NEDLAC LABOUR LAW REFORM

EFFICIENCY OF LABOUR MARKET INSTITUTIONS: TOWARDS EFFECTIVE DISPUTE RESOLUTION AND LABOUR JUSTICE

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Efficiency of Labour Market Institutions: towards effective dispute resolution and labour justice

thinkpiece

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SUMMARY OF PROPOSITIONS FOR CONSIDERATION

In response to the identified barriers to *LMI Efficiencies*[1] we propose a multi-faceted approach pivoting on **four sets of targeted amendments** (encompassing *twenty cross-cutting interventions* – set out in Part B) which includes general amendments to enhance the efficiency and coherence of labour dispute resolution processes.

Targeted amendments to promote LMI efficiency

The **four sets of targeted amendments (**with specified interventions) are –

1. **Clarify, consolidate, enhance, and apply the CCMA's rule-making powers to regulate (and improve) its procedures in relation to CCMA dispute resolution, compliance, and enforcement procedures.** By granting the CCMA greater autonomy to shape and refine its processes, we aim to address issues that arise from the misclassification of disputes; the potential for multiple causes of action; abuse of process / referral of disputes that are vexatious; and to empower the CCMA to design and implement streamlined processes for dispute resolution, compliance and enforcement procedures that reduce duplication and are effective within a more agile and responsive labour dispute resolution framework.[2]

2. **Align the dispute resolution pathways of the LRA and the EEA and the dispute resolution jurisdiction of the CCMA, Bargaining Councils, and accredited dispute resolution agencies.** Aligning the dispute resolution pathways, and jurisdiction of 'cognate' dispute resolution bodies will avoid fragmentation and asymmetry; and reduce procedural complexities and foster the effective resolution of labour disputes.[3]

3. **Clarify the role of commissioners and judges in promoting effective labour dispute resolution and labour justice**.[4]

4. **Clarify the Labour Court jurisdiction and standard of review (**LRA s. 145; s 157; s 158 (1) (g) and (h)); specifically, clarify the review standard of CCMA awards, and reviews in terms of s. 158. Case law on the reasonableness standard has given rise to confusion, and amendments are proposed to provide a uniform and consistent approach.[5]

General amendments that address legislative anomalies

In addition to the targeted amendments, the paper proposes additional general interventions that address **legislative 'anomalies'** (with some overlaps to the above) that are barriers to effective labour dispute resolution.[6]

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[1] The barriers include challenges from the (mis)classification of a dispute, fragmented and complex dispute resolution proceedings/ pathways, jurisdiction issues, complex review proceedings, and ineffective enforcement mechanisms.

[2] **Specific interventions (set out in Part B) that relate to the first proposition**: 1. CCMA Dispute referral form; 2. Attempts to resolve dispute; 3. clarifying the nature of the dispute, and expressing a view, provision for 'with prejudice' settlement offer; 4. Consolidation of disputes; 5. Directions to rectify errors; 20. CCMA enforcement of awards; and general (overlapping) interventions: 8. Severance pay disputes; 9. Collective agreement disputes; 10. Claims for failure to pay.

[3] **Specific interventions (set out in Part B) that relate to the second proposition**: 6. Alignment across CCMA, BCs, and accredited agencies; 7. Alignment of the LRA and EEA dispute resolution pathways; 10. Claims for failure to pay.

[4] **Specific interventions (set out in Part B) that relate to the third proposition**: 5. Directions to rectify errors; 17. LC processes (informal, expeditious, inexpensive).

[5] **Specific interventions (set out in Part B) that relate to the fourth proposition**: 14. LC contractual and unlawfulness jurisdiction; 19. Review proceedings

[6] **Interventions to address legislative 'anomalies' include**: 8. Severance pay disputes; 9. Collective agreement disputes; 10. Claims for failure to pay (statutory and contract); 11. Consolidation of statutory claims; 12. Jurisdiction to issue a fine for non-compliance; 13. Objection to compliance order; 15. Facilitated retrenchments; 16. Expanding con-arb (in phase 1); 18. Small-business code for dismissals (note phase 1 developments).

INTRODUCTION: OBJECTIVES AND CONTEXT

1. The think piece is concerned with improving efficiency of proceedings in **labour dispute resolution institutions**,[7] and responds to the identified need for measures that:

    1. **address bottlenecks in existing systems**
    2. **reduce levels of disputes and simplify dispute procedures (including adjudication, reviews, and enforcement); and**
    3. **promoting small and new business sustainability and enable economic growth.**

2. The 'inefficiencies' are interrelated: high levels of disputes and complex dispute procedures contribute to bottlenecks, and complex dispute procedures impact on the sustainability of small and new businesses. To address the inefficiencies the paper adopts a 'points of leverage' approach,[8] and identifies sites in the dispute resolution system, and stages in dispute resolution, where interventions could improve LMI efficiency and equity within the labour market. Interventions to improve efficiency should be guided by the principles for effective labour dispute resolution institutions, which include 'efficiency, speediness, accountability, accessibility, independence, impartiality, fairness, equality, professionalism and enforcement', of which **efficiency**, **speediness**, **fairness,** and **enforcement** are most relevant and envisage the following:[9]

	Principle:	Guidance:
Efficiency	'An effective dispute resolution institution resolves disputes in a way that minimises resource usage (value for money while maximising net benefits to users). The concept of resource minimisation is moderated by other legitimate considerations such as the complexity and significance of the dispute, and the need to facilitate procedural and substantive justice.'	Refers to the case management /digital system; ability to track progress; leverage of technology to improve efficiency (remote proceedings; online portal; mobile phone messaging; effective website).
Speediness	'An effective institution provides labour dispute resolution without undue delay, through swift, streamline and unbureaucratic procedures and processes.'	Refers to compliance with dispute resolution deadlines and the time taken to resolve labour disputes.
Fairness	An effective labour dispute resolution institution ensures that the outcomes are not only fair but are reached – and seen to be reached – in a fair way.'	Refers to fairness in the process (and outcomes) and assistance to parties navigate the system and ensure that parties do not abuse the process.
Enforcement	'An effective labour dispute resolution institution has mechanisms to ensure effective compliance with the final resolution.'	Refers to the capacity to use different mechanisms to ensure enforcement and to promote enforcement under a standardized procedure.

Table 1: Labour justice and effective DR institutions: relevant principles

[7] A labour dispute resolution institution is 'an organisation that assists in the resolution of labour-related disputes' including 'judicial and non-judicial institutions' and covers 'different arrangements including ministries and departments of labour … independent statutory bodies … courts, and shared arrangements'. ILO *Access to labour justice: A diagnostic tool for self-assessing the effectiveness of labour dispute prevention and resolution* (2023) p. 3.
[8] Leverage points identify places in a system where a small change or intervention can have a significant impact on improving the system. In the context of labour market regulation, See McCann, D., & Fudge, J. 'A strategic Approach to Regulating unacceptable Forms of Work' (2019) *Journal of law and society*, *46*(2), 271-301.
[9] Extracted from ILO *Access to labour justice* (2023) (note 7).

3. The Scoping Paper identified several 'mischiefs' related to issues that impact on 'the efficiencies within and between the LMIs responsible for the **adjudication and enforcement of awards and rights** including reviews and lack of enforcement'.[10] The 'mischiefs' include:
   - Duplication of proceedings
   - High case loads
   - Concerns regarding remedies
   - Misclassification of disputes (jurisdictional issues / technicalities)
   - Fragmented / Overlapping / concurrent jurisdiction (jurisdictional issues / technicalities)
   - Complex proceedings, including review applications
   - Non-compliance with Arbitration Awards

4. In April 2022 year a three-phased process of labour law reform was agreed to; and the first phase is underway, in which proposed amendments have been drafted for consideration, and which primarily address aspects of the first three 'mischiefs', as follows –

'Mischief':	**Phase 1 Proposed Amendments:**
1. Duplication of proceedings	Expanded use of inquiry by arbitrator
	Limitations on making both contractual and fairness claims
2. High case loads	Qualifying period for full unfair dismissal protection
	Simplified procedural requirements for dismissal
	Restrictions on high paid employees
3. Concerns regarding remedies	Limits on financial compensation

5. The remaining issues include concerns relating to -
   - Classification of disputes (as a requirement for jurisdiction) and the potential for multiple 'disputes' (causes of action);
   - Alignment of dispute resolution jurisdiction (CCMA, Bargaining Councils, and accredited dispute resolution agencies), fragmented jurisdiction / asymmetrical processes, and concurrent jurisdiction;
   - Duplication of processes;
   - Complex and formal Labour Court Rules and procedures, include review referrals and proceedings; and
   - Ineffective enforcement processes.

6. The think piece complements the phase 1 law reform proposals, and any overlaps between the two processes are indicated in the paper.

PART A. LABOUR DISPUTE RESOLUTION: REGULATORY FRAMEWORK AND AREAS OF CONCERN

7. The table below provides an overview of the stages in the 'lifecycle' of a dispute and sets out the relevant laws, rules, and practice applicable to the various dispute resolution processes. This is followed by a list of concerns and considerations for improving the efficiency of dispute resolution institutions, which are elaborated in the interventions that are set out for consideration in Part B.

[10] The Scope of Work and Deliverables set out in the Request for Proposals.

Dispute resolution regulatory framework: areas of concern across the lifecycle of a dispute

(Shaded blocks 1. to 5. reflect broad areas of concern impacting the effectiveness of the labour dispute resolution institutions)

Referring a Dispute/s	Conciliation of a Dispute/s	Arbitration & Adjudication of a Dispute/s	Review Proceedings	Enforcement Processes
① **Classification of a dispute & multiple causes of action** – the 'true nature' of a dispute/s is not always evident at referral and can result in a jurisdictional issue (including absence of a 'jurisdictional precondition') at arbitration / adjudication / review stage. The presence of multiple causes of action can result in fragmented / fractured jurisdiction – see overpage (2. and 2A.) on jurisdictional issues.			④ **Improving efficiency in review referrals and proceedings**	⑤ **Improving efficiency in enforcement processes** (Enforcement of arbitration awards sounding in money)
Rules & Practice: CCMA Rule 10 (Referral); Rule 12 (Attempting to resolve) Referral Form 7.11 LRA provisions: s. 28. Powers and functions of BC s. 43. Statutory councils s. 51. & 52. Councils s.115 Functions of Commission s. 127. Accreditation EEA provisions: s. 10. Referral of a dispute to the CCMA	Rules & Practice: CCMA Rule 14 (Determining jurisdictional issues); Rule 15 Certificate Practice Manual LRA provisions: s. 133. CCMA resolution s. 135. Conciliation – ss. 3A on consolidation s. 191. Unfair dismissal/ULP disputes	Rules & Practice: CCMA Rule 18 (Referral for arbitration); Form 7.13 Labour Court Rule 6 (Referrals) CCMA Rule 28 When the Commission may consolidate disputes Labour Court Rules 23 Consolidation of proceedings LRA provisions: s. 133. CCMA resolution s. 136. Arbitration s. 137. Senior commissioner s. 138. General re arbitration s. 141. Consent to arbitration s. 147. LC power to arbitrate s. 157. LC Jurisdiction ss. (4) con first; (5) re arbitration disputes s. 158. LC powers ss. (2) s. 191. Unfair dismissal/ULP disputes Re: Interpretation & application disputes LRA s.24; BCEA s.80; EES s.52 = referral to CCMA Re: Consolidation (CCMA & LC Rules *above*) &: BCEA: s.74 Consolidation of proceedings (BCEA, NMWA) EEA: s. 47 EEA disputes against the same employer may be consolidated	Rules & Practice: Labour Court Rules 7. Applications, 7A Reviews (ito s. 145/ s 158(1)(g)) Practice Manual of the Labour Court, para. 11.2. LRA provision: s. 145. Review of arbitration awards s. 158(1) (h) & (g) LRA s. 159 Rules Board for Labour Courts and rules for Labour Court	Rules & Practice: CCMA Rule 40 Certification and enforcement of arbitration awards Form 7.18 Application to certify a CCMA Award (7.18A re a BC Award) LRA provisions: s. 142. Powers of commissioner ss. (8) & (9.) Contempt of the CCMA s. 143(5). arbitration award to pay an amount of money enforceable as if it were an order of the Magistrate's Court s. 149. CCMA may provide assistance

Referring a Dispute/s	Conciliation of a Dispute/s	Arbitration & Adjudication of a Dispute/s

②

Alignment of dispute resolution jurisdiction: CCMA, Bargaining Councils / SCs and accredited agencies
(see below (2A) re Collective agreements, Statutory Entitlements and Contractual jurisdiction)

LRA provisions:
s. 28. Powers and functions of BC
s. 43. Statutory councils
s. 51. & 52. Dispute resolution functions of council
s. 127. accreditation of councils and private agencies – list of excluded disputes
s. 147. Performance of DR function by CCMA in exceptional circumstances
(CCMA Practice and Procedure Manual (Nov. 2014) Chapter 2 Functions, Jurisdiction and powers)
EEA provisions:
s. 10. Referral of a dispute to the CCMA; ss(2)

'Pure' Compliance proceedings

②A

Fragmented jurisdiction and asymmetrical processes involving dispute resolution and / or compliance processes in the context of:

- **Collective Agreements**
- **severance pay, minimum wages, and other statutory; and contract of employment entitlements**

Collective agreements (CCMA) – *Disputes / Disputes + Compliance* -
LRA s. 24. Disputes about CAs (interpretation and application) (CCMA)
LRA s. 33A(7) Council's arbitrator may determine any dispute concerning the interpretation or application of a CA
LRA s. 147. Performance of DR function by CCMA in exceptional circumstances, if the dispute is about the interpretation or application of a CA
BCEA. 73A. Claims for failure to pay any amount **…. including CA** (below the earnings threshold (CCMA)(con-arb) referred as a dispute

Enforcement of CAs (BCs) – *Compliance proceedings*
LRA s. 28. Power of BC to enforce CAs
LRA s. 33. Appointment of BC agents to secure compliance
LRA s.33A. Enforcement of CA by BC; ss. (3) CA may authorise a BC agent to issue a compliance order

Basic conditions & employment contract: *Disputes + Compliance*
BCEA s. 41(6). **Severance pay** - disputes re entitlement to severance (referral to CCMA, BC for conciliation / arbitration & if LC is adjudicating OR dismissal dispute)
BCEA s. 73A. Claims for failure to pay **any amount ito BCEA, NMWA, employment contract, SD or CA**: employees earning below the earnings threshold (CCMA) – referred as a dispute
BCEA s. 74(2). Consolidation of proceedings – unfair dismissals with claim for amount owing ito BCEA/NMWA; & ss. (3) may be initiated jointly with a severance pay (s 41(6).

LC (Jurisdiction & Powers) & *concurrent* jurisdiction
LRA s. 157 Jurisdiction
LRA s. 157(2) concurrent with HC re fundamental rights
LRA s. 157(5) disputes to be arbitrated
LRA s. 158 Powers; ss(2) power to arbitrate
BCEA s. 77 (3). LC has concurrent jurisdiction with civil courts iro any matter concerning a contract of employment

Compliance with basic conditions:
Rules & Practice:
CCMA Rule 31B How to apply for enforcement of written undertakings and/or compliance orders

BCEA provisions:
s. 64. Labour inspectors may refer non-compliance (BCEA, NMWA, UIA/UICA) disputes to CCMA
s. 68. Securing an undertaking
s. 69. Compliance order
s. 73. Order may be made an arbitration award
s. 76A. Fine for not complying for NMW
s. 77A. Powers of the Labour court - (f) order imposing a fine

Referring a Dispute/s	Conciliation of a Dispute/s	Arbitration & Adjudication of a Dispute/s

③

Reducing duplication and streamlining processes:
improving access, efficiency, and the effective resolution of disputes
(including provision for Small Businesses to simply compliance with dismissal law obligations)

LRA provisions:
s. 188A. / Rule 34 CCMA Rules: Inquiry by arbitrator *(* proposals already drafted)*
s. 189A. Facilitated retrenchments
s. 191. Dismissal and ULP disputes
s. 191(5A). Compulsory con-arb / Rule 17 CCMA Rules
s. 189. OR Dismissals; s 188(2) read with s. 203(4). Codes of good practice
s. 80 Workplace Forums

EEA provisions:
s. 10.(4)(b) Reasonable attempt to resolve the dispute; & Harassment Code (2022)

Categories of concern and an overview of interventions for consideration

1	**Classification of disputes and the presence of multiple disputes (causes of action)**
	At referral stage:
	1. Referral form to elicit additional information that will assist to classify the dispute/s and prior attempts to resolve the dispute (exhaustion of internal processes) (Rule 10, form 7.11)
	2. Attempts to resolve the dispute and to clarify prior attempts to resolve the dispute and the nature and classification of the dispute/s should be required by the commissioner *before* conciliating the dispute (Rule 12; and Rule 28)
	At conciliation stage:
	3. Clarifying the true nature of the dispute/s and commissioner to express a (non-reviewable) view on the merits on the Certificate of Outcome (Rule 14) (LRA s. 133; s. 135(5)(a)) (Certificate of outcome), s. 115 (2A) (j) order as to costs; and introduce provision for with prejudice offer to settle
	4. At *any* stage. Consolidation of disputes and compliance proceedings arising from the facts / issues in dispute (overlapping causes of action) should occur in the ordinary course, subject to jurisdictional limitations (CCMA Rule 28, Labour Court Rule 23; LRA s135(3A); s. 138; s. 157, 158) Where possible, jurisdictional issues should be resolved by directions of the presiding commissioner/adjudicator (see intervention 5) in accordance with the principles for effective labour dispute resolution.
	At arbitration / adjudication stage:
	5. The arbitrator or judge to direct the process in the event of the misclassification of a dispute/s and similar errors and regarding jurisdictional pre-conditions in a manner that promotes effective dispute resolution. (LRA. s 138; s.141; s.147; s.157; s.158; CCMA Rules; Labour Court Rules) (See also intervention 17)

2	**Alignment of dispute resolution jurisdiction: CCMA, Bargaining Councils/SCs and accredited agencies**
	Aligning the jurisdictional competencies of the administrative / quasi-judicial dispute resolution institutions to resolve labour disputes effectively
	6. The dispute resolution jurisdiction of BCs/SCs/accredited agencies should align with that of the CCMA (LRA s.127; EEA s.10(2); SDA s. 19; BCEA (see 2A regarding compliance procedures and Recommendations in the context of collective agreements, severance pay, minimum wages and other statutory / employment law entitlements); and Recommendations to ensure that disputes that arise from the same facts/issues in dispute can be consolidated and resolved efficiently.
	Aligning the dispute resolution pathways for disputes arising from the same facts / issues in dispute (EEA v LRA disputes)
	7. Alignment of the LRA and EEA dispute resolution pathways for disputes of the same nature and disputes that arise from the same facts (LRA s. 191; EEA s. 10; s.47). This relates to the EEA (unfair discrimination) and LRA (ULP and unfair dismissal) jurisdiction
2A	**Fragmented jurisdiction and asymmetrical processes involving dispute resolution and compliance proceedings in the context of Collective Agreements, Severance pay, minimum wages, and other statutory / employment contract entitlements (including concurrent LC/HC jurisdiction)**
	The process for disputes concerning severance pay when there is a contractual term more favourable than the BCEA
	8. Disputes concerning entitlement to severance pay (BCEA. s. 41(6)) should be clarified in relation to an employee's more favourable (contractual / collective agreement) entitlement to severance pay and clarify routes to enforcement of CA / employment contract ((LRA s.33A re Bargaining Council)(BCEA s.68; s.69 re Labour Inspector); (BCEA s.73A dispute – different routes below/above the threshold); (BCEA s.74(2) LC may consolidate with unfair dismissal dispute).

	Disputes regarding terms of a collective agreement: clarifying 'interpretation or application' disputes v 'compliance/enforcement of a CA' proceedings **9.** Disputes regarding collective agreement: LRA and BCEA (interpretation, application, compliance/breach, and enforcement) results in 'uneven' / asymmetrical jurisdiction (and no LC jurisdiction – (see also intervention 14). In summary – - LRA s. 24 confers jurisdiction on the **CCMA** to resolve 'Interpretation or application' disputes, and - BCEA s. 73A to the **CCMA** for claims for failure to pay any amount (statutory/contract/CA), and - BCEA s. 64(dA) for a **labour inspector** to refer non-compliance disputes to the CCMAs; whereas in terms of **BCs**: LRA s. 28 powers to enforce CAs; and s. 33A provides for enforcement of a CA by BC including ss. (3) **BC agent's** compliance orders, and ss. (4)(a) for BCs to appoint an arbitrator for non-compliance with a CA.
	Clarifying BC jurisdiction to determine claims for failure to pay any amount (BCEA, NMWA, employment contract, sectoral determination, or CA) **10.** Claims for failure to pay (statutory and contract). As per above, the BCEA should clarify that s.73A claims may be referred to the CCMA as well as any BC / SC / accredited agency with jurisdiction; and ito ss. (3) consider extending jurisdiction to all employees/ workers but imposing a cap on the amount that may be awarded; s. 73A (2) to indicate that the provision does not apply to employers or workers where the CA falls within the scope of a BC; (or cross-reference to the BCs powers ito s. 28 and 33A)], and consider amending ss. (2), (3), to permit referral by parties earning above the threshold but with a maximum cap on the amount that the CCMA/BC may award in terms of employment contracts/CAs
	Clarifying consolidation of (statutory) claims **11.** Consolidation of statutory claims: BCEA s74(3) states that dispute/claims for an amount owing in terms of the BCEA and NMWA may be 'initiated jointly' with a severance pay (s. 41(6)) dispute; which suggests that if it is not included in the severance pay referral, then the commissioner or LC cannot determine the claim for money. However, ss. (2) does not similarly require that the claims re ss(2) should be 'initiated jointly', and ss. (3) should be amended to align with the wording in ss.(2).
	Identifying the authority to issue of a fine for non-compliance with the NMWA (BCEA s 76A) **12.** Jurisdiction to issue a fine for non-compliance: BCEA s.76A does not indicate the authority that should issue a fine for non-compliance with the NMWA and this should be clarified. s. 77A Powers of Labour Court includes imposing a fine for contravention of any provision of the Act for which a fine may be imposed. This may be part of a broader reflection on the enforcement role and processes of the Inspectorate;[11] the CCMA; the Bargaining Councils and BC agents; and the LC.
	Clarifying the process for objection to compliance orders (BCEA s 69(6)) **13.** Objection to compliance order: BCEA s.69(5) provides a mechanism for an employer to refer a dispute to the CCMA concerning a compliance order issued by a labour inspector in terms of s. 69 (non-compliance with BCEA, NMWA, UIA/UICA); and s. 69(6) indicates that the employer's dispute is to be dealt with in terms of BCEA s.73, however s. 73 does not set out a procedure for dealing with the employer's objection to the compliance order; it is recommended that s. 69(6) be amended to provide for a con-arb process (similar to the provisions in s 73A(4) and (5)); and that provision for condonation be provided in s 69(5).
	Labour Court jurisdiction: concurrent jurisdiction (civil courts) and contractual jurisdiction of the CCMA and Bargaining Councils (Statutory Councils/Agencies) **14.** The 'jurisdictional morass' – revisiting the exclusive and concurrent jurisdiction of the LC and limitations on the LC's contractual and unlawfulness (CCMA/BCs/agencies) (LRA s.157; s.158) (BCEA s. 77) In addition, see Recommendation 17 on LC adjudication of disputes and the role of judges

[11] Article 3 of the Labour Inspection Convention, 1947 (No. 81) emphasises that the function of labour inspection is 'to secure the enforcement of legal provisions relating to conditions of work and the protection of workers … such as provisions relating to hours, wages, safety, health and welfare …'.

3	**Reducing duplication and streamlining processes: improving access, efficiency, and the effective resolution of disputes**
	15. Facilitated retrenchments: LRA s.189A - to reduced duplication it should be clarified that referral for conciliation is not a necessary pre-condition for referral to the Labour Court.
	16. Enhancing dispute resolution and expanding use of con-arb: to improve efficiency (and recentre conciliation) and expand the use of con-arb to include all ULP/unfair dismissals except disputes that may be referred to the LC for adjudication; and disputes involving a protected disclosure; and *all* (arbitrable) disputes within first 6-months of employment.
	Labour justice and the effective resolution of labour disputes: reflection on Labour Court processes and the role of judges **17.** Ensuring that Labour Court processes are informal, expeditious and inexpensive: The importance of judges in the effective resolution of labour disputes should not be underestimated; and disputes that fall to be resolved by the Labour Court (particularly in circumstances where the dispute could alternatively be resolved by arbitration; and in circumstances when the reason for the dismissal evolves) should be adjudicated with minimum legal formalities. (LRA 141(5)(a), Labour Court Rule 6, LRA 191; EEA).
	Small business dismissal code and mechanisms for the effective resolution of disputes in the workplace **18.** Simplifying compliance for small businesses: LRA S. 189; s 188(2) with s. 203(4) – can be used to introduce a code for small businesses (a definition to be provided) to simply and promote compliance with dismissal procedures (see Part B. and Annexure: Small Business Code); for small businesses, the requirements (and checklist) of the code would replace LRA s.189. In addition, the possibly of a code of good practice incorporating the CCMA/BUSA guidelines on managing the employment relationship and guidelines and template for Grievances should be considered to assist with managing conflict and promoting compliance (eg procedures as required by law (eg. EEA s. 10.(4)(b))) (and see Part C. Promoting conflict resolution and prevention in the workplace).

4	**Improving efficiency in review referrals and proceedings**
	19. Considerations at review stage: A recent positive development is that the Labour Court Rules Board has been reconstituted. In addition to the revision of the Rules regarding review processes, consideration should be given to the possibility of clarifying aspects of s. 158(1)(g) and (h) reviews by the LC. (Rule 7, Applications and Rule 7A Reviews; and LRA s.145; s. 158).

5	**Improvement enforcement proceedings**
	20. Revisiting enforcement mechanisms for monetary awards; and the arrangements between the CCMA, the Sherriff, and Legal Aid. The CCMA / LC have subpoena powers that could be utilised to gather information about the defaulting employer/bank accounts.

PART B. POSSIBLE INTERVENTIONS TOWARDS LABOUR JUSTICE & EFFICIENT DISPUTE RESOLUTION

NOTE- On the CCMA Rule-making powers

*The CCMA's rule-making powers (**LRA s. 115 Functions of Commission**) should be clarified and enhanced by amendments to the LRA, so that the CCMA is authorised to issue Rules and Regulations (**LRA s. 115** and **s. 208**) to determine the procedures and the forms applicable to **CCMA dispute resolution, compliance, and enforcement procedures** under the LRA **and any employment law** (BCEA, EEA, NMWA etc).*

The various provisions in employment law (LRA, BCEA, NMWA, EEA) dealing with CCMA dispute resolution, compliance and enforcement mechanisms should be reviewed, and consolidated in secondary legislation (Rules or Regulations) issued by the CCMA (with the details repealed from the primary statutes).

In this regard, proposed amendments to the LRA include –

- *Amending LRA s. 115(1)(a) and (b) to indicate that the Commission must attempt to resolve disputes referred in terms of this Act **or any employment law** (this could also be achieved by a more general provision applicable to all provisions of the LRA to the effect that 'unless the context otherwise requires, "this Act" means any employment law'); '**dispute**' could also be clarified to include a dispute i**n terms of any employment law** (also in the context of ss. (2A);*
- *LRA s. 115 should be amended to permit resolution of **compliance and enforcement** disputes in terms of this or **any other employment law**, and to authorise the CCMA to issue Rules and Regulations in this regard;*
- *LRA s. 115 (2A) currently empowers the Commission to make rules regulating '(a) the practice and procedure in connection with the resolution of a dispute through conciliation or arbitration; and …. (i) the forms to be used by parties and the Commission'; and should be clarified to include the rules regulating CCMA **dispute resolution, compliance and enforcement proceedings and related forms** to be used by parties and the Commission, including the forms to initiate CCMA procedures. In addition, the CCMA should be authorised to issue relevant Regulations in this regard.*
- *LRA s. **208 Regulations** currently authorises the Minister to make regulations relating to matters that may or must be prescribed in terms of the LRA; and could be clarified regarding the CCMA's powers to make regulations regarding its procedures and forms.*

Relevant interventions related to the CCMA's rule-making powers are set out below.[12]

1. Clarifying the dispute at referral stage [CCMA GB; LAW AMENDMENT]

At the referral stage, opportunities for improving efficiency include awareness-raising and attempts to resolve the dispute and to review and correct the classification of the dispute/s.

The misclassification of a dispute at referral stage may result in a jurisdictional issue (including absence of a jurisdictional 'precondition' at a later stage) if it subsequently emerges that the 'true'

[12] **Specific interventions related to CCMA processes include**: 1. CCMA Dispute referral form; 2. Attempts to resolve dispute; 3. clarifying the nature of the dispute, and expressing a view, provision for 'with prejudice' settlement offer; 4. Consolidation of disputes; 5. Directions to rectify errors; 20. CCMA enforcement of awards; and general (overlapping) interventions: 8. Severance pay disputes; 9. Collective agreement disputes; 10. Claims for failure to pay.

dispute differs from the referred dispute, or if the dispute should have been referred to an alternative DR body.

Relevant Rules, Practice, Provisions etc.:

- LRA s.115(2A) confers CCMA Rule-making powers including the forms to be used by parties (*however the current Forms are Gazetted as LRA Regulations (LRA s.208) by the Minister (most recently amended in GG Notice R. 3317, April 2023)*
- Rule 10 of the CCMA Rules (2023) provides for **the referral of a dispute using Form 7.11** for conciliation
- EEA s.10(4)(*b*) requires the referring party to have attempted to resolve the dispute

For consideration:

8. In *Speedy social justice*, Van Niekerk J expresses the view that one of the problems is that 'at the point of entry into the system, referring parties are not required to articulate the terms of their dispute in any terms that might be considered as precise.'[13] He cautions that consequently employee parties can adopt a 'shot-gun' type approach, placing every issue in dispute with nothing to lose; and suggests that the CCMA forms should 'require a referring party to identify in precise terms the nature of the dispute referred.' Although in some case the referring party may not be in position to make an accurate classification of a dispute (and should not be penalised for this), and moreover may not realise that the issues concerned could give rise to more than one dispute.

9. Changes to the referral form can be achieved through the CCMA rule-making powers (LRA s.115 (2A))[14] and amendments that the Governing Body could consider in terms of form 7.11 include –

   [1] Providing mechanisms to promote greater clarity in terms of the dispute/ potential causes of action and permitting referring parties to identify more than one dispute from different legislation in a single referral form. **Currently the Form 7.11 and the online application only permit "tick one box" on the 'Nature of Dispute' to be selected; although note that the info sheet for s.73A of the BCEA indicates that 'more than one type of dispute can be selected on the LRA7.11 form).**

   [2] Asking the referring party to indicate on the form whether they have / or intend to refer an additional dispute(s) related to the issues in dispute.

   [3] Asking the referring party to indicate on the form if they are uncertain and require assistance [prior to conciliation][15] with ascertaining the nature of the dispute or disputes that the issues / 'facts of the dispute' gives rise to.

   [4] The referring party should indicate if they have attempted to resolve the dispute (except in unfair dismissal cases). Currently this is required only in respect of EEA disputes (EEA s.10(4)(*b*), para. 11 of Form 7.11). While it should not be a precondition for referral, the purpose would be to improve awareness and processes for workplace dispute prevention and

[13] Van Niekerk, A 'Speedy social justice: Streamlining the statutory dispute resolution processes' (2015) 36 *ILJ* 837 at 843.

[14] The current forms have been gazetted as LRA Regulations (LRA s.208) by the Minister (most recently amended in GG Notice R. 3317, April 2023). The administrative powers of the CCMA to determine its procedures in respect of all employment laws should be clarified.

[15] This could be achieved **prior** to conciliation, possibly through amendment to Rule 12; and/or at conciliation and could include a fact-finding exercise (ito LRA s.135).

resolution (and reduce the CCMA case load). The response could provide context to the dispute and may draw attention to possible issues in the workplace employee relations system, which the CCMA could point out / provide advice on.

NOTE The scope for correcting classification/jurisdictional issues may be more limited at referral stage; and this may be a matter that is more efficiently dealt with at: conciliation; and/or at arbitration and adjudication. The proposals for changing the practice at referral stage is in addition to the mechanisms at subsequent stages, bearing in mind the view that -

> *'It would require no changes to legislation to introduce a system where the essence of the dispute is identified at the earliest possible stage, parties are restricted in their presentation to those issues and a decision is made only on those issues.'*[16]

2. Attempts to resolve, clarify, and consolidate dispute/s *prior to* conciliation [CCMA GB]

Relevant Rules, Practice, Provisions etc.:

- Rule 12 of the CCMA Rules (2023) provides that the **Commission or Commissioner may attempt to resolve dispute before conciliation** by contacting the parties prior to the commencement of conciliation to attempt to resolve the dispute.
- Rule 28 of the CCMA Rules (2023) **When the Commission may consolidate disputes** permits the CCMA or a commissioner to consolidated more than one dispute so that the disputes may be dealt with in the same proceedings.

For consideration by the CCMA Governing Body:

10. The relevant Rules and Practice should encourage attempts to resolve a dispute and to clarify the nature and classification of the dispute/s **prior** to conciliation. Rule 12 could be amended to –

    [1] clarify the role of the commission or commissioner prior to conciliation in attempting to resolve the dispute;[17] and to ascertain/clarify the nature of the disputes(s) and confirm the appropriate dispute resolution forum; and

    [2] cross-referring to Rule 28 on the consolidation of disputes and clarify the role of the commission or commissioner to enquire and to consolidate disputes *before* conciliation (see Intervention 3. below regarding conciliation stage).

3. Clarification by the commissioner, and options for (a). a (non-reviewable) opinion; and (b.) provision for a with prejudice settlement offer [CCMA GB; LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- LRA 135 **Resolution of disputes through conciliation** ss. (3A) permits a single commissioner appointed in respect of more than one dispute involving the same parties to consolidate the conciliation proceedings so that '**all the disputes**' may be dealt with in the same proceedings.
- Rule 14 of the CCMA Rules (2023) **How to determine whether a commissioner may conciliate a dispute** provides that a commissioner, if it appears that a jurisdictional issue has not been

[16] *Speedy Social Justice* p. 845.

[17] Benjamin 'Conciliation, arbitration and enforcement: the CCMA's achievements and challenges' (2009) 30 ILJ 26 at 32, reports that pre-conciliations – in 2007/8 were held in 13% of cases, and that 45% of cases were settled or withdrawn as a result, reducing the caseload for 'formal' conciliation to 45%.

determined, must require the referring party to prove that the Commission has jurisdiction to conciliate the dispute.

- Rule 15 of the CCMA Rules (2023) **Issuing of a certificate (form 7.12) ito LRA s. 135(5)** requires the certificate to state whether the dispute has been resolved and must identify *the nature of the dispute* and the parties as described in the referral or as identified by the commission during conciliation.
- The CCMA Practice and Procedure Manual (Nov. 2014), ch. 8.9.1 states that: 'a conciliator is obliged to ascertain the nature of the real dispute that was referred for conciliation and having done so, to conciliate that dispute,' but that 'Neither a party nor the conciliating commission can change the nature of the dispute between the parties'. However (para 8.10.1) *does* permit a party to seek to amend a statement of case as set out in the referral, where appropriate, and with consideration to prejudice to the other party.

In the context of arbitrations and before commencing the arbitration:

- CCMA Rules Part 4 **Arbitrations** – Rule 19 **Statement of case**; Rule 20 **Pre-arbitration conference**
- Rule 22 **How to determine whether a commissioner may arbitrate a dispute**
- LRA s. 133 **Resolution of disputes under auspices of CCMA**
- LRA.s 136 **Appointment of commissioner to resolve dispute through arbitration -** Referral to arbitration: Form 7.13; and Rule 18 CCMA Rules (2023)

For consideration by the CCMA Governing Body:

11. Van Niekerk J, in *Speedy social justice*[18] commends the CCMA, and its approach to arbitrations, performance standards, and the quality of arbitration. To further streamline the processes, and to avoid lengthy delays, he argues for an amendment to the CCMA forms to require 'a clear and concise statement of the facts and legal issues' to streamline the arbitration process; and he emphasises the importance of the pre-arbitration conference as an opportunity to identify the real issues in dispute and to confine the case to the issues identified.

12. Moreover, at the end of conciliation process, Van Niekerk suggests that commissioners should be permitted 'formally to express a view should they believe that the claim has little or no merit' along the lines of a 'proceed at your peril' notice, putting the referring party on terms 'that an adverse costs order will [likely] be granted should the matter proceed to the next stage and ultimately be missed.'[19]

13. A further intervention to encourage the settlement of disputes at conciliation stage that could be considered is the introduction of a process for a 'with prejudice settlement offer' aimed at promoting the effective resolution of disputes and reducing the burden on the CCMA / Labour Court.[20] A with prejudice settlement offer could for example be available for acceptance up until the commencement of arbitration; if the referring party proceeds with the arbitration the offer immediately falls away, and if the referring party is not successful, or if compensation awarded is less than the settlement offer, the arbitrator may take the offer into account in determining costs.

[18] At p. 844-45.
[19] At p. 844.
[20] 'With prejudice offers' are an aspect of labour dispute resolution in a number of countries (including USA, Ontario, Canada), and appear in different forms. The Uniform Rules of Court make provision for unconditional and without prejudice offers as a mechanism of curtailing civil litigation.

14. Interventions to consider regulating aspects of conciliation / end of conciliation include –

[1] Clarifying the true nature of a dispute/s, by amending Rule 14 to require the commissioner, if it appears during conciliation proceedings that the referring party has incorrectly classified a dispute; or if it appears that the issues in dispute/nature of the dispute may give rise to more than one dispute, to clarify the nature of the dispute or disputes, which could include a processes of fact-finding exercise (ito LRA s.135). [*Although failure to clarify the true nature of the dispute or disputes should be remediable at arbitration / adjudication, with mechanisms in place (see Intervention 5) for the arbitrator /judge to rectify misclassification errors]*; and

[2] Amending Rule 15 to provide for the commissioner to indicate any concerns regarding the dispute / merits of the dispute on the certificate of outcome, which, in terms of CCMA practice, may be a factor in determining whether to award a costs order in. *Though, care should be taken to ensure that the commissioner's opinion is not reviewable, and if necessary, this could be clarified through an amendment to the LRA (s. 135) to clarify that 'no person may apply to any court of law to review the commissioner's opinion'.*

[3] Consideration should also be given (possibly through clarification in s.136) as to the manner in which errors on the Certificate of Outcome are subsequently dealt with (see also intervention 5 below in this regard), to ensure that the approach to errors does not undermine the principles of labour justice; noting Zondo JP's judgment in *National Union of Metalworkers of SA & others v Driveline Technologies (Pty) Ltd & another* 2000 (21) *ILJ* 122 (LAC) (*Driveline*), to the effect that (para 64) –

> '[I]t matters not for the purposes of jurisdiction whether at the time of the conciliation of a dismissal dispute, the reason alleged for the dismissal was operational requirements or an automatically unfair reason. The dispute is about the fairness of the dismissal. Therefore, provided the alleged reason is one referred to in s 191(5)(b), the Labour Court will have jurisdiction to adjudicate the real dispute between the parties without any further statutory conciliation having to be undertaken as long as it is the same dismissal.'

[4] The possible introduction of CCMA Rules for employers to make a 'with prejudice settlement offer' prior to the commencement of arbitration, which would fall away when the arbitration commences, and which could have cost implications for the referring party.

4. Consolidation of disputes arising from the same facts/ issues [CCMA GB; LC RULES BOARD]

Relevant Rules, Practice, Provisions etc.:

- LRA 135 **Resolution of disputes through conciliation** ss. (3A) permits a single commissioner appointed in respect of more than one dispute involving the same parties to **consolidate the conciliation** proceedings so that '**all the disputes**' may be dealt with in the same proceedings.
- Rule 28 of the CCMA Rules (2023) **When the Commission may consolidate disputes** permits the CCMA or a commissioner to consolidated more than one dispute so that the disputes may be dealt with in the same proceedings.
- Labour Court Rule 23 **Consolidation of proceedings** permits the consolidation of separate proceedings

For consideration:

15. Rule 28 regulates the consolidation of proceedings before the CCMA and currently consolidation is permitted (the commission or commissioner '*may*'), whereas in the context of unfair discrimination disputes, para 12.9 of the CCMA Practice and Procedure Manual (Nov. 2014) indicates that, in the case of arbitration, the disputes '*should*' be consolidated, and that the arbitrator '*should*' determine all the disputes based on the same set of facts. 'Only in exceptional circumstances should the disputes be arbitrated separately.'

16. To facilitate the consolidation of disputes, the following interventions could be considered –

    [1] Amending CCMA Rule 28 to provide that disputes (LRA, EEA, BCEA) arising from the issues in dispute/same facts *should* ordinarily be consolidated (unless there are compelling reasons not to). *[Moreover, not consolidated disputes at conciliation could be remediable at arbitration / adjudication, with mechanisms in place for the arbitrator / adjudicator to rectify any mistakes [omissions to conciliate a particular dispute] that may have occurred in the conciliation* proceedings – *per intervention 5. below];* and

    [2] Rule 23 of the Labour Court Rules could similarly clarify that disputes based on the same facts/issues in dispute 'should', in the ordinary course, be consolidated.

[See intervention 11. below for considerations related to consolidation of statutory claims.]

5. Commissioner, arbitrator, or judge to direct the process [CCMA GB; LC RULES BOARD; LAW AMENDMENT]

[Also: in the context of adjudication (Labour Court) processes and the role of judges in the effective resolution of disputes see interventions 14, 16 and 17.]

Relevant Rules, Practice, Provisions etc.:

- CCMA Rule 22 **How to determine whether a commissioner may arbitrate a dispute**
- Labour Court Rule 6 **Referrals** (4) **Pre-trial conference by parties** (5) **Judges directions** (6) **Judge's powers on pre-trial matters**
- LRA s. 138 **General proceedings at arbitration proceedings** requires the commissioner to conduct the arbitration in an appropriate manner to determine the dispute fairly and quickly with minimum legal formalities but must deal with the substantive merits of the dispute; and ss. (3) If all parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.
- LRA s.137 **Appointment of senior commissioner to resolve dispute through arbitration** on application to the director considering the complexity of the dispute etc.
- LRA S 141 **Resolution of disputes if parties' consent to CCMA arbitration** (instead of LC adjudication) (LC powers re award) S 141(5)(a) Resolution of disputes if parties' consent to CCMA arbitration
- LRA s 157(4) (a) states that the LC *may* refuse to determine a dispute [except appeal/review] if not satisfied that an attempt to conciliate was made; & (b) a certificate of outcome is sufficient proof that a conciliation attempt has been made
- LRA s 157(5) **Jurisdiction of LC** *[except for s 158(2)]* LC does not have jurisdiction to adjudicate a dispute IF any *employment law* requires the dispute to be resolved through arbitration
- LRA s 158(2) **Powers of LC** if at any stage after referral to the LC if it becomes apparent that the dispute ought to have been referred to arbitration, the LC may – (a) stay proceedings and

refer the dispute to arbitration; *or* (b) if expedient … continue with the proceedings (limited to power of CCMA ito award, although may award costs for incorrect referral – s 162(2)(a)

- LRA 191(5) **Disputes about unfair dismissals and unfair labour practices, which** differentiates between ss. (5)(*a*) and s(5)(*b*) disputes as reflected in the table below [see also Intervention 16]

LRA 191(5)(*a*) [category *'5(a)'* dismissals] BC/CCMA must arbitrate –	**LRA 191(5)(*b*) [category *'5(b)'* dismissals] may be referred to the LC for adjudication -**
→ If the alleged reason is related to conduct or capacity (unless the reason is the employees' participation in a non-compliant strike);	→ If the alleged reason is automatically unfair
→ If the alleged reason is that the employer made continued employment intolerable; or less favourable conditions after a transfer; unless the allegation relates to a reason contemplated in s.187;	→ If the alleged reason is based on the employer's operational requirements
→ The employee does not know the reason for the dismissal **	→ If the reason is the employees' participation in a non-compliant strike
→ If the dispute concerns a ULP *[although not related to a dismissal].*	*[Note that if the ULP involves alleged discrimination under the EEA; it is the LC that will have jurisdiction.*

** The LRA is silent on the jurisdiction of the arbitrator if it emerges that the reason is in fact a category 5(b) dismissal that should have been referred for adjudication.

For consideration:

17. Jurisdictional issues can arise that may frustrate the efficient resolution of a labour dispute, such as –

    - the absence of a certificate of non-resolution; or 30 days may not have expired since referral; or
    - in the case of 'misclassification', the dispute that was referred and conciliated and which is reflected in the Certificate of Outcome may differ from the 'true' dispute that subsequently emerges during the proceedings: for example, the employee may have alleged a 'category 5(*a*) dismissal and it subsequently emerges that the disputes is a 'category 5(*b*) dismissal;[21] or an employee may have alleged an unfair labour practice and subsequently it emerges that the employer's conducted amounted to unfair discrimination .

18. The error may be that a pre-condition (conciliation or a 30-day period) has been missed; or it may be that the dispute resolution body to which the dispute has been referred does not have statutory jurisdiction to determine the dispute. To navigate these jurisdictional issues requires knowledge of a comprehensive body of jurisprudence (which is expertly evaluated by Le Roux and Le Roux in *Labour Dispute Resolution: Jurisdictional Potholes, Pitfalls and Dongas: Reflecting on Recent Jurisprudence* (2022) 43 *ILJ* 1443). Jurisdictional issues are compounded by complex provisions and different dispute pathways and can result in significant delays and cost.

[21] Although the 'dispute' is the same - 'unfair dismissal', the reason has changed, impacting the dispute resolution pathway.

19. Interventions should be considered that shift the burden from the employee/referring party to the presiding officer to clarify the jurisdictional issue and provide directions in response to **jurisdictional issues** based on the misclassification of a dispute or the absence of a jurisdictional pre-condition. This could include -

    [1] introducing a statutory provision empowering and requiring commissioners, arbitrators, and judges (the 'presiding officer') to give directions to the parties including an adjournment for 30 -days to permit referral and conciliation, with a directive and referral to the appropriate dispute resolution body (CCMA, Bargaining Council, accredited agency. Case management mechanisms should also be in place between the labour dispute resolution institutions to ensure the effective co-ordination of dispute resolution between the institutions. [see also intervention 17 on the LC jurisdiction provisions (LRA s 157(4) and the role of judges in this regard].

    [2] Amendment to CCMA Rule 22 **How to determine whether a commissioner may arbitrate a dispute**[22] could require the commissioner to give directions to the referring party regarding the jurisdictional issue in a manner that promotes efficient, speedy and fair resolution of the dispute. If the dispute is one that the CCMA (or other DR institution, subject to s 147(4)(b)) would ordinarily have jurisdiction to resolve, but where there is a jurisdictional issue such as the misclassification of the dispute/s (which may mean that there has not been a satisfactory attempt to resolve the dispute),[23] or if the dispute should have been referred to a BC/SC/agency, the arbitrator should give appropriate directions to correct the jurisdictional issue in a manner that is expedient and promotes the effective resolution of the dispute. In the ordinary course, to avoid delays/duplication, the arbitrator should continue to hear the matter (in terms of s LRA 147, fees would be recoverable from a council who has jurisdiction, and costs against a party could be considered) and may attempt to resolve the dispute through conciliation (if it emerges that the 'true' dispute/s have not been conciliated); or adjourn the arbitration (eg up to 30 days/shorter by agreement) with directions for any attempt to resolve the dispute that is required or desirable and any settlement reached may be issued by the commissioner as an arbitration award (s 138) or by the commission in terms of s 142A.

20. Specific provisions that could clarify the use of directions from the presiding officer to promote effective dispute resolution include -

    [1] In the provisions relating to the powers and jurisdiction of the LC (LRA s. 157 and s. 158); and in terms of s. 158(2) where it appears that the dispute should have been referred to arbitration (for example because of the nature of the dispute, or the reason for the dismissal), that the Labour Court should, in the ordinary course of events, continue with the *arbitration* proceedings in the interests of the effective resolution of the dispute (see Intervention 17 on Labour Court processes for resolving labour disputes).

    [2] In terms of s. 157(4)(a) when the Labour Court is not satisfied that an attempt has been made to resolve the dispute through conciliation, but the matter is otherwise ripe for hearing, the judge should treat the failure to attempt conciliation as if it were a pre-trial matter and give directions to the parties on the appropriate procedure, including a short postponement to

[22] Rule 22 sets out the position if it appears that a jurisdictional issue has not been determined, and the burden is placed on the referring party to prove that the Commission has jurisdiction to arbitrate the dispute.
[23] See *Motsomotso v Mogale City Local Municipality* [2016] 11 BLLR 1146 (LAC).

allow the parties to attempt conciliation in a manner that promotes effective labour dispute resolution.

6. Aligning jurisdictional competencies: CCMA, councils, accredited agencies [LAW AMENDMENT]

[Note: Intervention 6 deals with alignment of institutions (CCMA, BCs and accredited agencies); and Intervention 7 builds on this and proposes alignment of LRA and EEA dispute resolution pathways].

Relevant Rules, Practice, Provisions etc.:

- LRA s. 28 Powers and functions of **BCs**
- LRA s.43 **Statutory councils**
- LRA s.51 and 52 includes provision for dispute resolution involving non-parties within the registered scope of the council.
- LRA s. 127 **Accreditation of councils and private agencies** in ss. (2) lists the exclusions of disputes which councils and agencies may not perform.
- LRA. s. 147 Performance of DR functions
- Bargaining council limitations in the EEA include –
    - EEA s.10(2) referral of unfair discrimination disputes to the CCMA
    - EEA s. 16 disputes about disclosure of information [& LRA s. 16] to the CCMA;
    - EEA s. 52 disputes about protection of employees; rights to the CCMA; and
- **BCEA 73A Claims for failure to pay any amount** – referral to CCMA, excludes Bargaining Council
- s 19 SDA
- (On the scope (limitations) and powers of accreditation (BCs and private agencies), see the GN 1987 of 25 August 2023: List of BCS accredited by the CCMA)

For consideration:

21. The dispute resolution jurisdiction of BCs/SCs and agencies is restricted by statutory exclusions in the LRA (including s.127(2)); the EEA (including s 10.); the BCEA; and the SDA.[24] This can create inefficiencies and complex dispute resolution pathways when a dispute is misclassified (& therefore sent to the incorrect DR body); or where there are more than one disputes, and the BC has jurisdiction to conciliate one but not the other, which was the conundrum in *Motsomotso v Mogale City Local Municipality*.[25]

[24] On the exclusions, see also the CCMA Practice and Procedure Manual (Nov. 2014), Chapter 2 Functions, Jurisdiction and Powers Generally, and see also Chapter 5 Referrals and initial administration.

[25] The tortuous dispute resolution pathways resulting from the current jurisdictional quagmire is well-illustrated by the facts in *Motsomotso v Mogale City Local Municipality* [2016] 11 BLLR 1146 (LAC). The case involving a promotions dispute which the employee *first referred* as an unfair labour practice (ULP) to the Bargaining Council (SALGBC); and an award was granted in her favour, however on review the Labour Court set aside the arbitration award on the grounds that the dispute should have been referred as an unfair discrimination claim, which the BC would not have had jurisdiction to conciliate. Ms Motsomotso subsequently duly referred (*second referral)* an unfair discrimination claim to the Labour Court (the LC has jurisdiction to adjudicate after conciliation), however, because the Bargaining Council does not have jurisdiction to hear discrimination cases under the EEA (only the CCMA has jurisdiction), the BC could not have attempted to conciliate a discrimination claim, leading the LC to conclude (a decision confirmed by the LAC para 21) that the BC certificate of outcome would therefore only be valid in respect of the ULP claim; and in the absence of a referral to the CCMA for conciliation, the LC declined to adjudicate the dispute; a decision which the LAC confirmed on appeal. The LAC laments that the appellant 'has over the years tried everything, at great

22. Consideration should be given to the following –

[1] Amending LRA s.127 **Accreditation of councils and private agencies** to read (underlined inserted) – (1) Any council or private agency may apply to the governing body in the prescribed form for accreditation and for accreditation of the persons to perform any of the following functions –

(a) resolving disputes through conciliation, if *any* employment law requires conciliation, and

(b) arbitrating disputes that remain unresolved after conciliation, if ~~this Act~~ *any* employment law requires arbitration.

[2] Amendments to employment law statutes to explicitly include bargaining council jurisdiction in relation to SDA referrals; to determine EEA disputes (amending EEA s. 10 – that reference to CCMA includes Bargaining Council and accredited agencies); and BCEA (ss. 73A) claims.

7. Aligning and converging the LRA and EEA dispute resolution pathways [LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- LRA s. 191 **Disputes about unfair dismissals and ULPS**
- LRA s.191(5) referral (for arbitration or adjudication) after lapse of 30 day (or before then if there's a certificate of outcome) and within 90 days after
  - s.191(5)(a) disputes – to arbitration
  - S.191(5)(b) disputes – to the Labour Court for adjudication
- EEA s. 10 **Disputes concerning this chapter**; s.47 **Consolidation of proceedings**
- Note also non-alignment between CCMA and Bargaining Councils
  - Bargaining council limitations include –
    - EEA s.10(2) referral to the CCMA (*Intervention 7)*
  - LRA. s. 16 disputes about disclosure of information [& EEA s. 16] to the CCMA;
  - s. 52 disputes about protection of employees; rights to the CCMA; and s 19 SDA
  - (On the scope (limitations) and powers of accreditation (BCs and private agencies), see the GN 1987 of 25 August 2023: List of BCS accredited by the CCMA)

For consideration:

23. Currently, the provisions of the LRA (in particular s 191) and the EEA (s. 10) establish a complex matrix of dispute resolution pathways, that can result in difficulties after – particularly when the reason for an employer's actions Amendments should be considered to align jurisdiction (and provide clarity / guidance in the event of a 'misclassification' or evolving classification [point below]), in relation to the nature and type of dispute (and disputes that might arise from the same facts) in the context of EEA and LRA[26] disputes. Considerations in this regard include –

[1] Revisiting, and aligning, the EEA (unfair discrimination) and LRA (ULP and unfair dismissal) **jurisdiction** and **dispute resolution pathways** – to allow arbitration of LRA (s 191) disputes that might also give rise to an EEA claim for earners below the threshold; employees earning below the BCEA threshold should have the option to refer automatically unfair dismissal

expense, to prosecute this dispute. Unfortunately, the merits of the dispute were never adjudicated in a court of law.'

[26] See *Motsomotso* (n 25).

disputes to arbitration (aligned with EEA jurisdiction provisions); LRA s 191 should be revised to align with the dispute resolution provisions of the EEA that permit referral of disputes to arbitration for referring parties who earn below the BCEA earnings threshold. This provides an opportunity too for revision/clarification that ensures that referrals and disputes in terms of s 191 are determined effectively (and directions given) in accordance with the principles of labour justice; and ensures that the evolution of a dispute / evolving nature and classification of a dispute [differentiated from **reason** for dismissal – the reason may be unknown, and may evolve as evidence emerges] does not result in technical barriers to the efficient determination of a dispute. Specific examples of scenarios that would benefit from clarifying the law and ensuring that labour justice is not undermined include *SACCAWU obo Gasa & others v Melbro Wholesale (Pty) Ltd* (LC, 2021): whether the reason for the dismissal is misconduct ss. (5)(a) dispute) or for participation in a non-complaint strike (a ss (5)(b) dispute); and *Motsomotso* (above).

[2] Sexual Harassment disputes should not be 'exceptionalised' – this fragments jurisdiction and becomes a problem if there is harassment or discrimination but if it subsequently emerges that it is not 'sexual' harassment.[27] The EEA s. 10(6)(aA) should be amended, and the same dispute resolution pathway should be applicable to harassment claims, regardless of the ground alleged. (Note that the CCMAs jurisdiction over discrimination cases more generally is more limited than its jurisdiction over harassment).

8. Severance pay disputes, with more favourable contract terms [LAW AMENDMENT]

A Side Note: Differentiating between 'dispute resolution' and 'compliance proceedings'

24. Before proceeding to consider various provisions relating to compliance (eg. with basic statutory minimums such as BCEA severance pay) and enforcement, it is perhaps useful to reflect on the conceptual difference between labour disputes and 'dispute resolution' and non-compliance disputes.

25. Whereas the focus of **dispute resolution** is on reaching agreement / resolving disputes that relate to employer or employee concerns and grievances regarding an aspect of work performance or employment, **compliance proceedings** typically involve ensuring that the employer adheres to established (statutory or contract) conditions of employment. **Compliance proceedings** are therefore more concerned with investigating / auditing – 'labour inspection' - to establish non-compliance, and, if there is non-compliance, with the processes to ensure compliance.[28] On the other hand, **dispute resolution processes** focus on resolving a dispute (an issue / grievance between the parties) ideally through negotiation or conciliation, in a manner that is mutually agreeable to the parties; and, in the absence of agreement, the dispute is settled by way of arbitration or adjudication.

26. The labour inspectorate (and BC agents) are concerned with compliance, but typically should not be involved in dispute resolution;[11] whereas dispute resolution institutions such as the CCMA,

[27] See for example *KB v Nedbank* [2020] 2 BALR 138 (CCMA).

[28] Compliance proceedings are facilitated by Rule 31B of the CCMA Rules (2023) How to apply for the enforcement of written undertakings and/or compliance orders; and possibly Rule 37 of the CCMA Rules (2023) How to have a subpoena issued and served to secure the presence of a person in terms of LRA s. 141(1), form 7.16.

although primarily concerned with labour dispute resolution, may also play a role in compliance proceedings (often attached to the issue in dispute – eg. a retrenchment might involve a dispute about fairness and compliance proceedings regarding statutory severance pay).

27. Interventions 8. to 13. primarily deal with specific issues relating to (BCEA and LRA) compliance and compliance proceedings; which are an aspect of the proposed review and consolidation of CCMA dispute resolution, compliance, and enforcement provisions in any 'employment law'; and the use of CCMA Rule-making powers to regulate its procedures, practice and forms. for compliance matters; and which clarifies the authority and application of fines for non-compliance.

Relevant Rules, Practice, Provisions etc.:

- BCEA s.41(6) **Severance pay** – ss.(6) currently limits referral to the CCMA to disputes that are 'only about the minimum entitlement in terms of s.41'; whereas ss. (10) permits the Labour Court to enquire into 'any severance pay'.
- LRA s.142 **Powers of commissioner when attempting to resolve disputes**
- LRA Form 7.11 provides for referral of a 'severance pay' dispute

For consideration:

28. There appears to be confusion [see *National Union of Metalworkers of SA & another v Scaw SA (Pty) Ltd* (2023) 44 ILJ 1807 (GJ)] regarding the interpretation of s. 41(6), as the section appears to require employees who have a severance pay dispute (but not an 'unfair dismissal' dispute) and where the severance pay is contractual, to pursue their claim in the Labour Court, or the Magistrate or High Court. The source of this confusion lies in an earlier Labour Court decision *Telkom v CCMA* [2004]8 BLLR 844 (LC) which involves a significant misinterpretation of this provision.

29. To remedy the confusion, and to avoid the fragmentation of claims and to provide certainty and an equitable remedy to retrenched employees, the following amendment to s.41(6) of the BCEA is suggested for consideration –

    [1] BCEA S.41(6) 'If there is a dispute ~~only~~ about the entitlement to severance pay ~~in terms of this section,~~ the employee may refer the dispute in writing to –'. [*note however phase 1 law reform amendments regarding high-earners and clarification regarding their exclusion may be necessary*]

9. Collective agreements: interpretation, application, compliance & enforcement [LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- LRA s. 24 **Disputes about collective agreements** provides for dispute resolution in the context of collective agreements (and a settlement agreement); Schedule 4, flow diagram 3
    - (ss). 2 – if there is a dispute about the **interpretation or application** of a collective agreement (CA) *any party* to the dispute may refer the dispute to the CCMA if the CA does not provide for a procedure, or if the procedure is not operative, or if the resolution of the dispute has been frustrated by any party
- LRA s. 28 **Powers and functions of bargaining council** includes: (a) to conclude collective agreements, and (b) **to enforce collective agreements**
- LRA S.33 provides for the appointment and powers of designated agents of BCs (powers set out in Sch. 10); and -

- LRA s. 33A. **Enforcement of collective agreements by BCs** provides that 'despite any other provision in the LRA, a BC may **monitor and enforce compliance with its CAs** in terms of this section or a CA concluded by the parties to a council; and that a BC may refer unresolved dispute concerning compliance with a provision of a CA to arbitration; and an arbitrator may impose a fine for failure to comply – fines regulated in ss (13) in terms of a Ministerial notice regarding maximum fines

For consideration: Interpretation & Application Disputes v Compliance / breach

30. The dispute resolution processes result in 'uneven' jurisdiction [see Intervention 14 on the Labour Court and Collective Agreements]. In summary -

    - LRA s. 24 confers jurisdiction on the **CCMA** to resolve '**interpretation or application'** disputes, and BCEA s. 73A to the CCMA for claims for failure to pay any amount (statutory/contract/CA), and BCEA s. 64(dA) for a **labour inspector** to refer non-compliance disputes to the CCMA;

    - Whereas in terms of **BCs**: LRA s. 28 powers to **enforce** CAs; and s. 33A provides for enforcement of a CA by BC including ss. (3) BC agent's **compliance orders**, and ss (4)(a) for BCs to appoint an arbitrator for non-compliance with a CA.

31. Consideration should be given to the jurisdiction of the Labour Court; the CCMA; the BCs; and accredited agencies in respect of collective agreement disputes, and compliance with collective agreements. In this regard, Le Roux and Le Roux[29] refer to the 'asymmetry in dispute procedures, depending on the source of the contractual provision', which gives rise to complex scenarios when contract terms have different sources (for example, some terms are provided in the original employment contract terms; other contract terms are incorporated because the parties are bound by a collective agreement (LRA s. 24(3), and still other contract terms are included in terms of BCEA s. 4). One of the gaps is Labour Court jurisdiction over collective agreements (see Intervention 14.) Specific interventions could address the following issues.

    [1] There is some confusing regarding disputes to the CCMA couched as **'interpretation or application'** in terms of LRA s. 24 (which excludes reference to BC referrals), when the true dispute is about enforcement of the rights that flow from the collective agreement (see *HOSPERSA obo Tshambi v Department of Health, KZN* (2016) 7 BLLR 649 (LAC)). If it is desirable to limit the application, the term **'interpretation or application'** should be defined; alternatively, LRA s. 24 could be expanded to include compliance disputes[30] (note the absence of referral timelines, which should be imposed and CCMA/BC); alternatively, to cross-reference to s. 73A for compliance/enforcement disputes; and (possibly in a footnote) that if it emerges that the dispute is about compliance, then the arbitrator must determine the dispute in terms of the applicable provisions (note the proposal for consolidated procedures issued in terms of the CCMAs Rule-making powers).

    [2] Another issue is the non-alignment of the CCMA and BC jurisdictions [LRA and BCEA], and whether LRA s.24 should be amended to apply to both CCMA & BCs; and interventions to align and clarify disputes and the relevant LRA and BCEA proceedings for CA enforcement and compliance.

[29] At p. 1470.

[30] See Van der Walt, 'Breach of a collective agreement: does the LRA provide a remedy in section 24? *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council* (2010) 6 BLLR 594 LAC' (2011) *Obiter* 769.

10. Failure to pay any amount claims (s73A BCEA, NMW, employment contract, CA) [LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- BCEA s.73A **Claims for failure to pay any amount** provides that 'despite s 77', the CCMA has jurisdiction over disputes concerning the failure to pay any amount owing to that employee or worker in terms of the **BCEA**, the **NMWA**, a **contract of employment**, a **sectoral determination** or a **collective agreement**' provided that the worker/employee earns below the BCEA earnings threshold.
- [*Other employees may institute claims in: the LC; the HC or, subject to jurisdiction, the Magistrates' Court or the small claims court (ss. (3)]*

For consideration:

32. **BCEA s. 73A** extends jurisdiction to the CCMA to contractual disputes (employment, collective agreement) where an employee or worker earns below the BCEA earnings threshold. Amendments to consider include –

    [1] **Aligning and clarifying the contractual / BCEA / NMWA jurisdiction of councils / accredited agencies with the jurisdiction of the CCMA** (amendment to ss s 73A(2) and cross-reference to LRA. s 28 regarding employees or workers where the collective agreement falls within the scope of a BC.

    [2] Possibly extending the contractual jurisdiction of the CCMA to workers who earn above the threshold, but capping the amount that can be awarded in a contractual claim.

    [3] More generally (and linked to interventions below), clarity on the power of the CCMA, Bargaining Council, accredited agencies, to issue awards relating to the payment of money claims (and authority to issue fines/ and how to process fines – see intervention 12) is advised.

11. Consolidation of statutory claims (BCEA s.74(3)) [LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- BCEA s.74 **Consolidation of proceedings** provides for consolidation of BCEA and NMWA disputes; ss. (2) with unfair dismissal disputes; and ss (3) re an applicant **jointly initiating** a claim for money owing in terms of the NMWA, BCEA, with a dispute instituted by that employee over an entitlement to severance pay (BCEA s. 41(6)).
- (Note also EEA s. 47. Consolidation of disputes concerning contraventions of the EEA by the same employer)

For consideration:

33. BCEA s74(3) states that dispute/claims for an amount owing in terms of the BCEA and NMWA may be **'initiated jointly'** with a severance pay (s. 41(6)) dispute; which suggests that if it is not included in the severance pay referral, then the commissioner or LC cannot determine the claim for any other amount owing. However, ss. (2) does not similarly require that the claims be be 'initiated jointly', but rather that the Labour Court or the arbitrator may determine …'. An amendment along similar lines is recommended –

    [1] BCEA s74 ss. (3) the Labour Court or the arbitrator may determine a claim for any amount owing in terms of [BCEA or NMWA] with a dispute by that employee over the entitlement to severance pay in terms of s 41(6)'.

12. Clarifying authority to issue a fine for NMW non-compliance (BCEA s. 69; 73; 76A) [LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- BCEA s.68 **Securing an undertaking**
- BCEA s.69(2)(c) **Compliance order**
- BCEA s.73 **(Compliance) order to be made an arbitration award**
- BCEA s.73A **Claims for failure to pay any amount**
- BCEA s.76A **Fine for not complying with the NMW**
- BCEA s.77A **Powers of Labour Court**
- Rule 31B CCMA Rules (2023)
- LRA s. 33A **Enforcement of collective agreement by bargaining council** makes provision for a fine ss(8)(b) in accordance with ss (13) **Ministerial notice** for the maximum fines for breach of a CA

For consideration:

34. BCEA s.76A does not indicate the **authority responsible for issuing a fine** for non-compliance with the NMWA and this should be clarified. BCEA s.69 **Compliance order** provides for a **labour inspector** to issue a compliance order which is required [(s.69(2)(c)] to set out various details including: 'in the case of a failure to pay the NMW, the amount that the employer is required to pay to an employee in terms of s 76A' *[however, this refers to the rate of pay in the s 76A formula]* S.69(2)(f) also requires **the labour inspector to indicate any fines that may be imposed in terms of Schedule Two of the BCEA.** s. 77A **Powers of Labour Court** includes imposing a fine for contravention of any provision of the Act for which a fine may be imposed.

35. Rule 31B CCMA Rules (2023) sets out the procedure to apply for a compliance order to be made an arbitration award (in terms of s. 73) and does not expressly refer to payment of fines.

36. The CCMA's jurisdiction over claims for failure to pay any amount including amounts due in terms of the BCEA and NMWA does not make provision for a fine to be added to an award issued in terms of s 73A.

37. Consideration should be given to -

    [1] Clarifying the authority to issue a fine in terms of BCEA s.76A – and cross-reference to the appropriate provision, and whether a fine should be included in a compliance order that is made an arbitration award in terms of BCEA s. 73; and/or clarified in Rule 31B CCMA Rules (2023).

    [2] Whether the jurisdiction of the Bargaining Council/SCs and – and powers of BC agents – in terms of BCEA compliance orders / related fines should be clarified and referrals directed as appropriate. The mechanism for determining fines by Ministerial notice could be considered.

38. *[More broadly, in the process of consolidating the CCMA's procedures, the enforcement and compliance role and processes of the Inspectorate;*[31] *and the role of the CCMA, the Councils (the BC agents); and the LC in terms of compliance and enforcement could be considered.]*

[31] Article 3 of the Labour Inspection Convention, 1947 (No. 81) emphasises that the function of labour inspection is 'to secure the enforcement of legal provisions relating to conditions of work and the protection of workers … such as provisions relating to hours, wages, safety, health and welfare …'.

13. Employer objection to a BCEA compliance order (BCEA s. 69(5) & (6)) [LAW AMENDMENT]

[To be considered as an aspect of consolidating the CCMA procedures.]

Relevant Rules, Practice, Provisions etc.:

- BCEA s. 69(6) **Objecting to a compliance order** – requires that the dispute must be dealt with in terms of s 73; and s 73(1)(b) cross-refers back to s 69(5) of the BCEA
- CCMA Referral form 7.11 applies to disputes referred by the employer in terms of BCEA s.69(5)
- BCEA s.73 **Order may be made an arbitration order**
- CCMA Rule 31B **How to apply for the enforcement of written undertakings and/or compliance orders**

For consideration:

39. CCMA Rule 31B (4) provides the process where employer objects to a compliance order being made an arbitration award which is the process initiated by the Director-General in terms of BCEA s.73. The process (for the CCMA Rule) envisages the serving and filing of an affidavit by the employer setting out the objection, to which the DoEL / party who initiated the proceedings has an opportunity to reply, and (31B(8)) a commissioner is appointed to determine the application by considering the documents filed in terms of the Rule. Provision is also made (31B(9) for a hearing of the application; and (31B(10)) for the application to be heard on a motion roll.

40. However, it appears from the wording in BCEA s 69(5) and (6), as well as the referral form that the employer may object to a BCEA compliance order issued by a labour inspector before or independently of/regardless of whether the Director-General applies (in terms of s. 73) for the order to be made an arbitration award. Recommendations include –

    [1] Clarifying the process when an employer refers a dispute in terms of the BCEA s 69(5) objection to the compliance order by amending s 69(6) and substituting 'must be dealt with in terms of s 73' with a dispute resolution procedure (con-arb) similar to that in BCEA s. 73A(5); and making provision in s. 69(5) for condonation; or alternatively that the objection procedure must be determined by the CCMA [the LRA s. 115 (2A) powers].

    [2] Clarifying the jurisdiction of the Bargaining Council/SCs and – and powers of BC agents – in terms of BCEA compliance orders and objections to compliance orders.

14. The LC's exclusive, concurrent, contractual & unlawfulness 'jurisdictional morass' [LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- LRA s.157 **Jurisdiction of the LC** ss. (1) **exclusive** jurisdiction; ss (2) **concurrent** jurisdiction (constitutional / fundamental rights); ss. (5) Except as provided for in s.158 (2), LC does not have jurisdiction to adjudicate an unresolved dispute if … employment law requires an attempt to conciliate
- LRA s.158 **Powers of the LC;** ss (2) if the proceedings ought to have been referred to arbitration – which includes a dispute about **interpretation or application of a collective agreement** (& ss. (3)) may continue proceedings
- BCEA s. 73A(1); (3) **Claims for failure to pay any amount** (CCMA or LC, depending on earnings threshold) – including an amount due in terms of a collective agreement; s.77 **Jurisdiction of LC** ss. (1) exclusive jurisdiction; and ss.(1A) exclusive jurisdiction re civil relief on listed claims ito the BCEA; and s. 77A **Powers of Labour Court**.

For consideration:

41. The **'jurisdictional morass'** (a term coined by the late Anton Steenkamp, J and Craig Bosch)[32] remains a barrier to the effective performance of the Labour Court. As Van Niekerk J explains:

> '[t]he most easily identifiable culprit in relation to limitations on access to the Labour Court is the question of jurisdiction. Although the Explanatory Memorandum alludes to the desirability of a single court, with exclusive jurisdiction in all labour matters, the drafters did not propose specifically that all labour – or employment-related disputes resort ultimately or in the first instance under the jurisdiction of the Labour Court'.[33] 'Subsections (1) and (2) of s 157 and the complexities that they generate continue to exercise the labour courts and the Constitutional Court.'[34]

42. As the previous JP of the Labour Court (now CJ of the Constitutional Court) has previously lamented,[35] '[t]he fact that the High Courts also have jurisdiction in employment law and labour disputes completely undermines and defeats that very important and laudable objective [efficient, cost-effective and expeditious system of resolving labour disputes] and thereby undermines the whole Act.' Since then, emerging jurisprudence has moreover narrowed the jurisdiction of the LC over matters brought to the Court based on a 'lawfulness' claim. Zondo (then JP), in the *Langeveldt* judgment, pleads for consideration to be given (by, among others, 'Parliament, the Minister of Justice and Constitutional Development, the Minister of Labour and NEDLAC) to resolve the issue of the LC's jurisdiction. The 2013 Constitution 17th Amendment Act, which excluded the SCA's jurisdiction to hear appeals in labour matters was a positive development.

43. The 'jurisdictional morass' may be classified into the following (overlapping) areas of jurisdictional concern –

- *Exclusive jurisdiction* (LRA s.157(1))
- *Concurrent jurisdiction* (LRA s.157(2))
- *Unlawful dismissals (no jurisdiction)* (LRA. s. 191)
- *Contractual jurisdiction (limited jurisdiction)* BCEA

44. The party who refers a matter to the LC must identify the provision in the LRA, BCEA or other employment law, which confers jurisdiction on the LC to hear the matter. On exclusive and concurrent jurisdiction -ss. (1) and (2) of s. 157 – 'the complexities that they generate continue to exercise the labour courts and the Constitutional Court.'[36] While it is competent for LRA amendments to extend the Labour Court's exclusive jurisdiction such an amendment would have consequences for case-loads which would require consideration. In addition, these amendments would require consultation with the Department of Justice and/or the Office of the Chief Justice.

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[32] Craig Bosch 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' *Acta Juridica* (2012) 1: 120-147, p. 134.

[33] Van Niekerk J, Reducing labour conflict as an obstacle to economic and social progress: the role of the Labour Court twenty-five years on' Chapter 3 in *Liber Amicorum Manfred Weiss*, p. 18 (The Labour Court 25 Years On').

[34] The Labour Court 25 Years On', p. 19, summarise the 'waves' of challenges.

[35] In *Langeveldt v Vryburg TLC & Others* [2001] 5 BLLR 501 (LAC).

[36] The Labour Court 25 Years On', p. 19.

*Considerations in the context of **unlawful dismissals** (and unlawful conduct more generally):*

45. Van Niekerk cites the decision in *Edcon,* deliberating on the absence of a provision in the LRA that could be relied on to declare a dismissal invalid or unlawful, stating that '[c]onspicuous by its absence here [in LRA s.185] is a para *(c)* to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in s.185 or anywhere else in the LRA it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal is invalid.'[37] Notably, '[p]rior to Edcon, the Labour Court had regularly entertained claims of unlawful employer conduct, most often on an urgent, interim basis.'[38] A potential intervention could be –

    [1] To amend LRA s.185 to clarify that every employee has the right not to be dismissed unlawfully;[39] and/or alternatively to re-craft provisions in the LRA s.157 **Jurisdiction** and s.158 **Powers** that confer jurisdiction and powers on the Labour Court to extend the LC's footprint to determine unlawfulness disputes arising from the employment relationship [currently, the disputes must arise from the employment contract].

46. On the Labour Court's current jurisdiction regarding the employer's unlawful conduct, Van Niekerk summarises the status quo: 'employer conduct may be challenged on the grounds of fairness using the mechanisms established by the LRA, or by way of a claim of breach of contract, or by way of review where the state is the employer and the impugned decision constitutes the exercise of a public power. Any challenge to the lawfulness of employer conduct outside those parameters is a matter for the High Court.' 'In short: The "one-stop" shop remains elusive, and forum shopping remains rife'.[40] *Note that extending the LCs jurisdiction, depending on how the provisions are crafted may or may not impact on/ limit the HCs jurisdiction over employment and labour matters.*

*Considerations in relation to **contractual** jurisdiction (particularly in relation to Collective Agreements) and the **power** to order the **payment of an amount of money**:*

[See also Intervention 9 on the uneven jurisdiction in respect of collective agreements.]

47. Complexities may arise when an employee has multiple claims that arise from contractual arrangements that may have different dispute resolution pathways. For example, the LC has jurisdiction over contracts of employment (BCEA); whereas collective agreement disputes are required to be arbitrated (unless BCEA s. 73A(3) applies). BCEA s. 77A. sets out the **Powers of the LC** to make any appropriate order and to make a determination concerning a contract of employment, however, specific powers to order the payment of money due (in terms of s. 73A:

[37] *Steenkamp & Others v Edon Ltd (NUMSA intervention)* (2016) 37 *ILJ* 564 (CC) in 'The Labour Court 25 Years On', p. 22.
[38] 'The Labour Court 25 Years On', p. 22.
[39] The desired 'unlawfulness' (breach of contract and otherwise – eg ULPs, unlawful suspensions) of the LC and the CCMA should be considered/agreed upon and clearly articulated in the LRA/employment law, with directions on process provided in CCMA / Labour Court
[40] 'The Labour Court 25 Years On', p. 24. Van Niekerk cites Zondo CJ in *Langeveldt* to the effect that the fact that the HC has jurisdiction in employment and labour disputes undermines the objectives of the LRA; and that there should be 'a single hierarchy of courts which have jurisdiction in respect of all employment and labour matters …'.

ie. due in terms of the BCEA, NMWA, contract of employment, sectoral determination or a collective agreement) is not explicitly stated.[41]

48. BCEA s. 73A (1); (3) confers jurisdiction over **claims for failure to pay any amount** (CCMA or LC, depending on earnings threshold), including an amount due in terms of a collective agreement; **and** s. 77A **Powers of Labour Court**.

    [1] As part of the broader considerations regarding the LCs jurisdictional footprint, the desirability of LC jurisdiction in respect of the contractual (with clarification regarding terms incorporated by collective agreement) jurisdiction of the LC, and the LCs power in terms of claims for an amount due, should be considered.

    [2] Linked to the above, reference to 'employment contract' could possibly be defined along the lines that it includes - (a) a term implied in a contract or by statute or otherwise; (b) terms of contract as modified by or under statute or otherwise; (c) a term that is incorporated by reference or by statute, including the terms of a collective agreement.[42]

49. Other considerations regarding jurisdiction include –

- S. 157(5) Except as provided for in s 158(2) or elsewhere in any employment law the Labour Court does not have jurisdiction to adjudicate an unresolved dispute … to be resolved through conciliation; and
- s 158(2)(b) … if it is expedient and in the interests of labour justice … continue with the proceedings

[The above considerations adopt a 'fix' the current provisions approach. The idea which Van Niekerk J expresses in 'The Labour Court 25 Years On' (p. 27) is broader, and he asks – in the context not only of the jurisdictional issues, but also in terms of the inefficiencies across the dispute resolution system: 'At the level of the concept, perhaps the time has come to consider the appointment of a commission or task team to redesign the statutory dispute resolution system, both to take into account developments in the labour market since 1996, and to acknowledge the limitations on resources which currently exist.']

15. Facilitated retrenchments [LAW AMENDMENT]

[Currently under consideration in the Phase 1 law reform process]

Relevant Rules, Practice, Provisions etc.:

- LRA s. 189A Dismissals based on OR by employers with more than 50 employees ss. (3) makes provision for Facilitation and the appointment of a facilitator.
- s. 189A (7) refers to a facilitated process and permits the employer to give notice to terminate employment (after 60 days of issuing s 198(3) notice. In response, ss. 7(b) permits employees to give notice of a strike (s. 64(1)(b) or (d); or to refer a dismissal dispute to the LC ito s 191(11).
- The Facilitation Regulations, 2002 anticipate the referral of an unfair dismissal dispute to the Labour Court (Regulation 9.), and is silent on referral to conciliation prior to the Labour Court

[41] See the discussion in Le Roux and Le Roux *Labour Dispute Resolution: Jurisdictional Potholes, Pitfalls and Dongas: Reflecting on Recent Jurisprudence* (2022) 43 *ILJ* 1443: see in particular Issue 10 – Some Contractual Terms Are More Equal than Others and Issue 12 – Jurisdiction but No Power.

[42] For a similar provision, see s 3(6) of the UK Employment Tribunals Act 1996.

- The CCMA Practice and Procedure Manual (Nov. 2014), ch. 23.6.7 explicitly states that 'the effect of the appointment of a facilitator and the facilitation processes is that … further conciliation (following a section 189A facilitation process is not required before … strike notice … or before referring a dispute about the fairness of the reason for the dismissal to the LC for adjudication.'

For consideration:

50. Although it appears from the LRA provisions and the Facilitation Regulations, 2003, that conciliation was not anticipated before referring an unfair dismissal dispute to the Labour Court, the recent decision in *NUMSA oho Members v SAA Technical (Pty) Ltd* (2023) 44 ILJ 2000 reiterates the principle in *Intervalve* of that 'one of two preconditions before the dispute can be referred to the Labour Court for adjudication is that there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication'; and maintains that conciliation after dismissal relates to a dispute about fairness, which differs from facilitation.

51. In order to limit the duplication of processes, unfair dismissal referrals after s 189A facilitated process should ordinarily not require conciliation as a pre-condition; and to achieve this s. 189A (7) could be amended to explicitly indicate that the trade union or employees are not required to refer the dispute for conciliation before taking the steps anticipated in ss. (7)(*b*).[43]

16. Enhancing dispute resolution and expanding con-arb [CCMA GB; LC RULES BOARD; LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- CCMA Rules (2023) and CCMA Practice and Procedure Manual (Nov. 2014),
- **LRA Chapter VII Dispute Resolution, Part C – Resolution of disputes under Auspices of Commission**
- **LRA s. 115** (CCMA's Rule-making power)
- **LRA s. 191 Disputes about unfair dismissals and ULPs**
- **LRA s. 191(5 A)** requires the use of **con-arb** *if the dispute concerns* –
  (a) Dismissal related to probation
  (b) ULP related to probation; and
  (c) unless there's an objection: any other dispute contemplated in s.191(5)(*a*).

For consideration:

52. The LRA's dispute resolution system prioritises **conciliation** and 'elevates mediation as the primary means of resolving conflict. … [yet] mediation is avoided if not undermined, with deleterious consequences for democracy. Dialogue degenerates. Processes proliferate. Costs ramify. A default to litigation results in subverting the opportunity for designing consensual outcomes in favour of succumbing to the unpredictability of litigation.'[44]

[43] Various considerations are the option of a 'Certificate of Outcome' from the Facilitator that could serve as the 'pre-condition'; where there has been a significant passage of time between Facilitation and Referral; and the possibility of amending s 189A (7) to clarify that conciliation is not required before referring an unfair dismissal dispute to the Labour Court, but to include an option that the referring party may elect to do so.

[44] Dhaya Pillay, 'Labour Dispute System Design – Dispute Resolution, Conflict Management or Problem Solving? (2020) 41 ILJ 2237.

53. Previously, concerns have been raised regarding the 'short time periods allocated to the conciliation processes', and that 'commissioners seldom have more than one hour in which to try to reconcile parties to a dispute' which has received criticism in a report from the ILO.[45] Conciliators should be encouraged to make use of opportunities for skills development, to share insights, and to keep abreast of best practice; and should have adequate time to try to resolve the dispute (through the various methods identified in the LRA: **mediation**, **fact-finding**; or **making a recommendation**). The CCMA is responsive in this regard and should be further capacitated (the CCMA operates under significant capacity and resource constraints) to lead in the field – the development of theory and practice – adopting best practice to enhance ADR processes at the CCMA (which should inform the CCMA Rules and CCMA Practice and Procedure Manual), to the extent that is feasible in view of capacity and resource constraints. Efforts in this regard should be encouraged (including ongoing developments regarding arbitration practice – which should also influence development of **Labour Court processes** towards a more **inquisitorial approach** to the determination of labour disputes) with a view to enhancing dispute resolution aligned with evolving developments in the field of ADR.

54. Amendments that could improve the efficiency of dispute resolution processes (see also Intervention 7.) include expanding the use of compulsory con-arb.[46] (This would likely entail amendment to LRA s.191(5 A), and Rule 17 CCMA Rules (2023)). Considerations in this regard include –

    [1] Previous draft amendments (Clause 15 of the 2010 Draft Amendment Bill);[47] that s 191(5A) be amended to extend the use of con-arb to all arbitration proceedings, unless the commissioner concludes that con-arb is 'unreasonable', or the parties and the commission agree otherwise. The Explanatory Memorandum explained that the 2002 introduction of the con-arb process 'has contributed to a significant reduction of the period taken to resolve disputes', but that objections to con-arb are lodged in 'roughly 30% of cases significantly delaying the resolution of disputes'.[48] However, the amendment did not materialise, and should be revisited. Further considerations include -

        a. The possibility of limited compulsory con-arb to all employees within the first [six] months (or alternative period) of employment (all ULP/unfair dismissals except disputes that must be referred to the LC for adjudication, and protected disclosure disputes); and disputes involving a protected disclosure;

        b. A provision that condones con-arb (and arbitration) processes if it subsequently emerges that the dispute should have been determined in an alternative process/another tribunal (subject to a principle of no-prejudice to either party);

        c. Moreover, the right of a referring party (below the BCEA earnings threshold) to elect arbitration is currently provided for in the EEA s. 10; and the LRA provisions should be aligned accordingly (see also Intervention 7.)

[45] Anton Steenkamp & Craig Bosch 'Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential' (2012) *Acta Juridica* 120 at 124.

[46] See the arguments and modalities for expanding the use of con-arb in Hanneli Bendeman, 'An Analysis of the Problems of the Labour Dispute Resolution System in South Africa' (2006) *African Journal on Conflict Resolution).*

[47] Available at https://www.gov.za/sites/default/files/gcis_document/201409/338731112a.pdf

[48] Para 13, Explanatory Memorandum.

[2] The law should clarify the circumstances in which a commissioner may postpone arbitration proceedings when a dispute is set down to be determined via con-arb.[49]

17. LC procedures: Informal, expeditious, inexpensive [LC RULES BOARD; LAW AMENDMENT]

See also Intervention 5; and Intervention 19.

The authors of a 2016 ILO comparative study of 9 countries[50] stress the importance of judges in effective labour dispute resolution and point out that 'there is an increasing emphasis on settlement through in-court conciliation'.

'It is not processes in themselves that cause delay; people cause delay.'[51]

Relevant Rules, Practice, Provisions etc.:

- LRA s.157 **Jurisdiction of the Labour Court** ss. (4) (a) LC may (except in review [see intervention 19]/appeal) refuse to determine any dispute unless conciliation has been attempted & (b) certificate of outcome is sufficient proof of an attempt; and ss (5) limitations if the dispute is required to be arbitrated
- LRA s.158 **Powers of the Labour Court**
- LRA s.159 **Rules Board for Labour Courts and rules for Labour Court**; the Rules Board is responsible for making rules to regulate the conduct of proceedings in the Labour Court, and (ss. (11)) requires the Judge President to ensure that the Rules Board for Labour Courts meet at least once every two years to review the rules of the Labour Court.
- **Labour Court Rules;** LRA s.141(5)(a) empowers the LC to continue proceedings with the Court acting as arbitrator in certain circumstances; LRA s. 191 ss (5) (b) envisages adjudication

For consideration:

55. A positive development is that the Labour Court Rules Board has recently been reconstituted,[52] and revision of the Rules, and regular review, is anticipated.

56. On the mandate and achievements of the LRA's purpose of establishing a Labour Court (LC) that is 'easily accessible with informal, expeditious and inexpensive procedures', Van Niekerk J (now JA), comments that '[a]t every level the Labour Court has manifestly failed to meet this mandate'.[53] He expresses the view that '[t]he goal of easy access has been frustrated from the outset by uncertainty regarding the extent of the court's jurisdictional footprint (dealt with in Intervention 14.), with the result that any determination of the appropriate forum in which labour disputes are to be adjudicated remains the subject of a complex set of rules'. In the context of 'speedy and efficient dispute resolution', Van Niekerk points out the absence of any case management system, delays and backlogs in proceedings (exacerbated by an increase in cases

[49] Steenkamp and Bosch 'Labour Dispute Resolution under the 1995 LRA', -. 127.

[50] The study considers the labour dispute resolution systems in the following countries (from common law, civil law, and mixed legal systems): Australia, Canada, France, Germany, Japan, Spain, Sweden, UK, and the USA. Minawa Ebisui, Sean Cooney and Colin Fenwick (eds), *Resolving Individual Labour Disputes: A comparative overview* (2016) ILO.

[51] *Speedy social justice,* p. 838.

[52] 'A properly functioning rules board is … a prerequisite for the refinement of legal process in the labour courts, and, in particular, for the introduction of any substantive measures to ensure speedy justice.' (Speedy social justice, p. 840.)

[53] André van Niekerk 'Reducing labour conflict as an obstacle to economic and social progress: The role of the Labour Court twenty-five years on', Chapter 3 in *Liber Amicorum Manfred Weiss* (2021) 13.

without additional posts), and that, '[d]espite the stated purpose … Labour Court procedures and proceedings are as formal as those applicable in any Division of the High Court', where 'parties not infrequently resort to the Uniform Rules of Court and seek the direct application of these Rules.'[54]

57. (Now retired) Judge President Waglay suggests (in an address to the CCMA's September 2022 conference) as a 'longer-term intervention … the need for a comprehensive review of the Labour Court's rules. To make its processes more informal and flexible, and not subject to the straight-jacket like rules applicable in the High Courts.'[55]

58. The first Board was appointed in 1996 and the rules were amended in 1997, 1998 and 2001; however, it seems the board lapsed in 2002 until 2017. In 2018, a revised set of Rules was drafted. Although the revised Rules have yet to be published, it is anticipated that the Rules will be a significant improvement on the current, formalistic Rules.[56] The role of the Rules Board is critical for modernising and ensuring the efficient functioning of the Labour Court. To this end, both the LRA and Labour Court Rules should prioritise effective dispute resolution, and the importance of the role of the judge[57] and the Court Rules could be reinforced by–

    [1] amending LRA s. 159 to explicitly reflect that the Rules Board is to 'make rules to regulate the conduct of proceedings, taking into account the role of judges in dispute resolution in the Labour Court, the objects of the Act, and the principles of labour justice in accordance with best practice'.

    [2] LRA s.157 **Jurisdiction of the Labour Court -** ss. 4 and ss. (5) – deal with potential jurisdictional issues where there may be technical flaws in the conciliation stage (or the nature of dispute reflected on the certificate of outcome may have evolved); or the dispute may be one that should be arbitrated. An amendment to LRA s. 157 could clarify that the LC/ judge must give directions that promote labour justice, including, if appropriate, a short adjournment (30 days) with directions (and referral to appropriate DR body) so that the jurisdictional issue can be attended to without delaying the LC processes; and unless there are compelling reasons not to, the LC should arbitrate a dispute the is otherwise 'properly' before it. [see also intervention 5 – and in the case of reviews, see intervention 19.

18. Small business compliance & workplace conflict resolution [CCMA GM; NEDLAC; LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- LRA provisions on dismissals, unfair labour practices, and **Codes of Good Practice** (s. 188(2); s.189; s.203); EEA s. 10(4)(b); Functions of Commission (s.115)
- LRA chapter **Workplace Forums**

[54] 'The Labour Court 25 Years On', p.26.
[55] Reported at https://www.judgesmatter.co.za/opinions/the-state-of-the-labour-court-and-the-need-for-interventions-to-improve-its-performance/
[56] 'The Rules have not kept pace with changes to the LRA' and other legislative developments – see the examples in Andre van Niekerk, 'Speedy social justice: Streamlining the statutory dispute resolution processes' (2015) 36 ILJ 837.
[57] Van Niekerk J suggests that 'judicial intervention, even on an informal basis, has the potential to focus professional minds at an earlier stage than might otherwise be the case.' In 'Speedy social justice', p. 842.

For consideration:

59. As a self-diagnostic tool on dispute prevention, the 2023 ILO *Access to labour justice*[58] asks:

> 'Does the institution provide advice to workers and employers on how to solve disputes at the workplace through workplace cooperation and grievance procedures?'

Interventions to bolster efforts that equip employers and workers with the tools to prevent and resolve disputes at workplace level (see the discussion in Part C. on the CCMA and BUSA tools in this regard) should be prioritised.

60. In the context of simplifying compliance for small businesses, Part C. also elaborates on considerations in relation to –

[1] introducing a Small Business Fair Dismissal Code (see for example the Small Business Fair Dismissal Code introduced in terms of the Fair Work Act, 2009 in Australia) that would simplify dismissal processes. LRA s.189 could be amended to clarify application to small businesses and enable the gazetting of a Small Business Fair Dismissal Code; and

[2] interventions promoting dispute prevention and resolution in the workplace, including the possibility of 'formalising' the use of the CCMA/BUSA grievance processes, guidelines and templates in a Code of Good Practice (issued in terms of LRA s. 203, which, in terms of ss (4) must be taken into account in applying or interpreting any employment law). Evidence of proper use of the Tools would then be taken into account at the CCMA as evidence of compliance with the law.

61. **Employee participation** in the workplace, as envisaged in Chapter V of the LRA (workplace forums) is a means to **enhance efficiency in the workplace** (s. 79). However, the potential for workplace forums as a mechanism for cooperation, dialogue and join decision-making in the workplace has not been realised.[59] Currently, workplace forums may be established on application by a trade union or trade unions jointly that have as members the majority of the employees employed by an employer, who employs more than 100 employees. Lowering the minimum threshold, and other mechanisms could be considered to promote the establishment and use of workplace forums; however, interventions in this regard need to be fully ventilated - the current chapter has had no traction, and the reasons for this need to be investigated, and the social partners engaged on the context and complex reasons for the low uptake of workplace forums that will inform interventions and revisions to Chapter V and other interventions to promote the establishment and functionality of workplace forums.

[1] NEDLAC social partners could consider a 'Worker Participation and Workplace Forums' Task team, or project, to engage with a view to formulating interventions that will be effective in promoting worker participation and forums for joint-decisioning in the workplace and enhance efficiency in the workplace.

[58] Note 7.

[59] See Clive Thompson, 'Co-operation in the workplace: the South African flag never unfurled', chapter 12 in *Liber Amicorum Manfred Weiss* (2021) Juta and Co.

19. Considerations at review stage [LC RULES BOARD; LAW AMENDMENT]

Relevant Rules, Practice, Provisions etc.:

- LRA s. 145 **Review of arbitration awards** provides for the review of an 'alleged defect in any arbitration proceedings; ss. (4) provides that if an award is set aside by the LC, then the LC may determine the dispute in the manner it considers appropriate; or may make any order it considers appropriate about the procedures to be followed to determine the dispute.
- LRA s.158(1)(g) **Review applications of any function provided for in the LRA**, subject to s. 145; and
- LRA s.158 (1)(h) **Review of any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law**
- LRA s. 159 **Rules Board for Labour Courts**

For consideration:

62. Review applications 'form the bulk of a LC judge's work, and this is where the more significant delays occur.'[60] In *Speedy social justice*, Van Niekerk J points out the differences between a criminal appeal in the High Court (where records are 'rarely in excess of 100 or 200 pages') and a review application in the LC. He asks the question: 'If appeals against convictions for murder, rape and robbery could be dealt with on what seem to me to be a relatively efficient basis, why is it that the arbitration of disputes about the unfair dismissal of single employees consumes the resources that it does?'

63. Recent developments to improve the efficiency of review proceedings include –

    → amendments (2014) to LRA s.145 that discourage reviews as a delay tactic by providing for security (ss (7); (8)) in order to suspend the operation of an arbitration award pending the review outcome, and requiring the applicant to apply for a hearing date within six months of the review application (ss.(5)).

    → the reconstitution of the Rules Board. Notably, a revised set of Rules that will 'introduce more informal and expeditious procedures, particularly in relation to review applications' was prepared in 2018.[61] The finalisation of the long-delayed revised Labour Court Rules will greatly expedite the process of review proceedings in the Labour Court and NEDLAC should seek to ensure that the finalisation of the new Rules is expedited.

64. The large body of decisions on the applicable test has led to an extremely complex jurisprudence. In the light of this, it is appropriate to consider whether legislative amendments would serve to further reduce the load of reviews and the complexity of such litigation. Such a goal could be achieved by –

    [1] Aligning the provisions of s 158 (1)(g) [review of any function provided for in the LRA] and s 158 (1)(h) [review of any act performed by the State in its capacity as employer] with s. 145 (the provisions of s. 145 should apply *mutatis mutandis* in terms of the s 158 reviews), which would regulate the limitations on the time-period for review; the applicable law, and process and relief that the LC may grant. Both these issues are addressed in s 145 in the context of the review of an arbitration award.

[60] 'Speedy social justice', p. 842.
[61] The Labour Court – 25 Years On', p. 26.

[2] In addition to review proceedings, possible amendments should be considered to s. 145 to clarify the standard of review of CCMA awards, and indicating the relevant considerations in determining reasonableness for the purposes of review.[62] (It should be noted that the elaboration of a statutory review test while having significant potential benefits for labour dispute resolution would require extremely careful formulation that takes account of the complexities of administrative law.)

20. Improving enforcement of awards for payment of money [CCMA GB; LAW AMENDMENT]

As mentioned in the introduction, the ILO Diagnostic Tool on Access to Labour Justice[63] identifies Enforcement as a core principle of the effectiveness of labour dispute resolution, indicating that 'An effective labour dispute resolution institution has mechanisms to ensure effective compliance with the final resolution.' This 'refers to the capacity to use different mechanisms to ensure enforcement and to promote enforcement under a standardized procedure'. In this regard, the diagnostic tool asks the following three questions as a self-diagnostic tool to assess whether the relevant dispute resolution institution has mechanisms for effective enforcement:[64]

- Is the settlement agreement automatically vested with an executive title/writ of execution?
- Does a settlement agreement need to be ratified by a judge/ notary or other official authority in order to be legally enforceable?
- Does the institution engage with other public institutions for effective enforcement (e.g. labour administration, tax service, etc)?

Prior amendments to the LRA have streamlined the processes and relate largely to the first two bullet-points; and intervention 20 builds on the existing mechanisms and arrangements between the Sheriffs' and the CCMA.

Relevant Rules, Practice, Provisions etc.:

- CCMA Infosheet on LRA s. 143; LRA Form 7.18; 7.18A; Chapter 19 of CCMA Practice and Procedure Manual
- LRA s.142 Powers of commissioner when attempting to resolve disputes … includes the power of the commissioner to subpoena any person who may be able to give relevant information that will help resolve the dispute
- LRA s.143 Enforcement of an arbitration award ss. (1) may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued; and ss. (5) an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcement or executing that award as if it were an order of the Magistrate's Court; provided that ss. (3) the director has certified that the arbitration award is an award contemplated by the section (ie. final and binding and not an advisory award); and LRA s. 51(8) -unless otherwise agreed in a CA, s. 143 applies to arbitration conducted by a BC.
- LRA s.149 **Commission may provide assistance** together with **Legal Aid** SA – if asked by an employee

[62] Clarifying the applicable standard and how to determine reasonableness would address confusion in this regard (see most recently, Anton Myburgh SC "The Reasonableness Review: The Quest for Consistency" which articulated these issues at a 2024 conference).
[63] ILO Access to labour justice (2023) (n 7).
[64] Note 7, p54.

- Rule 40 of the CCMA Rules (2023) **Certification and enforcement of arbitration awards** provides for an application to have an arbitration award certified:

  (1) Form 7.18 – an award issued by a commissioner; Form 7.18A – an arbitration award ito arbitration under the auspices of a BC
  (2) Once certified, an award that orders the **payment of money may be enforced by execution against the property of the employer party by the Sheriff of the court** in the Magisterial district where the employer party resides, or conducts business; and
  (3) Includes an award of costs (LRA s.138(1), a taxed bill of costs and any arbitration fee ito s. 140(2); and
  (4) The amount of money that may be enforced through execution by the Sheriff ito the Rule includes-
    - the amount that is ordered to be paid ito the award;
    - any interest on that amount ito s. 143(2); and
    - the Sheriff's costs permitted ito the Magistrate's Court Tariff for Sheriffs.
  (5) If the CCMA financially assisted a party to enforce / execute an award, the CCMA may, if the costs of execution were not realized in the sale, may collect such costs from the defaulting party.

- Magistrates' Courts Rules, Rule 38 Security by judgement creditor- the sheriff may require that the party suing out the process in execution shall give security to indemnify the sheriff; Rule 45 Enquiry into financial position of judgment debtor

- Public Finance Administration Act (PMFA), s. 66 Restrictions on borrowing, guarantees and other commitments provides that 'an institution to which the PMFA applies (the CCMA is a Schedule 3 entity) may not issue a guarantee, indemnity or security, or enter into a transaction that binds the institution (or the Revenue Fund) to any future financial commitment unless – authorised by the PMFA & other legislation; or … ss. (3) through the following persons… (b) … if … authorised by notice in the national Government Gazette by the Minister: The accounting authority for that government business enterprise [CCMA], subject to any conditions the Minister may impose.' – the Minister for PMFA purposes is the Minister of Finance

- Magistrates' Courts Act, s. 65A. Notice to judgment debtor if judgment remains unsatisfied; and s. 65M Enforcement of certain judgments of division of High Court or court for regional division.

- Uniform Rules of Court (in terms of the Supreme Court Act), Rule 45. Execution – General and movables

For consideration:

65. Effective enforcement of arbitration awards has been described as 'the true test of the legitimacy of the CCMA given that parties cannot be said to respect the outcomes of the processes if they ignore the CCMA's awards and agreements as soon as they step outside its doors'.[65] The Guidance Notes in the ILO's *Access to labour justice* elaborates, in the context of judicial dispute resolution bodies, the following related to enforcement –

[65] Steenkamp and Bosch 'Labour Dispute Resolution under the 1995 LRA' (n 45) at 130. The authors, with reference to the CCMA annual reports, state that the 'indications are that close to 30% of awards are not complied with, that that figure seems set to increase.'

'enforcement of its decisions and awards [should] be based on clear procedures that allow enforcement of ultimate solutions to be fast and effective, while respecting due process …'

'… different mechanisms and good practices [should be used] to ensure that enforcement of solutions is achieved completely. This may include special arrangements with government institutions, for instance to facilitate assisting arrests by the police and tax services, and with bank institutions, in order to get the necessary information regarding the debtor's assets and location. In addition, an institution that uses electronic and online procedures to guarantee the effectiveness of enforcement will do it faster.'

66. The difficulties which an employee/former employee faces when seeking to enforce an award, include the complexities of enforcing an award (which recent amendments go some way to address by extending the mandate of the CCMA to assist). Without the assistance of the CCMA, once an award has been certified by the CCMA, the (former) employee (who is the judgment creditor) is required to approach the sheriff to assist with enforcement. The employee is expected to pay the sheriff's costs and to provide security to the sheriff for any claims that might result from the attachment. Even with the CCMA's assistance, and arrangements with the Sheriff, provisions in the PFMA mean that the CCMA is not able to provide the sheriff with the necessary indemnity.

67. Considerations to facilitate the effective enforcement of CCMA awards include –

[1] The Minister of Employment and Labour approaching the Minister of Finance on behalf of the CCMA for a PMFA s.66 Notice authorising the accounting authority for the CCMA to issue 'a guarantee, indemnity or security in favour of the sheriff' to cover costs incurred in the process of execution against debtors.

[2] Designing a protocol or best practice for the effective enforcement of monetary awards with due consideration to the ILO guidelines in *Access to labour justice* including the following –

a. The potential for 'special arrangements with government institutions … and with bank institutions, in order to get the necessary information regarding the debtor's assets and location.' Some considerations in this regard are –

i. The extent to which relevant information regarding employers' location (and assets, bank account details) can be obtained by the CCMA – for example from the various reporting requirements (eg to the authorities within the DoEL) that arise from employment law obligations;[66] or from the employer in CCMA enforcement proceedings (including the use of subpoenas) (see on enforcement hearings below) and

ii. The possibility of tripartite arrangements between the CCMA, Sheriffs Board, and Legal Aid to co-ordinate enforcement proceedings;

iii. The potential for introducing enforcement hearings,[67] or using / adapting the enforcement mechanisms provided for in s.65A and s. 65M Magistrates' Courts Act (as the Labour Court has the status of a High Court); Rule 45 of the Magistrates' Courts Rules, or even Rule 45(8) of the Uniform Rules of Court in

[66] For example, employers are required to provide information under COIDA including Bank Account Details for refunds. Another avenue to pursue is disclosure by SARS under the Tax Administration Act 28 of 2011, s. 70(2) & (4) (Disclosure to other entities).

[67] This could be at the CCMA and could include use of subpoena powers – and Rule 37 of the CCMA Rules (2023) How to have a subpoena issued and served to secure the presence of a person in terms of LRA s. 141(1), form 7.16). Note also Bargaining Council enforcement proceedings.

proceedings, designed to attach the employer's (the debtor) bank account,[68] or other incorporeal property that may be available for attachment (which could be gleaned from information provided by arrangement between the CCMA and the DoEL or other public authority). This would require co-ordination between the various institutions.

b. The use of 'electronic and online procedures' for enforcement that could streamline the processes;
c. The CCMA's powers to make rules regulating enforcement procedures should be clarified and if necessary clarified through amendments to s 115, as discussed earlier in the Paper.

PART C. WORKPLACE DISPUTE RESOLUTION & SIMPLIFYING COMPLIANCE FOR SMALL BUSINESSES

Simplifying compliance for small business and private households

68. The CCMA and Business Unity South Africa (BUSA) Practical Labour Advice Web Tool for Small Businesses and Mobile App was approved at NEDLAC and is part of the Presidential Jobs Summit Framework, 2018 and provides a useful tool to support small businesses to comply with labour legislation. The Web Tool provides detailed guidelines and templates on the various aspects of employment related to –

- *Fair selection, recruitment and appointment*
  - How to recruit and select employees and what are an employer's statutory obligations upon commencement of employment, including templates and checklists for UIF, COIDA, SARS, BCEA.

- *Managing employees for a productive and stable workplace*
  - Managing conduct and capacity
  - Employees on probation
  - Misconduct and poor performance
  - Sickness or injury
  - Retrenchment
  - Employee conflict
  - Employee grievances
  - Unfair labour practices
  - Trade unions
  - Strikes or protect action

- *Ending employment*
  - Employees on probation
  - Misconduct and poor performance
  - Sickness or injury
  - Retrenchment
  - Unprotected strike action
  - Automatically unfair dismissal
  - Resignation and retirement
  - End of fixed-term contract
  - Employer and Employee Obligations on termination of employment

[68] For example, in the UK employment tribunal, decisions sounding in money are recoverable under the County Courts Act and can be recovered by way of a 'third-party debt order' against, a bank that owes the employer money (ie. when the bank account is in credit).

- Referral of disputes to CCMA / BC

69. The Web Tool provides useful guidance and templates and ways to encourage access and expand the use of the guidelines and templates should be considered, and the possibility of 'legitimising' the Tool by introducing the content into Codes of Good Practice issued in terms of LRA s. 203, which, in terms of ss (4) may provide that the code must be considered in applying or interpreting any employment law. Evidence of proper use of the Tools would then be considered at the CCMA as evidence of compliance with the law.

70. Simplifying the application of the LRA dismissal law provisions (Chapter VIII), and the Code of Good Practice on dismissals and on Dismissals Based on Operational Requirements could reduce the costs of compliance and have a positive impact on SMME employment levels and the formalisation of small businesses. Examples in comparative law include simplified dismissal/retrenchment procedures for small businesses, such as the Small Business Fair Dismissal Code (see Annexure) in Australia. In this regard, s. 388 of the Fair Work Act 28 of 2009[69] provides that the 'Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code'. A dismissal is 'deemed to be fair' (see Annexure) if the employer (employing fewer than 15 employees) complies with the Code. The introduction of such a Code would curtail the application of s 189 to small businesses; this would need to be reflected in s. 189.

71. Additional advocacy to support small businesses with legal compliance (and simplifying processes/requirements for small businesses) may be possible through the Bargaining Council structures, as the representation of small businesses is required in Bargaining Councils (LRA s. 29; s. 30(1)(b)), and in the context of statutory councils (LRA s. 41(5)(b)).

Improving workplace dispute resolution

72. In the context of the workplace, the objectives of the LRA (s. 1(d)) include -

> (iii) to promote … **employee participation** in decision-making in the workplace *[see below re Workplace Forums]*; and …
> (iv) the **effective resolution of labour disputes.**

73. With regard to (iv) the **effective resolution of labour disputes**: the manner in which conflicts and grievances are dealt with in the workplace will have an impact on whether or not a dispute is subsequently referred to the CCMA (or bargaining council); of which the adequacy and accessibility of grievance (and disciplinary) processes in the workplace is an aspect.

74. Guidance on the examination of grievances - related to conditions of employment contrary to a collective agreement/employment contract or works rules or laws/regulations or to the custom or usage of the occupation etc, and in good faith) within the undertaking/workplace level, are set out in the ILO's Examination of Grievances Recommendation, 1967 (No. 130) (R 130). These include –

→ Item 8. 'As far as possible, grievances should be settled within the undertaking …. [through] … effective procedures … adapted to the conditions of the country, branch of economic activity and undertaking concerned …'

[69] In Australia a person is protected from unfair dismissal if the person has completed a minimum employment period, which is 6 months, unless the employer is a small business, in which case the minimum employment period is one year. The Fair Work Act also imposes restrictions on person who earn above a high income threshold (s. 382(b)(iii).

→ 'Procedures within the Undertaking'

- Item 10. (1) An initial attempt to settle grievances directly between the worker and their immediate supervisor; if the grievance is not resolved or if it is not appropriate to raise it with his or her supervisor,
- (2) the worker should be entitled to have his or her case considered at one or more higher steps, depending on the nature of the grievance and on the structure and size of the undertaking.
- Grievance procedures should be uncomplicated and quick – appropriate time limits may be prescribed;
- Worker should have the right to participate directly in the grievance procedure & to be assisted or represented during the examinations of his grievance by a representative of a workers' organisation, by a representative of the workers in the undertaking, or by any other person of his own choosing, in conformity with national law or practice. The employer should have the right to be assisted or represented by an employers' organisation.

75. As indicated in Part B., the CCMA and Business Unity South Africa (BUSA) Labour Advice Web Tool for Small Businesses provides useful guidance and templates and ways to encourage access and expand the use of the guidelines and templates should be considered, and the possibility of 'legitimising' the Tool by introducing the content into Codes of Good Practice issued (by Nedlac or the Minister) in terms of LRA s. 203 , which, in terms of ss (4) may provide that the code must be taken into account in applying or interpreting any employment law; or alternatively, the CCMA may publish guidelines (LRA s.115(1)(g) and ss.(3)) and make provision for consideration to grievance processes at the stage of referral and/or conciliation as an aspect of CCMA practices and procedures (LRA. s115(2A)).

76. In the context of **employee participation** in decision-making, this is envisaged in Chapter V (**Workplace Forums**) of the LRA. A primary object of workplace forums (LRA s. 79) is to **enhance efficiency in the workplace**. However, the potential for workplace forums as a mechanism for cooperation, dialogue and join decision-making in the workplace has not been realised.[70]

77. Workplace forums are established on application by a trade union or trade unions that have as members the majority of the employees employed by an employer, who employs more than 100 employees. The LRA lists the matters for consultation (LRA s.84); the nature of consultation (LRA s.85); and matters for joint decision-making (LRA s.86), and a process for dispute resolution if the forum does not reach consensus with the employer on matters for joint decision-making.

78. Workplace forums have the potential to play a significant role in ensuring employee participation in decision-making and promoting a cooperative work environment, and amendments to the LRA could be considered to facilitate the uptake of workplace forums, in particular revision to LRA s.80 (**Establishment of Workplace Forum**) – possible revision includes lowering the minimum threshold, and providing alternative pathways to establish a workplace forum, as currently only a majority trade union/s may apply for a workplace forum to be established.

79. Moreover, ways of actualising the provisions of the 2018 Code of Good Practice: Collective bargaining, industrial action and picketing[71]could be considered. The provisions include **measures**

[70] See Clive Thompson, 'Co-operation in the workplace: the South African flag never unfurled', chapter 12 in *Liber Amicorum Manfred Weiss* (2021) Juta and Co.
[71] GNR.1396 of 19 December 2018.

to promote employee participation and dialogue in the workplace, including, in the absence of a workplace forum, **consultative forums** (differentiated from structures of collective bargaining) that should be inclusive of the different occupational categories irrespective of union membership.

AN ACTION PLAN TOWARDS ENHANCED EFFICIENCY AND EQUITY

80. A roadmap and timelines for implementation of the proposed amendments should consider factors relevant factors including –
    - the current stage and status of progress on law reform (phase 1)
    - the feasibility of interventions
    - priorities and 'appetite'; and the
    - cost and ease of implementation.

81. '**Quick wins**' would include interventions that improve the efficiency of the dispute resolution system, at all levels (the workplace and at sector level, at the CCMA, and the Labour Courts) without requiring amendments to legislation. In this regard, the role of the social partners in promoting labour justice and effective dispute prevention and resolution should not be underestimated, particularly at the level of the workplace and at sector level. Appropriate interventions include awareness raising, training and education by stakeholders and the social partners with their constituencies, to promote effective dispute resolution and a culture of dialogue and cooperation should be encouraged. The CCMA Governing Body and the Labour Court Rules Board also have a role to play both in terms of the exercise of their respective rule-making powers to direct processes within their respective domains, and as a co-ordinated system for labour dispute resolution.

82. Four sets of **targeted amendments** are proposed: in relation to (1) **the CCMA's rule-making powers** and a review and consolidation of CCMA dispute resolution, compliance, and enforcement procedures; (2) alignment of the **jurisdiction of the CCMA, Bargaining Councils, and accredited agencies**; (3) alignment of the **LRA and EEA dispute resolution pathways**; and in the context of the Labour Court, (4) legislative amendments to the Labour Court jurisdiction and **standard of review** are recommended. Some interventions are also proposed to address **anomalies in the legislation**.