INTRODUCTION

The establishment of the Commission for Conciliation, Mediation & Arbitration (the CCMA) is recognized as one of the most innovative examples of institutional design in the post-apartheid reconstruction of the South African state as well as internationally in the area of labour dispute resolution. Created through an intensive process of tripartite negotiation, the CCMA has provided an unprecedented level of access to social justice for employees, particularly those who are unfairly dismissed.

The ambition of its creators was to establish an institution that could provide accessible, cheap, quick and non-technical dispute resolution in the most common categories of labour disputes. The CCMA was brought into existence by the Labour Relations Act 66 of 1995 (LRA) a statute developed through intensive engagement between the new democratic government and the representatives of organized business and labour. The CCMA’s structure and powers reflect its origins in a tripartite negotiation process and both organized labour and business continue to participate in the governance of the CCMA through their participation on its tripartite governing body.

The CCMA has been given a legislative mandate to resolve disputes in a manner that seeks to avoid the technicality and delay that are such a dominant feature of litigation processes. Key aspects of the CCMA’s procedures that promote this approach include short time periods for referring disputes, simplified dispute referral forms, compulsory conciliation of all disputes, an approach to arbitration that seeks to focus on the merits of cases rather than technicalities, restrictions on legal representation in dismissal arbitration, no right of appeal against arbitrators’ decisions and restrictions on the grounds for judicial review of arbitration awards.

The Act promotes orders to reinstate or re-employ dismissed employees as the primary remedy for unfairly dismissed workers and also caps the maximum compensation awards that employees

* Professor of Law, University of Cape Town; Director: Cheadle Thompson & Haysom Attorneys Inc. I have received considerable assistance from CCMA personnel during the writing of this article, in particular Nerine Kahn, Nersan Govender and Eugene van Zuydam. I have also benefited from discussing these issues with Tanya Venter of Tokiso and presenting this material to SASLAW seminars.
can receive. The Act’s combination of core statutory provisions with a ‘soft law’ Code of Good Practice seeks to promote certainty while at the same time simplifying the procedural requirements for a dismissal developed by the Industrial Court and allowing a flexibility in application which allows factors such as the size of businesses and private agreements to be taken into account. A specialist Labour Court (LC) and Labour Appeal Court (LAC) with an exclusive jurisdiction over many aspects of labour law was established to exercise a supervisory jurisdiction over the CCMA and deal with more complex cases. These reforms sought to protect worker rights while at the same time reducing the costs of disputes and the time taken to resolve disputes. The policy documents that preceded the enactment of the LRA argued that this was to promote industrial peace by ensuring that dismissal disputes do not trigger strikes. Since the enactment of the LRA there has been a very substantial decrease in the number of strikes over dismissal and other disputes of right.

The first part of the article seeks to assess the efficiency of the CCMA as a dispute-resolution agency with a particular emphasis on its role in conciliating and arbitrating disputes of right within its jurisdiction, most notably unfair dismissal disputes. This section of the article draws on information recorded by the CCMA through its electronic case management system (CMS) as well as several studies of the operation of the CCMA.1 The different stages of the dispute-resolution process within the CCMA from the initial referral of a dispute to the making of an award at the conclusion of an arbitration hearing are examined. The wealth of available information allows a comprehensive, although not complete picture, to be drawn of this phase of the statutory labour dispute-resolution system.

The second part deals with the processes that occur after an arbitration award has been given. It covers the pattern of review applications brought in the LC as well as the tortuous route that faces employees who are required to enforce awards made in their favour against reluctant employers. Much less information is available about this aspect of the labour dispute resolution as the LC, in particular, does not record data about its operation in the same manner as the CCMA. However, the picture that emerges is that the process of enforcing awards in these circumstances is extremely drawn out and highly

---

1 Studies of the operation of the CCMA include: P Benjamin & C Gruen The Regulatory Efficiency of the CCMA Working Paper 06/110, Development Policy Research Unit UCT (DPRU); H Bhorat, K Paaw & L Mncube Understanding the Efficiency and Effectiveness of the Dispute Resolution System in SA: An Analysis of CCMA Data (September 2007); and I Macun, D Lopes & P Benjamin An Analysis of Commission for Conciliation Mediation and Arbitration Awards Working Paper 08/134, DPRU. These papers can be accessed on http://www.commerce.uct.ac.za/Research_Units/DPRU/Employment_Promotion_Program/WorkingPapers.htm. In addition, the three Tokiso Reviews (2005–6, 2006–7 and 2007–8) contain valuable information on the operation of the labour dispute-resolution system but also contain some provocative assessments that are not substantiated by data.
problemati
c and that this is undermining the effica
cy of the CCMA as a dispute-resolution
institution.

The conclusions seek to locate the operation of the CCMA within
broader debates about labour market regulation in South Africa and to
identify issues in which legislative amendment or changes in practice
are required to ensure that the CCMA retains the capacity to fulfi
its
mandate.

PART ONE: CONCILIATION AND ARBITRATION

How many disputes are referred to the CCMA?

During the fi rst six years of its operation, the number of cases
referred to the CCMA rose each year with the number of referrals
virtually doubling in this period. Referrals increased from 67,319 in
1997–8 (the CCMA’s fi rst full year of operation) to 127,715 in 2003–4.
For the next three years (2004–5 to 2006–7) the caseload was more or
less constant leading to speculation that the CCMA’s caseload had
stabilized. This trend is refl ected in the 2006–7 fi gure of 123,472 refer-
rals. However, in 2007–8, 132,868 cases were referred to the CCMA,
an increase of some 8% over the previous year. The increase in 2007–8
is in all likelihood linked to the economic downturn that commenced
in early 2008 and which has led to signifi cantly higher levels of
retrenchments than were the case in the immediately preceding period.

The number of referrals received by the CCMA exceeds the
assumptions made during the establishment of the CCMA when it
was estimated that some 40,000 cases would be referred to the
CCMA each year. This estimate of its caseload was used as the basis
for determining the CCMA budget from its inception until 2006.

A signifi cant proportion of cases referred to the CCMA are not
within its jurisdiction and are screened out at the initial stage. The
number of incorrectly referred cases has been consistently in the vic-
nity of 30% throughout the life of the CCMA, going as high as 35%
in some years. In keeping with this trend in both 2006–7 and 2007–8,
31% of cases were screened out as being outside of the CCMA’s
jurisdiction. Roughly half of these cases should have been referred
to other dispute-resolution institutions such as bargaining councils
(25%), the Department of Labour (19%) and the LC (2%). The
bulk of the remainder (45%) are referred away because the referral
documentation is incomplete or the referrals are premature.

The high number of mis-referrals indicates the extent to which the
CCMA is better known and more accessible than the other dispute-
resolution institutions. As the CCMA does devote signifi cant resources
to re-directing these matters, it is appropriate that they should be taken

2 The CCMA has analysed out of jurisdiction cases since September 2007.
into account for budgeting purposes. However, the global referrals figures can be misleading when examining patterns of dispute referral and resolution because the incomplete and premature referrals included in this category may be the subject of a subsequent competent referral and the other ‘out of jurisdiction’ cases are likely to be dealt with by other dispute-resolution institutions.

What cases are referred to the CCMA?

Once the ‘out of jurisdiction’ cases are excluded, the CCMA’s case-load of disputes within its jurisdiction can be established. The CCMA is obliged to seek to resolve all these cases through conciliation. In 2007–8, 90,727 conciliations were conducted, an increase from the 2006–7 figure of 85,130.

The vast majority of cases referred to the CCMA are disputes of right that the CCMA is required to conciliate. If they are not settled, these disputes can, depending on the subject-matter, be referred to either a CCMA arbitration or for adjudication by the LC. Again the referral patterns show a remarkable consistency. Throughout the CCMA’s life, approximately 80% of jurisdictional cases referred to it each year have been unfair dismissal cases. There are minor fluctuations in referral levels: in 2006–7, 81% of cases concerned dismissal; in 2007–8 the figure was slightly higher at 83% representing an increase of approximately 3,000 dismissal cases over the previous year. The other major categories of rights disputes referred to the CCMA are unfair labour practices (7%), collective bargaining disputes (3%) and severance pay disputes (2%).

Only three per cent of cases referred to the CCMA involve disputes of interest arising from collective bargaining over wages and conditions of employment. However, conciliating these disputes is one of the CCMA’s most significant functions as many of these disputes concern industry-wide negotiations in the country’s major economic sectors for which the CCMA provides intensive and often extended conciliation. While the vast bulk of the CCMA’s work may involve conciliating and arbitrating dismissal cases, public perceptions of the CCMA’s efficacy as a dispute-resolution institution are closely connected with its ability to resolve high profile wage negotiations. However, this article is concerned with the CCMA’s role in dealing with the high number of rights disputes, especially dismissal cases, referred to it.

3 The CCMA estimates that it spends between 20 and 30 minutes dealing with each non-jurisdictional case.
4 There is a limited exception to this rule: some bargaining councils are authorized to conciliate but not arbitrate disputes. If conciliation fails, these disputes can be referred to the CCMA for arbitration.
5 The CCMA’s reports incorrectly refer to these disputes as ‘matters of mutual interest’ rather than disputes of interest. The reports also do not contain separate statistics for disputes of interest and it is suggested that this is an unfortunate omission.
Who refers disputes to the CCMA?

In 2007, some 9.4 million persons worked in the formal sector in South Africa. Twenty-eight per cent of these employees were covered by a bargaining council; the remaining 72% (6.8 million employees) were entitled to refer disputes to the CCMA. As virtually all employees in the public service (national, provincial and local government) are covered by bargaining councils, the CCMA covers approximately 85% of employees in the private sector. The pool of employees who can refer disputes to the CCMA is further reduced by the fact that many employees are covered by collective agreements that provide for dismissal disputes to be referred to private arbitration or have contracts of employment containing such a clause.

The CCMA deals with some 70,000 dismissal cases each year. These include large-scale retrenchments and dismissals for participating in an unprotected strike. If these disputes are not settled by conciliation, they can be referred to the LC for adjudication. While there may be a relatively small number of these cases, some may involve large groups of workers. However, no information is currently available about the number of employees involved in these cases each year.

The majority of cases are referred by lower paid workers who are classified as being low-paid and low-skilled or semi-skilled. Information extracted from arbitration awards issued from 2003 to 2005 shows that 31% of dismissal and unfair labour practice cases were referred by employees earning less than R1,000 per month and 90% by employees earning less than R5,000 per month. This picture is confirmed by an analysis of the skills level of employee applicants. Slightly over half of referrals (52% of cases) are by employees who are classified as low-skilled; 35% are by semi-skilled workers and only 11% by skilled workers. Figures for unfair labour practice cases show that a slightly lower proportion of cases (45%) are referred by employees earning less than R1,000 per month and 80% by employees earning less than R5,000 per month.

Bhorat, Pauw & Mncube at 8.

In terms of s 147(6) of the LRA the CCMA retains a discretion to arbitrate disputes even where a collective agreement or contract of employment provides for private arbitration. The CCMA has been particularly reluctant to accept an ouster of its jurisdiction particularly where contracts of employment concluded with low-paid workers provide for private arbitration.

Since 2002, the CCMA has had jurisdiction to arbitrate individual dismissals for operational requirements. However, the result of the much criticized judgment of Nel AJ in the Rand Water v Bracks & others (2007) 28 ILJ 2310 (LC) is that the CCMA may only arbitrate these cases if the employee does not contest the procedural fairness of the dismissal. More recently Ngalwana AJ has held that Nel AJ misinterpreted the Act (Scheme Data Services (Pty) Ltd v Myhill NO & others (Case No. JR 1456/06). In the light of these conflicting decisions, arbitrators are entitled to assume jurisdiction in any individual retrenchment case, irrespective of whether or not the procedural fairness of the dismissal is challenged.

Dismissals which employees alleges are automatically unfair in terms s 187 must be referred to the LC.

This information could be obtained from an analysis of CCMA referral forms as well as Labour Court files.

Macun, Lopes & Benjamin. The CCMA’s CMS does not record information on the earnings and skills levels of employees who refer cases to the CCMA. This information has been extracted from the text of awards.
lower proportion, although still the vast majority, of cases are brought by low-paid employees with low levels of skills. These figures point to the inaccuracy of the claims of some commentators that a disproportionately high number of dismissal\textsuperscript{12} and unfair labour practice\textsuperscript{13} cases are referred to the CCMA by high-earning employees.

How long does it take employees to refer cases?

Dismissed employees are required to refer disputes to the CCMA within 30 days of their dismissal. In comparison, civil claims based on contract, including contracts of employment, can be brought within three years of the claim arising. The short referral period promotes the swift resolution of disputes and provides considerable certainty to employers who know that they will not face claims instituted several years after a dismissal.

Employees who refer claims more than 30 days after a dismissal (or 90 days after an unfair labour practice dispute) can request the CCMA to condone their late referral on good cause. Some 10% of dismissals claims are late and include an application for condonation.\textsuperscript{14} In 2007–8, there were 7,531 applications for condonation of which 75% (5,704) succeeded. This means that roughly 2% (1,827) of employees who referred disputes to the CCMA for arbitration in that year were denied access because of a late referral. This suggests that there is widespread knowledge among employees of the requirements for referring disputes to the CCMA. The high level of claims that are made in time can also be attributed to the relatively simple referral forms and the fact that employees can lodge claims by reporting to the CCMA offices where duty personnel assist them to complete the referral forms. This demonstrates that the policy objective of ensuring the swift referral of disputes to the CCMA is being achieved.

In contrast to the 30-day period for initial referral, employees have 90 days after the end of conciliation to refer disputes to either arbitration or to the LC. This second referral period falls away in cases that are dealt with in terms of the merged ‘con-arb’ process introduced by the LRA Amendment Act of 2002. In these cases, the arbitration phase can commence as soon as the conciliation process ends and the employee is not required to make a further referral. The 90-day period

\textsuperscript{12} For instance, the Tokiso Review 2005/2006 (at 32) has suggested that ‘white collar workers from industries such as professional services, banking, parastatals, tourism, financial services etc account for about 40% of referrals to the CCMA’.

\textsuperscript{13} 76% of unfair labour practice cases were brought by employees who earned less than R5,000 per month (in 2003–5) and 80% of these applicant employees were either low-skilled or semi-skilled. This shows the inaccuracy of Halton Cheadle’s claim that unfair labour practice has become a ‘charter of rights for middle and senior management’ (H Cheadle ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ (2006) 27 ILJ 663 at 664).

\textsuperscript{14} The CCMA only began in 2007–8 to distinguish in its reports between condonation applications and other in limine (preliminary) applications.
is probably explained by the fact that a party referring a matter to the LC is required to file a detailed statement of case which is not required in arbitration referrals.

How long does it take the CCMA to resolve disputes?

Conciliations

The LRA expressly mandates the CCMA to commence conciliation in all disputes referred to it within 30 days. The CCMA measures compliance with this yardstick thorough its CMS system. In 2007–8, the first event was held within the 30-day period in 97% of disputes referred to the CCMA. This represented an improvement on 2006–7 in which this threshold was reached in 95% of cases. In 2007–8 the average time taken for conciliation was 28 days.

The performance of the different regional offices in this area varies greatly with a number of regions managing to hold the first conciliation within 30 days in all disputes while the poorest performing region in 2007–8 only conducting conciliations in 81% of disputes within this period.

In addition, a significant number of disputes are resolved prior to a matter being formally enrolled for conciliation. This process of ‘pre-conciliation’ involves informal mediation by a CCMA official at the time the dispute is referred. In 2007–8, pre-conciliations were held in 13% of cases (12,256). Approximately 45% of pre-conciliations lead to the matter being settled or withdrawn, reducing by almost 6,000 the number of cases requiring ‘formal’ conciliation.

Con-arb

In the merged conciliation-arbitration process (con-arb) introduced in 2002, arbitration can start immediately after conciliation has failed to resolve the dispute, unless one of the parties objects. This has significantly reduced the period taken to resolve disputes. The CCMA has made increasing use of con-arbs to resolve disputes with the percentage of cases heard in this manner increasing from 20% in 2003/4, to 32% in 2004/5 to almost 45% in 2007–8.

In 2007–8, the CCMA scheduled 59,922 disputes to be heard as con-arbs. However, in roughly one-third of cases (19,219) one of the parties objected to this. In the vast majority of these cases, the objecting party was the employer with employees objecting to con-arb in only 455 matters. While still extremely high, there has been a decline in the level of objections which has been as high as 60% in previous years. In

15 This figure includes cases resolved through ‘pre-conciliations’.
17 Pre-conciliations are used mainly in disputes in the private security sector and in domestic employment. It is an informal process that is not provided for in the LRA.
many cases, it is thought that employers object to the dispute being processed as a con-arb on the advice of a lawyer or labour consultant. However, it is likely that in many cases the objection is made 'automatically' as the referral form invites employers to object to con-arb without being required to give reasons for doing so.

Once there has been an objection, the ordinary process applies and the employee must refer the dispute to arbitration within 90 days of conciliation failing to settle the matter. However, in many cases the employee is assisted to complete the arbitration referral at the conclusion of the conciliation.

Avery high proportion (roughly 80%) of con-arbs are finalized in a single ‘event’. In 2006–7, 82% of disputes in which there was no objection to con-arb (26,170 out of 32,106) were resolved at the first hearing either by a settlement or by arbitration. In 2007–8, the equivalent figure was 83%. This means that in these cases, constituting almost a third of the CCMA’s total case-load, the parties are only required to be present at the CCMA’s offices on a single occasion before the dispute is resolved.

Arbitrations

Arbitrations are completed on average seven months after the dispute has first been referred to the CCMA for conciliation. However, this period includes delays involved in the employee referring the dispute for arbitration and the CCMA’s efficiency in conducting arbitrations can be most usefully measured from when the CCMA receives the employee’s request for arbitration. The time taken to conclude arbitrations has declined significantly. The average period from date of request to date closed was 79 days in 2005–6, 48 days in 2006–7 and 42 days in 2007–8. Significant factors contributing to this decrease have been the decrease in the time to enrol arbitrations and in the time taken for arbitrators to make their awards.

Arbitrators are required by the LRA to issue arbitration awards, together with brief reasons, within 14 days of the conclusion of the arbitration. This provision was included to minimize the prejudicial consequences on parties of delays in the issuing of awards. In 2007–8 only 3% of awards were rendered outside the statutory 14-day period, a 100% improvement over 2006–7 in which 6% of awards were late. In previous years up to 20% of awards were delivered outside of the 14-day period. Arbitrators may request an extension of the period in which to grant an award; however, little use is made of this and in 2007–8 there were only 280 requests for extensions.

A further indicator that is used to assess the efficiency of dispute

18 CCMA: Progress Against Strategy 2007/8. For the purposes of CCMA recording, a case is considered to be closed and finalized when the award is sent to the parties. A case may be reopened if, for instance, a party applies for the award to be rescinded.
resolution is the proportion of disputes that are resolved in the same year that they are referred. In 2007–8, the CCMA had a year-end carry-over rate of 13% meaning that 87% of disputes referred to it are heard in the same year (ie reporting cycle) that they are referred. This was an improvement of the previous year’s figure of 16%.

How many disputes are settled?

The CCMA is required to conciliate all disputes referred to it. The compulsory conciliation of all rights disputes arising from the LRA places considerable pressure on the resources of the CCMA. The CCMA dealt with 90,729 disputes falling within its jurisdiction in 2007–8 of which all except about 2,000 were disputes of right. Of these disputes, a little under 10% (8,424) were subsequently withdrawn. Of the balance, slightly under 50% (40,559) were settled. This includes cases settled at pre-conciliation (5%), conciliation (17%), con-arb (33%) and arbitration (19%) as well as those settled by the parties without direct CCMA assistance (3%).

When calculating its settlement rate, the CCMA includes cases that are withdrawn or settled by the parties themselves in addition to settlements concluded under the auspices of the CCMA. On this basis, its national settlement rate has exceeded 60% in recent years. It was calculated at 60% in 2005–6, 63% in 2006–7 and 67% in 2007–8. When cases that are withdrawn or settled by the parties themselves are excluded, the settlement rate is in the vicinity of 50%. In 2000–8 this approximates to some 40,000 cases being resolved through a settlement. The terms of these settlement agreements are not known. However, it is likely that a considerable portion of these are resolved by the employee receiving a financial settlement.

How many disputes are referred to arbitration?

The CCMA enrolled a total of 46,597 arbitrations in 2006–7 and 38,469 in 2007–8. This decrease of about 17% can be attributed to the improved settlement rate as well as the increased number of con-arbs. This means that more than 80% of cases that are not settled before or during conciliation are referred to arbitration. It is estimated that 2–3% of cases that are not settled are referred to the LC which means that some 15% of unresolved cases are not proceeded with. Between 20% and one-third of arbitrations (8,421 in 2007–8; 13,000 in 2006–7) are settled in the course of the arbitration. Two per cent (753 in 2007–8) of arbitrations are rejected as being out of jurisdiction, most commonly because it is shown that the applicant is not an employee. This low figure may reflect the efficacy of the CCMA’s

---

19 This figure only includes con-arbs not concluded in a single event; as many con-arbs may be concluded at the first event by arbitration, this figure does not reflect the full extent of arbitration by the CCMA.
initial screening process. However, it may also indicate that individuals who are uncertain as to their status as employees are reluctant to refer disputes to the CCMA.

Legal representation

The LRA excludes legal representation of parties in the most common category of cases (misconduct or incapacity dismissal arbitrations) unless the parties agree to be legally represented or the arbitrator permits it on account of the complexity of the case, the comparative ability of the parties and the public interest. The rationale for excluding legal representation is that it tilts the balance in favour of the party with greater resources (generally the employer) and the participation by lawyers results in cases becoming more technical, drawn-out and expensive.20 Available information indicates that employer and employee parties are represented by lawyers in about 15% of dismissal arbitrations.21 The similar levels of legal representation of employers and employees indicates that the concerns about parity of representation appear to have been addressed successfully. In 34% of cases employees are represented by trade union representatives and in 35% of cases employers are represented by management or human resources personnel. This indicates that trade unions and employers have responded to the exclusion of legal representation by utilizing in-house representation. Again, the figures indicate a parity of representation. Employers are represented by officials from employer organizations in about 20% of cases. In contrast, figures derived from a survey of LC review judgments indicate that applicants have legal representation in 87% of cases and respondents in 84% of cases.22,23 The very much higher level of legal representation in the LC reflects the considerable savings that are achieved by the restrictions on representation in the CCMA.

The 2000 LRA Amendment Bill proposed extending the right of legal representation to all arbitrations. This proposal was not enacted. However, the rules concerning representation before the CCMA were moved by the Act to the CCMA Rules, allowing the governing body to amend the rules. There are frequent complaints that the rules permitting trade unions and employers’ organizations to represent their members are abused by both lawyers and consultants. The LC (and in

20 As the costs of an employer having legal representation are tax deductible, it can be argued that a portion of these costs are in fact borne by the public through reduced tax revenue.
21 The figures in this section are from Macun, Lopes & Benjamin. While the CCMA records information on representation in proceedings, it is not complete.
22 Tokiso Review 2007–8 at 44.
23 A study of Industrial Court decisions between 1988 and 1992 showed that both parties were represented in some 60% of cases and that union officials or employees appeared against lawyers in 20% of cases (P Benjamin ‘Legal Representation in Labour Courts’ (1994) 15 IJF 250).
December 2008 the LAC) have rejected arguments that the restriction on legal representation in dismissal arbitrations is unconstitutional.24

Non-attendance, default awards and rescission applications

One of the striking features of CCMA statistics is the high level of non-attendance by parties at both conciliations and arbitrations. In 2007–8 one or both parties was/were not present at 15% of conciliations and 19% of arbitrations. Patterns of non-attendance in 2006–7 and 2007–8 are reflected in the table below:

<table>
<thead>
<tr>
<th></th>
<th>All parties</th>
<th>Applicant</th>
<th>Respondent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conciliations</td>
<td>3,088</td>
<td>3,301</td>
<td>5,319</td>
</tr>
<tr>
<td>Arbitrations</td>
<td>1,401</td>
<td>1,951</td>
<td>2,794</td>
</tr>
</tbody>
</table>

The consequence of non-attendance by the parties differs. If the applicant (employee) is not present at a conciliation or con-arb hearing, the CCMA Rules provide for the referral to be postponed or dismissed. If the conciliating commissioner dismisses the referral, the employee would have to refer the dispute again and seek condonation for what would inevitably be a late referral. However, the LAC has ruled that the CCMA’s governing body was not authorized to make a rule providing for a dismissal of the matter for non-attendance at conciliation as this limited an employee’s statutory right to refer a dispute to arbitration.25 Currently, therefore, an employee’s failure to attend conciliation proceedings does not prevent the employee referring the dispute to arbitration. If the initial event is a con-arb, an employer who is present in the absence of the employee is entitled to request that the commissioner start the arbitration phase immediately and dismiss the application. If that happens, the employee will be required to apply for the decision to dismiss the claim to be rescinded in order to have the dispute processed.

24 See Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others (2005) 22 ILJ 1712 (LC); Norman Tsie Taxis v Pooe NO & others (2004) 25 ILJ 724 (LC) and (2005) 26 ILJ 110 (LC). The Netherburn judgment was confirmed on appeal by the LAC in a judgment handed down in December 2008, over five years after the Labour Court decision.

25 Premier Gauteng & others v Ramabulana NO & others (2008) 29 ILJ 1999 (LAC). Significantly, this case concerned a dispute referred to a bargaining council and it was accordingly not necessary for the court to deal with the interpretation of the CCMA Rules. Nevertheless, Zondo JP ruled that the relevant rule was beyond the powers (ultra vires) of the governing body of the CCMA because it negatively impacted upon the right to arbitration. This ruling was made without hearing argument on behalf of the CCMA which was not a party to the proceedings. While this decision does not set a precedent binding on the CCMA because the ruling on the CCMA Rules was not necessary to decide the case which concerned the validity of proceedings before a bargaining council, the CCMA has elected to alter its procedures to comply with the views of the LAC. Nevertheless, it is a matter of considerable concern that the LAC should choose to interpret the Rules of the CCMA in the case without having invited the CCMA to make representations before it.
The consequences of an employer party’s absence are very different. If the employer does not attend the conciliation, the employee will be entitled to refer the dispute to arbitration. If, however, an employer fails to attend a con-arb or arbitration hearing, the arbitrator is entitled to determine the matter on a default basis in the absence of the employer. The arbitrator is required by CCMA practice to ascertain whether the employer received proper notification of the hearing. An arbitrator must also be satisfied that the employee has a good case before granting this relief. The arbitrator is therefore required to test the employee’s case to ensure that the employee is entitled to an award in his or her favour. In the vast majority of arbitrations conducted in the absence of an employer, an award is made in favour of the employee.

In 2007–8, there were 9,093 default awards — 5,833 in con-arbs and 3,260 in arbitrations. An employer against whom a default award is made, can apply for rescission, a procedure which allows a commissioner to withdraw an award on a range of technical grounds, including a failure to prove that the referral forms were served on the employer. When an award is rescinded, the dispute is referred back to arbitration. Most commonly, employers claim that they have not received any notification that the dispute has been referred to the CCMA. Many employers only examine CCMA documentation when they receive a copy of the award directing them to reinstate or compensate a dismissed employee. Some employers may only do so when the sheriff of the court arrives at their premises to draw an inventory of their goods for the purpose of arranging a sale in execution. Even in these circumstances, the employer will succeed in having the award rescinded if the employee cannot produce satisfactory proof that the referral forms were served on the employer.

In 2007–8, there were 7,512 rescission applications of which 4,680 were granted. This involves a significant drop from 2006–7 when the number of rescissions was 9,046 of which 5,667 succeeded. By far the most common ground for rescissions is that the party against whom the award was made was absent and had not received proper notice of the arbitration.

Who wins arbitrations?

In 2007–8, the CCMA enrolled some 38,500 matters for arbitration hearings. However, a significant number of these were abandoned, withdrawn or settled. Approximately 60% of arbitrations set down for hearing led to an arbitration award. In 2007–8 there were 23,017 arbitration awards. The CCMA figures provide a breakdown of awards on the basis of the party in whose favour they are. In 2007–8, 60% of awards (13,781) were in favour of the employee and 39% (9,008) in favour of the employer. This pattern has also been fairly consistent throughout the life of the CCMA.
However, when these figures are broken down into those cases where both parties are present at the arbitration and those in which a default award was made in the absence of the employer, a very different scenario emerges. Of the 14,043 contested arbitrations, 38% of awards were in favour of employees and 61% in favour of employers; in default awards, on the other hand, 95% were in favour of employees and 5% in favour of employers. In addition, a large number of awards are rescinded (4,680 in 2007–8; 5,667 in 2006–7); less than one per cent of successful rescissions are made by employees. The vast majority of awards that are rescinded are default awards made in the absence of the employer.

This aspect of CCMA statistics has been one of the most controversial and has been interpreted as indicating that CCMA arbitrators are more likely to find for employees in a particular case than either bargaining council or private agency arbitrators. While the overall outcome has been consistent over time, there are significant regional variations. One might expect those regions with higher pro-employer outcomes to have a higher level of successful reviews but this does not appear to be the case. An alternative explanation is that a higher level of pro-employee findings may also be indicative of more successful conciliation processes where a higher proportion of employees with claims that are unlikely to succeed are persuaded to drop their claims and accept offers of settlement made by the employers.

**Remedies: reinstatement, re-employment and compensation**

The Act provides for reinstatement as the primary remedy for workers dismissed without a valid reason. However, in practice financial compensation is by far the most common remedy. Less than 10% of employees who are found to have been unfairly dismissed receive

---

26 See, for instance, the Tokiso Review 2006–7 at 25 where the conclusion is made that ‘an employee has a much better chance of winning a given case in the CCMA than in any other dispute resolving forum’. This conclusion was based on statistics for 2005–6 which showed a significantly higher level of awards in favour of employees in the CCMA than in private arbitrations or in bargaining councils. This conclusion received considerable publicity after the publication of the Review. As the authors of the Review do point out, this outcome was inconsistent with the findings of the previous Review which showed that in 2004–5 almost two-thirds of awards were in favour of employers. Likewise, the statistics produced in the 2007–8 edition of the Tokiso Review also show that roughly 55% of awards were in favour of employers; a figure more or less on par with the outcome of bargaining council arbitrations. It is highly unlikely that the CCMA’s performance would have undergone such a dramatic shift in a single year and there is no indication of this occurring in the figures derived from the CCMA’s CMS. It is therefore possible that the sample of awards analysed was not representative and that the analysis of the 2005–6 statistics did not take adequate account of the significance of default awards which are almost always in favour of employees; an aspect that is addressed in the 2007–8 Review. In defence of the authors of the Tokiso Review, the CCMA does not breakdown awards between default and ‘opposed’ cases in the data it circulates drawn from its CMS. Benjamin & Gruen (at 30) does contain such a breakdown. Nevertheless, the broad-ranging comments in the 2006–7 Review on the CCMA’s capacity to arbitrate were not justified by conclusions drawn from statistics for a single year.
reinstatement orders. Arbitrators also make little use of the remedy of re-employment which allows an arbitrator to order an employee’s return to work on changed terms and conditions of employment or in different work.

Reinstatement

In 2007–8, 1,264 employees were reinstated. This equates to 9% of employees who received arbitration awards in their favour. As an arbitrator may only reinstate an employee whose dismissal is found to be substantively unfair, this figure needs to be analysed in the context of that proportion of employees whose dismissal is found to be substantively unfair. While the CCMA data does not breakdown arbitration awards in this manner, surveys of arbitration awards shed some light on the extent to which employees seek reinstatement and the extent to which such an award is made.

These suggest that a high proportion of employees claim that their dismissal was both procedurally and substantively unfair. One study suggest that this claim is made in 75% of dismissal cases studied and that in a further 10% of cases, the employee alleges substantive unfairness (ie no valid reason for the dismissal) but accepts the employer followed a fair procedure. Despite this, less than a quarter of employees (23%) seek reinstatement as a remedy. If this figure is representative, it means that less than 30% of employees who claim their dismissal was substantively unfair seek reinstatement.

Not surprisingly, the most common award in favour of an employee is that the dismissal was both procedurally and substantively unfair. The Tokiso Review 2007–8 suggests the following breakdown of findings in awards made in favour of employees —

<table>
<thead>
<tr>
<th>Substantively and procedurally unfair</th>
<th>46%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedurally unfair</td>
<td>38%</td>
</tr>
<tr>
<td>Substantively unfair</td>
<td>18%</td>
</tr>
</tbody>
</table>

Based on these figures, almost two-thirds of employees who receive an arbitration award in their favour are entitled to seek reinstatement. However, less than one in six of employees whose dismissal is found to be substantively unfair are in fact reinstated. A number of factors could contribute to this state of affairs. One reason is that many employees do not seek to be reinstated. A second reason is that a significant proportion of CCMA cases involve domestic employment or very small businesses where reinstatement is unlikely to be appropriate, even if the employee seeks it. A third contributing factor could be a tendency among many arbitrators to accept the employer’s assertion

27 Macun, Lopes & Benjamin.
that reinstatement is not appropriate because it will not be possible for the employer and employee to resume a constructive working relationship. Such a claim could be based on the employee’s conduct during or subsequent to the dismissal. The extent to which these factors contribute to the current level of reinstatement orders is not known. However, the overall effect is that while the LRA intended reinstatement to be the ‘primary remedy’ in practice it has become the exception rather than the rule with less than two per cent of employees who refer dismissal disputes to the CCMA being reinstated as a result of a CCMA award.

It is not known what proportion of employees who receive reinstatement orders actually return to work. Some may accept a financial settlement while others may not be able to enforce their order of reinstatement if the employer refuses to comply with the order.\(^{28}\) For many others, the date of return to work may be delayed by several years, or even indefinitely, by review proceedings instituted by the employer in the LC. In addition, the extent to which settlement agreements concluded during CCMA proceedings result in employees returning to work is also not known.

**Compensation**

Of the 13,879 employees who received an arbitration award in their favour in 2007–8, 85% received only compensation. The average award of compensation was R22,265. This average is skewed by awards to high paid employees and the most common (median) award amounts to roughly four months’ wages. Reinstated workers receive on average backpay of approximately R10,000. The *Tokiso Review* estimates that in three years from April 2004 until March 2007, 58% of compensation awards were for an amount below R10,000.\(^{29}\) As the second part of this article demonstrates, it is a long hard struggle for many of these employees to receive that compensation.

**PART 2: THE LONG AND WINDING ROAD: RESISTING AND ENFORCING ARBITRATION AWARDS**

For a dismissed employee, obtaining an arbitration award does not automatically translate into the employee going back to work or receiving compensation. The employer (or an unsuccessful employee applicant) may institute review proceedings in the LC or seek to have the award rescinded by the CCMA. Even if neither of these steps is taken, the employer may sit back to wait to see if the employee has the patience and resources to process the award through three institutions in order to enforce it.

\(^{28}\) A reinstatement order is enforced through contempt proceedings in the Labour Court.

\(^{29}\) *Tokiso Review* 2007–8 at 36.
Reviews

Roughly one in ten arbitration awards by CCMA commissioners are taken on judicial review in the LC. This amounts to a total of 1,700 review applications being launched each year during the first decade of the operation of the CCMA. What are we to make of the level of review applications? The view articulated in the Tokiso Review is that the level of reviews is indicative of the poor quality of decision making in the CCMA and this may well reflect the conventional wisdom in the labour law community. However, closer examination shows a more complex story. Firstly, the claim by the authors of the Tokiso Review that ‘when employers take CCMA decisions to the Labour Court for review, two out of three are overturned’ is not borne out by a more detailed statistical analysis. While inconsistent decision making by commissioners undoubtedly contributes to the number of reviews, there is no doubt that many employers use (and are advised to use) the institution of reviews as a strategy to delay the enforcement of arbitration awards against them.

An analysis of the pattern of review applications in the LC highlights two very striking contrasts with the position in the CCMA. Firstly, the LC does not have the systems to record statistics on the number of cases instituted or track their progress. As the preceding section of this article reveals, the data collected through the CMS allow for a clear picture to be drawn of the CCMA’s operation. The information on which the analysis in this section is based has been pieced together by the CCMA from the review papers served on it and by going through court files in the Labour Court. Secondly, other than an initial requirement in the LRA that reviews be instituted within six weeks of an award, there are no requirements in either the rules or practices of the LC to expedite the progress of review applications through the court and to prevent reviews being used as a delaying technique.

It takes an estimated 23 months from the date of the arbitration award for the LC to hear a review application and a further three months for judgment to be given. Thus a review that is processed to the stage of a hearing in the LC will significantly delay the enforce-

---

30 The figures on which this section is based cover the ten years from May 1997 when the first review was instituted to May 2007.

31 In the Tokiso Review 2007–8, the authors of a study on the Labour Court claim (at 49) that it is ‘alarming’ that 59% of review judgments analysed result in the award being set aside. However, the study does not provide a basis for this conclusion. Firstly, the sample of review judgments studied was small (126 cases). Secondly, the breakdown of review judgments between those that succeed and those that do not is not a statistically significant indicator of the quality of decision making in arbitration awards because the parties select which awards they take on review and this is likely to include a high number of awards that the parties believe have a good prospect of success on review.

32 Tokiso Review 2006–7 at 45.
ment of an arbitration award. In some cases, further delays can flow from the fact that there are three levels of appeal available against LC decisions.

However, the most significant impact of review proceedings on the arbitration process lies in the fact that most arbitration awards are not processed to finality. Research by the CCMA showed that (as at May 2007) only 20% of reviews lodged nationally had been finalized. A high proportion of reviews are not processed to finality and the files of many cases sit dormant gathering dust in the office of the Registrar of the LC, frustrating the enforcement of awards. There are significant regional variations. In KZN, the province for which the most complete information is available, one-third of the 6,181 reviews instituted between May 1997 and April 2007 had been finalized. This problem is most severe in the country’s most populous region, Gauteng, which has the highest level of reviews instituted and lowest level of reviews finalized. While Gauteng handles approximately a quarter of the CCMA’s caseload, 36% of review applications are instituted there and only six per cent of these have been finalized. This is perhaps indicative of a more technical and litigious approach to dispute resolution in Johannesburg. The small proportion of reviews that have been proceeded with to finality indicates that in many cases employers use the institution of review proceedings to delay the need to comply with arbitration awards in favour of an employee.

The absence of any time-limits (after the initial six-week requirement for making an application) for processing review applications has been described as a ‘gaping omission’. Such a requirement does not require legislative amendment and could be introduced through an amendment to the LC Rules. However, these rules have not been amended since 2001 and the rules board has not been constituted for several years.

The CCMA’s research also shows that the Tokiso Review’s claim that two in three arbitration awards that are reviewed are set aside is not accurate. Nationally, of those that had been finalized by May 2007, 44% led to the award being set aside, 30% resulted in the award being confirmed and the remaining 26% were withdrawn. Again there are significant regional variations. In KwaZulu-Natal (KZN), 32% of finalized arbitrations led to the award being set aside; 43% led to the award being confirmed and the remaining 25% were withdrawn. Nationally, these figures translate into the fact that slightly less than 5% of reviews instituted in the CCMA’s first decade led to an award being set aside.

There is no doubt that the approach of the LAC encouraged the launching of reviews. In Carephone v Marcus, the LAC held that, in
addition to the statutory grounds specified in s 145 of the LRA, an arbitrator’s award could be set aside if it was not rationally justifiable in the light of the reasons given for the award. In practice, this approach led to a blurring of the legitimate grounds of review and appeal which was exacerbated by the large number of acting judges who sat in the LC.\textsuperscript{35} In particular, this gave judges who favoured a more interventionist approach in reviews considerable scope to set aside arbitrators’ awards. Secondly, there were conflicting decisions of the LAC on the extent to which an arbitrator could interfere with an employer’s decision to dismiss. Both of these issues have now been definitively pronounced on by the Constitutional Court in the \textit{Sidumo v Rustenburg Platinum} case.\textsuperscript{36} An arbitrator is entitled to use his or her own sense of fairness to determine the fairness of a dismissal and an arbitration award may only be set aside if it is one that no reasonable arbitrator could have reached. This clarity, which it is suggested accurately reflects the LRA’s promotion of expedited resolution, should reduce the scope for successful review applications. However, it will take additional institutional reforms to prevent reviews being abused to frustrate the enforcement of awards.

\textit{Certifying arbitration awards}

As the first part indicates the majority of employees who are found to have been unfairly dismissed receive awards in their favour requiring the employer to compensate them. If the employer does not pay this money, the employee is required to have the award certified by the CCMA in terms of s 143 of the LRA as a precursor to enforcing it. This requirement also applies to employees who have been retrospectively reinstated if the employer fails to pay the ‘backpay’ portion of the award.

The certification requirement was introduced by the 2002 LRA amendments. Previously, employees who wished to enforce an arbitration award entitling them to receive payment from a non-compliant employer had to apply to the LC to have the award made an order of court. While it was envisaged that the certification procedure would simplify the enforcement of awards, as will appear from the discussion below, this solution has become a bureaucratic quagmire of its own.

The power to certify awards rests with the Director of the CCMA who may delegate the function to commissioners. The number of awards that the CCMA is asked to certify varies between roughly one-third and one-half of arbitration awards made in favour of employees in that year. While there have been significant annual...
fluctuations in the number of certifications, a very substantial portion of employees who receive arbitration awards in their favour are required to have them certified to obtain payment. Certification takes places on average seven months (215 days) after the award is granted. This indicates that employees resort to certification after the employer has refused to comply with an order to pay compensation. The CCMA certified 7,446 awards in 2006–7 and 5,389 in 2007–8. In addition, the CCMA certified a substantial number of bargaining council awards. These figures indicate that a substantial proportion of employers do not comply voluntarily with arbitration awards. It would appear that the word has gone out that employers can wait a long time before having to pay compensation in terms of awards and that many employees will not be in a position to move through all the procedural hoops that are required to enforce an arbitration award.

Even after an award has been certified by the CCMA, the employee is still required to have a writ (warrant of execution) issued by the LC before the award can be executed by the sheriff of the court. In Johannesburg this final step can add a further six months onto the process and at times there has been a backlog of up to 2,000 awards awaiting the issuing of a warrant in the Johannesburg LC.

**Execution**

Once an employee (or representative) has cleared the hurdle of certification and obtained a writ, an arbitration award requiring the payment of a sum of money can be executed on behalf of the employee by the sheriff of the court in the area in which the employer is located. At this point, the CCMA and labour courts depend on the conventional judicial institutions for awards to be enforced. At the same time, the provision of free access to dispute resolution breaks down. An employee who wishes to have the sheriff attach and, if necessary, sell the employer’s assets to obtain the compensation owed is required to put up security to cover costs that may be incurred in this process and not recovered because of technical difficulties or the employer’s lack of assets. This puts the final stage of the legal process...

---

37 Most of this decrease comes from a major drop in the number of certifications in Johannesburg from 3,820 in 2006–7 to 2,145 in 2007–8.

38 The CCMA certified 1,935 bargaining council arbitration awards in 2007–8 and 2,580 awards in 2006–7. These certifications are in respect of awards granted in arbitrations conducted under the auspices of bargaining councils in the private sector which cover about 1,1 million workers. Bargaining council certifications flow from dismissal and unfair labour practice arbitrations as well as enforcement arbitration conducted in terms of s 33A of the LRA in terms of which bargaining councils seek to compel compliance with their collective agreements.

39 Information supplied by the CCMA.
out of the reach of many employees who have obtained arbitration awards in their favour.

Once the employee has put up the security, the first step in the execution process is for the sheriff to visit the employer’s premises to draw up an inventory of the employer’s assets to ascertain if a sale of these goods is likely to raise sufficient funds to cover the employees. This step may lead some employers to settle the employee’s claim. However, at this stage, many employers claim not to have received copies of the forms referring the dispute to the CCMA. It is not known what proportion of these claims are genuine and what proportion are a strategic response by employers who ignored the referral. At this stage, an employer who had no knowledge of the referral may apply for the award to be rescinded. It is the practice of some sheriffs to not execute on awards that are the subject of a rescission application or review proceedings, even if the employer is taking no steps to process the review. A number of other issues may delay execution: the employer may claim that assets on its premises are the property of others or the employer may have a different name from that cited on the CCMA referral. These may be because of an error in citation or because the employer has changed its identity. These eventualities necessitate a further round of litigation (known as interpleader proceedings) in the LC to determine the validity of the writ.

Although sheriffs fall under the auspices of the Department of Justice and a Board of Sheriffs, they operate for their own account. As a result of what they perceive to be the significant risks attached to executing arbitration awards, sheriffs require security to cover any costs that may be incurred but not recovered from a sale of the employer’s assets.

The fact that the Rules of the CCMA allow parties to serve dispute papers themselves and that parties generally do not have legal representation increase the possibility that an award cannot be enforced because of defective service (or the inability to prove to the satisfaction of the sheriff that service has been effected). A similar difficulty exists in respect of the Small Claims Court whereas all processes in the High Court and Magistrate’s Court must be served by sheriffs. The fact that a certified arbitration award is deemed to be an order of the LC which has the same status as a High Court order exacerbates this situation because the costs of execution are determined in terms of the High Court tariff which is higher than the equivalent Magistrate’s Court tariff although most claims arising from arbitration awards are likely to be well within the jurisdiction of the Magistrate’s Court.\(^{40}\)

The requirement that an employee who has been compensated for an unfair dismissal and who may well have been unemployed for a

\(^{40}\) Currently R100,000.
considerable period of time is required to put up security for the sheriff’s costs undermines the capacity of the CCMA as an institution to provide employees with access to swift and cheap justice. There are very strong arguments that these costs should be covered in the CCMA’s budget and that there should be CCMA personnel available to assist employees to enforce awards, including in their dealing with sheriffs. There is a precedent for this in the Maintenance Act 99 of 1998 which provides for civil execution of maintenance orders without cost to the individual entitled to receive maintenance.

Cumulatively, the procedural hurdles and significant delays associated with reviews, rescission, certification and execution mean that compliance is resisted or significantly delayed in over 75% of cases in which employers are ordered to compensate unfairly dismissed workers. This means that employers voluntarily comply with awards in no more than a quarter of cases. This massively undermines the capacity of the CCMA to deliver on its mandate of social justice and expeditious dispute resolution. The table below gives an indication of the hurdles placed in the way of employees seeking to enforce awards in their favour. 41

<table>
<thead>
<tr>
<th></th>
<th>2006–7</th>
<th>2007–8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arb Awards: for employees (incl default awards)</td>
<td>14,534</td>
<td>13,781</td>
</tr>
<tr>
<td>Rescissions granted</td>
<td>5,667</td>
<td>4,680</td>
</tr>
<tr>
<td>Awards certified</td>
<td>7,446</td>
<td>5,389</td>
</tr>
<tr>
<td>Reviews instituted (annual average)</td>
<td>1,671</td>
<td>1,671</td>
</tr>
</tbody>
</table>

**CONCLUSION**

The CCMA was established to provide social justice in the employment arena through the expeditious and cheap conciliation and arbitration of disputes. Given the CCMA’s enormous (and in all likelihood increasing) caseload its achievements in conciliating and arbitrating cases, particularly dismissal cases, within relatively short periods of time has been impressive. The economic benefits of this include a very significant decrease in the rate of industrial action over dismissal disputes in the post-1996 period. There is no doubt that consistency of decision making remains a very significant challenge but steps are being taken within the organization to address this.

Before examining the second part of the picture presented in this article, it is worth placing the performance of the CCMA in the

---

41 This table is illustrative only. It is likely that virtually all rescissions are obtained by employers. However, it is not known in what proportion of cases the rescission application is brought after the award has been certified. There may also be cases in which the employee does not even attempt to have an award certified when the employer refuses to comply. The review figure includes reviews brought by employees.
broader context of debates about the regulation of the South African labour market. A number of authoritative studies have pointed to the anomaly that while South African labour law is, in comparative terms, ‘relatively flexible’ there is a widespread perception that South Africa is highly regulated and that dismissal is difficult and costly.42 These perceptions influence firms’ hiring decisions and impact upon the investment climate.

One possible explanation for the discrepancy between the content of the law and perceptions lies in the manner in which the law is applied, in particular an overly technical approach to procedural fairness by some arbitrators and a perceived inconsistency in decision making. However, the LC in Avril Elizabeth Homes,43 has emphasized that an over-technical approach to procedural fairness is not consistent with the LRA. It can be anticipated that the CC’s clarification of the role of the arbitrators in the Sidumo case will produce a more consistent approach to dismissal cases by arbitrators.

Another possible explanation for these perceptions is the ease with which employees are able to refer disputes to the CCMA and the fact that the likelihood of an employee challenging a dismissal has increased significantly. As this article suggests the efficiencies of the CCMA in resolving the vast majority of cases has greatly improved. If business perceptions are a genuine response to experience of the CCMA, changes within the CCMA should lead to changing perceptions. If these perceptions flow from a more ideological hostility to labour regulation, the disparity between perception and reality will continue with damaging consequences.

What emerges from the discussion in the second part of this article is that the CCMA’s capacity to deliver on its legislative mandate is seriously undermined by a range of factors that either fall outside the institutional control of the CCMA or reflect shortcomings in the legislative model. These include the high number of review applications instituted in the LC and the lengthy periods involved in processing those reviews and the extremely time-consuming processes that employees have to navigate in order to compel an unwilling employer to make payments ordered in terms of an arbitration award. The full extent of the impact of these factors on the operation of the CCMA is not known. However, there is no doubt that this results in the benefit of a successful outcome in an arbitration award in their favour being denied to, or seriously delayed, for a significant (and it appears) increasing number of employees.

Putting the two parts together, the story that emerges from this article is one in which the efficiencies of the CCMA in resolving

---


disputes through conciliation and arbitration are being undermined by its dependence on other institutions, in particular, the LC and the sheriffs, to enforce compliance with its awards. The brunt of these shortcomings is borne by employees whose employers do not comply with CCMA awards. This problem is in part administrative and in part structural.

Immediate steps can be taken to resolve the former. These include reconstituting the rules board of the LC and revising the court’s rules to prevent abuse of review proceedings. Funds should be made available to the CCMA to allow it to assist employees in cases in which execution against an employer’s property is required to satisfy compensation awards. This should be done in a fashion that obviates the need for employees to put up deposits to cover the sheriffs’ costs. In addition, there should be more significant sanctions for employers who do not comply with awards. An inter-agency committee should be established to monitor the entire enforcement process. Effective changes in these two areas would make many employers take CCMA awards considerably more seriously. The fact that many employers can rely on the employee’s lack of resources as a motivation for not complying with arbitration awards is fundamentally subversive of effective labour dispute-resolution.

When the next amendments to the LRA are considered, serious consideration should be given to enhancing the CCMA’s capacity to enforce its own awards as well as providing appropriate assistance to employees who are required to enforce awards against reluctant employers. These changes are required to ensure that the CCMA is able to continue to deliver on its legislative mandate to provide cheap and swift access to justice for employees.