



Ten years of the CCMA – An assessment for labour¹

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1 INTRODUCTION

Members of COSATU, NACTU, FEDUSA, and other attendees from organised labour in the Western Cape and guests; it is truly an honour for me to address you this evening. We hope that this will be the first of many similar seminars that DITSELA will host in future.

I have been asked to speak on the topic: ‘Ten years of the CCMA – An assessment for labour’. While it may have been more appropriate for a person from organised labour to critically assess the role of an institution, such as the CCMA over the last ten years, I will try, as far as possible, to do so within the context of the seminar’s theme: ‘Labour Law: Engaging from a working class perspective’.

While the CCMA has a statutory obligation to be impartial and to be seen to be impartial, there are many of us who fully understand that our legal system, labour laws and labour market institutions are cultural products of our society and our history. We, therefore, cannot narrowly define the law as a given set of rules aimed at regulating the community or labour market.

If we are committed to furthering the interests of working people and advancing social justice, then we must view our legal system and its institutions as one that can be shaped by our actions and one in which the promotion of social justice should take priority over vague legal concepts. This means that the law in South Africa must constantly be shaped by an ongoing engagement and constitutional project to build a just society.

The struggle for workers’ rights in South Africa was and remains located within the broader ideological, class and human rights struggles of our people. This struggle did not end in 1994 or with the promulgation of the Labour Relations Act 66 of 1995 (the LRA) and other important pieces of labour market legislation. Rather, the post-1994 period has ushered in a new phase of engagement under changed conditions within a tripartite and consensus-driven regulatory environment that is a part of a broader constitutional project.

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While NEDLAC, other tripartite institutions and the CCMA are regarded as independent tripartite institutions, they remain products of the historical struggle and the resulting consensus between organised labour, business and government. However, as we learn in the real world every day, the current consensus is never cast in stone. The laws and institutions that currently regulate our labour market will continue to be impacted upon and battered by broader developments at a socio-economic and political level.

The so-called 'unintended consequences' of our current dispensation could very well be the thin end of the wedge aimed at bringing about negative 'intended consequences' to the detriment of workers and the protections they presently enjoy.

It therefore goes without saying that the CCMA remains a terrain of engagement like every other tripartite institution in South Africa today. The CCMA does not make the law. Its role is to interpret and implement the law that is promulgated as a result of the dialogue and consensus-driven process between the social partners.

Organised labour, therefore, like the other stakeholders, has a critical and ongoing role to play both in giving form and substance to the laws that regulate the work of the CCMA and in ensuring that the institution is adequately resourced to meet its obligations as required by the law. Perhaps, at this point, it is necessary to briefly reflect on the purposes of the LRA.

The LRA 1995 was aimed at changing the law governing labour relations and, for this purpose, to give effect to section 23 of the Constitution.²

Section 1³ of the LRA gives effect to the above intentions to change the law by clearly setting out the purpose of the Act, that is, to advance economic development, social justice, labour peace and the democratisation of the workplace.

Considering the above four key purposes spelt out in the Act, it is evident that organised labour was, and still is, party to a consensus that tells us that the advancement of economic development, social justice, labour peace and

2 S 23 reads as follows:

- (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
 - (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 organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation 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).
- (6) National legislation may recognise 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).

3 S 1 reads as follows:
'1. Purpose of this Act

(continued)

the democratisation of the workplace are both our constitutional and statutory labour market mandates, set by the social partners, against which the effectiveness of our institutions, such as the CCMA, must be measured and judged. So, too, must we measure and judge the effectiveness of Government, organised labour and business in terms of advancing those non-negotiable rights set out in the Bill of Rights.

Any assessment of the CCMA must of necessity be addressed within the confines of our real and practical experiences with the law, the institutions created by the law over the past ten years, our current reality, what we believe is likely to be the situation for the foreseeable future and the key challenges this poses for organised labour.

What then, are the key areas of the CCMA requiring an assessment for labour and what challenges does such an assessment raise within the broader context of our labour laws that will allow you to more effectively engage from a working class perspective?

Any assessment of the CCMA for the past ten years must also, of necessity, deal with CCMA operations and service delivery, the law as it affects labour, the current operations of the CCMA and related labour market debates such as the debate on over-precederalisation.

I will, in this brief assessment, consider some of these key areas and what we believe are some of the key challenges facing labour both now and in its future efforts to use the law to advance both individual and collective rights and the protection of workers, while strengthening the trade union movement and its organisational capacity to reach the millions of unorganised workers in South Africa.

2 A HELICOPTER VIEW AND ASSESSMENT OF CCMA OPERATIONS

The LRA clearly provides that various types of disputes, such as disputes of rights and disputes of interests fall within either the sole jurisdiction of the CCMA or the Labour Courts.

At the same time, the Labour Court (LC) and High Court (HC) and Labour Appeal Court (LAC) and Supreme Court of Appeal (SCA) have concurrent ju-

The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are:

- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
 - (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
 - (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can:
 - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
 - (ii) formulate industrial policy; and
 - (d) to promote:
 - (i) orderly collective bargaining;
 - (ii) collective bargaining at sectoral level;
 - (iii) employee participation in decision-making in the workplace; and
 - (iv) the effective resolution of labour disputes.'
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jurisdiction over certain issues with the SCA being able to hear appeals against decisions of the LAC.⁴ In other words, a party can choose to either approach the labour courts or other courts for relief in certain labour disputes. This clearly is an untenable situation that can only be resolved by the legislature and what we require at this level is not just legal certainty but legal sanity.

With this background, let me now turn to assessing some of the CCMA's work in areas related to its key statutory obligations without boring you with statistics.

2.1 Case load

Since its formation in November 1996, well over one million disputes have been referred to the CCMA nationally. From 1 April 2006 to 31 January 2007 just under 100 000 disputes were referred to the CCMA. Of these, 13 893 were referred in the Western Cape and 4 634 were found to be out of jurisdiction while 9 167 were in jurisdiction. The balance relates to pending condonation applications as many cases are still referred outside of the statutory time limits.

2.2 Referrals by sector

16% of all referrals come from the retail sector – the highest referring sector in the country. This is followed by business/ professional services and safety/security, each referring 11% of all cases with the domestic sector at 10%. Building and construction refers 8% while agriculture and farming and food and beverage (manufacture) each refer 4%. This, too, poses a challenge for labour, as the highest referring sectors are also the least organised sectors. The CCMA's Dispute Management Department has developed an outreach programme to work with trade unions and employers in high-referring sectors to assist them in building their own organisational capacity to self-regulate their own workplaces and sectors. In some instances, this involves training employers and union representatives at workplace level and in others, assisting the parties to establish centralised bargaining structures and/or bargaining councils within a sector.

2.3 Trade union representation and unrepresented employees

Workers who are not represented by trade unions refer approximately 72% of all disputes to the CCMA. This raises a serious challenge for labour, as many of these workers are at the mercy of touts and consultants. In addition, a number of trade unions have been formed with the sole purpose of representing workers at the CCMA and charge a fee for this service. Organised labour must find ways to develop a capacity to reach workers who would otherwise be left to the mercy of consultants and attorneys that they can ill afford. Labour must explore creative ways to engage the over 80 000 unassisted workers who refer disputes to the CCMA every year.

⁴ See, for example, *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation & Arbitration & Others* (2006) 27 ILJ 2076 (SCA).

2.4 Employer representation

Numerous employer organisations have been formed with the sole purpose of representing employers at the CCMA at a fee and often play an obstructionist role by delaying processes. For example, objections to the con/arb process are lodged as a matter of course as this increases their earnings potential. It is more lucrative to first represent employers at a conciliation process and to postpone arbitration to a later date.

2.5 CCMA processes

2.5.1 Pre-conciliations (*telecons*)

Nationally, 11 608 (17% of jurisdictional cases) conducted of which 5 309 (8% of jurisdictional cases) were settled. These cases mostly involve non-unionised workers in the domestic, retail although not restricted to these sectors.

2.5.2 *Con/arbs*

37% (25 488) of all cases were conducted as con/arbs and 82% of these were finalised in one process. This is despite the fact that the CCMA receives a high percentage of objections to the con/arb process, particularly from employers. Reducing the number of objections to the con/arb process remains an important challenge for the CCMA and labour as such objections defeat the purpose of what was intended to be an expedited process, often to the detriment of the dismissed worker. As things stand, legislative intervention would be required to achieve this, as the current provisions allow parties to object to the con/arb process without having to advance any good reasons or show good cause, as is the case with postponements.

2.5.3 *Conciliations*

66 828 conciliations were conducted from 1 April 2006 to end of January 2007 with 90% of these cases having been conducted and closed, that is, either settled or referred to arbitration.

2.5.4 *Arbitrations, rescissions, reviews and enforcing compliance with awards*

38 515 arbitrations have been conducted during the year to date. Relatively high levels of non-attendance at arbitration (19% nationally and 11% in the Western Cape) and conciliation (16% nationally and 11% in the Western Cape) lead to numerous rescission applications by both parties and LC reviews related to dismissed cases, rescissions that were not granted and default awards.

The LC judgment in the *Shakespeare's Pub*⁵ case did not help the situation, as the CCMA is still required to consider rescission applications, even when an award has already been certified in terms of section 143 of the LRA. In this

5 *Tony Gois t/a Shakespeare's Pub v Van Zyl & Others* (2003) JOL 11875 (LC)

case the employer did not attend the arbitration hearing and only sought a rescission after the award had been certified and the sheriff was knocking on his door. The CCMA refused to consider the employer's rescission application at this point, arguing that the award was now effectively an order of the court and the CCMA no longer had the jurisdiction to entertain a rescission application. The LC took the view that that the CCMA has to consider a rescission application, even when an award has been certified in terms of section 143. Consequently, employers can refuse to comply with an award and frustrate enforcement by applying for a rescission at the point when the sheriff is knocking at the door. Legislative intervention is required to address this and some of the serious shortcomings related to section 143 enforcement provisions, including the costs that applicants have to bear in relation to the execution of the writ by the sheriff of the court.

2.5.5 Statutory time limits and turnaround time

Nationally, 3 084 (5%) cases were conciliated/conducted outside of the statutory 30 day time limit. Of these only 315 were conducted outside 30 days without the parties' consent. In all other cases, the consent of the parties was sought for that and most of these cases relate to the December 17 to January 7 periods, during which the CCMA is unable to issue notices and/or schedule cases. Nationally, the average turnaround time for conciliation that is measured from the date of referral to date of closure is 31 days, while for arbitration the turnaround time is 48 days. The turnaround times in the Western Cape are 29 days for conciliation and 39 days for arbitration.

2.5.6 Arbitration awards

Nationally, 6% of all awards were issued late (outside of the statutory 14 day period) during the year to date. This is an area of zero tolerance and the CCMA has taken steps to penalise part-time commissioners (suspend work allocation and not pay an award fee) and discipline full-time commissioners who submit late awards. Consequently, this figure is constantly reducing, as we must ensure full compliance with the Act.

2.5.7 Awards in favour of employees and employers

Nationally, 60% of arbitration awards are handed down in favour of the employee. This figure varies greatly between regions with, for example, 41% of awards in the Western Cape being in favour of the employee and 52% in favour of the employer and 73% being in favour of the employee and 25% in favour of the employer in KwaZulu-Natal. Studies are currently underway in the CCMA to get a better sense of why we have such a vast difference between regions as this also impacts on the number of rescission applications and LC reviews in the various regions. The irony is that regions that have a lower number of awards in favour of employees are not necessarily the same regions that have the highest number of reviews or successful reviews from employees for that matter. Initial indications are that the key factors that inform the number of successful reviews across regions are the competence

levels of commissioners and the quality of the final written product.

2.6 Some comments on specific categories of disputes and processes

2.6.1 *Unfair dismissals*⁶ – *The over-proceduralisation debate*

Misconduct-related dismissals constitute the large majority of cases referred to the CCMA. Dismissals related to incapacity (due to ill health or poor work performance) make up a relatively small proportion of unfair dismissal referrals. The challenge for organised labour is to be able to effectively screen cases before referral to the CCMA without losing the trust of their organised constituencies, particularly in an environment where trade unions are often competing for membership and where we often find more than one union having an organised presence in the same workplace.

Without seeking to oversimplify the debate on over-proceduralisation, Professor Cheadle refers to the following, amongst other issues, as ‘procedural perversions’:

- *The hearing must precede the decision to dismiss*: In this regard the decision in the *Semenya*⁷ case indicates that it does not matter when the hearing is held as long as the Commissioner is satisfied that the employee had a real opportunity to challenge the allegations.
- *The employee should be present at the hearing*: Here again, it is contended that this assumes that there has to be a hearing. However, if there is no legal requirement for a hearing there can be no such requirement for attendance. All an employer has to do is give the employee a chance to state a case and this can be done in a number of ways – by telephone, by correspondence, or via a representative.
- *The employee must be allowed to call and question witnesses*: This would depend on whether the employer has an established procedure for a formal hearing. If there is such a procedure then the employer must comply with it. If there is no procedure, then a lot depends of the allegations and the procedure should be tempered by the fact that the employee is going to be able to challenge the allegations at arbitration.
- *The presiding officer should keep minutes*: There is no authority for this proposition and it should not constitute a requirement for a fair procedure. Whether to keep a record or not is a practical matter that should not go to the fairness of the procedure.

These are some of the issues being raised concerning the debate on over-proceduralisation in disciplinary procedures and those wanting to engage the topic in more detail should refer to Professor Cheadle’s papers.⁸ What is clear

6 Unfair dismissal disputes account for 81% of the disputes referred to the CCMA.

7 *Semenya & Others v CCMA* [2006] 6 BLLR 521 (LAC)

8 ‘Over-proceduralisation’, unpublished paper presented at a seminar of the South African Society for Labour Law, 10 November 2006; ‘Regulated flexibility: Revisiting the LRA and the BCEA’ (2006) 27 *ILJ* 663

is that labour will be required to engage with these issues over the coming months as efforts intensify to address the 'unintended consequences' of the current dispensation.

2.6.2 *Automatically unfair dismissals*

The CCMA only has jurisdiction to conciliate automatically unfair dismissal disputes. Where these disputes are not resolved in conciliation applicants are faced with the daunting task of seeking relief in the LC. In many cases, applicants do not pursue their cases in the courts, as they are not union members and cannot afford to appoint an attorney. The CCMA has to a large extent developed the institutional capacity to arbitrate such matters and it may be appropriate to consider legislative amendments that will give applicants the option of choosing to either refer the dispute to the LC for adjudication or to have it arbitrated by the CCMA.

2.6.3 *Sexual harassment and Employment Equity Act⁹ discrimination cases*

Sexual harassment cases often involve women workers who have resigned due to sexual harassment because the employer has failed to act against the perpetrator and this has made continued employment intolerable. In terms of the section 186(1)(e) such a resignation is regarded as a dismissal (commonly referred to as a constructive dismissal). Generally, the CCMA would have jurisdiction to both conciliate and arbitrate cases of constructive dismissal.

However, in terms of section 187(1)(f), where the employee alleges she was discriminated against and forced to resign due to sexual harassment because of her 'sex', this would be regarded as an automatically unfair dismissal and the CCMA would only have jurisdiction to conciliate.

CCMA commissioners have often been criticised by NGOs for their handling of such cases where, for example, the worker had agreed to settle the matter with the employer paying four months' salary as compensation. The criticism more broadly is that the CCMA should not conciliate such settlements as the worker could receive as much as two years' salary as compensation if she wins the case in the LC and the employer may also be slapped with an amount for damages. This position obviously assumes that an unassisted worker will be able to prove and win her case in the LC.

The dilemma facing commissioners is that if the matter is unresolved, the unassisted worker is thereafter left on her own to refer the matter to the LC where cases of this nature have often dragged on for an extensive period of time and compensation that was finally ordered in the worker's favour, could not be claimed as the company had since gone into liquidation. Alternatively, the worker may not be able to prove the sexual harassment and/or constructive dismissal in the LC and after a lengthy legal battle be left with nothing else but a hefty legal bill.

⁹ Act 55 of 1998

The NGOs who criticise the CCMA in our handling and settlement of such cases are themselves often not able or prepared to assist such workers in their LC applications if such cases remain unresolved after conciliation.

The challenge for organised labour and particularly the main trade union federations is to build the capacity to be able to offer such unassisted workers the necessary support and assistance in both CCMA and LC proceedings.

This also applies to Employment Equity Act discrimination matters (not related to a dismissal). Presently, most referrals emanate from persons from previously advantaged groups who believe they have been discriminated against by the application of affirmative action policies in workplaces. Very few discrimination cases are brought by persons from previously disadvantaged groups and this may indicate reluctance by non-unionised workers to challenge discriminatory practices in their workplaces.

2.6.4 Unilateral changes to conditions of employment and contract-related disputes involving individual workers

The current provisions do not offer protection to individual employees in cases where an employer seeks to unilaterally change conditions of employment. In many of these cases employees are faced with the option of resigning and bringing a constructive dismissal case or taking legal action in the courts for breach of contract. This is so because an individual employee is unable to exercise the right to strike in such a mutual interest dispute and the CCMA is unable to arbitrate such matters.

2.6.5 Probationary employees

In his paper on over-proceduralisation¹⁰, Professor Cheadle says that that 'probation is a vexed issue' because employers need it to assess the suitability of an employee. If the employer is unable to dismiss an unsuitable employee with relative ease during probation then the whole purpose of probation is undermined and becomes a barrier to employment. Professor Cheadle proposes that the solution to probation lies in the approach adopted in other countries that ordinary unfair dismissal protections (that is, other than automatically unfair dismissals) should not apply to employees with less than six months service. To prevent abuse by employers, the six months should be calculated to include all previous service with an employer or a related employer and that such a probation period of six months could be shortened by collective agreement, sectoral determination or Ministerial discretion. Labour will be required to engage in this debate over the coming months, that is, whether or not the current protections afforded to probationary employees should be changed to address an 'unintended consequence', that is, a perceived barrier to employment caused by the current provisions.

¹⁰ See (fn above).

2.6.6 Organisational rights and labour brokers

While the organisational rights provisions in the LRA have generally assisted trade unions in extending organisation into many previously unorganised workplaces, a more recent problem has arisen in workplaces not covered by bargaining council collective agreements that may require legislative intervention to resolve, depending on how the courts rule in this matter. Businesses who use the services of labour brokers are denying trade unions access to their premises to meet union members on the basis that the business is not the employer. So too, will such clients of labour brokers deny shop stewards the right to time off for union activities on the basis that the business is not the employer and that organisational rights can only be enforced against an employer, in this case the labour broker.

It will be important to monitor how the CCMA and courts deal with this issue over the coming months as this will have significant consequences for unions in workplaces where the majority of employees are employed by labour brokers.

2.6.7 Section 189A – large-scale retrenchments

Since 2002, the CCMA has facilitated many section 189A processes. In the Western Cape, every process has resulted in an agreement between the parties that more often than not reduced the number of employees who were retrenched. In other instances, the CCMA assisted the parties in processes that led to the orderly closure of a business. Only in one instance did a section 189A matter end up in the Labour Court when an employer sought to abandon the facilitation process midway and issue termination notices. In this case the court ordered the employer to withdraw the notices and to continue with the facilitation process under the auspices of the CCMA.

In most instances the parties either jointly approached the CCMA or the trade union approached the CCMA to facilitate in terms of section 189A. In most cases, once an employer has given notice of its intention to retrench, workers and unions are in a vulnerable position and unable to use the threat of a strike to fight retrenchments. Indications are that unions most often rely on the CCMA to facilitate the process as this ensures a proper disclosure of information and a robust consultation process that requires parties to focus on ways to avoid or minimise the impact of job losses.

The challenge for labour is to strategically balance the use of s189A facilitation process, the strike weapon and access to the courts to protect their members' interests. This is so particularly when one considers the decision of the court in the *Fry's Metals* case¹¹. Here, a unilateral change of conditions of employment dispute (mutual interest issue related to the implementation of new shift work arrangements) morphed into a section 189 retrenchment process and employees who refused to accept the changed conditions of employment were dismissed due to operational requirements. The court, in this case, upheld the right of the employer to effect the dismissal of employees for reasons related to the employer's operational requirements.

11 *Fry's Metals (Pty) Ltd v NUMSA & Others* (2003) 24 ILJ 133 (LAC)

Another debate that labour will need to confront over the coming months is the proposal to restructure section 189 to exclude small businesses and domestic employment from the applicable procedures. According to a proposal by Professor Cheadle, this restructuring of section 189 should not remove an employer's obligation to ensure that dismissals are both procedurally and substantively fair and such a procedure should be set out in a code and not be regulated by section 189.

3 CONCLUSION

A little more than ten years ago, the South African labour market and dispute resolution mechanism was fractured: divided by race, class and sector. There was little, if anything in common between competing interests. The old Industrial Court was inaccessible, unaffordable and unable to meet the needs of a changing workplace. It did not enjoy the legitimacy of the majority of workers. Workplaces throughout the country were often in a state of revolt. And many strikes were related to contested dismissals.

Over the past ten years the CCMA has completely changed the landscape of our dispute resolution system and we have established a universal industrial citizenship based on respected rights, freedoms and responsibilities.

Today, we still have our fair share of strikes and disputes but in many instances these are routinely managed with the kind of maturity that a few years ago would have been unthinkable. The real legacy of the past ten years is not that the CCMA has solved all our problems, but rather that it has given us a platform to face up to our problems and to deal with them.

Many critics say we cannot afford the luxury of the CCMA, that we have set the bar too high and that we expect standards of conduct that are not suited to an emerging economy. According to the Minister of Labour, such critics 'have a price for everything, but know the value of nothing. The CCMA is a prize for which we have struggled and it is a prize that we are prepared to pay'.

Finally, in assessing the CCMA for labour, we need to consider whether or not the institution is delivering on its Constitutional mandate to advance economic development, social justice, labour peace and the democratisation of the workplace. In this regard, labour needs to be the final judge and arbiter, as we at the CCMA would also like to hear your critical and constructive views on what you believe the CCMA should and could be doing better within the confines of the current regulatory framework and existing case law, to more effectively meet our statutory obligations.

The reality is that the CCMA is confined in what it can do by both the law and the various interpretations that our courts have given to the existing statutory provisions. In many instances, this will remain so until such time that the law is changed.

Consequently, the CCMA and the laws that regulate our labour market will continue to be impacted upon by broader developments at a socio-economic level. This being the case, the actions of organised labour over the coming



years will be an important factor in determining whether the rights of working people are further advanced or eroded.

BIBLIOGRAPHY

Cheadle 'Over-proceduralisation', unpublished paper presented at a seminar of the South African Society for Labour Law, 10 November 2006

Cheadle 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663

