at Work to priority and technical conventions.

The ratification of international labour standards creates an obligation for Namibia to submit periodic reports reflecting the application in practice of the ILO instruments discussed in this chapter, consequently accepting to be supervised by the ILO supervisory machineries that influence the country's labour legislation and practices. Namibia appears to be successful in terms of its reporting obligation, but there are a number of areas that require improvement in order to comply fully with the standards, particularly those aspects relating to the supply of information in reply to the comments of the CEACR. Aside from these problems, the country has successfully complied with the requirements of articles 19 and 22 of the ILO Constitution.

The ILO's supervisory machineries have been criticized for their lack of punitive and other appropriate sanction measures for non-compliant member states. This is a result of the ILO's lack of enforcement measures other than the potential inclusion of the social clauses of the WTO in labour standards, which the governing body and many member states have objected against. Compliance is, therefore, dependent on goodwill by member states. In extreme cases, such as in the case of Myanmar, the vague provision of article 33 of the ILO Constitution was enacted by calling on member states to take "measures of economic character" against Myanmar for its persistent refusal to comply with international labour standards relating to forced labour.

Ultimately, Namibia has codified the ILO ADR system asserted by the ILO conventions. With the enactment of the Labour Act, conciliation and arbitration have been fully implemented in Namibia, with adjudication reserved for appeals and review cases. However, the new ADR system faces a number of challenges that are addressed in detail in the next chapter. The following chapter features a comparison of the Namibian ADR system with the South African ADR system.

**CHAPTER 6**  
**NAMIBIAN LABOUR DISPUTE RESOLUTION SYSTEM:**  
**COMPARISON WITH SOUTH AFRICA**

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“The use of the comparative method requires a knowledge not only of the foreign law, but also of its social, and above all, its political context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit, which ignores this context of the law.”<sup>1</sup>

## **6.1 INTRODUCTION**

In Namibia and South Africa respectively, there are social partners<sup>2</sup> with common and divergent short and long-term interests. These divergent interests must be accommodated and reconciled and this process is the subject of labour law and

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<sup>1</sup> Blanpain *Comparative Labour Law and Industrial Relations* 17.

<sup>2</sup> Social partners are the workers' and employers' organisations in terms of the ILO classification.

industrial relations. However, the processes employed in Namibia and South Africa vary.<sup>3</sup>

The purpose of this comparative chapter is to highlight and explain the differences between and similarities of the two respective countries' labour dispute resolution systems.<sup>4</sup> This comparative approach brings to bear two schools of thought, the first being the *convergence school*, and the second the *divergence school*.<sup>5</sup> The convergence school holds that the influence of industrialisation gradually brings the labour relations systems of various countries closer to one another. The divergence school, on the other hand, maintains that labour relations are sub-systems of political systems and manifestations of prevailing social and economic conditions. Chapter Three of this study demonstrates the evolution of labour legislation in Namibia, which moved away from colonial or *apartheid* labour legislation and developed its own post-independence labour dispute resolution system in light of the country's developmental needs. The new system is further influenced by the ILO and South African labour law.

This chapter provides a more extensive investigation of Namibia and South Africa's labour dispute resolution systems. This entails a dualistic approach, namely<sup>6</sup> a theoretical analysis of both the law and practices of each country in order to set them side-by-side and, in doing so, noting the similarities and differences. Moreover, the chapter explains those similarities and differences and identifies trends and overall developments that are manifested in Namibia and South Africa.

To carry out the comparative study described above, the author establishes how the ADR system is applied and how it functions in practice.<sup>7</sup> This approach provides a panoramic view of the different ways in which similar problems are addressed in the

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<sup>3</sup> Blanpain *Comparative Labour Law and Industrial Relations* 17.

<sup>4</sup> Schregle "Comparative Industrial Relations: Pitfalls and Potential" (1981) *International Labour Review* 27.

<sup>5</sup> Finnemore *et al Contemporary Labour Relations* 5.

<sup>6</sup> Valticos "Comparative Law and the ILO" (1977) *Comparative Labour Law Review* 274.

<sup>7</sup> Blanpain *Comparative Labour Law and Industrial Relations* 24.

countries under discussion and how Namibia's ADR system relates to that of South Africa.<sup>8</sup>

Despite the above, it should not be taken for granted that systems and institutions are transplantable<sup>9</sup> as it is argued that any attempt to do so may entail a wish of rejection. The reason for this view is premised on the basis that Namibia and South Africa are not 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 or vice versa, and therefore a degree of transferability can be accepted.

Undertaking a study of this magnitude requires the author to demonstrate knowledge about general labour law and an insight into the countries' histories, cultural and political systems, and the prevailing values of the societies under study in order to understand the essential details of the labour dispute resolution system. This is discussed in Chapters Three and Four of this study, which form the basis for the comparison undertaken here.

On closer analysis, 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 SADC countries, particularly in the area of labour dispute resolution.<sup>10</sup> This holds true for Namibia's Labour Act, 2007, which has established specialised institutions, such as the Labour Commissioner, to promote the use of conciliation and arbitration as the primary mechanisms for the prevention and resolution of labour disputes. The Labour Court system was established for adjudication as a last resort.

In this context, this chapter compares Namibia's labour dispute resolution system to that of South Africa, with a view to finding solutions to problems confronting the Namibian ADR system.

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<sup>8</sup> Blanpain *Comparative Labour Law and Industrial Relations* 25.

<sup>9</sup> Blanpain *Comparative Labour Law and Industrial Relations* 29.

<sup>10</sup> Benjamin *The Challenges of Labour Law Reform in South Africa* 255.

## 6.2 HISTORICAL COMPARATIVE

A study of the historical development of Namibian and South African labour relations contributes to a greater understanding of the present labour dispute resolution system by showing how it has evolved.<sup>11</sup> The development of the respective countries' labour relations systems are discussed in more detail in Chapters Three (3.2) and Four (4.2). It is demonstrated in these two chapters that the development of labour relations was mainly determined by the historical position of black workers, taking into account that workers of different races played important roles in the prevailing labour relations systems of the era. These dual labour relations systems fuelled conflicts in the workplace.<sup>12</sup>

For the purposes of this section, the historical development of these two countries are not discussed in detail, but an overview of the similarities and differences that prevailed in Namibia and South Africa leading to the enactment of post-independence labour dispute resolution systems is supplied.

The Union of South Africa was established in 1910 by an Act of the British Parliament.<sup>13</sup> South West Africa, now Namibia, was entrusted to the Union of South Africa as a Class C mandate on 17 December 1920. This was done in terms of the Peace Treaty of Versailles and article 22 of the Covenant of the League of Nations.<sup>14</sup> As illustrated in Chapter Three, it was under this mandate that the South African government exercised full powers of administration and legislation over Namibia.

In South Africa, the first significant labour legislation to be enacted was the Industrial Conciliation Act of 1924. This statute comprehensively established mechanisms for labour dispute resolution. Although the Industrial Conciliation Act was of national application, it was applicable only to white workers, thereby excluding African or black employees from its application. Despite the statute's primary focus on labour dispute resolution, the creation of racial separation was its dominant feature.

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<sup>11</sup> Ferreira "The CCMA: Its Effectiveness in Dispute Resolution in Labour Relations" (2004) 23 *Politeia* 73.

<sup>12</sup> Ferreira "The CCMA: Its Effectiveness in Dispute Resolution in Labour Relations" 74.

<sup>13</sup> Benjamin *The Challenges of Labour Law Reform in South Africa* 240.

<sup>14</sup> Bauer *Labour and Democracy in Namibia* 19.

In Namibia, the Master and Servants Proclamation 24 of 1920 was the first labour legislation to be promulgated. The statute was enacted to regulate the relative rights and duties of masters and their servants. Although the Master and Servants Proclamation applied to African workers, unlike its South African counterpart, it failed to create comparative mechanisms for labour dispute resolution. Instead, it established criminal sanctions in the form of fines and imprisonment for black workers who failed to comply with any condition of their employment.<sup>15</sup> At the time, recourse to the existing courts was the only option for all labour related contraventions that carried criminal penalties.<sup>16</sup>

The key difference between the Master and Servants Proclamation and the Industrial Conciliation Act of South Africa is that the latter created industrial councils and conciliation boards for conciliation of interest disputes, while rights disputes were referred to the ordinary courts.<sup>17</sup> The Master and Servants Proclamation failed to do the same, but created criminal courts to punish contraventions of the labour laws. The differences between these two statutes stem from the fact that they were tailored to suit the type of workforce that the countries had at the time. The Industrial Conciliation Act applied to the white workforce, mainly those in the mining sector, and it was inappropriate to convict and punish workers for contraventions of the Act. Nevertheless, the Industrial Conciliation Act underwent several reforms. The statute was first amended in 1937 and again in 1956. It was the 1956 version of the Industrial Conciliation Act that created the system of industrial tribunals to arbitrate disputes, although limited to job reservation disputes for white employees and those of foreign origin.<sup>18</sup>

In Namibia, the Vagrancy Proclamation 25 of 1920 supplemented the Master and Servants Proclamation by legalising and facilitating forced labour mechanisms in the Police Zones. The statute contemplated restriction or suppression of trespass, idleness and vagrancy, and restricted indigenous black people to homelands unless

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<sup>15</sup> Van Rooyen *Portfolio of Partnership* 135.

<sup>16</sup> Fenwick *Labour Law Reform in Namibia* 321.

<sup>17</sup> Bhorat, Pauw and Mncube *Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of the CCMA* (2007) 15.

<sup>18</sup> *Ibid.*

they could prove to the authorities that they had employment or other means of support, thereby excluding them from the resources in the Police Zones.<sup>19</sup> In South Africa, the *Apartheid* government enacted the Native Law Amendment Act<sup>20</sup> that equally restricted the movement of Africans in the country, extending influx control laws to include African women who were excluded in the original statute.<sup>21</sup> Another separate statute, the Native Labour Settlement of Disputes Act<sup>22</sup> was enacted as an alternative for black workers to industrial councils, which were applicable only to white workers, thus creating a separate dispensation for black workers.<sup>23</sup> The Native Labour Settlement Dispute Act introduced what was labelled a circumscribed system of consultative committees based on plant workers' committees, regional labour committees and central native labour boards.<sup>24</sup>

In Namibia, the Native Proclamation 56 of 1951 typified the extensive segregation approach by regulating the ingress of natives into and their residence in Police Zones. Unlike its South African equivalent, this statute failed to provide for helpful labour dispute resolution mechanisms aside from creating recourse to the Native Commissioner. The Commissioner was empowered by the statute to investigate a labour complaint and to declare the employment agreement void, consequently ordering the removal of the African worker.<sup>25</sup>

In 1952 the Wages and Industrial Conciliation Ordinance<sup>26</sup> was enacted in Namibia and was seen as the first comprehensive labour legislation regulating collective labour relations in the country. However, despite its significance at face value, the statute was mainly about labour relations amongst white workers, like South Africa's Industrial Conciliation Act. It was equally discriminatory in that it excluded from its application farm workers and domestic servants, roles filled predominantly by black workers.<sup>27</sup> Moreover, although the Wages and Industrial Conciliation Ordinance

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<sup>19</sup> Fenwick *Labour Law in Namibia* 6.

<sup>20</sup> Act No54 of 1952.

<sup>21</sup> Godfrey *et al Collective Labour Law in South Africa* 52.

<sup>22</sup> Act No 48 of 1953.

<sup>23</sup> Godfrey *et al Collective Labour Law in South Africa* 52.

<sup>24</sup> Ss 3, 4 and 7 of the Native Labour Settlement of Disputes Act 48 of 1953.

<sup>25</sup> ILO *Labour and Discrimination in Namibia* 59.

<sup>26</sup> No 35 of 1952.

<sup>27</sup> S 2(2) of the Wages and Industrial Conciliation Ordinance No 35 of 1952.

provided for the registration of trade unions and employers' organisations, African workers were not allowed to register any workers' organisations or unions, consequently excluding them from making use of the available dispute settlement machineries of conciliation and ordinary courts for the determination of their disputes.<sup>28</sup> As discussed in Chapter Three, this statute remained in force until 31 October 1992, three years after Namibia's independence. The reasons for the protracted application of this colonial statute are discussed in Chapter Three (3.8).

In South Africa, the Industrial Conciliation Act<sup>29</sup> reinforced the racial divide and created a new model of industrial tribunal, with vested powers to investigate and arbitrate disputes referred to it by the industrial councils or conciliation boards.<sup>30</sup> In Namibia and South Africa respectively, the prevailing labour relations systems of the era owed much to an unjust and repressive political dispensation that increasingly relied on force to maintain stability.

The continued tendency of the *Apartheid* government to entrench repressive laws led to resistance, for example, the formation of the Ovamboland People's Organisation (OPO) and, eventually, SWAPO in Namibia. These organisations aimed to fight, amongst other things, the draconian labour conditions imposed on Namibian workers. In addition, the country experienced waves of strikes, the most devastating of which was the 1972 national strike aimed at resisting and/or boycotting the contract labour system.<sup>31</sup> South Africa experienced a similar increase in political militancy on the part of the black population, propelled by the black trade unions, the African National Congress (ANC), Pan Africanist Congress (PAC) and a number of student movements.<sup>32</sup>

Following the 1972 national strike in Namibia,<sup>33</sup> the government enacted various fragmented pieces of labour legislation intended to address the individual needs of

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<sup>28</sup> Van Rooyen *Portfolio of Partnership* 155.

<sup>29</sup> No 28 of 1956.

<sup>30</sup> Godfrey *et al Collective Bargaining in South Africa* 55.

<sup>31</sup> Bauer *Labour and Democracy in Namibia* 22.

<sup>32</sup> Godfrey *et al Labour Relations in South Africa* 43.

<sup>33</sup> A massive amount of literature relating to the 1972 strike in Namibia is available online.

selected homelands. These included the Ovambo Labour Enactment,<sup>34</sup> Kavango Labour Act,<sup>35</sup> and the Labour Enactment Act<sup>36</sup> for the Eastern Caprivi. This was an attempt to introduce self-governance. In South Africa the dualistic labour relations system became unbearable and started affecting the international investment image of South Africa.<sup>37</sup> Consequently, the government was forced to appoint the Wiehahn Commission of Inquiry to rationalise existing labour legislation and to eliminate bottlenecks experienced in the labour relations system.<sup>38</sup> Chapter Four (4.2.4) provides a detailed account of this commission.

The commission made numerous recommendations to the government, but the government did not immediately implement all the recommendations, sceptically making piecemeal changes instead. Some significant outcomes of the commission included the amendment and renaming of the Industrial Conciliation Act of 1956 to the Labour Relations Act of 1956. The amendment introduced the concept of unfair labour practice and replaced industrial tribunals with the Industrial Court for the adjudication of unfair labour practices.<sup>39</sup>

In Namibia, it was the enactment of the Basic Conditions of Employment Act<sup>40</sup> that introduced wider ranging protective provisions in respect of conditions of employment. The Act also repealed all the homelands' tailor-made labour legislation. Given the limited participation of black workers in the Wages and Industrial Conciliation Ordinance, the Basic Conditions of Employment Act was passed as an urgent remedial measure to ameliorate the prevailing situation, without necessarily amending the Industrial Conciliation Ordinance.<sup>41</sup>

Despite this seemingly interventional innovation, the situation continued to be unbearable for the government, forcing it to come to the realisation that the existing

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<sup>34</sup> No 6 of 1972.

<sup>35</sup> No 2 of 1974.

<sup>36</sup> No 3 of 1973.

<sup>37</sup> Bendix *Industrial Relations in South Africa* 77.

<sup>38</sup> Finnemore *Introduction to Labour Relations in South Africa* 34.

<sup>39</sup> *Ibid.*

<sup>40</sup> No 12 of 1986.

<sup>41</sup> Wiehahn Report - Namibia 29.

structures and systems were no longer capable of handling and resolving labour disputes, which were rapidly becoming part of the Namibian system. This led to the appointment of the Wiehahn Commission of Inquiry, chaired by Professor Nicholas Wiehahn who chaired the South African commission of 1977. However, in Namibia the commission had a different composition and mandate. Chapter Three (3.5) provides a detailed account of the Wiehahn Commission in Namibia.

The Wiehahn Commission was appointed in 1987, three years before Namibia attained her independence, and reported its work on 2 February 1989, a year before the country's independence. The commission was tasked to examine the relevance and adequacy of existing labour legislation and to recommend the necessary adjustments that would address the needs of the changing times.<sup>42</sup> Amongst the most important findings of the commission is the finding that the Namibian labour relations system lagged behind that of South Africa, on whose legislation most, if not all, of the system was based. Consequently, the commission recommended, amongst other things, that the five internationally recognised labour dispute settlement procedures, namely negotiation, mediation, conciliation, arbitration and adjudication, be afforded full recognition in Namibia's new labour relations legislation.<sup>43</sup> As in South Africa, the commission's recommendations were implemented in part in the 1992 Act, with the majority only coming to realisation with the implementation of the Labour Act of 2007.

### **6.3 COMPARATIVE CONSTITUTIONAL LABOUR LAW PROVISIONS**

At independence in 1990 Namibia adopted a constitution that guarantees the protection of basic labour rights, as well as other rights that have a bearing on government policy in regulating labour rights.<sup>44</sup> In this respect, the Namibian Constitution guarantees fundamental freedoms, including freedom of association and the freedom to form and join trade unions.<sup>45</sup> These freedoms extend to include the right to withhold labour without being exposed to criminal penalties. In addition,

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<sup>42</sup> Wiehahn Report- Namibia (ii).

<sup>43</sup> Wiehahn Report-Namibia 117-118.

<sup>44</sup> Fenwick *Labour Law Reform in Namibia* 327.

<sup>45</sup> Art 21(1)(e) of the Namibian Constitution.

Chapter 11 of the Constitution provides for the Principles of State Policy. In terms thereof, article 95 obliges the state to promote the welfare of the people of Namibia by adopting policies aimed at, amongst others, active encouragement of the formation of independent trade unions to protect workers' rights and interest, and to promote sound labour relations and fair labour practices.

In South Africa, the Government of National Unity, on assuming power, undertook comprehensive labour law reforms to give effect to various constitutionally entrenched labour rights and to regulate all the facets of the labour relationship. The intention was to create an environment free from conflict, which is conducive to and promotes harmonious labour relations.<sup>46</sup> The core of South Africa's democracy lies in the Bill of Rights, wherein a variety of rights is enshrined for all South-Africans. As in Namibia, these rights include the right to fair labour practices, freedom of association, collective bargaining and the right to strike.<sup>47</sup> However, it is argued that the right to fair labour practice was not novel in the new South Africa, but had its origin in the equity jurisprudence developed by the Industrial Court.<sup>48</sup>

In South Africa, following the adoption a democratic constitution that enshrines labour rights, the negotiated Labour Relations Act 66 of 1995 was enacted to replace the 1956 Labour Relations Act (LRA). The new LRA gives effect to the Constitution, given that one of its principal objectives is to promote an effective and efficient labour dispute resolution system.<sup>49</sup> The ultimate goal was to overcome the lengthy delays caused by labour disputes, save costs related to disputes, reduce the incidences of industrial actions, which characterised the *apartheid* era, and change the labour relations system from a confrontation-based system to a cooperation-based one.<sup>50</sup> To strengthen this perception, in *Shoprite Checkers (Pty) Ltd v Randaw*<sup>51</sup> the Labour Court inferred that the resolution of labour disputes in terms of the 1956 LRA, particularly unfair dismissal disputes, was complex, inefficient, protracted, expensive

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<sup>46</sup> Venter *et al Labour Relations in South Africa* 179.

<sup>47</sup> S 23 of the South African Constitution No 108 of 1996.

<sup>48</sup> De Waal *et al The Bill of Rights Handbook* 4<sup>th</sup> ed (2001) 390.

<sup>49</sup> S 1(d)iv of the LRA 66 of 1995.

<sup>50</sup> Borat *et al An Analysis of the CCMA* 8.

<sup>51</sup> (2000) 21 *ILJ* 1232 LC.

and highly legalistic. The same view was expressed in *Pep Stores (Pty) Ltd v Laka No and Others*,<sup>52</sup> where Mlambo J commented as follows:

“the process...from the date of dismissal through conciliation to determination was very dilatory. On the average, matters took up to two years, and sometimes more, to be finalized by the Industrial Court. However, because there was a general appeal provision, the majority of the Industrial Court determinations were taken on appeal to the Labour Appeal Court and this necessitated a further waiting period. One was faced with the prospects of disputes taking not less than three years to be finalized after appeal. If there was any appeal, to the then Appellant Division, the waiting period was considerably longer.”

The same sentiments are relevant in Namibia in relation to the efficiency and operation of the District Labour Courts and appeals to the Labour Court. Thus, social partners collectively agreed to repeal the 1992 Act and replace it with the current Labour Act, 2007, which envisages an easily accessible, simple, quick and user-friendly Act that is sufficiently flexible to deal with various types of disputes by creating an independent (in its functionaries), legitimate and impartial system of labour dispute resolution.<sup>53</sup> The Labour Act, 2007 was passed to give effect to the constitutional commitment to promote and maintain the welfare of the people of Namibia, as proclaimed in Chapter 11 of the Constitution. The Act gives effect to this commitment through the promotion of sound labour relations and fair employment practices.<sup>54</sup> In a similar vein, the Labour Act, 2007 contemplates the systematic prevention and resolution of labour disputes to be achieved through the established labour dispute resolution institutions discussed in Chapter Three of this thesis.

In South Africa, certain secondary objectives are achieved while fulfilling the purpose of the LRA as set out in section 1 of the Act. Brassey<sup>55</sup> points out that one of these secondary objectives is the decriminalisation of labour law. This objective has its origin in the brief given to the drafting committee and is further contained in the Explanatory Memorandum to the LRA. The Explanatory Memorandum makes it clear that the use of criminal law to enforce labour law and collective agreements violates international standards. Under this guidance, criminal sanctions in the LRA have

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<sup>52</sup> (1998) 19 *ILJ* 1534 LC par 1539.

<sup>53</sup> LaRRi *Labour Rights Report in Namibia* 10.

<sup>54</sup> See Preamble to the Constitution of the Republic of Namibia.

<sup>55</sup> Brassey *Commentary on the Labour Relations Act* A1-4.

been replaced by self-regulation and enforcement through private law interventions, such as statutory arbitration, private arbitration and adjudication by the Labour Court.<sup>56</sup>

In Namibia, both the repealed Labour Act of 1992 and the current Labour Act, 2007 contains criminal provisions for the contravention of or failure to comply with various provisions of the Act.<sup>57</sup> This is despite the Wiehahn Report-Namibia having established that there were serious problems relating to the prosecution of offenders under the Basic Conditions of Employment Act of 1986. This situation clearly indicated the need to decriminalise labour law transgressions and to have such matters dealt with in a specialised court instead.<sup>58</sup> The Wiehahn Report-Namibia recommended, for the purpose of the envisaged new labour dispensation, that any contravention of or failure to comply with the provisions of labour law be decriminalised and, instead, such contraventions be largely declared as unfair labour practices to fall under the jurisdiction of the proposed Labour Court. Despite this advice, the drafters of both the 1992 Act and the Labour Act, 2007 ignored this recommendation and allowed the inclusion of criminal provisions in the Act, adopted from the *apartheid* dispensation.

The Explanatory Memorandum to the 1992 Act and the Labour Act, 2007 fall short of any explanation for such an inclusion. Criminal provisions in the Labour Act have proven impracticable and cumbersome to enforce. From the author's personal experience,<sup>59</sup> the Namibian Police and prosecutors have serious difficulties in enforcing and prosecuting labour related criminal cases reported by labour inspectors.

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<sup>56</sup> *Ibid.*

<sup>57</sup> See Musukubili A *Comparative Study of the Namibian Dispute Resolution* (2.5.13) for a detailed illustration of all criminal provisions in the Labour Act, 2007.

<sup>58</sup> Wiehahn Report- Namibia 34.

<sup>59</sup> This comes from my experience in my position as Deputy Director of Labour Services. Many cases country wide, ranging from child labour to failure to comply with compliance orders, have not been prosecuted to date, despite being reported a number of years ago.

#### 6.4 COMPARISON BETWEEN THE LABOUR COMMISSIONER AND THE CCMA

The Labour Act, 2007 and the LRA both emphasise the quick and cost effective resolution of conflicts and disputes. The Labour Commissioner in Namibia and the CCMA in South Africa have been entrusted to promote and provide the framework for the effective and efficient resolution of labour disputes. The overall goal is to overcome the bottlenecks of the old systems, which included lengthy delays, and reducing the incidence of industrial actions, which were attributes of the *apartheid* dispensation, with the hope of moving from confrontation to cooperation.<sup>60</sup>

The Labour Act, 2007 makes provision for the appointment of the Labour Commissioner,<sup>61</sup> as well as the establishment of other labour dispute resolution institutions, such as the Labour Inspectorate<sup>62</sup> and the Labour Court.<sup>63</sup> In South Africa, the LRA created the CCMA<sup>64</sup> as well as the dual level of the court systems.<sup>65</sup> The two institutions, the Labour Commissioner and the CCMA, takeover the roles played by the conciliation boards and District Labour Courts in Namibia and conciliation boards and the Industrial Court system in South Africa. They both bring about democratic solutions to conflicts, which are now resolved through communication and reaching agreements. In this new arena, the battleground is even and parties to a labour dispute are given the opportunity to see their dispute dealt with in a faster way, in a friendlier environment and with anticipated quicker results.<sup>66</sup> The emphasis is now on ADR through conciliation and arbitration, reserving the court system as a final option when all other attempts have failed to yield the desired outcome.<sup>67</sup>

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<sup>60</sup> Bhorat *et al An Analysis of the CCMA* 8.

<sup>61</sup> Ss 120 and 121 of the Labour Act, 2007 (Act No11 of 2007).

<sup>62</sup> Ss 124 and 125 of the Labour Act, 2007 (Act No11 of 2007).

<sup>63</sup> Ss 115,116 and 117 of the Labour Act, 2007 (Act No11 of 2007).

<sup>64</sup> S 112 of the LRA 66 of 1995.

<sup>65</sup> See ss 151 and 167 of the LRA 66 of 1995.

<sup>66</sup> Ferreira "The CCMA: Its Effectiveness in Dispute Resolution in Labour Relations" 78.

<sup>67</sup> *Ibid.*

In Namibia, the Labour Commissioner is the head of the office responsible for labour dispute prevention and resolution.<sup>68</sup> The Labour Commissioner is an individual appointed by the Minister of Labour in terms of the Public Service Act.<sup>69</sup> The Labour Commissioner, although the Act refers to an individual, is an office with its domicile within the Ministry of Labour and Social Welfare. Consequently, all staff members, including conciliators and arbitrators, are government employees, thus creating a perception of a lack of independence.

In South Africa, the LRA created the CCMA as an autonomous statutory body<sup>70</sup> with legal personality or, in other words, as a juristic person.<sup>71</sup> This is absent in Namibian legislation. However, although the CCMA is an independent institution, it is largely funded by the state, thereby creating doubts over its complete independence. There are no costs involved for referring a dispute to the Labour Commissioner or the CCMA. The Labour Commissioner assumes responsibility for conciliation and arbitration by virtue of his appointment and is obliged to report to the Minister of Labour on the activities of the office.<sup>72</sup> It appears that the Committee for Dispute Prevention and Resolution, a tripartite structure,<sup>73</sup> may exercise some level of supervision in the form of reviewing the performance of dispute resolution by the Labour Commissioner on a regular basis for the purpose reporting to the Labour Advisory Council.<sup>74</sup>

In South Africa, the LRA clearly states that the CCMA is independent of the state, political parties, trade unions and employers' organisations.<sup>75</sup> It is governed by a governing body comprising of social partners representing organised labour, organised business and the state.<sup>76</sup>

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<sup>68</sup> S 120 of the Labour Act, 2007 (Act No 11 of 2007).

<sup>69</sup> S 1 of the Labour Act, 2007 (Act No 11 of 2007).

<sup>70</sup> S 113(2)(b) of the LRA 66 of 1995.

<sup>71</sup> S 112 of the LRA 66 of 1995.

<sup>72</sup> S 121(b)(e) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>73</sup> See s 101 of the Labour Act, 2007 (Act No 11 of 2007).

<sup>74</sup> S 100 of the Labour Act, 2007 (Act No 11 of 2007).

<sup>75</sup> S 113 of the LRA 66 of 1995.

<sup>76</sup> S 116 of the LRA 66 of 1995.

The Committee for Dispute Prevention and Resolution in Namibia and the Governing Body in South Africa are more or less on par in terms of their functionalities and representative composition. Unlike the Director of the CCMA, who is a member of the governing body by virtue of his appointment, the Labour Commissioner is neither a member nor sits in on the meetings of the Committee for Dispute Prevention and Resolution. The CCMA director is appointed by the governing body based on his or her skills and experience, automatically holds the office of a senior commissioner<sup>77</sup> and is the equivalent of the Labour Commissioner in Namibia. The two heads of these offices are charged with the responsibility to manage the activities of their institutions, including supervising the performance of their staff.

In Namibia, conciliators and arbitrators are the equivalent of the commissioners of the CCMA. Conciliators, arbitrators and commissioners are appointed either on a full-time or part-time basis.<sup>78</sup> However, unlike the CCMA commissioners who are appointed by the governing body, conciliators and arbitrators in Namibia are appointed by the Minister of Labour on the recommendation of the Committee for Dispute Prevention and Resolution. Full-time conciliators and arbitrators in Namibia hold designated portfolios in terms of the public service hierarchy. They are either junior conciliators or arbitrators, or chiefs or principals, depending on their level of appointment in the public service. Namibian labour legislation does not make provision for convening arbitrators, unlike full-time senior commissioners in the CCMA who are tasked with monitoring and are responsible, together with the registrar, for the allocation of cases in their jurisdictional provinces.<sup>79</sup>

In Namibia, it is incumbent on the Labour Commissioner alone to allocate cases to conciliators and arbitrators to resolve referred disputes.<sup>80</sup> However, the allocation is optional as he may choose to either allocate a case or conciliate and arbitrate it himself.<sup>81</sup> The Labour Commissioner's functions may, however, be delegated to any individual employed in the Ministry of Labour and Social Welfare. For this reason, this study investigates methods of improving the Labour Commissioner's service delivery

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<sup>77</sup> S 118(4) of the LRA 66 of 1995.

<sup>78</sup> See ss 82(2) and 85(4) of the Labour Act, 2007 and s 117 of the LRA 66 of 1995.

<sup>79</sup> Van Rensburg *Participation and Progress* 10-10.

<sup>80</sup> See ss 82(3) and 85(5) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>81</sup> S 121(c) and (d) of the Labour Act, 2007 (Act No11 of 2007).

through the delegation of powers and functions to regional principal conciliators and arbitrators.

Independence and impartiality are the key attributes required of arbitrators and CCMA commissioners in the execution of their functions.<sup>82</sup> Although Brassey<sup>83</sup> argues that the CCMA is largely funded by the taxpayers, making it partially independent, it is not the funding that determines the independence of the CCMA, but rather the fact that it is run by an autonomous governing body. The Explanatory Memorandum to the LRA explains independence of the state to mean, “that save as otherwise provided under the LRA,<sup>84</sup> the decision of the CCMA should not be in any way fettered or controlled by the Minister of Labour or any other State official”. This is the essence of independence: being free from any political influence in decision-making.

In Namibia, the Explanatory Memorandum to the Labour Act, 2007, states that full-time arbitrators will be public servants. Therefore, section 2 of the Public Service Act<sup>85</sup> refers to the role of the public service as “prompt execution of government policy and directive”. To this end, reference was made to the *Mostert* case (without any citation), where the Court held that magistrates who were then public servants were obliged to execute government policies and directives that infringed upon their independence as judicial officers. The Explanatory Memorandum further refers to section 85(5) of the Labour Act that addresses this potential constitutional problem by guaranteeing the independence and impartiality of arbitrators despite any other law, including section 2 of the Public Service Act by implication. However, to address the independence of judicial officers, magistrates are no longer public servants and are now employed under the Magistrates’ Commission, an independent commission funded by the state. Since the inception of the Labour Act, 2007, arbitrators have taken over the functions performed by magistrates in the District Labour Courts, but in a different fashion.

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<sup>82</sup> See s 85(6) of the Labour Act, 2007 and s 117(2)(b) of the LRA 66 of 1995.

<sup>83</sup> Brassey *Commentary on the Labour Relations Act* A1-2.

<sup>84</sup> S 114(2) of the LRA 66 of 1995.

<sup>85</sup> Act No13 of 1995.

It is evident from their respective statutes that the functions of the Labour Commissioner and the CCMA are similar in nature. Their paramount functions include the conciliation and arbitration of labour disputes, and providing training in respect of dispute prevention and resolution. See Chapters Three (3.14) and Four (4.7) for a full description of these functions.

## 6.5 CONCILIATION OF LABOUR DISPUTES

The principles of conciliation discussed in Chapters Two, Three and Four, which include mediation in disputes, conducting fact-finding and making an advisory award if it enhances the settlement of the dispute, are similar in Namibian and South African systems. In Namibia, the original Act had a determination provision permitting conciliators to determine disputes at conciliation meetings.<sup>86</sup> The Labour Court has since ruled that conciliation is not a court within the meaning of article 12(1) of the Namibian Constitution. Consequently, Damaseb JP inferred that conciliation proceedings lack the trappings of a court or tribunal. Therefore, it is merely an avenue to resolve labour disputes where the conciliator does not have the competence to make a legally binding award against any party to a conciliation meeting.<sup>87</sup>

South Africa holds the same view: that a conciliating commissioner has no adjudicative or decision-making power and consequently has no power to make a final and binding award.<sup>88</sup> As is now the position in Namibia, the conciliating commissioner's function is limited solely to assisting the parties to settle their dispute without exerting force on them.<sup>89</sup>

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<sup>86</sup> See s 3 of the Labour Amendment Act, 2 of 2007.

<sup>87</sup> *Purity Manganese (Pty) Ltd v Tjeripo Katzao* par 29.

<sup>88</sup> Govindjee *Labour Dispute Resolution* 223.

<sup>89</sup> Grogan *Workplace Law* 444.

### **6.5.1 REFERRAL**

In Namibia, the dispute must be referred to the Labour Commissioner on Form LC 21 after serving copies on the other party to the dispute.<sup>90</sup> This is similar to the South African process where the referring party must complete and sign LRA Form 7:1 and serve copies of the referral document on the other party to the dispute.<sup>91</sup> In both respects, proof of service is required on filing the referral with the Labour Commissioner or with the CCMA. The difference, however, is that in Namibia the proof of service must be commissioned by the Namibian Police.

In Namibia, collective bargaining disputes, commonly known as interest disputes, must be referred to the Labour Commissioner within one year after the dispute arose.<sup>92</sup> In South Africa, 30 days is required for dismissal disputes, while the prescribed time for acting on unfair labour practice disputes is 90 days.<sup>93</sup> Discrimination disputes must be referred within six months of the dispute arising.<sup>94</sup>

After proper referral has been made, the Labour Act, 2007 and the LRA contain relatively similar provisions requiring the dispute to be conciliated within 30 days of the referral unless the parties have agreed to extend the period.<sup>95</sup>

### **6.5.2 ATTENDANCE AND REPRESENTATION**

In Namibia and South Africa, all the parties to a properly referred dispute are required to attend the conciliation meeting in person unless they have instructed permitted representatives to appear on their behalf. Where the parties do not appear, the conciliator<sup>96</sup> in Namibia or the commissioner in South Africa<sup>97</sup> has the discretion to dismiss the matter, postpone it or continue in the absence of the defaulting party. In

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<sup>90</sup> S 82(7) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>91</sup> CCMA Rule 4(1).

<sup>92</sup> S 82(8) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>93</sup> S 191 of the LRA 66 of 1995.

<sup>94</sup> S 10(2) of the EEA 55 of 1998.

<sup>95</sup> See ss 133(1) and 135(1) and (2) of the LRA 66 of 1995 and see also ss 82(10)(a) and (b) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>96</sup> See s 83 of the Labour Act, 2007 (Act No 11 of 2007).

<sup>97</sup> CCMA rule 10.

Namibia, prior to the Labour Amendment Act 2 of 2012, the conciliator was empowered to determine the matter. This concept of determination had no descriptive meaning, leaving it to conciliators to assume an arbitral role, thereby making binding decisions at this meeting. In the wake of the *Purity Manganese (Pty) Ltd v Tjeripo Katzao* decision, this provision has been deleted from the Act.

In Namibia and South Africa respectively, conciliators and commissioners have wider powers, although seldom used, to subpoena any person to give evidence, to administer an oath and to question a witness. In Namibia, failure to comply with requests made by the conciliator constitutes a criminal offence and the offender may be liable for a fine not exceeding N\$10,000, may be imprisoned, or both.<sup>98</sup> In South Africa, conciliators' duties extend to inspecting documents and entering premises. However, parties cannot be held criminally liable for failure to comply with the wishes of conciliators.

Criminal liability resulting from failure to take an oath and giving evidence at a conciliation meeting could conceivably lead to an environment that fails to promote the voluntary settlement of collective bargaining (interest) disputes. The Explanatory Memorandum to the Labour Act does not provide any reason for such an intervention at the conciliation stage of a dispute. The intention of such a provision is unclear given that parties may have recourse to industrial action in case of non-settlement or may refer their dispute to arbitration by agreement.

In respect of representation at conciliation meetings the LRA and Labour Act, 2007 place limitations on representation to those officials authorised only by these statutes.<sup>99</sup> In Namibia, legal representation and assistance from other undefined individuals<sup>100</sup> is permitted by agreement of the parties and on the discretion of the conciliator, having considered various factors. In South Africa, no legal representation, including labour consultants or paralegals, is permitted at conciliation

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<sup>98</sup> S 82(18) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>99</sup> See ss 135(4) Schedule 7 Item 27 of the LRA 66 of 1995, now read with CCMA rule 25. In Namibia, see s 82(12) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>100</sup> S 82(13)(a) and (b) of the Labour Act, 2007 (Act No 11 of 2007).

level.<sup>101</sup> These individuals are excluded in the South African context as allowing legal representation at conciliation meetings turns proceedings legalistic and the process becomes expensive for ordinary parties to the dispute.<sup>102</sup>

### 6.5.3 CERTIFICATE OF OUTCOME AND ENFORCEMENT

The Labour Act, 2007<sup>103</sup> and the LRA<sup>104</sup> require the conciliator and the commissioner to issue a certificate of outcome at the conclusion of the conciliation meeting. In both cases, the certificate must state whether the dispute has been resolved or remains unresolved. Where the dispute is resolved, the conciliator or the commissioner may draft the settlement agreement or may leave it to the parties to do so. The settlement agreement must be signed by both parties to the dispute, thereby becoming binding on them. A signed agreement effectively becomes sufficient evidence of settlement of a dispute that a party had the right to refer to arbitration<sup>105</sup> or the Labour Court.<sup>106</sup>

Once reduced to writing and signed by the parties, both in the South African and Namibian systems, the agreement becomes proof of full and final settlement of the dispute properly referred to the Labour Commissioner or the CCMA. Where a certificate of non-resolution of the dispute is issued and in the absence of an agreement to refer the dispute to arbitration, such a deadlock outcome satisfies the condition for legitimate industrial action.<sup>107</sup> However, where the parties agree to refer the dispute to arbitration they forfeit their right to industrial action.

In South Africa, a settlement agreement may be converted to an arbitration award by agreement of the parties or on application by a party,<sup>108</sup> thereby acquiring the enforcement status of a usual arbitration award. Moreover, the parties may apply to the Labour Court for the settlement agreement to be made an order of the court.<sup>109</sup> In

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<sup>101</sup> CCMA Rule 25.

<sup>102</sup> Van Jaarsveld *et al Principles of Labour Law* 353.

<sup>103</sup> S 82(15) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>104</sup> Ss 64(1)(a)(i), 135(5)(a) and 136(1)(a) of the LRA 66 of 1995.

<sup>105</sup> See ss 82(16) of the Labour Act, 2007 and ss 136(1) and 191(5)(b) of the LRA 66 of 1995.

<sup>106</sup> See also Govindjee *Labour Dispute Resolution* 225.

<sup>107</sup> See ss 64(1) of the LRA 66 of 1995 and s 74(1)(c) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>108</sup> S 142A of the LRA 66 of 1996.

<sup>109</sup> S 158(1)(c) of the LRA 66 of 1996.

Namibia, the Labour Act, 2007 makes no provision for converting a settlement agreement to an award. However, the parties may apply to the Labour Court for the settlement agreement to be made an order of the court.<sup>110</sup>

A further comparison shows that in South Africa, the issue of non-enforceability of settlement agreements, which appeared to have haunted the CCMA during its inception stage, has finally been resolved by the 2002 amendment to the LRA. In terms of that amendment, a settlement agreement can now be converted into an arbitration award in terms of section 142A, which gives it legally binding effects as if it were an arbitration award.

By contrasts, in Namibia, the Labour Act, 2007 does not make explicit provisions for the status of settlement agreements reached at conciliation. Unlike its predecessor the repealed 1992 Act, where settlement agreement were statutory binding and had the force of law.<sup>111</sup> As a result, some parties agree to settle labour matters for the purposes of getting the matter out of their way only to fail to comply. This normally happens to frustrate the other party. To make matters worse, settlement agreements do not qualify as decisions and consequently cannot be enforced by Labour Inspectors. In essence, therefore, settlement agreements are meaningless, especially where one of the parties (usually the respondent) defies it for lack of punitive measures.<sup>112</sup>

## 6.6 ARBITRATION OF LABOUR DISPUTES

Chapters Two, Three and Four of this study clearly demonstrate that the arbitration process involves the settling of a labour dispute using an impartial third party. However, unlike conciliation where the third party plays a facilitative role to help the parties find common ground, an arbitrator settles the dispute by making a final and binding decision. This process is similar in form, content, and procedure in Namibia and South Africa.

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<sup>110</sup> S 117(1)(h) of the Labour Act, 2007 (Act No.11 of 2007).

<sup>111</sup> See s 68 of the 1992 Act.

<sup>112</sup> Ilhane *The efficacy of settlement agreements made under the Labour Act 11 of 2007: A dissertation submitted in the partial fulfillment of the requirements of Bachelor of Laws Degree* (2012) 22.

In both respects, arbitrators and commissioners are given the *carte blanche* to conduct arbitration proceedings in the manner that they consider appropriate. The reason for the wider scope provided is to determine the dispute fairly and quickly, thereby dealing with the substantial merits of the dispute with the minimum of legal formalities.<sup>113</sup> These provisions are the same in Namibia and South Africa. This suggests that, since the LRA was enacted in 1995, Namibia copied these provisions from the LRA verbatim. The Labour Act, 2007 was promulgated in 2007, having been initially drafted with the help of experts from South Africa.

Beyond this scope given to arbitrators and commissioners in arbitration, the Labour Act, 2007 and the LRA do not provide any further details or guidance on how to conduct arbitration.<sup>114</sup> Instead, it is secondary literature and the courts that have developed useful guidelines for the application of labour law.<sup>115</sup>

#### **6.6.1. REFERRAL, SET DOWN AND APPOINTMENT OF ARBITRATORS AND COMMISSIONERS**

In Namibia, referral of disputes to arbitration is done in the same manner as referrals to conciliation. The referring party is required to complete Form LC 21, providing the required details pertaining to the dispute and the provision of the Labour Act that gave rise to the dispute. The duty is on the referring party to serve a copy of the referral to the opposing party to the dispute before filing the referral with the Labour Commissioner. Dismissal disputes in Namibia must be referred within six months from the date on which action arose.<sup>116</sup> In South Africa, a dismissal dispute must be referred to the CCMA within 30 days of dismissal or of final date of dismissal.<sup>117</sup> While the LRA<sup>118</sup> creates a possibility for late referral of disputes for good cause shown, the Labour Act, 2007 does not provide for such a possibility, save for the

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<sup>113</sup> See s 86(7)(a) and (b) of the Labour Act, 2007 (Act No 11 of 2007) and s 138(1) of the LRA 66 of 1995.

<sup>114</sup> Grogan *Labour Litigation and Dispute Resolution* 140.

<sup>115</sup> See for example in South Africa, *Nairaindath v CCMA & others* (2000) 21 ILJ (LC) and in Namibia, *Roads Contractors Company v Nambahu* par 32.

<sup>116</sup> S 86(2)(a) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>117</sup> S 191(1) of the LRA 66 of 1995.

<sup>118</sup> S 191(2) of the LRA 66 of 1995.

rules of the Labour Commissioner.<sup>119</sup> This provision in the rules of the Labour Commissioner appears to be in conflict with a recent Labour Court judgment.<sup>120</sup> The Court held that if a dispute is referred to the Labour Commissioner after the expiry of the six-month period, the referral is out of time and, in fact, prescribed in terms of section 82 of the Labour Act, 2007. Consequently, the Court concluded that the Labour Commissioner lacked jurisdiction to entertain the dispute because doing so was equal to acting *ultra vires*. In this case, the Court did not refer to the possibility for condonation created by the rules of the Labour Commissioner, which is absent in the enabling statute. One can only assume that this failure is the result of the omitted condonation provision in the Labour Act, 2007.

In Namibia, set-down of a dispute takes place only if the Labour Commissioner is satisfied with the referral.<sup>121</sup> This provision is similar to the provision in the LRA of South Africa.<sup>122</sup> Thereafter, the Labour Commissioner will give the parties at least 14 days' notice<sup>123</sup> of the date of the arbitration hearing, while in South Africa the parties are entitled to at least 21 days' notice.<sup>124</sup>

In Namibia, parties have little say, if any, in the appointment of an arbitrator. It is the sole function of the Labour Commissioner, except where delegated,<sup>125</sup> to appoint an arbitrator.<sup>126</sup> In South Africa, it is the responsibility of the CCMA to appoint an arbitrator, except where there is an objection to the conciliation – arbitration (con-arb) process, in which case parties may give input regarding the proposed arbitrator.

## 6.6.2 CONCILIATION-ARBITRATION

In Namibia, con-arb was introduced with the enactment of the current Labour Act, 2007. In terms of the Act, all disputes referred to the Labour Commissioner must first

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<sup>119</sup> Rule 10 read with rule 28 of the rules of the Labour Commissioner.

<sup>120</sup> *Standard Bank Namibia v Mouton* par 9.

<sup>121</sup> S 86(3) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>122</sup> See Grogan *Labour Litigation and Dispute Resolution* 129.

<sup>123</sup> Rule 15 of the Rules of the Labour Commissioner.

<sup>124</sup> CCMA rule 21.

<sup>125</sup> S 122 of the Labour Act, 2007 (Act No 11 of 2007).

<sup>126</sup> S 85(5) of the Labour Act, 2007 (Act No11 of 2007).

go through the conciliation process before being referred for arbitration. The only exception to this provision is in instances where the dispute was already conciliated. A practical example of this is in interest disputes where the parties agree to refer such a dispute to arbitration after a failed attempt at conciliation.<sup>127</sup> Section 85(5) of the Labour Act, 2007 reads:

“unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration”

For the above reason, the Labour Court<sup>128</sup> held that it is a requirement that the same arbitrator must attempt to resolve the dispute through conciliation and only if that process fails to produce the desired results, arbitration will commence. The Court further held that any argument against con-arb holds no merits and must be rejected.

In South Africa, con-arb is a relatively new phenomenon that was introduced with the 2002 LRA Amendments. It was intended to expedite the resolution of a certain limited range of disputes following its exclusion from the original Act. This provision allows specific disputes to proceed automatically to arbitration where conciliation efforts prove futile.<sup>129</sup> As in Namibia, the appointed arbitrating commissioner may be the same commissioner who attempted to resolve the dispute through conciliation. This is optional and not peremptory as in Namibia, thus allowing the parties to the dispute the opportunity to object to the same commissioner acting as an arbitrator.<sup>130</sup> However, it is submitted that whatever the merits of the objection may be, the commissioner should not withdraw from the arbitration on the request of the parties unless there are convincing grounds for a recusal.<sup>131</sup> To reinforce this argument, the Court has held that, once a commissioner is appointed to hear the matter, he has an obligation to discharge and comply with his duties without any fear or favour.<sup>132</sup> The same principle is applied in Namibia. There is no provision for parties to object to the con-arb process being conducted by the same arbitrator. Where such an objection is raised, the arbitrator is required to rule it *in limine* and proceed with the arbitration.

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<sup>127</sup> S 82(16) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>128</sup> *Old Mutual Life Assurance Company Namibia Limited v Linda Schultz* par 15 and 16.

<sup>129</sup> *Brand et al Labour Dispute Resolution* 260.

<sup>130</sup> S 136(3) of the LRA 66 of 1995.

<sup>131</sup> *Brassey Commentary on the LRA* A7-51.

<sup>132</sup> *SACCAWU v Irvin & Johnson* 2000 (3) SA 705 CC at 713 par 11.

Con-arb procedures automatically apply to the following types of dispute without having to inform the parties of the CCMA's intention to follow this process:<sup>133</sup>

- (a) the dismissal of an employee for reasons relating to probation;
- (b) an unfair labour practice relating to probation; and
- (c) any other dismissal or unfair labour practice dispute if none of the parties object to con-arb.

The CCMA is required to give the parties at least 14 days' notice of the date of the con-arb. If they wish to object, parties may file a written objection no less than seven days prior to the scheduled date of the con-arb meeting.<sup>134</sup>

### **6.6.3 ATTENDANCE AND REPRESENTATION**

Generally, all parties are required to attend arbitration hearings in person, unless a postponement was applied for and granted; this principle applies in both Namibia and South Africa. Representation in Namibia is governed by the same principles applicable at conciliation discussed in 6.6.2 above. Whereas legal representation in Namibia is by agreement of the parties and at the discretion of the arbitrators, legal representation is permitted by CCMA rule 25(1)(b) on condition that such a legal practitioner is admitted to practice as an advocate or attorney in the Republic of South Africa. However, legal representation is not automatic in disputes relating to the conduct or capacity of the employee.<sup>135</sup> In such disputes, the consent of the parties and the properly applied discretion of the commissioner are required.

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<sup>133</sup> S 191(5A) of the LRA 66 of 1995.

<sup>134</sup> CCMA rule 17.

<sup>135</sup> CCMA rule 25(2)(b).

#### 6.6.4 ARBITRATION AWARD

The Labour Act, 2007 prescribes the arbitrator to issue an award within 30 days of the conclusion of the arbitration proceedings. The award must set out brief reasons for the decision made and must be signed by the arbitrator.<sup>136</sup> This provision is the same in South Africa, but the award must be made within 14 days.<sup>137</sup> This difference is significant as the Namibian system allows arbitrators adequate time to produce high quality, informed awards, while at the CCMA the constrained time factor may, to a certain extent, compromise the quality of the award.

However, In South Africa, the LRA has provided remedial measures where an award may be issued beyond the prescribed time limit. The reason for such a provision is that the issuing of the award is seen as directory and not peremptory.<sup>138</sup> To this end, the CCMA director may, on good cause shown by the commissioner, extend the period within which the award is issued by the commissioner.<sup>139</sup> Namibia has no provision for the extension of an award, but it is likely that where there is a justified extension, this can be a reason to nullify the proceedings at review. There have been instances where awards were not issued within the prescribed time, but this is an exception to the norm.

In making awards, commissioners and arbitrators in Namibia are given the scope within which they should make their decisions. In the case of the CCMA, the following awards may be issued:

An award:<sup>140</sup>

- (a) that gives effect to any collective agreement;
- (b) that gives effect to the provisions and primary objective of the Act; and
- (c) that includes or is in the form of a declaratory order.

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<sup>136</sup> S 86(18) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>137</sup> See s 138(7) of the LRA 66 of 1995.

<sup>138</sup> Grogan *Labour Litigation and Dispute Resolution* 154.

<sup>139</sup> S 138(8) of the LRA 66 of 1995.

<sup>140</sup> S 138(9) of the LRA 66 of 1995.

Unlike the above abstract provisions of the LRA, the Labour Act, 2007 in Namibia provides for a wider scope within which an appropriate award may be issued. These include:<sup>141</sup>

- (a) an interdict, which may be an interim or a final prohibitory or mandatory interdict, or as may be sought on urgent basis;<sup>142</sup>
- (b) an order directing performance to remedy a wrong;
- (c) an order of reinstatement of an employee;
- (d) an award of compensation; and
- (e) an order of cost, although rarely awarded, which applies if a party or a person who represented that party in the arbitration proceedings acted in a frivolous and vexatious manner.<sup>143</sup>

The cost order is similar in South Africa, although the statutory provision contained in section 138(10) of the LRA has been repealed and this is now regulated by CCMA rule 39.

In Namibia and South Africa respectively, monetary compensation awards automatically accrue interest from the date of the award, unless the arbitrator rules otherwise. The interest is premised on a similar enabling statute, the Prescribed Rates of Interest Act.<sup>144</sup> In South Africa, the liability for interest ends when the debtor makes an unconditional offer to pay,<sup>145</sup> while in Namibia the interest accumulates from the date of judgment or award to the date of payment.<sup>146</sup>

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<sup>141</sup> S 86(16) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>142</sup> Parker *Labour Law in Namibia* 186. The author provides a useful argument of the nature of interdicts capable of being made by arbitrators.

<sup>143</sup> S 86(16) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>144</sup> Act No 55 of 1975.

<sup>145</sup> *Top v Top Reisen CC* (2006) 27 ILJ 1948 LC.

<sup>146</sup> See *JB Cooling and Refrigeration CC v Kasho Kavendjua* par 32.

In South Africa, the arbitration award becomes final and binding unless such an award is advisory, whereas in Namibia the award is only said to be binding on the parties, but not final, as the Labour Act makes no provision for this action. In South Africa, the CCMA director certifies the award, thereby making it enforceable.<sup>147</sup> Alternatively, it may be filed with the Labour Court and consequently become an order of the Court, earning the same status of enforcement as any other court order. In Namibia, the Labour Commissioner does not certify the award, however it accrues binding status immediately at issue. For this reason, any affected party or the Labour Commissioner, at his discretion, may file the award with the Labour Court, thereby making it an order of the Court.

### **6.6.5 REINSTATEMENT AND COMPENSATION AWARDS**

In South Africa, reinstatement or re-employment is the primary remedy provided by the LRA. The Act requires arbitrators or the Labour Court to first order reinstatement or re-employment where an unfair dismissal decision is reached. The only exception is where the employee does not wish to be reinstated, the circumstances surrounding the dismissal makes the continued employment relationship intolerable, and several other factors.<sup>148</sup> In Namibia, there is no preference; however, reinstatement or re-employment is preferred over compensation.

Parker<sup>149</sup> provides a detailed explanation of the difference between re-employment and reinstatement. The author points out that reinstatement means putting the employee back in the same position he held before the dismissal.<sup>150</sup> In *TransNamib Holdings Ltd v Engelbrecht*,<sup>151</sup> the Supreme Court has provided yet another clear distinction between reinstatement and re-employment, where the former relates to returning to an identical job, while the latter relates to returning to a similar job that is comparable to the position the employee held prior to the dismissal. However, the

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<sup>147</sup> S 143(1) and (3) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>148</sup> S 193 of the LRA 66 of 1995.

<sup>149</sup> Parker *Labour Law in Namibia* (2012) 88-193.

<sup>150</sup> See Parker *Labour Law in Namibia* 188 citing the of *Chegetu Municipality v Manjora* 1997 (1) SA 662 (ZSC) and the English Case of *Powel Duffryn Ltd v Rhodes* (1946) 1 ALL ER 666.

<sup>151</sup> 2005 NR 372 (SC) at D.

Court cautioned that the reinstatement order must be exercised judicially, whether by an arbitrator or by a court.<sup>152</sup>

In South Africa, where compensation is awarded, the LRA places a limitation on compensation to guide commissioners or the Labour Court.<sup>153</sup> In this respect, the LRA provides as follows:

- in an unfair dismissal, where the employer failed to prove the fair reason for dismissal or where a fair procedure was not followed, the award of compensation must be just and equitable. However, it may not be more than 12 months' remuneration on the date of dismissal;
- automatically unfair dismissal also requires just and equitable compensation equivalent to 24 months' remuneration, calculated at the employee's rate of remuneration;
- the award in the case of unfair labour practice is equal to not more than 12 months' remuneration.

In all the above respects, the compensation award is additional to any other benefits the employee is entitled to in terms of any law, collective agreement or contract of employment. It does not substitute any other entitlements.<sup>154</sup> In Namibia, severance pay in lieu of unfair dismissal is equally not a substitute to any other benefits that the employee is entitled to.<sup>155</sup>

In Namibia, section 86(15)(e) of the Labour Act, 2007 empowers the arbitrator to make an award of compensation. Unlike in South Africa, the compensation provision in Namibia does not go beyond the mere issuing of the award. The Labour Act, 2007 therefore does not provide any guideline to give effect to the meaning of section

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<sup>152</sup> *Pupkewitz Holding (Pty) Ltd v Petrus Mutamuka and others* Case No LCA 47/2007 (reportable).

<sup>153</sup> S 194 of the LRA 66 of 1995.

<sup>154</sup> S 195 of the LRA 66 of 1995.

<sup>155</sup> Ss 35(1) and (5) of the Labour Act, 2007 (Act No 11 of 2007).

86(15) of the Act. At the implementation stages of the Labour Act, 2007 this caused serious inconsistencies in awarding compensation for unfair dismissal.

In the absence of the statutory provision thereto, the Namibian Labour Court has developed a tremendous body of guidelines, which were probably unknown to some arbitrators at the commencement of the Labour Act. In *Pupkewitz & Son (Pty) Ltd v Kankar*<sup>156</sup> the Court interpreted and applied the provisions of section 46(1)(a)(iii) of the repealed 1992 Act. The Court held that in calculating the amount of compensation payable to an employee dismissed unfairly, considerations must be made for the loss suffered or the amount the dismissed employee would have been paid had he not been dismissed. Parker<sup>157</sup> splits this judgment into two categories. First, that compensation should be an amount equal to the remuneration that the employee would have been paid had he not been dismissed. Second, an amount equal to any losses a dismissed employee suffered resulting from the dismissal. Parker submits that there is no reason why such categorisation of compensation cannot apply to compensation under the Labour Act, 2007.

In *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & others*,<sup>158</sup> Parker J held that the calculation of compensation must be related to a determined period and the amount easily ascertainable. The Court awarded compensation of various amounts equal to the remuneration of the respondents at the time of dismissal, but over varying periods.<sup>159</sup>

Effectively, in the absence of any statutory provision to this effect and given the role of the Court in interpreting legislation, thereby creating clear meaning of the statute, this Court judgment now acts as a guide to arbitrators in Namibia. However, the judgment does not place any limitation on, but rather requires compensation for, the requisite losses suffered, irrespective of how long it took to resolve the dispute.

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<sup>156</sup> 1997 NR 70.

<sup>157</sup> Parker *Labour Law in Namibia* 195.

<sup>158</sup> Case NoLCA 47/2007(reportable).

<sup>159</sup> *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & others* par 21.

The Court further stated that where compensation of an equivalent to losses suffered is considered, it is not necessary for an employee to lead evidence to establish the amount involved. However, where compensation includes losses of certain benefits, such as medical aid, the employee must lead evidence to establish the losses involved.<sup>160</sup>

## **6.7 THE ROLE OF THE LABOUR INSPECTORATE IN LABOUR DISPUTE RESOLUTION**

Internationally, the work of labour inspectors is governed by the Labour Inspection Convention.<sup>161</sup> In terms of this convention, the Labour Inspectorate is responsible for making the arrangements required for ensuring that employers and workers comply with labour laws and regulations. Compliance with labour laws is secured through interventions, such as informing and educating workers and employers on the contents of labour law and regulations, advising parties on how to comply with legal requirements, enforcing labour law as may be appropriate and reporting on the various details and shortcomings in the law and its application.<sup>162</sup>

It should be pointed out that neither Namibia nor South Africa has ratified the Labour Inspection Convention. Nevertheless, Namibia and South Africa have undoubtedly modelled their Labour Inspectorate terms of reference, or frameworks, on this convention. For the purpose of this section, the role of the Labour Inspectorate in dispute resolution and enforcement of arbitration awards is investigated instead of its overall role.

In Namibia, the Labour Inspectorate is seen as one of the means to prevent labour disputes, to improve working conditions and to protect workers. The Labour Inspectorate emphasises compliance and cooperation rather than strict enforcement and penalties.<sup>163</sup> Further, industrial disputes can be taken directly to the Labour Inspectorate as the first step in dispute resolution. Labour inspectors are empowered

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<sup>160</sup> *Pep Stores (Namibia) (Pty) Ltd v Lyambo and others* 2001 NR 211 LCat 223F.

<sup>161</sup> 81 of 1947.

<sup>162</sup> Heron and Van Noord *National Strategy on Labour Dispute Prevention and Settlement* 17.

<sup>163</sup> See Preamble to the Namibian National Labour Inspection Policy (GRN) Ministry of Labour and Social Welfare.

by the Labour Act, 2007 to assist any person in resolving a labour complaint.<sup>164</sup> In doing so, they must endeavour to resolve the complaint or dispute. They may only refer the dispute to the Labour Commissioner for formal conciliation and arbitration if their intervention fails.<sup>165</sup> In South Africa, besides promoting, monitoring and enforcing compliance with employment law,<sup>166</sup> labour inspectors may investigate complaints made to them.<sup>167</sup> The use of compliance orders<sup>168</sup> in cases of non-compliance is but one of the extreme forms of intervention provided for in labour legislation; a similar provision exists in Namibian labour law. Therefore, labour inspectors in South Africa play a minor role, if any, in labour dispute resolution.

It is argued that although labour inspectors may perform mediation services as in Namibia, this mediation could be perceived as tainting the formal conciliation process and could add an element of confusion to the matter as parties receive a mixture of mediation and law enforcement.<sup>169</sup> This could be one of the reasons why South Africa chooses to limit its Labour Inspectorate services to labour law monitoring and enforcement rather than active involvement in labour dispute resolution.

However, there are mixed international views on whether labour inspectors must be involved in labour dispute resolution.<sup>170</sup> The Labour Inspection Recommendation<sup>171</sup> suggests that the function of labour inspectors should not include conciliation or arbitration. This is the result of conciliation and inspection being seen as incompatible with the main functions and obligations of labour inspectors, particularly where they must be seen by the parties to be impartial in the exercise of their duties.<sup>172</sup> This contradiction is further exacerbated by the Labour Inspection (Agriculture) Recommendation,<sup>173</sup> which recognises the possibility of labour inspectors acting as conciliators, at least on a temporary basis.

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<sup>164</sup> S 125(2)(i) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>165</sup> S 125(ii) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>166</sup> S 64(1) of the BCEA 75 of 1997.

<sup>167</sup> S 64(1)(c) of the BCEA 75 of 1997.

<sup>168</sup> See 69 of the BCEA 75 of 1997 and see also s 126 of the Namibian Labour Act, 2007.

<sup>169</sup> Heron *et al National Strategy on Labour Dispute Prevention Settlement* 18.

<sup>170</sup> Von Richthofen *Labour Inspection: A Guide to the Profession* (2004) 32.

<sup>171</sup> No 81 of 1947.

<sup>172</sup> Von Richthofen *Labour Inspection: A Guide to the Profession* 32.

<sup>173</sup> No 133 of 1969.

Heron<sup>174</sup> provides what seems to be the ideal solution to the problem. The author points out that the greatest contribution of the Labour Inspectorate to labour dispute prevention and resolution springs from improved inspection work. Labour inspectors' visits at workplaces should focus on risk enterprises where there are common workers' complaints. By doing so, they could solve many of the labour problems on the spot, thereby preventing complaints arising in the first place and limiting or minimising the need for conciliation through the Labour Commissioner or the CCMA.<sup>175</sup>

## 6.8 ENFORCEMENT OF ARBITRATION AWARDS

Section 3 of the Labour Inspection Convention reads:

“to secure the enforcement of the legal provisions relating to the conditions of work and the protection of workers while engaged in their work, such provisions relating to hours of work ... and other connected matters, in so far as such provisions are enforceable by labour inspectors”.

The ILO has interpreted the above provision to include, apart from enforcing labour legislation, the enforcement of arbitration awards and collective agreements that have the force of law.<sup>176</sup>

Given this ILO provision, the Namibian Labour Act, 2007<sup>177</sup> empowers labour inspectors to enforce arbitration awards. In terms of section 90 of the Labour Act, 2007, parties to an arbitration award may to apply to a labour inspector to enforce an award. Upon receipt of an application, the inspector must take the necessary steps to enforce the award, including the institution of execution proceedings on behalf of that person. In South Africa, labour inspectors do not play any role in the enforcement of arbitration awards.

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<sup>174</sup> Heron *et al National Strategy on Labour Dispute Prevention and Settlement* 18.

<sup>175</sup> *Ibid.*

<sup>176</sup> Von Richthofen *Labour Inspection: A Guide to the Profession* 32.

<sup>177</sup> S 125(2)(g) of the Labour Act, 2007 (Act No 11 of 2007).

The Labour Inspectorate in Namibia, with the assistance of the Government Attorney, has developed operational forms to enforce arbitration awards. In a case of failure to voluntarily comply with the award and after the award has been made an order of court, the applicant must inform the labour inspector that there is an arbitration award and that, despite the respondent's knowledge thereof, it remains outstanding.<sup>178</sup> Thereafter, the labour inspector takes the appropriate actions required to enforce the award. Enforcement interventions include, in the case of a compensation award, instructing the Deputy Sheriff to obtain a *writ of execution* and, in the case of a reinstatement award, instructing the Government Attorney to file for contempt of court proceedings in the Labour Court. Essentially, the government takes the responsibility of ensuring that arbitration awards are properly enforced and fully complied with at no cost to the applicants. In South Africa, while the methods of enforcement are similar, the Government Attorney plays no role in the enforcement of arbitration awards.

The writ of execution intervention in Namibia has proven to work and yields results. This is because the Deputy Sheriff is willing to execute most writs obtained, based on payment by the Ministry of Labour and Social Welfare. However, enforcing reinstatement awards after obtaining judgment for contempt of court remains one of the greatest challenges to the enforcement of arbitration awards in Namibia. Consequently, employees with reinstatement awards are left in the dark, causing them to lose confidence in the dispute resolution system. At the time of writing, no such application had ever been brought before the Labour Court. The Government Attorney attributes this to the technical nature of and cumbersome process involved in securing conviction. This is one of the major factors addressed in the conclusion and recommendations section of this thesis and an improved mechanism for the enforcement of reinstatement orders is suggested.

## **6.9 VARIATION AND RESCISSION**

Variation and rescission was discussed in Chapters Three (3.7.6) and Four (4.8.8). From those discussions, it is apparent in the provisions of the Labour Act, 2007 and LRA that variation and rescission are similar in content and substance, and in the

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<sup>178</sup> *Chiloane v Nhlumato Agricultural Project* [2000] 4 BLLR 392 LC par 14.

procedure for seeking rescission of the decision made. Given these similarities, it is not appropriate to continue to compare the provisions thereto.

## **6.10 BARGAINING COUNCILS**

South African bargaining councils have their origin in the industrial councils that operated under the Industrial Conciliation Act of 1924, which underwent numerous amendments, including the 1937 and 1956 versions, in an attempt to improve the Act's operational efficiency. Against this backdrop, the LRA has given recognition to bargaining councils in the new South Africa. They are formed on a voluntary basis by registered trade unions and registered employers' organisations for given sectors or areas.<sup>179</sup> Namibia has no similar provisions for bargaining councils. However, some industries, such as the security, construction and farming sectors, have formed "sectoral bargaining forums". Although they are not recognised in legislation, these forums operate within the scope of sections 64 and 70 of the Labour Act, 2007 by implication and, as a result, are recognised by the Ministry of Labour and Social Welfare. In Namibia and South Africa, industry bargaining forums and bargaining councils respectively have the same ultimate goals, namely defining and implementing conditions of employment in a given sector.<sup>180</sup>

Governing councils in South Africa are required to develop a constitution and register it with the Registrar at the Department of Labour. Thereafter, they may be accredited by the governing body of the CCMA to perform any of its statutory dispute resolution functions.<sup>181</sup> In Namibia, no accreditation is required from any of the recognised tripartite bodies. All that is required from the industry bargaining forum is to inform the Ministry of Labour, which in most cases chairs the meetings of these forums as an independent third party.

These industry bargaining forums in Namibia and bargaining councils in South Africa have the power to set minimum employment standards, such as guidelines relating to pension and other funds. To give effect to these conditions of employment, industry

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<sup>179</sup> S 27 of the LRA 66 of 1995.

<sup>180</sup> *Brassey Commentary on the LRA* A3-61.

<sup>181</sup> S 29 of the LRA 66 of 1995.

bargaining forums and bargaining councils have the authority to enter into and sign collective agreements, which are binding on the parties, and on request and in certain instances may be extended to non-parties by the Minister of Labour.<sup>182</sup> Non-parties may also voluntarily consent to the jurisdiction of the bargaining council, hence becoming bound by the collective agreement. The resultant collective agreements have the force of law once gazetted, thereby being policed by the parties themselves or by their appointed agents. In Namibia, labour inspectors and the parties to collective agreements play an enforcement role.

The LRA in South Africa permits bargaining councils to establish dispute resolution procedures for resolving disputes arising from collective agreements.<sup>183</sup> In Namibia, the Labour Act, 2007 requires every collective agreement, including those resulting from industry bargaining forums, to provide for a dispute resolution procedure to resolve any dispute about the interpretation, application or enforcement of the collective agreement.<sup>184</sup> For the lack of a better alternative, most bargaining councils in South Africa have modelled their dispute resolution procedures on the CCMA rules.

Industry bargaining forums in Namibia do not perform labour dispute resolution functions, except for referring deadlocked disputes to the statutory established dispute resolution machineries or to private arbitration. In South Africa, bargaining councils have arbitrating powers where they have been accredited, or they may appoint an accredited agency to perform those functions on their behalf. However, their dispute resolution powers are limited to matters of mutual interest specified in section 51, as read with section 28(1)(d), of the LRA. For this reason, other disputes are reserved for the CCMA.

Overall, bargaining councils in South Africa promote self-governance or self-regulation, are autonomous, and complement the work of the CCMA. Although

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<sup>182</sup> Grogan *Labour Litigation and Dispute Resolution* 46. See also s 71 of the Labour Act, 2007. (Act No 11 of 2007).

<sup>183</sup> S 51(9) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>184</sup> S 73(1) of the Labour Act, 2007 (Act No 11 of 2007).

Namibia is a developing country with few industries, a similar model could clear the backlog of cases in the Labour Commissioner's office if given statutory recognition.

## 6.11 PRIVATE ARBITRATION

Private arbitration is provided for in Namibia in terms of section 91 of the Labour Act, 2007 as an alternative and voluntary process in place of the compulsory arbitration made available by the state. In Namibia and South Africa respectively, private arbitration is regulated by the same law, the Arbitration Act.<sup>185</sup> The form and process of private arbitration is similar in both countries and premised on the arbitration agreement concluded by the parties to resolve their dispute. On this basis, the principles of private arbitration exclude the dictates of the Labour Act, 2007 and the LRA.<sup>186</sup>

There are, however, differences in terms of popularity and usage of private arbitration, given its advantages and disadvantages. In Namibia, for example, private arbitration is seldom used due to the absence of a properly established and recognised private dispute settlement institution such as Tokiso Dispute Settlement in South Africa. Tokiso Dispute Settlement offers comprehensive ADR services that are said to be cost effective and user friendly, with legally enforceable outcomes.<sup>187</sup> Namibia does not have an equivalent. Until such time that an alternative institution to the Labour Commissioner is established in Namibia, little can be said about private arbitration in the country.

Chapters Three (3.18) and Four (4.10) of this thesis provide a more complete description of the provisions of private arbitration in Namibia and South Africa respectively.

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<sup>185</sup> Act No 42 of 1965.

<sup>186</sup> Govindjee *Labour Dispute Resolution* 237.

<sup>187</sup> See Tokiso 2009 25 Part 6 *Employment Law* (advertorial page).

## 6.12 THE ROLE OF THE LABOUR COURTS IN DISPUTE RESOLUTION

In Namibia, the Labour Act, 2007 provides for the continuation of the Labour Court, created in terms of the repealed 1992 Labour Act,<sup>188</sup> as a division of the High Court. Essentially, there has been no change to the structure and function of the Labour Court. Judges are assigned by the Judge President and are drawn from the ranks of judges serving in the High Court, either on a permanent basis or in acting capacities. In South Africa, the LRA establishes the Labour Court as a court of law and equity. It is a superior court of record with authority, inherent powers and standing in relation to matters under its jurisdiction, equal to a provisional division of the Supreme Court.<sup>189</sup> Unlike in Namibia, the Labour Court of South Africa has a dedicated Judge President and Deputy Judge President who are judges of the Supreme Court,<sup>190</sup> while many other judges of the Labour Court must be judges of the High Court.<sup>191</sup> There is a similar requirement in Namibia.

In Namibia and South Africa respectively, the Labour Court is established as an avenue for the formal litigation of labour disputes and the development of jurisprudence in labour law.<sup>192</sup> It is evident that Namibia has no separate dedicated Labour Court as exists in South Africa. The High Court sits as a Labour Court when determining labour related matters. It is therefore argued that such arrangements or practices tend to compromise labour issues, as they require specialisation and arbiters vested with specialised skills to handle specialised labour disputes.<sup>193</sup>

In South Africa, Labour Court judges are specialist judges drawn from the legal profession and appointed on the advice of the National Economic Development and Labour Council (NEDLAC) in consultation with the Minister of Justice.<sup>194</sup> They are appointed because of their professional experience in and knowledge of labour

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<sup>188</sup> S 115 of the Labour Act, 2007 (Act No 11 of 2007).

<sup>189</sup> S 151(1)-(3) of the LRA 66 of 1995.

<sup>190</sup> S 153(2) of the LRA 66 of 1995.

<sup>191</sup> S 153(6) of the LRA 66 of 1995.

<sup>192</sup> Govindjee "*Labour Dispute Resolution*" 238.

<sup>193</sup> Khabo *Collective Bargaining and Labour Dispute Resolution* 14.

<sup>194</sup> S 152 of the LRA 66 of 1995.

law.<sup>195</sup> The Labour Advisory Council in Namibia plays no role in the appointment of Judges of the Labour Court, although it was the recommendation of the Taskteam that developed the Labour Act, 2007 that the council should play a role. The appointment of judges in Namibia is at the discretion of the President of the Republic of Namibia on recommendation of the Judicial Service Commission.<sup>196</sup>

In terms of jurisdiction, the Labour Court in Namibia, although a division of the High Court, has exclusive jurisdiction to determine appeals and reviews, which are separate functions dedicated to this Court only.<sup>197</sup> Chapter Three (3.20.1) provides a detailed jurisdictional discussion of the Labour Court in Namibia. In South Africa, the Labour Court also has exclusive jurisdiction in respect of all matters under its jurisdiction, in terms of either the LRA or any other enabling law. However, the LRA provides for dual jurisdiction of the Labour Court and the High Court, a situation that does not exist in Namibia. This dual jurisdiction is in respect to fundamental rights enshrined in Chapter 2 of the South African Constitution, arising from employment and labour relations.<sup>198</sup> Disputes of fundamental rights are adjudicated solely by the sitting Labour Court in Namibia and this responsibility is not shared with the High Court, although essentially the same Judges of the High Court presides over these matters.<sup>199</sup> Besides the Labour Court in South Africa, the LRA provides an appeal tier to the Labour Appeal Court (LAC).<sup>200</sup> The LAC has its own structure, and hears and determines all appeals against final judgments and final orders of the Labour Court. It has the power to decide any question of law reserved for it to decide.<sup>201</sup> Namibia has no similar structure save for the Supreme Court, which is the final arbiter in all matters resulting from the Labour Court.

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<sup>195</sup> S 153(6) of the LRA 66 of 1995.

<sup>196</sup> Art 82 of the Namibian Constitution.

<sup>197</sup> S 117 of the Labour Act, 2007 (Act No 11 of 2007).

<sup>198</sup> S 157(2) of the LRA 66 of 1995.

<sup>199</sup> S 7 of the Labour Act, 2007 (Act No 11 of 2007).

<sup>200</sup> S 167 of the LRA 66 of 1995.

<sup>201</sup> S 173(1) of the LRA 66 of 1995.

### 6.12.1 APPEALS AGAINST ARBITRATION AWARDS

Generally, appeals are associated with lengthy bureaucratic processes and delays. Nevertheless, Namibia has adopted an approach for appeals against arbitration awards, a practice that is absent in South Africa. The Namibian Labour Court is empowered to adjudicate appeals against arbitration awards.<sup>202</sup> The purpose of this is to give effect to the constitutional right to a fair trial and includes arbitration hearings on the premise that arbitration is a tribunal for the purpose of resolving disputes as contemplated in terms of article 12(1)(a) of the Namibian Constitution. In South Africa, the Constitutional Court (CC) has held that arbitration by the CCMA is an administrative action within the meaning of section 33 of the Constitution. However, the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) do not apply to the reviews contemplated in section 145(2) of the LRA.<sup>203</sup>

The Explanatory Memorandum to the Labour Act, 2007 provides that section 89(10) of the Act was devised to strengthen the power conferred on the Labour Court when setting aside the award of the arbitrator by empowering the Court to:

- (a) in case of an appeal, determine the dispute in the manner it considers appropriate;
- (b) refer it back to the arbitrator or direct that a new arbitrator be designated; or
- (c) make an appropriate order.

The Explanatory Memorandum recognises the fact that arbitration is between the employer and trade union or employee directly involved in the dispute and that the decision of the arbitrator may be subject to appeal or review in the Labour Court. However, the Labour Court has held that if the discretion at the arbitration proceedings has been exercised on judicial grounds and for sound reasons that are without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to intervene and substitute its decision. The Court requires the appellant

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<sup>202</sup> S 117(1)(a)(ii) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>203</sup> See *Sidumo v Rustenburg Platinum Mines*.

to show that the arbitration is wrong and that the decision ought to have been in his favour.<sup>204</sup>

In South Africa, no appeal is allowed on the premise that common law appeals ordinarily stay the enforcement of an award, whereas a review application does not have the same effect,<sup>205</sup> therefore allowing review only on limited grounds.<sup>206</sup> The review approach of the Labour Court in South Africa is relative to the Namibian approach. The LRA provides wider powers to the Labour Court to correct the decision it condemns on review. In doing so, the Court may-

- determine the dispute in a manner it considers appropriate; and
- make an order it considers appropriate about the procedures to be followed to determine the dispute.

An approach similar to that of Namibia is applicable in South Africa, where the Court held that it would not simply substitute its decision, unless exceptional circumstances exist.<sup>207</sup> In setting aside the award, the Court exercises its discretion to remit the matter to the CCMA for a fresh decision, giving direction whether the same or a new arbitrator must hear it.<sup>208</sup>

The Explanatory Memorandum to the LRA clearly shows the intention of the legislature, which was to limit the power of the Labour Court to review only CCMA arbitration awards, thus prohibiting appeals against such awards, which was a practice condemned by the 1956 LRA.<sup>209</sup> Fergus (2010)<sup>210</sup> submits that in excluding

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<sup>204</sup> *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka others* par 14, see also *Edgars Stores v Olivier and another*.

<sup>205</sup> See *Gruder v Gruder* 1990 (4) SA 680 (CC) at 683 G-H.

<sup>206</sup> See for example *Sidumo v Rustenburg Platinum Mines* par 245 and *Carephone v Marcus NO* par 25.

<sup>207</sup> See *SA Fibre Yarn Rings Ltd v CCMA & others*.

<sup>208</sup> *Brassey Labour Relations Act* A7-9.

<sup>209</sup> Fergus "The Distinction Between Appeals and Review- Defining the Limits of the Labour Court's Power to Review" (2010) 31 *Industrial Law Journal* 1556 p 1571.

<sup>210</sup> *Ibid.*

appeal provision from the LRA, the legislature sought to ensure that labour disputes were both expeditiously and efficiently resolved.

In terms of common law, appeals generally tend to suspend the effects of awards. However, with this in mind, the Namibian Labour Act, 2007 adopted a progressive, different approach to mitigate such effects. As discussed in Chapter Three, the noting or filing of an appeal application does not necessarily suspend the effect of the arbitration award.<sup>211</sup> The party seeking to suspend the binding effects of the arbitration award must apply for a separate stay order.<sup>212</sup> However, the Court has held that before a stay order is granted, the applicant must have filed a *bona fide* appeal application as a requirement to stay the award. The application allows the Court to examine the prospect of success of such an appeal and not to permit a stay application as a delay tactic.<sup>213</sup>

South Africa has the same practice, where the Labour Court has been vested with the power to stay the enforcement of the award pending their discretion on review.<sup>214</sup> Similarly, where the launching of a review application against the award does not suspend its operation, the Labour Court will invariably stay the execution of the award. The Court requires a special application to that effect,<sup>215</sup> comparable to the process of obtaining a stay order in Namibia.

An appeal to the Labour Court, as contemplated in the Labour Act, 2007, is an appeal premised on the record of proceedings limited to the evidence and information that was before the tribunal of first instance and is not a re-hearing in its true meaning of the words.<sup>216</sup> This is different in South Africa, where, for instance, an aggrieved party to an award may not have the matter reheard by the Labour Court and the Court may not make a decision based on the evidence led at arbitration.<sup>217</sup> An appeal to the Labour Court in Namibia is limited to the question of law alone,

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<sup>211</sup> S 89(6)(b) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>212</sup> S 89(7) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>213</sup> *Hardap Regional Council v Sankwasa James Sankwasa* par 7.

<sup>214</sup> See s 145(3) of the LRA 66 of 1995.

<sup>215</sup> See *Olivier v University of Venda* (2003) 24 ILJ 208 LC.

<sup>216</sup> *Pupkewitz Holdings (Pty) Ltd v Petrus Mutanuka & others* par 14.

<sup>217</sup> Fergus "The Distinction Between Appeals and Review- Defining the Limits of the Labour Court's Power to Review" 1558.

without considering any additional factors. It is thus a requirement when filing an appeal to specify the ground of the appeal as the ground may not be changed or reconstructed later.<sup>218</sup>

The Supreme Court of Appeal (SCA) in South Africa has recently expressed great concern regarding the grounds for review, where Murphy AJA expressly stated that he could not imagine how many decisions have been wrong, but upheld as reasonable. The Court further stated that the ground for review based on reasonableness leaves aside the moral hazard of a message to commissioners that there is no need for them to get their decisions right. They may believe that acting reasonable is enough, despite the possibility of commissioners arriving at wrong decisions based on wrong facts. In the Court's view, this is caused by not taking full or proper account of material evidence and errors in the application of the law, therefore failing to reach a legitimate decision because of not having properly applied their minds to the issues at hand and denying the parties a fair trial in the process.<sup>219</sup> The Court further pointed out that the hypothetical reward from limiting intervention to reviews based on reasonableness or rationality is dubious. On the contrary, the Court risks reducing the final adjudication of labour disputes to an exercise in semantics in pursuit of a perceived socially expedient advantage that is at best illusory. Moreover, the SCA referred to its experience in adjudicating reviews of awards issued in terms of the LRA and the controversy surrounding this as a demonstration of the requirement of substantive reasonableness, which is necessary to deal with obviously wrong awards.<sup>220</sup>

Based on the concerns expressed and the doubts about the reasonableness of review grounds, the judge calls upon social partners and the legislature to rethink this process and argues that justice for all concerned might be better served if the relief against awards was to take the form of an appeal rather than a review. He finds the protection granted by a narrower basis for intervention, in all likelihood, a fanciful chimera,<sup>221</sup> a situation Namibia sought to prevent by permitting appeals based on the

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<sup>218</sup> *Shoprite Namibia (Pty) Ltd v Fautino Moses Paulo & others* par 3.

<sup>219</sup> *Andre Herloldt v Nedbank* Case No: DA 20/2010(20 May 2012) par 55.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Andre Herloldt v Nedbank* par 56.

question of law and fact. However, this is contrary to the ILO's call not to subject the arbitration awards to appeal.

### 6.12.2 COMPARATIVE REVIEW OF ARBITRATION AWARDS

Detailed descriptive review provisions in Namibia and South Africa are discussed in Chapters Three (3.20.3) and Four (4.12.3) of this study. However, for this part of the study a further process and contextual comparative analysis of the review procedure is undertaken.

In order to provide a better understanding of the review, this section explains the difference between the appeal and review processes. Hoexter<sup>222</sup> provides a useful distinction between appeals and reviews. The author asserts that in an appeal, the Court hearing the matter is obliged to consider the merits of the matter before it and to conclude whether or not the decision of the tribunal or court *a quo* was right or wrong. In contrast, a review does not ordinarily entertain the merits of the decision. The Court is instead required to investigate the manner in which the decision was reached and whether the appropriate procedure leading to the decision was followed.<sup>223</sup>

The difference described above is supported by the court's decision in *Johannesburg Consolidated Investments Co v Johannesburg Town Council*<sup>224</sup> Wherein Innes CJ remarked as follows: an appellant approaches the Court based upon a record of the case in an inferior court and by that record he is bound. He cannot take advantage of any fact or circumstance that does not appear upon the record or cannot be deduced from it. In a review, litigants relies on irregularities that do not necessarily have to appear on the record. The judge concluded by stating that the applicant can be permitted to make an affidavit to bring the factors upon which he relies to the notice of the Labour or Supreme Court. The same view was expressed by the Labour Court in Namibia in *Ellen Louw v the Chairperson of the District Labour Court* and *JP*

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<sup>222</sup> Hoexter *Administrative Law in South Africa* (2011) 65.

<sup>223</sup> Fergus "The Distinction Between Appeals and Review- Defining the Limits of the Labour Court's Power to Review" 1557.

<sup>224</sup> 1903 TS 111 par 114.

*Snyman & Partners (Namibia) (Pty) Ltd.*<sup>225</sup> Hoff AJ pointed out that in a review, the parties are allowed to travel outside of the restricted records to bring extrinsic evidence to light to prove the irregularity or illegality alleged.

The Namibian Labour Court therefore accepts that in a review application, the Court only concerns itself with the lawfulness of the decision brought to its attention, without necessarily examining legality and fairness, which are elements examined in an appeal. The Court inferred that review relates to the conduct of the proceedings and not the result thereof.<sup>226</sup> Parker<sup>227</sup> notes that, should the reviewing court be permitted to go into the merits of the decision, it would be equal to substituting itself for the person or body to whom or to which the legislature has given the power to make the decision in question or where the statute has so granted such power of intervention.

In the case of *Chief Constable of North Police v North Wales Police v Evans*,<sup>228</sup> cited in Justice Parker's authoritative writing on labour law in Namibia, the Court held that the purpose of review proceedings is to ensure that the individual receives fair treatment by the authority to which he has been subjected. Therefore, the purpose is not to substitute the opinion of the judiciary or of the individual judges (arbitrators in this case) for that of the authority constituted by law to decide the matter in question. However, Willis<sup>229</sup> points out that the only exception to substitution is where the enabling statute expressly permits the court to substitute its decision for that of the body or tribunal at issue in review proceedings.

The above clearly demonstrates that in a review, unlike in an appeal, the court's powers are limited. Although it may set aside<sup>230</sup> the decision of the tribunal of the first instance (the CCMA and the Labour Commissioner respectively), it would generally not substitute its own decision for the tribunal *a quo* in the absence of such a

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<sup>225</sup> Case No LCA 27/1998 par 11 (reportable).

<sup>226</sup> *S v Bushebi* 1998 239 NR SC.

<sup>227</sup> Parker *Labour Law in Namibia* 206.

<sup>228</sup> (1982) 1 WLR 115 at 1160.

<sup>229</sup> Willis *Administrative Law and the British American Act* (1939) 53.

<sup>230</sup> See s 145(4) of the LRA 66 of 1995, see also s 89(10) of the Labour Act, 2007.

statutory provision.<sup>231</sup> For this reason, the Namibian Labour Act, 2007 obliges the Labour Court to refer the matter back to the arbitrator or to direct that a new arbitrator be designated<sup>232</sup> to rehear the matter afresh, or with specific directives to the procedure to be followed to re-determine the dispute.<sup>233</sup> The Labour Act, 2007 seemingly does not permit the Labour Court to substitute its decision in a review application. This is somewhat different in South Africa, where the LRA permits the Labour Court, by discretion, to determine the dispute in a manner it considers appropriate.<sup>234</sup> From an analytical perspective, such a determination could include substituting the original decision with that of its own or, alternatively, to exercise a similar provision as in Namibia, where the Court may be at liberty to refer the matter to the CCMA for a re-hearing with an appropriate directive to be followed.<sup>235</sup> It would logically appear that South Africa's LRA has infused the appeal element of determination into the review, whereas determination is a factor for appeal only and has no place in a review in Namibia. The reasonableness and otherwise lawfulness of the decision of the commissioner is examined equally in the review proceeding in South Africa.

Having established this difference between review and appeal processes, the focus now shifts to the legislative provision that endows the Labour Court with exclusive jurisdiction to review arbitration awards.<sup>236</sup> In South Africa, the Labour Court has exclusive jurisdiction to review CCMA arbitration awards, including those of the bargaining councils. On the other hand, section 117 of the Namibian Labour Act, 2007 extends to include other decisions, such as those made by the Minister of Labour, the Permanent Secretary of Labour, the Labour Commissioner or any other body or official in the exercise of powers conferred by the Labour Act. In comparison, in terms of section 157(1) of South Africa's LRA, the Labour Court's jurisdiction is distinctly reserved for all other decisions that may be reviewed, with the exception of arbitration awards.

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<sup>231</sup> Fergus "The Distinction Between Appeals and Review- Defining the Limits of the Labour Court's Power to Review" 1558.

<sup>232</sup> S 89(10)(b) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>233</sup> S 89(10)(c) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>234</sup> S 145(4)(a) of the LRA 66 of 1996.

<sup>235</sup> Fergus "The Distinction Between Appeals and Review- Defining the Limits of the Labour Court's Power to Review" 1559.

<sup>236</sup> S 117(1)(b)(i) of the Labour Act, 2007 (Act No 11 of 2007).

Given the Namibian Labour Court's jurisdiction to review arbitral awards, section 89(4) of the Labour Act, 2007 permits an aggrieved party to an arbitration award who alleges a defect in the arbitration proceedings to apply to the Labour Court for an order reviewing and setting aside the award. This provision is similar to that provided for in section 145(1) of the LRA of South Africa. The application for review in terms of the Labour Act must be made within 30 days after the award was served on the party challenging the award, unless the defect alleges corruption, in which case the application must be made within six weeks of discovery thereof.<sup>237</sup> In South Africa, the application for review must be brought within six weeks of the date the award was served on the party. This also applies to corruption allegations, where such an application must be noted within the same period after discovery of the offence.<sup>238</sup>

In South Africa, the LRA explicitly addresses condonation provisions for late filing of review applications. These include situations where, for instance, there are good reasons advanced for such an application and condonation may be granted by the Labour Court.<sup>239</sup> In Namibia, in terms of section 89(3) of the Labour Act, 2007, condonation may only be considered in the late noting of an appeal on good cause shown. The author submits that this does not include review applications. The Explanatory Memorandum fails to provide any reason for such an omission, thus leaving it to the Labour Court to decline any late noting of review applications.

Section 89(5) of the Labour Act, 2007 describes the defects referred to in section 89(4) of the Act to mean instances where the arbitrator has:

- (i) committed misconduct in relation to the duties of an arbitrator;
- (ii) committed a gross irregularity in the conduct of the arbitration;
- (iii) the arbitrator exceeded his or her power; and
- (iv) the award has been obtained improperly.

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<sup>237</sup> S 89(4)(a)(b) of the Labour Act, 2007 (Act No 11 of 2007).

<sup>238</sup> S 145(1)(a) of the LRA 66 of 1995.

<sup>239</sup> S 145(1A) of the LRA 66 of 1995.

These defects may give rise to a review application of an arbitration award in Namibia. They are effectively the same grounds of review provided for in section 33(1) of the Arbitration Act of 1965, which endows the Labour Court with the power to review and set aside a defective arbitration award.<sup>240</sup> These are the same substantive defects described by the LRA as the grounds for reviewing and setting aside a commissioner's award.<sup>241</sup>

As these defects were only listed in Chapter Three of this study, they are described in detail below.

- (a) Misconduct, referred to in section 89(5)(a)(i) of the Labour Act, 2007, relates to the arbitrator's duties, for example wrongful or improper conduct, which could include a dishonest act or any act or omission involving moral improbity on the part of the arbitrator. Any proof thereof becomes a requisite for setting aside the award.<sup>242</sup>
  
- (b) Gross irregularity, referred to in section 89(5)(a)(ii) of the Labour Act, 2007, will exist where the arbitrator breached the rule of natural justice by depriving the aggrieved party of a fair hearing. The rules of natural justice includes the *audi alteram partem* rule related to hearing both parties; the rule that the one who decides the matter must not be biased by deciding his own case; and the recently developed rule that justice should not only be done, but should also be prevalent and without any doubt be seen to be done.<sup>243</sup> The Labour Act, 2007 requires the irregularity to be gross in nature or the Court will not interfere with the decision of an arbitrator, unless prejudice against a party can be established.<sup>244</sup>

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<sup>240</sup> Parker *Labour Law in Namibia* 211.

<sup>241</sup> S 145(2) of the LRA 66 of 1995.

<sup>242</sup> Parker *Labour Law in Namibia* 212.

<sup>243</sup> *Meyer v Law Society, Transvaal* 1978 (2) SA 209at par 212H cited in Parker *Labour Law in Namibia* 213.

<sup>244</sup> Parker *Labour Law in Namibia* 213.

- (c) Exceeding power, referred to in section 89(5)(b) of the Labour Act, 2007, requires the arbitrator to restrict himself to the dispute brought before him. He is not permitted to raise or decide issues outside his scope.<sup>245</sup>
- (d) Defective proceedings are the result of a defect based on the award having been obtained improperly, for example through corruption, fraud or bribery.

It is submitted that the above list is exhaustive, due to the definition of “defect” where the Labour Act, 2007 used the term “means”.<sup>246</sup> This argument is premised on the fact that the legislature intended the meaning to be complete and therefore no part of the intended meaning is left out.<sup>247</sup> To this end, the Labour Court has held that in a review application, it is not for the arbitrator to justify his conduct, but for the applicant to satisfy the Court that good grounds exist to review the award made by the arbitrator.<sup>248</sup> Ultimately, the Court concluded that to succeed with a review application, each ground raised must establish a defined defect listed in section 89(5) of the Labour Act, 2007.

In South Africa, the LRA also defines the ground for review using the term “means”.<sup>249</sup> For the reasons advanced above, the position in South Africa is undoubtedly the same since the grounds for review are limited to the defects listed in section 145(2) of the Act. It has been submitted that section 145 has been devised especially for arbitration review above any other statutory provisions in the LRA or any other statute, such as PAJA.<sup>250</sup> Brassey submits that section 145 of the LRA is the sole basis of the review of arbitration awards and, therefore, that any other ground falling outside of it must be brought under section 158(1)(e) of the LRA. However, in *Sidumo v Rustenburg Platinum Mines*, the CC pointed out that section 145 of the LRA extends an invitation to scrutinise the process by which the results of arbitration proceedings were achieved, thereby enabling the Labour Court to intervene if the commissioner’s conduct is found wanting. As a result, the Court

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<sup>245</sup> Parker *Labour Law in Namibia* 214.

<sup>246</sup> *Ibid.*

<sup>247</sup> Thornton *Legislative Drafting* (1987) 175.

<sup>248</sup> *Atlantic Chicken Company (Pty) Ltd v Philip Mwandangi NO and another* par 5.

<sup>249</sup> S 142(2) of the LRA 66 of 1995.

<sup>250</sup> Van Niekerk *et al Law@Work* 448.

remarked that reasonableness may not be irrelevant in the enquiry and that it may be relevant to both the process and outcome.<sup>251</sup>

Myburgh<sup>252</sup> extends the above arguments by suggesting that section 145 of the LRA requires commissioners' decisions to fall within the "band of reasonableness", which he submits does not preclude the Court from scrutinising the process in terms of which the decision was made. Such scrutiny includes situations where the commissioner fails to consider material evidence or has considered irrelevant evidence, or that the commissioner committed some form of gross misconduct in the process of review, thereby prejudicing the other party. In these instances, the commissioner's award may qualify to be set aside irrespective of the result of the proceedings or whether the result can be justified based on the record of the proceedings.<sup>253</sup>

In Namibia, the examination of reasonableness may be a factor for consideration in an appeal rather than in a review application. Implied inclusion in South Africa could be attributed to the limited mechanisms available to attack an adverse arbitration award, given the limited scope of the review process and no other alternative, such as an appeal provision. This could be the reason why, in South Africa, the Labour Court ventures into the substance of the review application.

A closer examination of section 145 of the LRA clearly shows that review proceedings must be conducted both effectively and expeditiously.<sup>254</sup> This is not explicit stated in the Namibian Labour Act, 2007. However, labour legislation drafters have cautioned that the need for expedience in labour dispute resolution should not be allowed to overshadow the importance of labour disputes being reasonably and fairly resolved.<sup>255</sup> In Namibia, the court process is not expedient, with labour matters taking three to four years to be finalised.

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<sup>251</sup> Brassey *The Labour Relations Act A1-7*.

<sup>252</sup> Myburg "Determining and Reviewing Sanctions after Sidumo" (2010) 31 *ILJ* 16.

<sup>253</sup> *Ibid.*

<sup>254</sup> See s 1(d)(iv) of the LRA 66 of 1995.

<sup>255</sup> See the Explanatory Memorandum to the LRA parr 318-9.

The purpose of review proceedings, as set out in the LRA and the Labour Act, is to give consideration to and balance the constitutional right to just administrative action associated with the doctrine of separation of power, which must be observed.<sup>256</sup>

### **6.13 CONCLUSION**

This chapter clearly demonstrates that Namibia's labour legislation has been heavily reliant on that of South Africa since colonial times, as Namibia was under the mandate of South Africa during that period. As a result, any labour legislation that was enacted in the country was designed to serve South African interests. This is evident from the provision of statutes, such as the Industrial Conciliation Act of South Africa and the Industrial Conciliation Act of Namibia, which were exclusively applicable to white employees and excluded indigenous citizens from their application. In South Africa, the Wiehahn Commission of Inquiry significantly changed labour policy by affording black trade unions rights comparable to those of their white counterparts and prompting the creation of the industrial courts system to adjudicate disputes related to unfair labour practices.

In Namibia, Professor Wiehahn also chaired a commission that investigated the state of affairs regarding labour legislation. The commission recommended the enactment of labour law that embraces internationally recognised dispute resolution machineries of conciliation, arbitration and adjudication by the Labour Court.

At independence, Namibia and South Africa as sovereign states adopted democratic constitutions that guarantee basic labour rights, and enacted labour legislation to give effect thereto. The first Namibian Labour Act of 1992 was later repealed, paving the way for the current Labour Act of 2007. In South Africa, the negotiated LRA continues to be adapted to suit the needs of society.

This chapter has demonstrated some similarities and differences in the two countries' labour dispute resolution systems. It is clear that Namibia and South Africa both use conciliation, arbitration and adjudication, but significant differences exist in the

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<sup>256</sup> Fergus "The Distinction Between Appeals and Review- Defining the Limits of the Labour Court's Power to Review" 1573.

processes of the countries' ADR systems. This means that both countries can learn from each other. The next chapter of this study addresses the differences in the countries' ADR systems and the systems that could be adopted across the border, and provides proposals and recommendations for the resolution of the problems identified.

## CHAPTER 7

### CONCLUSIONS AND RECOMMENDATIONS

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#### 7.1 INTRODUCTION

This thesis has examined the Namibian labour dispute resolution system by undertaking a comparative analysis of international labour standards and the South African labour dispute resolution system. The author submits that the provision of a proactive and expeditious dispute resolution system 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 resolution system assures the users of ADR of its credibility, thereby creating confidence and enabling them to trust the system. Ideally, disputes should be resolved at conciliation level, resulting in the minority of disputes being referred to arbitration or the Labour Court. However, it has been established that there are gaps between the legal framework regulating labour dispute resolution and the application of laws and regulations in practice, making the attainment of effective and efficient labour dispute resolution difficult. For this reason, several remedial interventions are proposed that look to the future and the continued provision of fast, effective and user-friendly ADR services.

Chapter One places the thesis topic in perspective by outlining the general overview of the study. This chapter starts with the background of the study; rationale; statement of the problem; research questions; aims and objectives; methodology; research motivation and the justification for study. It sets out the adoption of the ADR system based on the ILO model, which has elements of voluntarism, informality,

accessibility and the speedy resolution of labour disputes premised on international labour standards.

Chapter Two investigates the general background leading to the formation of the ILO and the creation and application of international labour standards in member states, with particular focus on Namibia. Further, the chapter provides a detailed account of the ILO envisaged ADR system, the member states' obligations arising from the ratification of labour standards, and supervision of, enforcement of, and compliance with labour standards. This chapter outlined an overview of ADR systems and structures created in terms of international standards put in place to guide member states.

Chapters Three and Four examine the nature and statutory provisions of the Namibian and South African labour dispute resolution systems. These chapters demonstrate the use of ADR systems of conciliation and arbitration in the two respective countries. The main concept put forward in these chapters is that Namibia and South Africa moved away from the old labour dispensation that was characterised by high legal costs, prolonged legal actions and low settlement rates, to a relatively new ILO ADR system characterised by conciliation and arbitration procedures. Both countries have created institutions intended to effectively deal with labour disputes in an economical and expeditious manner.

Chapter Five examines Namibia's compliance with and enforcement of ratified international labour standards. This chapter demonstrates that Namibia became a member state of the ILO before its independence. The chapter further submits that Namibia has ratified numerous ILO conventions not limited to labour dispute resolution, thereby assuming the obligation to submit periodic reports to the ILO for supervision of the country's compliance with the standards in practice. In addition, the chapter highlights that although Namibia may be seen as complying substantively with its obligations, there are still shortfalls that require improvement to bring the country into full compliance with international labour standards. This relates to, amongst other things, the timely supply of informed reports to the ILO. It is further submitted that although the ILO has well established supervisory machineries to monitor and supervise compliance with standards, the organisation does not have

any established statutory sanctions and punitive mechanisms in place to deal with non-compliance with ratified standards, except those that depend on the goodwill of member states and rely on threats for the withdrawal of technical support and suspension of other international aid in order to compel compliance by member states.

Chapter Six provides a more extensive examination of Namibia and South Africa's labour dispute resolution systems. An analysis of the respective countries' labour law theories and practices was undertaken by setting the two respective systems side by side and examining their similarities and differences. Significant similarities and differences in the respective systems were discovered, making it clear that Namibia can learn from South African best practices.

The pertinent issue addressed in this concluding chapter is closing these gaps and suggesting measures that need to be taken to improve the provision of an effective and efficient labour dispute resolution system. The chapter provides suggestions and recommendations intended to improve the efficiency and effectiveness of the Namibian labour dispute resolution system. This is preceded by a summary of the earlier findings of this thesis.

## **7.2 SUMMARY OF THE FINDINGS**

The aim of this study is to determine whether Namibia's ADR system complies with international labour standards. Namibia became the hundred and thirty sixth member state of the ILO and, at independence, the country formally affirmed its ILO membership and undertook to comply with international labour standards. Eleven binding ILO conventions have been ratified by Namibia to date and the country consequently made a commitment to comply with the obligations arising from these ratifications.

This study has established that Namibia generally complies with most of the ratified international labour standards, particularly the core labour standards. However, the ILO has expressed dissatisfaction regarding various aspects of Namibia's compliance and has made a number of direct requests and observations premised

on articles 19 and 22 of the ILO Constitution. In this respect, the study has established the country's persistent failure to supply the required relevant information in response to the comments of the ILO's CEACR. The most significant failure relates to non-compliance with the Freedom of Association and Right to Organize Convention.<sup>1</sup> This convention embodies the cardinal principles of the ILO as it relates to the rights of workers to fairly pursue their economic and social interests. Given the importance of the convention, the study has ascertained that the ILO has questioned the Minister of Labour's sole determination of essential service disputes without explicitly providing for subsequent appeal procedures. The study further shows that the ILO noted with concern that the Labour Act, 2007 does not provide sufficient details on whether federations of workers and employers' organisations have the right to form confederations. Most importantly, the study has also shown that the ILO has been very critical regarding Namibia's Labour Act on the basis that it excludes the Namibian Prison Services from its application and this is in contravention of article 2 of the Freedom of Association Convention.

The study further reveals that the ILO's CEACR observed that section 64(1)(2) of the Namibian Labour Act, 2007, while providing for the threshold of 50 per cent membership to acquire exclusive bargaining agents status, does not provide for the representative rights of minority trade unions that do not have the prescribed 50 per cent membership. Therefore, it is submitted that minority trade unions in Namibia have no statutory rights to exercise collective bargaining rights; this is irrespective of the absence of a registered majority trade union at a given workplace. This omission is inconsistent with the rights guaranteed to minority unions and their rights to strike, as provided for by Conventions 87 and 98 and based on the interpretation of the ILO supervisory bodies.<sup>2</sup> However, the thesis argues that Freedom of Association and Right to Organize Convention itself does not explicitly provide for collective bargaining rights for minority trade unions.

The study has further highlighted the ILO's CEACR observation of section 86(7)(a) of the Labour Act, 2007, which empowers arbitrators to conduct arbitration in the manner they consider appropriate in order to determine disputes fairly and quickly.

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<sup>1</sup> No 87 of 1948.

<sup>2</sup> Van Niekerk *et al Law@Work* 28.

The CEACR found that the Act does not provide any details on the rapidness of the arbitration procedure. Despite this observation, the study submits that there is no ILO standard that specifically addresses the rapidness of arbitration hearings, except for the Voluntary Conciliation and Arbitration Recommendation,<sup>3</sup> which calls for an undefined expeditious process of arbitration in a very vague and abstract terms.

In addition, this study found that the Government of the Republic of Namibia, particularly the Ministry of Labour and Social Welfare, has failed in its obligation, despite several requests, to submit proof of consultative meetings held with social partners on reports submitted to the ILO. The ILO observed that this practice has denied social partners their active role in the supervision process of ratified standards. Non-consultation with social partners is in conflict with article 5(1) of the Tripartite Consultation (International Labour Standard) Convention<sup>4</sup> that requires tripartite consultation to be held at appropriate intervals on reports to be submitted to the ILO.

It has further been established that section 33 of the Labour Act, 2007 fails to provide detailed requirements of valid and fair reasons for the termination of employment as required by article 4 of the Termination of Employment Convention.<sup>5</sup> South Africa has promulgated a code of good practice to assist in the interpretation of these concepts. Namibia has yet to develop similar codes of good practice in order to fully comply with this convention.

It was also found that the ILO does not have any firmly grounded statutory enforcement mechanisms in place and lacks the statutory power to impose penalties for member states' non-compliance with international standards. Given this vacuum, some attempts have been made to integrate social clauses in trade agreements of the World Trade Organization (WTO) to aid in the facilitation of trade sanctions for non-compliance with international labour standards. However, these attempts have been rejected by ILO constituents on the basis that this practice affects global trade. The author agrees with the view that this lack of enforcement ability makes the ILO

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<sup>3</sup> No 92 of 1952.

<sup>4</sup> No 144 of 1976.

<sup>5</sup> No 158 of 1982.

ineffective in changing the labour practices of governments.<sup>6</sup> The ILO has been equated to a government without governance, making the organisation increasingly dysfunctional.

It is submitted that the ultimate goal of the ILO's labour standards should not be to restrain member states in the exercise of self interest, but, instead, should be to help governments, such as that of Namibia, to identify their self-interests and achieve these interests. The study further suggests that the ILO must begin to develop formulas that incorporate enforcement and sanctions for non-compliance. However, it is recommended that priority be given to educating member states and that capacity building, monitoring, learning best practices, technical assistance, and incentives for goodwill compliance be included in the process. For this reason, it is submitted that the ILO should not be an obstacle to the progress of member states and that the organization should become a solution rather than a problem.

Besides an analysis of Namibia's compliance with international labour standards, the second specific objective of this thesis is to analyse the Namibian labour dispute resolution system and compare it to South Africa's ADR system. The ultimate goal is to establish the positive attributes of the South African ADR system that Namibia can learn from, with a view to strengthening and improving the country's labour dispute resolution system.

The study established that, prior to Namibian independence in 1990, the country was administered by South Africa as a C mandate in terms of the Peace Treaty of Versailles and article 22 of the Covenant of the League of Nations.<sup>7</sup> At the time, the mandate empowered the South African government to exercise full administrative and legislative power over South West Africa, now Namibia. The study revealed that the SWAPO-led government brought about the demise of South Africa's colonial occupation of Namibia, led by Sam Shafishuna Nujoma, who later became the first President of the Republic of Namibia.

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<sup>6</sup> Douglas *et al* "An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions and NGOs" 276.

<sup>7</sup> Bauer *Labour and Democracy in Namibia* 19.

During South Africa's occupation of Namibia the country had no comprehensive labour legislation in place. However, as South West Africa was seen as South Africa's fifth province, it is submitted that most laws that were passed in South Africa were immediately duplicated in Namibia, or closely resembled those of South Africa. In this respect, the study identified the Namibian Master and Servants Proclamation,<sup>8</sup> with similar provisions to the Industrial Conciliation Act<sup>9</sup> in South Africa, and the Wages and Industrial Conciliation Ordinance,<sup>10</sup> comparative to the South African Industrial Conciliation Act 28 of 1956, which were both discriminatory to African workers. The Wiehahn Commission brought about significant changes to the labour relations system in South Africa, prior to the country's first democratic elections in 1994. A similar commission, led by Professor Wiehahn, was constituted shortly before Namibia's independence and was tasked with investigating labour matters in the country. The study revealed that the Wiehahn commission's recommendations were gradually implemented, with the first changes brought about by the enactment of the post-independence Labour Act of 1992 and later changes implemented through the current Labour Act of 2007.

The author applauds Namibia and South Africa for adopting constitutions that guarantee the protection of basic labour rights and for undertaking labour reforms to give effect to these constitutionally entrenched labour rights, with the aim of regulating all facets of labour relationships. To this end, Namibia enacted the Labour Act of 1992, which later become inadequate in resolving labour disputes, leading to the passing of the current Labour Act of 2007. It is suggested that this Act substantially altered labour law in Namibia and created a new framework for the resolution of labour disputes. From the evidence presented in the study it is clear that the changes made to the machinery for the resolution of labour disputes reflects a consensus that its predecessors, as set out in the 1992 Act, were not working effectively.<sup>11</sup> The Labour Act of 2007 shifted the emphasis to conciliation and arbitration by the Labour Commissioner. Given the backdrop of the repealed 1992 Act, the study found the new approach non-confrontational and based on user-

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<sup>8</sup> No 24 of 1920.

<sup>9</sup> No 11 of 1924.

<sup>10</sup> No 35 of 1952.

<sup>11</sup> Fenwick *Labour Law in Namibia* 39.

friendly procedures that suit the parties to labour disputes, instead of adversarial, court-based methods.<sup>12</sup>

The changes in the Namibian labour dispute resolution system resemble that of South Africa, where the negotiated LRA of 1995 was enacted to replace the 1956 LRA. The study affirms that the LRA was enacted to promote, among other things, an effective and efficient labour dispute resolution system.<sup>13</sup> It was expected to overcome the problems faced by its predecessor.

The South African LRA has decriminalised labour law by removing the use of criminal law to enforce labour law and collective agreements. It is submitted that the inclusion of criminal provisions in labour legislation violates international labour standards. Having moved away from criminal sanctions to enforce labour laws, South Africa adopted an approach of self-regulation and enforcement through private law interventions, such as statutory arbitration, private arbitration and adjudication by the Labour Court.<sup>14</sup> In Namibia, despite the Wiehahn Commission's recommendations to decriminalise labour law contraventions, the drafters of both the 1992 Act and the Labour Act of 2007 ignored these recommendations and permitted the inclusion of criminal sanctions in labour legislation. The Namibian Police and prosecutors experience serious difficulties in ensuring the successful prosecution and conviction of offenders due to the complexity of related charges. Consequently, the author contends that there is no purpose in the inclusion of such criminal provisions, given the very low rate of success (if any) in bringing offenders before criminal courts.

The Labour Commissioner's office and the CCMA 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. It is argued that the Labour Commissioner is an individual civil servant, appointed by the Minister of Labour, and includes conciliators and arbitrators in his office. As a result, social partners have very little input with regard to decisions made in the appointment of the Labour Commissioner, conciliators and arbitrators, save for playing an advisory role

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<sup>12</sup> Fenwick *Labour Law in Namibia* 40.

<sup>13</sup> S (1)(d)(iv) of the LRA 66 of 1995.

<sup>14</sup> Brassey *Commentary on the Labour Relations Act* A1-4.

in establishing the terms of conciliators and arbitrators' qualifications. In South Africa, there is a clear difference in that the CCMA is established as an autonomous statutory body with legal personality. The director and commissioners are appointed by the governing council of the CCMA. The CCMA is, without a doubt, independent of the state, political parties, trade unions and employers' organisations. This is not the case in Namibia, despite recommendations from the Taskforce responsible for drafting the Labour Act that the Labour Commissioner be independent of the state. Nevertheless, it has been pointed out that the Namibian Labour Act places a great deal of emphasis on the independence and impartiality of the Labour Commissioner and all arbitrators in the performance of their function, despite their appointment as civil servants.

It has been established that the LRA adopted the ADR systems of conciliation and arbitration and created the Labour Court as last resort in dispute resolution. It is clear that Namibia followed South Africa's example with the enactment of the Labour Act, 2007 and that the current Namibian labour dispute resolution system has been "borrowed or transplanted" from South Africa.<sup>15</sup> However, minor differences do exist.

Although the principles of conciliation are similar in both countries, the original Labour Act of 2007 empowered conciliators to determine labour disputes at conciliation level. This created the perception that conciliation meetings had similar trappings to a court or tribunal, which produces 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.<sup>16</sup> This provision has since been altered by the Labour Amendment Act No. 2 of 2012. In South Africa, since the inception of conciliation, commissioners have no binding determination powers at conciliation level.

It has further been established that there are practical differences between Namibian and South African ADR systems in terms of referral timelines for interest and rights disputes. In Namibia, interest disputes are referred to the Labour Commissioner

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<sup>15</sup> Fenwick *Labour Law in Namibia* 45.

<sup>16</sup> *Purity Manganese (Pty) Ltd v Tjeripo* par 29.

within one year, while rights disputes, such as dismissals, are referred within six months from the date the cause of action arose. In South Africa, dismissal disputes must be referred within 30 days, while unfair labour practice and discrimination disputes must be referred to the CCMA within six months of the dispute arising. Interestingly, it was found that there is a statutory provision for condonation for late referral on good cause shown in South Africa, while there is no such provision in the Labour Act in Namibia, save for the provision in the Rules of the Labour Commissioner. The Labour Court in Namibia has stressed that a dispute referred after the expiry of the six-month period is out of time and, consequently, prescribed in terms of section 82 of the Labour Act. The author submits that the absence of condonation provisions in the enabling statute, if challenged in the Labour Court, could render condonation provisions in the Rules of the Labour Commissioner null.

It has further been established that representation is limited to the parties at conciliation meetings, as stated in the LRA and the Labour Act, 2007. In South Africa, legal representatives, including consultants, are not permitted at conciliation level. In Namibia, legal representation and consultants are permitted on the agreement of the parties to the dispute and at the discretion of the conciliator. Accordingly, the author contends that legal representation at conciliation turns the proceedings legalistic and expensive for ordinary parties to the dispute and, therefore, has the effect of negating a speedy and simplified labour dispute resolution system.

It was further found that the Labour Act, 2007 has not created any mechanism for enforcing settlement agreements resulting from conciliation. The only remedy is to approach the Labour Court to make the settlement an order of Court. The author submits that this causes parties to enter into settlement agreements without the *bona fide* intention to resolve the dispute, knowing full well that there is no provision in the Labour Act compelling them to do so. Consequently, many settlement agreements remain in abeyance in Namibia. Namibia can learn from South Africa, which has a provision permitting the parties to approach the CCMA in order to convert a settlement agreement to an arbitration award, thereby acquiring the enforcement status of a usual arbitration award.<sup>17</sup>

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<sup>17</sup> S 142A of the LRA 66 of 1995.

The differences between the Namibian conciliation-arbitration (con-arb) process and that of South Africa are noted. In Namibia, con-arb was implemented with the enactment of the Labour Act, 2007 and directs that all disputes must go through a conciliation process before arbitration is sought. There are only two exceptions to this provision: disputes of fundamental rights in terms of section 7 of the Labour Act, 2007, which may be taken directly to the Labour Court, and cases where the dispute was already conciliated, for instance in collective bargaining disputes where the parties have agreed to refer the matter to arbitration. In South Africa, con-arb is a relatively new intervention applicable to a limited range of disputes. Only specific disputes described in Chapter Six (6.6.2) are permitted to make use of the con-arb process.

In a similar vein, parties to the con-arb process have the statutory privilege of objecting to the process; the same does not apply under Namibian labour law. These statutory privileges have resulted in a number of objections being raised about the con-arb process, creating a major challenge for the CCMA as parties seem to object to the process for no apparent reasons, possibly only to frustrate the other party's attempt to a speedy resolution of the dispute. Similarly, the author contends that while the effectiveness of a dispute resolution system depends substantially on its legitimacy, this attribute should not be compromised for efficiency. Focusing on the speed of con-arb proceedings could, in some cases, lead to the rapid settling of disputes and possible superficial settlements that fail to address the underlying causes of conflict or the real needs of the parties.<sup>18</sup>

The study ascertained that an arbitration award must be issued within 30 days of the conclusion of an arbitration hearing by arbitrators in Namibia and within 14 days by CCMA commissioners in South Africa. In both cases the award is final and binding and automatically earns interests. However, in South Africa, the liability for interest ends when the debtor makes an unconditional offer to pay.<sup>19</sup> This is a result of the Labour Court's<sup>20</sup> finding that an award is a debt and, as such, is subject to the

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<sup>18</sup> Bhorat *et al* *An Analysis of the CCMA* 33.

<sup>19</sup> See *Top v Top Reisen CC* (2006) 27 ILJ 1948 LC.

<sup>20</sup> See *Mpanzama v Fidelity Guards Holdings (Pty) Ltd* [2000] 12 BLLR 1459 (LC).

Prescription Act No. 68 of 1969. In contrast, in Namibia, the interest accumulates from the date of judgment or award to the date of payment and does not prescribe.<sup>21</sup>

The Director of the CCMA has the statutory power to certify the award, thereby making it enforceable immediately. 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 the Labour Court to make the award an order of Court, consequently becoming enforceable. 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.

It has been established that despite the prescriptive instruction by the Labour Act, 2007 for statutory arbitration and the Labour Courts to take into account the code of good practice when deciding cases that come before them, at the time of writing Namibia had not developed and made available codes of good practice on a range of issues, including dispute resolution. The study asserts that the codes of good practice, if promulgated, will facilitate proper implementation of the legislative framework and give users guidance on labour law and dispute resolution. Codes of good practice play a significant educational function and serve as an important dispute prevention aid.<sup>22</sup>

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, as discussed in Chapter 6 (6.6.5). In Namibia, the Labour Act fails to provide similar guidelines on awarding compensation and, as such, unjustified compensation awards have been made by arbitrators in the Labour Commissioners' office. This has created varying opinions as to the permissible limit of compensation awards. The study found that the Namibian Labour Court has not been very helpful neither in this respect. The Court has only stated 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.

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<sup>21</sup> *JB Cooling and Refrigeration CC v Kasho Kavendjua* par 32.

<sup>22</sup> Thompson *Dispute Prevention and Resolution* 33.

Clearly, 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 has 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 them or for labour inspectors to obtain writs of execution.

Two methods of enforcing arbitration awards have been illustrated: 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 the Deputy Sheriff to obtain a writ of execution. Contempt of court, on the other hand, is instituted by the Government Attorney on behalf of the labour inspector. This study shows that, in South Africa, labour inspectors play no role in the enforcement of arbitration awards. It is left to the parties themselves to pursue the enforcement at their own cost. This, for obvious reasons, may be unattainable for the ordinary party who may not be able to meet the costs involved. However, despite the involvement of the Government Attorney in the enforcement of reinstatement awards in Namibia, very little, if anything, has been achieved. At the time of writing, no contempt of court case had ever been brought before the Court, with reinstatement awards that have not been complied with piling up in the offices of the Government Attorney, where staff continuously promise labour inspectors that they intend to bring these applications before the Labour Court. This has led to a loss of confidence in the system by persons with unenforced reinstatement awards.

It has been found that the bargaining council system in South Africa complements the work of the CCMA, thereby reducing the organisation's case load and backlog. In Namibia, there are no statutorily 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, they have proven 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.

The study has demonstrated that private arbitration is an alternative method of voluntary dispute resolution available to disputants in terms of the Arbitration Act No. 42 of 1965. The author asserts that private arbitration in Namibia and South Africa is done in the same manner and premised on the same Arbitration Act. The study submits that there are, however, no properly established and recognised private arbitration institutions in Namibia, such as Tokiso Dispute Resolution in South Africa. Therefore, parties have a limited choice 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 adaptive and attuned formulas. It contributes benefits such as privacy, informality, speed, and focus on substance rather than form. This makes private arbitration cost effective even where it is not publicly subsidised;<sup>23</sup> disadvantages of this system are discussed in Chapters Three and Four.

Aside from available ADR machineries, the Namibian Labour Act, 2007 and the LRA of South Africa established Labour Courts in both countries, and the Labour Appeal Court in South Africa, as avenues for formal litigation and for the development of jurisprudence in labour law.<sup>24</sup> In South Africa, the Labour Court is separate from the High Court, although it has, in certain disputes, parallel jurisdiction. 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 matter while sitting as a Labour Court judge. The author argues that this practice or system tends to compromise labour issues as they require specialisation and arbiters vested with specialised skills to effectively handle disputes.<sup>25</sup>

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<sup>23</sup> Thompson *Dispute Prevention and Resolution* 46.

<sup>24</sup> Govindjee *Labour Dispute Resolution* 238.

<sup>25</sup> Khabo *Collective Bargaining and Labour Dispute Resolution* 14.

The study has shown that, 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 on a combination of these.<sup>26</sup> Appeal is permitted on the basis of article 12(1)(a) of the Namibian Constitution, which guarantees the right to a fair trial, as arbitration is considered a tribunal for the purpose of resolving labour disputes. The study shows that, in South Africa, the CCMA is an administrative body as defined in section 33 of the Constitution of the Republic of South Africa. However, the provisions of PAJA do not apply for the purpose of review. Review applications are therefore limited to the grounds listed in section 145 of the LRA. Clearly, 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 review of the arbitration proceedings. Inherent delays in finalising disputes are prevalent in both the South African and Namibian court systems, negating the ultimate objective of labour legislation, which sought to ensure that labour disputes are resolved expeditiously and in an efficient manner. The author argues that these delays are caused by the lack of statutory established timelines within which labour disputes must be finalised by the Labour Court, particularly where the enforcement of the award is stayed. Therefore, it is submitted that this has an adverse effect on the beneficiary of the award, particularly where the affected party continues to suffer the effects unemployment.

### **7.3 RECOMMENDATIONS FOR IMPLEMENTATION**

“It always seem impossible until it’s done” – Nelson Mandela.

In the light of the general findings of this study, the following recommendations are made.

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<sup>26</sup> S 89(1)(a)(b) of the Labour Act, 2007 (Act No 11 of 2007).

### **7.3.1 RECOMMENDATIONS FOR COMPLYING WITH INTERNATIONAL LABOUR STANDARDS AND IMPLEMENTING LEGAL REMEDIES TO IMPROVE ENFORCEMENT OF AND COMPLIANCE WITH INTERNATIONAL STANDARDS**

It is recommended that within the scope of Namibia's constitutional commitment to adhere to and act in accordance with international conventions and recommendations, the Government of the Republic of Namibia, particularly the Ministry of Labour and Social welfare, should study Chapter Five of this thesis as this section highlights numerous bottlenecks in the country's efforts to fully comply with ratified international labour standards, particularly those relating to labour dispute resolution. The study identifies persistent failures to supply relevant information and action in accordance with the comments of CEACR. It is therefore proposed that a ministerial reporting committee be established to oversee other offices, directorates and divisions in an effort to strengthen the reporting capacity of these sections. The suggested reporting committee must communicate its work to the Labour Advisory Councils for their input before finally submitting reports to the ILO. Doing so will lead to full compliance with the Tripartite Consultation (International Labour Standards) Convention No. 144 of 1976.

The Government of the Republic of Namibia has signed a Memorandum of Understanding with the ILO to assist the country in realising its obligations arising from ratified conventions. Through this agreement, entitled "The Decent Work Country Programme", the author recommends that government must continue to seek technical assistance and assistance with capacity building to allow the reporting committee to enhance its understanding of the application of conventions in order to ensure the timely and satisfactory submission of the required reports to the ILO.

Social partners, such as NUNW and NEF, have equal obligations in the monitoring and supervising of compliance with international standards in Namibia. Instead of waiting on government or the ILO to furnish them with copies of reports, they must be pro-active and inquisitive in establishing whether government complied with its ILO obligations in a timely manner. They too require capacity building assistance to enable them to properly monitor the process of reporting on and compliance with ILO

obligations. Ultimately, this course of action will save the country from appearing before the CEACR to explain the persistent failure to submit the required information.

Freedom of association is a cardinal principle of the ILO on the basis that it permits workers to fairly pursue their economic and social interests. As highlighted previously, the Labour Act, 2007 excludes the Namibian Prison Services from its application. The author submits that this exclusion contravenes the important ILO Freedom of Association and Protection to Organize Convention and recommends that policy-makers take note of this contravention. Although national security must be taken into consideration, urgent and concerted efforts are needed to amend the Labour Act, 2007 to include the Namibian Prison Services in its scope.

Namibia can learn from South Africa, where armed forces are permitted to associate for purposes of collective bargaining. In this respect, a study of the *SA National Defense Union v Minister of Defense and Another* is helpful as the Court made specific reference to article 2 of Convention 87, which permits workers and employers, without distinction, to have the right to establish and join organisations of their own choosing without prior authorisation. The Court ruled that article 9 of the convention guarantees armed forces these rights to a certain extent. This case could be persuasive in addressing the plight of the Namibian Prison Services.

In a similar vein, it is recommended that the Labour Act, 2007 must recognise minority trade unions for the purposes of collective bargaining, particularly in instances where there is no majority trade union representation. Doing so will ensure that the country complies with Conventions 87 and 98 on Collective Bargaining and the rights of minority trade unions to strike. A mechanism establishing a reasonable threshold, such as sufficient representation, can be adopted as it has proven to be effective in South Africa.

### **7.3.2 WHAT CAN NAMIBIA LEARN FROM SOUTH AFRICA WITH A VIEW TO STRENGTHENING AND IMPROVING THE COUNTRY'S LABOUR DISPUTE RESOLUTION SYSTEM?**

In the interest of resolving labour disputes efficiently and effectively, the author recommends an adjustment to the process of arbitration in Namibia, specifically

through unambiguously defined parameters as to what constitutes fair and quick determination of disputes, although international labour standards also fail to provide useful timelines for arbitration. The current 30-day period applicable in the conciliation process and provided for in the rules of the Labour Commissioner 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.

The author further recommends that section 33 of the Labour Act, 2007 be broadened to provide for a detailed meaning of the requirements for valid and fair reasons of dismissal instead of purely relying on jurisprudence created by the Labour Court. Alternatively, it is time that the Labour Advisory Council finalises the long awaited previously drafted guidelines and codes of good practice to be issued by the Minister of Labour. These guidelines are essential for the proper administration of the Labour Act, including dispute prevention and resolution, by the Labour Commissioner and users of the Labour Commissioner's services. Namibia can also learn from South Africa in this respect; in order to facilitate the proper implementation of the LRA and to give users guidance on labour law, the country promulgated codes of good practice related to a variety of labour related issues as an annexure to the LRA.

The Labour Act, 2007 contains a number of provisions that may be fairly perceived to have been borrowed or transplanted from South African labour law, but, unlike South Africa, Namibia did not decriminalise this branch of law. The criminal provisions in the Labour Act, 2007 have proven fruitless and difficult to enforce, thus time has come to reconsider such provisions.

The author additionally proposes that, given the recommendations of the drafting Taskforce team that had the wisdom to recommend that the Labour Commissioner be an independent institution outside of the Ministry of Labour, the time is ripe for policy makers to consider having the Labour Commissioner's office as an independent institution similar to the CCMA in South Africa. This is the prevailing trend in most SADC countries; for example, Lesotho has the Directorate of Dispute

Prevention and Resolution (DDPR), established under the Labour Code (Amendment) 2000, and Swaziland has the Conciliation, Mediation and Arbitration Commission (CMAC). Making the Labour Commissioner's office independent will restore users of the system's confidence in it, particularly where government disputes are involved.

The author recommends that given the requirement to simplify procedures for dispute resolution, the current technical and cumbersome referral procedures are not as envisaged and that certain aspects, for example the requirement to have proof of service that has been commissioned by the Namibian Police accompanying the referral, be removed. The police have no role in facilitating the resolution of labour disputes and the Labour Commissioner must be able accept proof of service based only on the proof outlined in the rules. Referral documents are accepted in South Africa without the involvement of the police.

In respect of the referral of labour disputes to the Labour Commissioner, the author recommends that an amendment be made to the Labour Act to include a provision similar to that in South Africa's LRA in respect of condonation for good cause shown. Although it appears that condonation is provided for in the Rules of the Labour Commissioner, there is no provision made in the Labour Act. The same applies to condonation in respect of review before the Labour Court. Condonation is only permitted in appeal applications, while the Labour Act omits the possibility of condonation in a review application. In South Africa, condonation is allowed in review proceedings on the grounds listed in Rule 9 of the CCMA. The same grounds for condonation can be applied in Namibia.

The author recommends that the sole powers of the Labour Commissioner to assign disputes be relaxed in terms of section 122 of the Labour Act, 2007. The Commissioner should exercise his powers of delegation to regional control arbitrators to allow them to designate disputes to conciliators and arbitrators within their regions in an attempt to improve efficiency, as is done by the senior convening commissioners of the CCMA.

The author strongly recommends that legal representation, including consultants, be excluded at conciliation meetings. This representation turns the meeting into a legalistic arena, thereby prejudicing a party appearing without legal representation and becoming expensive for ordinary disputants, denying them an even playing field. This has proven to work very well in South Africa, where legal representation and consultants are not permitted at these meetings.

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 adapted 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. The author proposes that a provision similar to section 142A of the LRA be included in the Labour Act. This will allow arbitration agreements to be enforced in the same manner as ordinary awards in terms of section 90 of the Labour Act, 2007. Moreover, arbitration settlements may be reinforced by the Labour Court in terms of section 117(1)(f) of the Labour Act, 2007.

Given the current delays in making awards enforceable, the author recommends an amendment to section 87 of the Labour Act, which 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 is an order of court. The author suggests the same approach be adopted in Namibia to reduce the backlog experienced at the Labour Court and to do away with the current unclear procedure of filing arbitration awards for the purpose of enforcement.

The author recommends that in the absence of guidelines and a code of good practice, section 86(14)(e) of the Labour Act, 2007, which provides for the awarding of compensation, be broadened to set out parameters for awarding compensation. This will eliminate the inconsistencies currently experienced in the system, where arbitrators have *carte blanche* and can award unlimited compensation using their discretion rather than defined guidelines. In this case, using a similar model of

limitation on compensation as set out in section 194 of the LRA will suffice in guiding arbitrators and the Labour Court to award just and equitable compensation.

The author recommends that the current sectoral or industry bargaining forums be given statutory recognition in order to operate in the same manner as the bargaining councils established by the South African LRA, despite the difference in industries. This will reduce the Office of the Labour Commissioner's workload and allow staff to deal with issues such as resolving labour disputes between parties that arise from collective agreements concluded in the forums and the establishment of minimum wages.

The author appreciates the speed in resolving labour disputes through private arbitration as parties voluntarily enter into arbitration agreements. Given the recognition of private arbitration in the Labour Act, 2007, the author suggests that labour trained persons should consider establishing formal private arbitration institutions in Namibia, similar to Tokiso Dispute Settlement in South Africa, to serve as an alternative to the statutory system provided.

The author recognises the essential role played by the Labour Court in Namibia to bring about an end to labour disputes where ADR proves futile and proposes that social partners and policy makers refer to the recommendations of the task team that suggested the establishment of an independent and dedicated Labour Court, staffed by specialist labour judges. This will negate the perception that the Labour Court is subordinate to the High Court and will do away with compromising labour dispute resolution. South Africa and other SADC member states, such as Lesotho, Malawi, Swaziland, and Botswana, have dedicated Labour and /or Industrial Courts.

Further, the author recommends that the Judge President of the Labour Court, in the interest of resolving labour disputes expeditiously as required by the ILO standards, sets timelines within which labour disputes must be concluded by the Court. The current delays have proven to have adverse effects on the parties, including where reinstatement has to be considered as a dismissed employee would long have been replaced by the time the dispute is resolved.

The Labour Act, 2007 emphasises the systematic prevention and resolution of labour disputes. This can be achieved by the Labour Commissioner and the Labour Inspectorate embarking on sensitisation and training initiatives aimed at satisfying the objectives of the Labour Act and raising awareness on harmonious labour relations in workplaces. By doing so, many labour problems can be solved on the spot, thereby preventing complaints arising and limiting or minimising the need for conciliation and arbitration by the Labour Commissioner.

The author also recommends that labour inspectors be excluded from the general conciliation and arbitration process. They should rather be allowed to focus on their core mandate of conducting workplace inspections with a focus on risk enterprises where there are persistent common workers' complaints.

Similarly, the author proposes that labour inspectors involved in the enforcement of arbitration awards be given the proper training in respect of the court system. Given the failure of the current enforcement system, the author further recommends that a clear, unambiguous standard operating procedure be developed, in consultation with the Government Attorney and the Registrar of the Labour Court, to facilitate the effective enforcement of arbitration awards. This should include timeframes from the time the award is filed with the Labour Court, the enforcement by labour inspectors and cover all steps until the matter is finalised. Moreover, where practically possible, the standard operating procedure must be gazetted to be recognised by the law.

Ultimately, the author recommends the handing down and publication of ADR decisions as is the case with the CCMA awards, to constitute valuable public good by disseminating information about what can be done and cannot lawfully be done.

Overall, based on the aforementioned findings and recommendations, it is strongly recommended to study and consider the positive attributes of the South African ADR system with a view to strengthening and improving Namibia's labour dispute resolution system.

## 7.4 GENERAL CONCLUSIONS

The study presents ADR as a method of conflict resolution that differs from the traditional methods of adjudication and litigation. ADR institutions have been created to facilitate this, specifically the Labour Commissioner in Namibia and the CCMA in South Africa. The Labour Act, 2007 and the LRA have been enacted as legal frameworks through which labour disputes can be resolved. This includes the use of conciliation, with only a few disputes going to arbitration or, as a last resort, to the Labour Court. These institutions have been mandated to promote and implement effective strategies for dispute prevention and resolution. However, the author submits that both the Labour Commissioner and CCMA seem to be failing to successfully realise these objectives. The basis for this view is the number of cases that appear before the Labour Courts for final adjudication.

As the primary sources of this study, a premium was placed upon the provisions of the Labour Act, 2007 and the LRA, legislation that envisages the quick and cost-effective resolution of conflicts and disputes. The Labour Commissioner and the CCMA are the drivers of this objective, which must be addressed through interventions such as communication and the reaching of agreements. Ideally, ADR should have moved disputes away from the court-based system, which was used in the past as a battle ground where labour wars were fought. However, the author contends that ADR is not as effective as envisaged; disputes are not dealt with in a faster way or in a friendly environment, and ADR systems consequently fail to deliver the expected quick results. This has created a perception that the courts are the only avenue available to finalise labour disputes. This perception undermines the purpose of the Labour Commissioner.

The study has demonstrated that disputes should be resolved as quickly and informally as possible, with little or no procedural technicalities, and without allowing them to drag on indefinitely, offering immediate solutions instead. This is far from the reality of the situation. In contrast, although the Labour Act, 2007 and the South African LRA have brought statutory dispute resolution within the reach of the ordinary worker, these Acts may have compounded the problems relating to dispute resolution in the respective countries. The author feels that these statutes have created

sophisticated systems of dispute resolution in which most role players are seen as failing to operate as a result of the complex and technical processes of dealing with disputes.

It was further deduced that given all the bottlenecks in the ADR systems, it has caused a new type of adversarialism in the employment relationship based on rights, rules and powers mostly sourced from guidelines in the labour statutes that prescribe the norms for dealing with conflict in the workplace. The technical nature of conflict resolution in the workplace, the inability of the parties involved to handle disputes at that level and the adversarial nature of the prevailing employment relationship are but some of the reasons leading to the high rate of referrals to and subsequent problems experienced by the CCMA and the Labour Commissioner.

The author suggests that the labour dispute resolution system in Namibia is not strictly time bound and therefore not responsive to business and trade unions' (employees') needs and expectations. The involvement of legal practitioners at the conciliation level makes the system expensive, complicated and therefore ineffective. The outcomes are neither quick nor fair or equitable. As a result, the author submits that there has merely been a change in emphasis, from the former judicial system or cumbersome process of conciliation boards to the new ADR system. The system has proven to fail to resolve labour disputes in the most effective manner without having to resort to the Labour Court.

Consequently, the author has made the above recommendations, which, if implemented, will not only treat the symptoms, but also the causes of workplace conflict and remedy the deteriorating, ineffective labour dispute resolution system.

Given the above, the author does not claim to address all the problems in the labour dispute resolution systems of the two countries. The study's limitations were pointed out in Chapter One; the topic was examined from a legal theoretical and practical perspective limited to the literature available and the personal experience of the author. The thesis did not intend to address those aspects that are beyond the scope of the study and further research of the system may be necessary as the system

continues to develop. Such study will complement this thesis in order to give a holistic solution to the problems experienced in the ADR systems of both countries.

A further limitation encountered in this study was the lack of adequate academic literature in Namibia that clearly explains what an efficient and effective labour dispute resolution system is and what it constitutes. This limitation did not, however, pose a serious problem given the availability of abundant resources on the subject in South Africa and internationally.

It is hoped that the outcome and results of this research will raise awareness with the policy makers in Namibia and equip them with knowledge that is helpful in improving the labour dispute resolution system in the country. In a similar vein, it is expected that the research will sensitise social partners, arbitrators and all other users of the ADR system in Namibia. The absence of a similar study in Namibia makes this study unique and significant to labour law scholars internationally, particularly in the SADC countries, and labour law practitioners, due to its comparative content. This study has created new knowledge on the topic, which may be further expanded by aspiring labour law researchers in Namibia or elsewhere.

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