
NATIONAL UNIVERSITY OF LESOTHO

# Attaining Effective and Speedy Resolution of Unfair Dismissal Disputes in Lesotho: An Exploration of Possible Lessons from South Africa

By: Mamolefi Anacletta Ntaitsane, 200201636

A mini-dissertation submitted in partial fulfillment of the requirements of the degree of Master of Laws (LL.M) of the Faculty of Law of the National University of Lesotho

Supervised by: Dr Motšoane Lephoto

June, 2023

## DECLARATION

I, **Mamolefi Anacletta Ntaitsane**, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The contents of this dissertation reflect entirely my own original research, save for where the work or contributions of others have been accordingly acknowledged.

| | |
|---|---|
| Name: | Mamolefi Anacletta Ntaitsane |
| Signature: | |
| Place: | Maseru, Lesotho |
| Date: | 19th June 2023 |

## DEDICATION

This thesis is dedicated to my late mother ‘Marethabile Anicia Ntakatsane. May her soul continue to rest in peace.

## ACKNOWLEDGEMENTS

With God, all things are possible. I would like to thank Him for being able to complete this thesis with a success.

There are people I would like to thank who contributed directly or indirectly to the success of this thesis.

First and most importantly, I thank my Supervisor Dr Mots'oane Lephoto for his valuable guidance, assistance and excellent supervision throughout the writing of this piece of work. If it were not for his continued assistance and support, it would have been difficult to complete this thesis on time.

Second, I would like to express my sincere gratitude to my daughter Shoeshoe, for her good wishes and always praying for me. It gave me strength to persevere.

Last, but not least, a big 'thank you' goes to my father Pekeche, my son Molefi and my husband Nthako for their moral support.

**TABLE OF CONTENTS**

# CHAPTER ONE

## 1. Introduction and Background

### 1.1.General background

The promotion of sound industrial relations is a critical part of effective labour market governance. It requires an effective system for prevention and resolution of labour disputes, particularly unfair dismissal disputes. Conflict is inevitable in any work relationship and is, however, accepted as normal. Nevertheless, the inevitability of labour conflicts does not mean that they should be ignored.[1]

In Lesotho before 1992, there was no legislation dealing with unfair dismissal disputes. Labour legislation in Lesotho has its provenance in the colonial period. The original legislation in the then Basutoland (now called Lesotho) that governed employer and employee relationships was the *Master and Servant Act 15* of 1856. This Act was repealed and replaced by the *Employment Act* 16 of 1964, which in turn was repealed and replaced by the *Employment Act 22* of 1967. The common feature of these laws was that none of them provided for protection against unfair dismissal. There were no specialized courts for labour matters. Parties had to resort to the ordinary courts in respect of their labour disputes. Approaching the ordinary courts in respect of labour matters meant that the cases had to stand in the queue of ordinary cases in those courts, where criminal cases took precedence over all other cases. This was not conducive to effective and speedy resolution of labour disputes.

In 1992, the *Labour Code Order* (*Labour Code*) was promulgated.[2] The *Labour Code* is the main piece of labour legislation in Lesotho's private sector. It provides that an employee shall not be dismissed for any reason not connected with the capacity of the employee to do the work, misconduct or operational requirements of the employer's establishment.[3] The *Labour*

---

1 Ictlo, Building effective labour dispute prevention and resolution system<http://www/itcilo.og/corses/building > accessed on 17 November 2022.

2 *Labour Code* Order 24 of 1992.

3 Section 66(1) of the *Labour Code* Order 1992.

*Code* further provides that any other dismissal shall be unfair unless the employer can sustain the burden of proof that he treated the reason for dismissal as sufficient grounds for terminating employment.[4] Thus, the concept of unfair dismissal was introduced and has become firmly established.

The *Labour Code* also created the Labour Court.[5] The jurisdiction of the Court was exclusive in relation to all matters provided for by the *Labour Code*, and the jurisdiction of ordinary courts was ousted.[6] The primary purpose for the introduction of the Labour Court was to create a specialised court for labour disputes so that they could be resolved timeously. This was necessitated by the fact that some labour law remedies in respect of unfair dismissal may be hard to implement or may not be practicable at all, if disputes are not resolved expeditiously. For instance, in a case of unfair dismissal, the primary remedy is reinstatement.[7] However, if a case takes too long to be finalised it may be impracticable to reinstate the employee. In *Republican Press (Pty) Ltd v CEPPWAWU & Gumede and Others*,[8] the Supreme Court of Appeal held as follows:

> In the present case, the passage of six years from the time the workers were dismissed, all of which followed consequentially upon failure of the union to pursue the claim expeditiously, was sufficient in itself to find that it was not reasonably practicable to reinstate or to re-employ the workers.

The *Labour Code* was amended in 2000, by creating the Directorate for Prevention and Resolution (DDPR), as an independent entity dedicated to resolution of unfair dismissal disputes through conciliation which is supposed to be non-adversarial and, failing which, arbitration.[9] From the year 2000, therefore, there were two forums where unfair dismissal claims (in the private sector) could be referred, namely the Labour Court and the DDPR. As to which forum had jurisdiction in a given case, this depended on the grounds for dismissal; the DDPR has jurisdiction if the reason for dismissal is misconduct, incapacity or poor

4 Section 66(2) of the *Labour Code* Order 1992.
5 Section 22 of the *Labour Code* Order 1992.
6 Section 24 of the *Labour Code Act* 24 of 1992.
7 Section 73 of the *Labour Code order 24* of 1992; also see *Lesotho Flour Mills v Matsepe* C of A (CIV) No. 58/2015.
8 *Republican Press (Pty) Ltd v CEPPWAWU & Gumede and Others* (2007) 11 BLLR 1001 (SCA).
9 Section 46B of the *Labour Code (Amendment Act)* 3 of 2000.

performance, and the Labour Court has jurisdiction if an employee was dismissed for a reason related to operational requirements.

## 1.2. Statement of the research problem

As was indicated earlier, the effective and speedy resolution of unfair dismissal disputes is important: it is important for both employers, employees and the society in general. Delays in resolving disputes has a negative impact on both employers and employees. In *Toyota SA Motors (Pty) Ltd v Commission of Conciliation Mediation and Arbitration and Others,*[10] the Constitutional Court held that failure to timeously prosecute labour disputes is detrimental not only to workers who may be without a source of income pending the resolution of the dispute, but ultimately, also to an employer who may have to reinstate workers after many years. There has to be finality to litigation. In *Mohlomi v Minister of Defence,*[11] the South African Constitutional Court held:

> Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interest of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end it is always possible to adjudicate satisfactorily in cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. The thus serve a purpose to which no exception in principle can cogently be taken.

In their article, Steenkamp and Bosch[12] also explain why speedy resolution of labour disputes is so important:

> The objectives of labour dispute resolution are, and have for a long time been, speed, accessibility (in terms of geographical location, cost and relatively simple procedures) and legitimacy (which derives from representativity in the dispute resolution body,

---

10 *Toyota SA Motors (Pty) Ltd v Commission of Conciliation Mediation and Arbitration and Others* 2016 (37) ILJ 313 CC.

11 *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) @129-130.

12 Anton Steenkamp and Craig Bosch, "Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential" 2012 *Acta Juridica* at page 120.

certainty and expertise). The *raisons d'etre* for these are obvious: neither employers nor employees (especially those recently dismissed) can afford delays and they do not have an intimate knowledge of legal processes.

Before 1992, there was no specialised labour court in Lesotho: labour disputes (in both the private and public sector) were referred to the High Court. Such disputes would then be resolved through the normal (adversarial) mechanism of adjudication, which tends to take a long time. It is important to note that the High Court was established by the *High Court Act* of 1978. Section 2 provides that the High Court shall be a superior court and shall have "unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho".[13] A judgment of the High Court can be challenged by appealing to the highest court in Lesotho, namely the Court of Appeal.[14]

After the establishment of the Labour Court in 1992, there was some uncertainty or debate around whether the High Court has concurrent jurisdiction with the Labour Court in labour-type disputes. In *Vice Chancellor and Another v Lana*,[15] the Court of Appeal stated that "the existence of such courts points to a legislative policy which recognises and gives effect to the desirability, in the interests of the administration of justice, of creating such structures to the exclusion of ordinary courts". In *Shale v Shale*,[16] a more recent decision of the Court of Appeal, the specific issue for determination was whether the High Court has jurisdiction when it comes to disputes concerning land. The Court of Appeal re-affirmed the now well-established principle that, where a statute creates and grants jurisdiction to a specialist court, the jurisdiction of other courts (including the High Court) is ousted.[17]

In light of the above, this means that once a dispute is classified as a labour dispute, it falls within the jurisdiction of the forums that have been created under the *Labour Code*. In order to attain the goal of expeditious resolution of labour disputes in Lesotho, the legislature has tried many things though it seemed to be uncertain about the correct formula for attaining this noble

13 In terms of section 2(1) of the *High Court Act* and also section 119(1) of the *Constitution of Lesotho*, 1993. See also *Jobo v Lenono* LAC (2011-2012) 23-24.
14 Section 16 of the *Court of Appeal Act* of 1978.
15 *Vice Chancellor and Another v Lana LAC* (2000-2004) 527.
16 *Shale v Shale* C of A (CIV) 35/2019 (unreported judgment delivered on 11 November 2019).
17 Ibid, at para 11.

goal. For example, when the Labour Court was established in 1992, there was a provision in the *Labour Code* that provided that the court was the first and final court with respect to any matters referred to it.[18] In other words, a decision of the Labour Court could not be challenged by appealing to any other 'higher' court. Obviously, if an unfair dismissal dispute only has to go through one court, such dispute would be resolved much quicker than if it had to go through three or four other courts.

In Lesotho, like in many other countries, alternative dispute resolution (hereafter "ADR") is now seen as a quicker way of resolving disputes before they get to the trial stage. The term 'ADR' embraces a broad range of mechanisms and processes to assist parties in resolving differences. These include arbitration, mediation, conciliation and simple negotiation.[19]

Given the many advantages of ADR, the *Labour Code (Amendment) Act* of 2000 introduced significant changes to how unfair dismissal disputes are resolved in Lesotho. The *Amendment Act*, created the DDPR, which is tasked with resolving unfair dismissal disputes through conciliation and arbitration. This was no surprise since ADR is often touted as being much quicker and more cost effective when compared with litigation.[20] An unfair dismissal dispute has to be referred to the DDPR within 6 months from the date of the dismissal and, in theory at least, where conciliation has failed, an arbitrator at the DDPR is expected to deliver an award within thirty days of the hearing.[21] The problem though is that the DDPR receives a large number of referrals each year but it only has a handful of arbitrators throughout the country.[22]

If either party is not satisfied with an award issued by the DDPR, the only remedy that is available is to institute review proceedings in the Labour Court (where cases can take forever to be finalised, as will be shown later). There is only one Labour Court in Lesotho. Currently,

---

18 See section 38 of the *Labour Code* (before it was amended in 2000).

19 Bronwyn Le-Ann Batchelor, Nasholan Chetty & Shelton Tapiwa Mota Makore, "Incorporating Afrocentric Alternative Dispute Resolution in South Africa's Clinical Legal Education" (25) 2021 *Law Democracy & Development* 483; Peter Bowal, "The New Ontario Judicial Alternative Dispute Resolution Model, (34) 1995 *Alberta Law Review* 207.

20 Alan Rycroft, "Rethinking Con-arb Procedure" (2003) 24 *ILJ* 699 at 710.

21 Section 228E (3) of the *Labour Code Amendment Act* of 2000.

22 See DDPR Annual Reports of 2020/2021 and 2021/2022.

the court is staffed by the 'President' and only two 'Deputy Presidents' who have to hear all the cases that come before the court. The court is obviously understaffed which can only lead to congested court rolls and delays.

With respect to review applications where DDPR awards are being challenged, being mindful that cases take a long time to go through the Labour Court, employers can use a variety of 'tricks' to frustrate an employee who has a DDPR award in their favour. What usually happens is that, after an employer loses a case at the DDPR, the employer institutes a review application in the Labour Court and then applies for an order that stays the execution of the DDPR award pending finalisation of the review application. Once the stay is granted, the employer then sits back and does nothing to prosecute the review application. In *Seeiso v The DDPR & Others*,[23] the Labour Court held that "this Court cannot permit and/or assist Applicant to hold 2nd Respondent at ransom by keeping this matter pending. It is trite law that parties to any litigation are entitled to its finality". The Labour Court, on application, does have the power to dismiss a case for want of prosecution.[24] Although the Labour Court has this power, this study will, amongst other things, explore whether the rules that govern proceedings in the Labour Court should be amended to provide that a review application will automatically lapse if it is not prosecuted within a certain amount of time.

It is important to note that, in addition to establishing the DDPR, the *Labour Code (Amendment) Act* of 2000 also established the Labour Appeal Court. This means that, where a litigant is not satisfied with the decision of the Labour Court, such party can institute an appeal in the Labour Appeal Court. Again, in an attempt to ensure that labour disputes are resolved expeditiously, the *Labour Code (Amendment) Act* of 2000 provided that the Labour Appeal Court shall be the highest or final court as far as labour disputes are concerned. This meant that an unfair dismissal case could start at the DDPR, then progress through the Labour Court (on review) and finally the Labour Appeal Court (on appeal).

---

23 *Seeiso v The DDPR & Others* case number LC/REV/43/2009 at para 10.

24 Rule 7(2) of the *Labour Court Rules* of 1994.

The constitutionality of the provisions that made the Labour Appeal Court the highest court in labour matters was challenged in *Ts'euoa v Ministry of Labour and others.*[25] Following this case, the *Labour Code* was amended again in 2010 through the *Labour Code (Amendment) Act* of 2010: the Code now provides that a litigant that is not satisfied with a decision of the Labour Appeal Court may appeal to the Court of Appeal (the highest court in Lesotho) only if the grounds of appeal raise questions of law. All this means that, currently, an unfair dismissal case can start at the DDPR, then progress through the Labour Court (on review), the Labour Appeal Court (on appeal) and the Court of Appeal (in a second appeal but only if the grounds of appeal raise questions of law). Obviously, it can take many years for a case to be finalised in such circumstances. Thus, it can be argued that there are too many courts that a dispute has to go through and that this is contrary to the idea that labour disputes should be resolved as quickly as possible. This study will explore whether the number of courts should be reduced and how.

The *Ts'euoa* case (discussed above) highlighted how disputes that fall within the public sector are treated differently from those that fall in the private sector. Where a government employee has been dismissed without being afforded a hearing, where he is entitled to one, in theory, he or she can challenge his dismissal by instituting a review application in the High Court. Thereafter, the case can go to the Court of Appeal, and that would be the end of the matter. In this case, the Court of Appeal acknowledged that:

> In Lesotho a two-stream labour law dispensation has evolved. Employees who are not public officers (as defined) are not regulated by the *Labour Code* (as amended). Their disputes, broadly stated, must progress through the Directorate, Labour Court and Labour Appeal Court. Public officers- a substantial part of the Lesotho Workforce in formal employment- are however in significant respects exempted by the *Labour Code Exemption Order, 1995 LLN22/1995* (made in *terms of s. 2(2)(b) of the Labour Code) from the Labour Cod*e. The net effect is that public officers aggrieved by decisions of their employers or tribunals within the public service may resort to the High Court and thereafter (in appropriate matters, with the leave) this court. No such complete bifurcation exists in, for instance, either the United Kingdom or South Africa, as Mr Mohau demonstrated. Thus, in Lesotho non-public officers have access to Labour Court, as opposed to High Court….

[25] *Tšeuoa v Ministry of Labour and others* 2005-2006 LAC 248. This case will be discussed in more detail in the next chapter.

Given the various challenges that exist in Lesotho that have been highlighted above, the study will explore what lessons (if) any Lesotho can learn from the South African experience. South Africa is an excellent choice for comparative purposes since, geographically, Lesotho is practically 'inside' South Africa. In South Africa, the *Labour Relations Act* 66 of 1995 expressly states that one of its purposes is to "provide simple procedures for the resolution of labour disputes"[26] and to "promote effective resolution of labour disputes".[27] Whilst, at first glance, resolution of unfair dismissal disputes in Lesotho and in South Africa may seem similar, there are some subtle but significant differences.

## 1.3.Research question

To what extent do labour dispute resolution mechanisms in Lesotho ensure speedy and effective resolution of unfair dismissal disputes?

## 1.4.Significance of the research problem

It is apparent that labour disputes are unavoidable at the workplace and, therefore, it is vital to manage conflict and promote sound labour relations by providing effective prevention and speedy settlement of unfair dismissal disputes. The speedy resolution of unfair dismissal disputes is important for employers and employees alike: there must be finality to litigation. This is an issue that can potentially affect every person that is employed in Lesotho since no one knows if and when they may have to refer a dispute to either the DDPR or the Labour Court. There are many factors that affect efficiency and speed of unfair dismissal disputes resolution. It is therefore important to identify these contributing factors and to make recommendations for much needed reforms.

[26] See the preamble to the Act.
[27] See section 1(d) (iv) of the Act.

## 1.5. The aims of the study

a) To identify the reasons as to why speedy resolution of labour disputes (in particular, unfair dismissal disputes) is so important for both employers and employees.
b) To critically discuss the structure that exists in Lesotho with respect to the resolution of unfair dismissal disputes.
c) To identify the causes of delays in the various fora, particularly in the DDPR and the Labour Court.
d) To critically discuss resolution of unfair dismissal disputes in South Africa, and to determine what lessons (if any) Lesotho can learn from the South African experience.
e) To make recommendations for much needed reforms in Lesotho.

## 1.6.The scope of the study

The study will focus on the resolution of unfair dismissal disputes in Lesotho, particularly, in the private sector. The various dispute resolution forums will be identified and the rules applicable therein discussed in order to determine how they impact the speedy and effective resolution of unfair dismissal disputes. Given the close relationship between Lesotho and its much larger neighbour South Africa, the study will also determine what lessons (if any) Lesotho can learn from the South African experience.

## 1.7.Literature review

Workplace conflict, how it manifests itself and, how it is managed, is a core part of employment and industrial relations. A strong view on the literature is that organizations are likely to pay a high cost if problems are not solved speedily and effectively[28]. Different writers acknowledge the importance of having dispute resolution mechanisms that are effective and expeditious.

[28] Paul Teague, "Resolving Workplace Disputes in Ireland: The Role of Labour Relations Commission" Working Paper No. 48 10 April 2013<http://www.ilo.org/ifpdial/information-resources/publications> accessed 10th January 2023.

Stefan Van Eck and Bosch argue that if disputes take a long time without legal redress, it frustrates employees. Dismissed employees have no income and cannot afford legal representation.[29] It is therefore ideal to have dispute resolution forums where they can represent themselves. These forums should also be within reach and have simplified procedures with less formalities.[30] It is crucial to have specialised dispute resolution forums that are equipped with presiding officers with necessary expertise in the field of industrial relations to hear and decide legal disputes in the labour sphere.[31] Specialised labour courts with exclusive jurisdiction are more likely to develop coherent labour law principles that are based on the premise of fairness rather than dealing with lawfulness within the confines of the law of contract.[32]

In Lesotho, there is a dearth of literature in relation to systemic delays in the resolution of disputes. The discussion of the topic in the various decisions of the courts and tribunals is focused on compliance with time periods set out in the law for filing of unfair dismissal claims, and how delays have to be justified for late filing to justify condonation of such delays. The discussion otherwise extends to compliance with the periods for filing of process once the claim is lodged, or within which to apply for review or lodge an appeal.

The International Labour Organization's (ILO) tripartite constituents have highlighted the important role of governments in developing labour dispute resolution systems that are effective, accessible and transparent, to ensure the rule of law at the national level.[33] Governments are encouraged to ensure the following:

---

29 Stefan Van Eck, "The Constitutionalisation of Labour Law: No place for a Superior Labour Appeal Court in Labour Matters (Part) 1: Background to South African Labour Courts and the Constitution" (Obiter 2005) at pg 552.

30 Stefan Van Eck, "The Constitutionalisation of Labour Law: No place for a Superior Labour Appeal Court in Labour Matters (Part 1): Background to South African Labour Courts and the Constitution" (Obiter 2005) at pg 552.

31 Pieter Le Roux, "Substantive Competence of Industrial Courts" (1987) 8 *ILJ* pg 193.

32 Stefan Van Eck, "The Constitutionalisation of Labour Law: No place for a Superior Labour Appeal Court in Labour Matters (Part 1): Background to South African Labour Courts and the Constitution" (Obiter 2005) at pg 552.

33 Michael Gay and Graig Bosch Report, ILO Labour Law and Industrial Relation Reform Project in Malaysia, ILO Office Geneva, March 2020<http://www.ilo.org/publns>accessed on 19th January 2023.

***A time bound system*** – Under the international standards and best practices, the role of the responsible Ministry is to provide conciliation, mediation and arbitration mechanisms that are free and expeditious.[34] In this context, strict and public time lines of all stages of dispute resolution process should be introduced. Rigorous case management must be applied. Postponement of cases, whether in the Labour Court or during conciliation or arbitration, should be limited in purpose and number.

***Enterprise level grievance*** **–** Requiring the establishment of an enterprise level grievance procedure for all employees in an enterprise with minimum employment number and for all aspects of employment relationship will go a long way in preventing the escalation of disputes, which may strain the labour dispute resolution system. Michael Gay and Graig Bosch,[35] have observed that:

The best labour dispute resolution system would be the one understood by every worker and employer and requiring minimal intervention by a lawyer. In this respect, it is important that more information in an easily digestible form should be made available the public through the responsible ministry to facilitate access to justice for all.

As was indicated earlier, ADR is seen as being quicker and more efficient than the traditional methods of dispute resolution, namely adjudication/litigation. In Lesotho, the DDPR resolves disputes through conciliation and arbitration. Conciliation proceedings are conducted on a 'without prejudice' basis and are confidential.[36] Conciliation also helps parties to resolve their disputes and achieve certainty without on-going investment on time, money and emotions. Parties express their feelings and seek remedies outside the legal grounds of the claim. This being said, conciliation can also be disadvantageous as conciliators do not carry the same authority as judges. Parties are often pressurised to make, accept or reject offers during conciliation.[37]

---

34 Michael Gay and Graig Bosch Report, ILO Labour Law and Industrial Relation Reform Project in Malaysia, ILO Office Geneva, March 2020<http://www.ilo.org/publns>accessed on 19th January 2023.

35 Michael Gay and Graig Bosch Report, ILO Labour Law and Industrial Relation Reform Project in Malaysia, ILO Office Geneva, March 2020<http://www.ilo.org/publns>accessed on 19th January 2023.

36 John Grogan, *Workplace Law*, (13th edn Juta & Co 2020) pg 446.

37 Rob Stevenson, The Pros and Cons of Conciliation of Workplace claims (bulletin 5 August 2021) <http//www.workplace-lawyers.com.au> accessed on 29th January 2023.

In Lesotho, the Industrial Relation Council (IRC) has adopted guidelines for conciliation and arbitration[38] which are a useful tool in the process of conciliation and arbitration at the DDPR. As far as conciliation is concerned, the procedure unfolds in four stages, namely the introduction, information gathering and analysis of the dispute, the development of consensus and the conclusion.[39] The introduction is aimed at creating a conducive environment to the resolution of the dispute. The conciliator is expected, amongst others to introduce the parties and explain the principles of conciliation and his role in the process.[40] No settlement will be imposed on any party and the process is confidential. The conciliator cannot become a witness for any of the parties in the event that the matter goes to arbitration or court. The conciliator has no power to rule or negotiate on behalf of any party but may only make recommendations or advise the parties on the substance of the dispute with the object of enhancing the prospects of settlement.[41]

At information gathering and analysis of the dispute stage, the conciliator invites the parties to present their stories, allowing each party to ask questions or seek clarification and to respond to the version of the other party. The conciliator also assists in eliciting any further information to seek to understand the underlying causes of the conflict and finally summarizes the issues in dispute and problems that need to be addressed.[42]

At the development of consensus stage, the conciliator considers the appropriate consensus building process; decides the order in which issues should be addressed; and generates possible options to resolve such issues. He also notes common ground, focusing on interests and expectations rather than positions of the parties, and finally building on areas of agreement amongst others. At the conclusion stage of conciliation, a conciliator brings the parties together; summarizes the status of the disputes; ensures that the settlement or agreement is clearly understood by both parties; causes the settlement agreement drafted, which would include a

38 *Labour Code (Conciliation and Arbitration Guideline) Notice* 2004.
39 Guideline 8 (1) of the *Labour Code (Conciliation and Arbitration Guidelines) Notic*e 2004.
40 Guideline 8(2) of the *Labour Code (Conciliation and Arbitration Guidelines) Notice* 2004.
41 Guideline 8(3) of the *Labour Code (Conciliation and Arbitration Guidelines) Notice* 2004.
42 Guideline 8(4) of the *Labour Code (Conciliation and Arbitration Guidelines) Notice*, 2004.

procedure for dealing with any dispute that may arise from the application of the agreement. He also discusses monitoring and follow up procedures amongst others.[43]If parties fail to settle the dispute, the conciliator is expected to propose alternative way of settling the dispute.[44]

When it comes to arbitration, conciliator arbitrator arbitrator seeks to conciliate the matter before moving to the stage of arbitration if conciliation fails.[45] The main purpose of conciliation before arbitration is to narrow the issues to be determined by arbitration.[46] Conciliation may not prejudice fair and impartial hearing before arbitration.[47]

*Voluntary Conciliation and Arbitration Recommendation*, 1957 (No.92) and the *Examination of Grievances Recommendation* 1967 (No.130) address certain aspects of the resolution of individual labour disputes that reflect the principles of International Labour Organization (ILO) system which are preventing the emergence of labour disputes, in case of inevitability orientation to its internal resolution, and in case of need, involvement of the third party.[48] The *Recommendation* emphasises, amongst other things, the importance of dispute resolution. Clause 1 provides that voluntary conciliation machinery, appropriate to national conditions, should be made available to assist in the prevention and settlement of industrial disputes between employers and workers.[49]

### 1.8 Hypothesis

a) The speedy resolution of unfair dismissal disputes is important for both employers and employees.

---

43 Guideline 8(7) of the *Labour Code (Conciliation and Arbitration Guidelines) Notice*, 2004.
44 Guideline 8(8) of the *Labour Code (Conciliation and Arbitration Guidelines) Notice*, 2004.
45 Guideline 16 of the *Labour Code (Conciliation and Arbitration Guidelines) Notice*, 2004.
46 Guideline 16(2) of the *Labour Code (Conciliation and Arbitration Guidelines) Notice*, 2004.
47 Guideline 16(3) of the *Labour Code (Conciliation and Arbitration Guidelines) Notice*, 2004.
48 See Paragraph 1 of the *Voluntary Conciliation and Arbitration Recommendation*, 1957 (No.92); See also Michael Gay and Graig Bosch Report, ILO Labour Law and Industrial Relation Reform Project in Malaysia, ILO Office Geneva March 2020<http://www.ilo.org/publns>accessed on 19th January 2023.
49 Michael Gay and Graig Bosch Report, ILO Labour Law and Industrial Relation Reform Project in Malaysia, ILO Office Geneva, March 2020<http://www.ilo.org/publns>accessed on 19th January 2023.

b) In Lesotho, there are too many courts that an unfair dismissal dispute has to progress through; a lengthy hierarchy of appeals should be avoided.

c) Lesotho can learn some valuable lessons from the South African experience.

### 1.9. Research Methodology

This study is based on literature review of relevant primary and secondary resources such as textbooks, law journal articles, statutes, case law, and internet material from reliable sources. It will also provide statistical data of disputes referred to the DDPR and the time it takes to resolve such disputes either through conciliation and or arbitration.

### 1.10. Chapter outline

This study will be divided into four chapters.

**Chapter one –** This chapter will introduce the subject matter of the study and legal problem to be solved, aims and objectives of the study and methodology of the research.

**Chapter two –** This chapter will discuss the resolution of unfair dismissal disputes in Lesotho, the law applicable and challenges arising therefrom. It will also focus on how the forums for resolution of labour disputes are constituted and the rules applied in each of the forum. It will further discuss the treatment accorded to both public officers and private employees in relation to resolution of their disputes.

**Chapter three –** This chapter will be a comparative study wherein South Africa will be used as comparator. It will determine how unfair dismissal disputes are handled in South Africa and identify possible lessons that Lesotho can learn from it.

**Chapter four –** This chapter will be conclusions and recommendations. It will propose a way forward for Lesotho in order to ensure speediness and efficiency of resolution unfair dismissal disputes.

# CHAPTER TWO

## 2. Resolution of Unfair Dismissal Disputes in Lesotho: The Law and Challenges

### 2.1. Introduction

In the previous chapter it was shown that resolution of unfair dismissal disputes in Lesotho raise a concern in relation to speediness and effectiveness. The consequences that come as a result of delays in resolution of unfair dismissal disputes are very detrimental to both an employer and employee. This chapter will discuss the position of the law in relation to resolution of unfair dismissal disputes in Lesotho. It begins with a historic overview. Thereafter, the various forums that deal with resolution of unfair dismissal disputes are discussed, in particular, the legal framework and/or rules applicable within each forum that impacts on speediness and effectiveness.

### 2.2. Labour disputes resolution in Lesotho: a historical overview

Labour legislation in Lesotho can be traced back to the late 1800s when Lesotho (then known as 'Basutoland') was a British Colony. Lesotho became a British protectorate in 1868. From 1871 it was ruled from the Cape Colony. Then, in 1884, the British issued the *General Law Proclamation 2B* of 1884. The Proclamation provided that the law that would apply in Basutoland shall be the law in force at the colony of the Cape of Good Hope.[50]

Relevant for purposes hereof, as far as can be gathered, the first piece of legislation that was made applicable via the machinery of *Proclamation 2B* was the *Master and Servant Act* 15 of 1856. This was repealed and replaced by the *Employment Act* 16 of 1964, which in turn was later repealed and replaced by the *Employment Act* 22 of 1967.

[50] Hoolo Nyane, "Abolition of criminal defamation and retention of *scandalum magnatum in* Lesotho" (2019) 19 *African Human Rights Law Journal* at 744.

### *2.2.1. Master and Servant Act 15 of 1856*

The Act provided for contracts of service and those of apprenticeship. A contract of service and a contract of apprenticeship meant, respectively, any agreement, oral or written within which the servant or apprentice respectively entered into, or made with any Master for the performance of any work or labour of whatever nature.[51] The terms of the contract could be express or implied.[52]

The Subordinate Courts of the first class were conferred jurisdiction to determine all cases in their respective districts, between Master and Servant, and also between Master and Apprentice, in relation to their respective rights and duties, or any other matter, or offence in relation to which provision was made in the Act.[53] Non-payment of wages was enforceable by an action instituted by the servant before the Magistrate Court.[54] Where in such an action the servant could not prove the rate of wages, the Court was required to fix the rate of wages with reference to wages that were usually paid in the district for the same service performed by the servant, taking into account the skill and ability of the servant.[55]

Whereas the Act conferred on Magistrates a territorial jurisdiction over labour matters arising within their districts, they were enabled to dismiss a case on the basis that it could conveniently be dealt with in a different district.[56] The fact that Magistrates had such wide unregulated powers could be open to abuse. This was particularly so when there were no criteria that were set out in the Act that the Magistrates were bound to consider before declining jurisdiction. Significantly, a magistrate could dismiss an action irrespective of whether the grounds giving

---

51 Section 2 of the *Master and Servant Act 15* of 1856.

52 Section 2 of the *Master and Servant Act* 1856 defined the word "master" as any person, whether male or female, employing for hire, wages or other remuneration any servant, or to who any apprentice shall have been indentured or bound by any contract of apprenticeship made according to law.

53 Section 42 of the *Master and Servant Act 15* of 1856.

54 Section 11 of the *Master and Servant Act 15* of 1856.

55 Section 12 of the *Master and Servant Act 15* of 1856.

56 Section 42 of the *Master and Servant Act 15 o*f 1856.

rise to the case arose in the district or whether the action is brought against a defendant who resided in the district.

Apart from a civil claim that could be instituted by the servant, non-payment of wages could be enforced by criminal sanctions. A master who withheld payment without reasonable or probable cause for believing that wages withheld were not due committed an offence and was liable to a fine, and to imprisonment in default of payment.[57] Significantly, from a labour law perspective, employees were not protected against unfair dismissal as employers could terminate their contracts after merely giving them notice. As has been observed, in the 1850s, there were no specialised labour courts and labour disputes were determined by the ordinary civil courts.

### *2.2.2. Employment Act 16 of 1964*

The Act repealed, amongst others, the *Master and Servant Act* of 1856[58] and introduced some significant improvements. Every contract of employment was governed by the Act unless otherwise provided.[59] The offices of the Labour Commissioner and Labour Officers were created and tasked with the administration of the Act. Labour Officers were given powers to settle disputes between employers and employees whenever they received a report that either of them neglected or refused to comply with the terms of any contract and, whenever any question, difference or dispute arose as to the rights or liabilities of any party to the contract.[60]

A labour officer could refer any matter or dispute to the courts in his or her own name or in the names of the employee, family members or representative against the employer in respect of any matter or thing or cause of action arising from the employment or such employee or termination of any such employment. [61]

---

57 Section 60 of the *Master and Servant Act 15* of 1856.

58 The preamble of the Act stated that it was intended to "amend and consolidates the laws relating to employment in accordance with fundamental labour standards as expressed in the International Labour Organisation applicable to the territory and to regulate conditions of employment for employers and employees."

59 Section 10 of the *Employment Act* 16 of 1964.

60 Section 84(1) of the *Employment Act* 16 of 1964.

61 Section 85 of the *Employment Act* 16 of 1964.

The *Employment Act*, like its predecessors, conferred jurisdiction on Magistrates of the First Class to:

a) Impose any punishment or penalty to which any person is liable under the provisions of the Act.
b) Rescind any contract and make such consequential orders as may be just in the circumstances.
c) Assess the fair value of services rendered by an employee in any case in which such services are to be assessed in accordance with the provisions of this Law, or in any case where the rate of wages or other benefits to which an employee should be entitled were not agreed between the employer and employee or it is uncertain what was agreed.
d) Decide the relative rights and duties of employers and employees in relation to any matter referred to the court under the provisions of this Law.
e) To fix the amount of compensation for loss or damage to the property of an employer where such loss has been occasioned by the wrongful act or omission of his employee.
f) Adjust and set off one against the other all claims on the part either of the employer or of the employee arising out of or incidental to such relationship between them as the court may find to be subsisting, whether such claims are liquidated or unliquidated or are for wages, damage to person or property or for any other cause, and to direct payment of the balance found due by one party to the other.
g) Award damages for wrongful dismissal.[62]

Where the action was instituted against the employer in terms of the *Employment Act*, and it appeared that the employer was likely to abscond to avoid payment of wages to any employee, the court could order arrest and detention of such an employer pending the proceedings, or until an earlier payment of such wages had been paid in full.[63] A judgment for payment of wages could be enforced by imprisonment at the request of the labour officer claiming on behalf of any person to whom wages were due.

[62] Section 87(1) of the *Employment Act* 16 of 1964.
[63] Section 90 of the *Employment Act 16* of 1964.

### *2.2.3. Employment Act of 1967*

With respect to resolution of labour disputes, the *Employment Act* of 1967 reproduced in identical terms the machinery that was provided for under the *Employment Act* of 1964, which has already been discussed. Labour officers retained their role. Jurisdiction was conferred on the First-Class Magistrates in relation to labour disputes.[64] The Act also applied to Government employees, except to the extent that its operation was excluded in respect of any public authority, army category or class of public officers.[65] This Act came into operation a year after Lesotho became a member of International Labour Organisation (ILO).[66]

### *2.2.4. The Labour Code Order of 1992*

In 1992 a new law, the *Labour Code Order* was enacted.[67] It repealed all the laws that governed labour matters that came before it. The *Labour Code* is the most significant and comprehensive labour legislation ever to be enacted to regulate labour matters in Lesotho. The *Labour Code*, however, excludes certain categories of employees from its application, for instance, members of Royal Lesotho Defence Force and other disciplined forces.[68]

The offices of the Labour Commissioner and Labour Officers have been retained and their powers were substantively the same as in the repealed *Employment Act*.[69] However, this power to settle disputes between employers and employees was later removed by the repeal of section

---

64 Chapter II sections 81-89 of the *Employment Act* of 1967.
65 Section 2 of the *Employment Act* of 1967.
66 Lesotho became a member of the ILO in 1966. The ILO is a specialized agency of the United Nations established in 1919 with the aim of promoting rights at work, encouraging decent employment opportunities, enhancing social protection and strengthening social dialogues. < http//www.ilo.org. > accessed on 17th May 2023.
67 *Labour Code Order* No. 24 of 1992.
68 Section 2 of the *Labour Code Order* 1992.
69 Sections 12 of the *Labour Code Order* 1992.

15 of the Labour Code in the year 2000.[70] Nevertheless, a labour officer can still institute and carry on in his or her own name proceedings in relation to contravention of any provision of the *Labour Code* or of any offence under the *Labour Code*.[71]

As indicated in the previous chapter, the *Labour Code* created the Labour Court and constituted it as the first forum for labour dispute resolution. It has been indicated that specialised labour courts ensure that disputes are finalised expeditiously. Moreover, labour law has become a special area of law that seeks specialists in employment relationship to consider and resolve labour disputes.[72] Having a specialised labour court in Lesotho was a positive step. Labour disputes are now separated from ordinary claims in the civil courts and can, therefore, receive undivided attention by presiding officers who specialise in labour matters. This undivided attention can ensure speedy and effective resolution of labour disputes, in particular unfair dismissal disputes. The *Labour Code* was later amended in 2000 to introduce the Directorate of Dispute Prevention and Resolution (DDPR), as we have seen earlier, and the Labour Appeal Court.[73]

## 2.3. Dispute resolution forums created under the current labour legislation

### *2.3.1. The Labour Court (before enactment of Labour Code (Amendment) Act 3 of 2000)*

#### 2.3.1.1. Time limit for referring unfair dismissal cases to the Labour Court

To underscore the importance of speedy resolution of unfair dismissal disputes, an employee was initially required to present his or her claim to the Labour Court within six months of termination of employment.[74]The Court could, however, allow referral of the claim outside of

---

70 Section 4 of the *Labour Code Amendment Act* 2000 deletes section 15 of the *Labour Code order* 1992.

71 Section 16(1) of the *Labour Code Order* 1992.

72 Stefan Van Eck, "The Constitutionalisation of Labour Law: No place for a Superior Labour Appeal Court in Labour Matters (Part 1): Background to South African Labour Courts and the Constitution" (2005) *Obiter* at pg 552.

73 Section 38 of the Labour Court Amendment Act 3 of 2000 establishes the Labour Appeal Court.

74 Section 70(1) of the *Labour Code Order* 1992. This section has been deleted and there is currently no time limit for referring unfair dismissal disputes based on operational requirements, dismissal as a result of participating in an unlawful strike and as a consequence of a lockout.

the six months period if the court was satisfied that it was in the interest of justice to do so.[75] This time limit was, however, removed when the Code was amended in the year 2000.[76] Currently, this means that if, for example, an employee has been dismissed for a reason based on operational requirements, there is no specific time limit within which the employee is required to refer an unfair dismissal dispute to the Labour Court.

#### 2.3.1.2. Legal representation in the Labour Court

Legal representation of parties was initially only allowed when all parties, other than the Government, were represented by legal practitioners.[77] Section 28 of the *Labour Code* reads as follows:

> (1) At any hearing before the Court, any party may appear in person or be represented-
> (a) By an officer or an employee of a trade union or of employers' organisation;
> (b) By a legal practitioner, but only when all parties are represented by legal practitioners.
> (2) Where the Government is a party to the proceedings before the Court, the Government may be represented by the Attorney General or by any person appointed by the Attorney general for that purpose.

The position suggested by the above section had obvious pitfalls. A party could decide not to be represented by a lawyer for a variety of reasons. For example, an employer could have an official who, though not necessarily an admitted and practicing legal practitioner, has legal training. It would be unfair in such circumstances that the employee should have to forgo legal representation. The *Labour Code* did not define what is meant by 'legal representatives'. If the assumption was that it referred to those that are admitted and practise as legal practitioners in the courts of law, certainly, there was a lacuna in the provisions of the *Labour Code.*

Not allowing legal representation in the Labour Court also had some advantages as far as the speedy and effective resolution of disputes is concerned. This was observed by the Labour

---

75 Section 70(2) of the *Labour Code Order;* See also *Ekkerhrst Oosterhuis v Bishop Phillip Mokuku* LC/2/ 1994 where the court accepted that two weeks delay is not inordinate; The Court also condoned three months delay in *Lesotho Clothing and Allied Workers Union v C.G.M Industrial (Pty) Ltd* [1999] LSLC 34 (16 April 1999).

76 Section 19 of the *Labour Code (Amendment) A*ct 3 of 2000.

77 Section 28 (1) (b) of the *Labour Code Order* 1992.

Appeal Court in the case of *Queen Komane & Another v City Express Stores (Pty) Ltd*,[78] where it stated that:

> The policy considerations behind sections such as these ones are, not only to ensure that there is fair trial in the sense of there being equality of arms, but also, to render the proceedings of the labour court less expensive, more expeditious, less technical, more accessible, non-legalistic, more prompt and timeous, fair and equitable, more transparent. These principles sit at the heart of an efficient labour dispute resolution system.

The provision that limited legal representation in the Labour Court were challenged successfully in the case of *Security Lesotho Pty Ltd v Moepa*.[79] In this case, the first respondent had appeared in person in the Labour Court and the applicant was represented by a legal practitioner. The second respondent, being the Labour Commissioner, objected to legal representation of the applicant by relying on section 28 (1) (b) of the *Labour Code*, which provided that at any hearing before the Labour Court, any party may appear in person or be represented by a legal practitioner, but only when all parties other than the Government are represented by legal practitioners.

The applicant approached the Constitutional Court – which is a division of the High Court – to challenge the constitutionality of section 28(1) (b) of the *Labour Code*.[80] The applicant argued that this section disentitled it to be represented by a legal representative of its choice in the Labour Court but in the ordinary courts legal representation is allowed. Denying legal representation in the Labour Court is unfair to litigants as issues that are canvassed in the Labour Court are more complex and need assistance of a lawyer, so the applicant argued. The applicant further contended that the outcome of litigation in the Labour Court is mostly likely to adversely affect individual rights. On the other hand, the respondent on the other hand argued that the right to legal representation in the Labour Court is not completely disallowed; it is a discretion of the Court whether to allow or refuse it considering the complexity of the matter before it.

---

78 *Queen Komane & Another v City Express Stores (Pty) Ltd* LAC/CIV/A/5/2002.

79 *Security Lesotho v Moepa* CC 12 of 2014.

80 The Constitutional Court is the High Court exercising its jurisdiction in respect of constitutional matters and is presided over by a panel of three judges.

The Constitutional Court found that section 28(1) (b) of the *Labour Code* was unconstitutional in that its purpose was not pressing and substantial; it failed the proportionality test. The Court stated:

> Section 28 (1) (b), because it absolutely denies a party whose opponents are not themselves legally represented any entitlement to legal representation, may have the effect of depriving such party of a fair trial. For this reason, even if the rationale of the provision was to somewhat ensure equality of arms, the law as presently framed is over restrictive and as a result constitutionally flawed.

2.3.1.3. The exclusive jurisdiction of the Labour Court in labour matters

The Labour Court was conferred with exclusive jurisdiction as regards any matters provided for in the *Labour Code* including, but not limited to, trade disputes. Significantly, when the court was established in 1992, the decisions of the Labour Court were final and no appeal could be taken in respect of any matter otherwise falling within its sole jurisdiction.[81] Section 38 (1) of the *Labour Code* (before it was amended) read as follows:

> An award or decision of the Court on any matter referred to it for its decision or any matter otherwise falling within its sole jurisdiction shall be final and binding upon the parties thereto and on any parties affected thereby, and such award or decision shall not be the subject of an appeal in any proceedings or court.

It is apparent, therefore, that the intention of the legislature was to ensure that labour disputes were resolved as quickly as possible. Making the Labour Court the court of first instance as well as the final court would certainly ensure that cases reach finality sooner without having to go through several courts. While in itself the goal of reaching finality is a noble one, the attainment of justice could be compromised. The fact that members of the Labour Court were initially appointed by the Minister, and not by an independent body of legally qualified persons such as Judicial Service Commission, cast doubt on the quality of decisions of the Court befitting the highest court. More importantly, judicial officers that preside in the Labour Court are human beings like everyone else, and they are bound to make mistakes in their judgments. To deny employees and employers the right to challenge decisions of the Labour Court in a higher court seemed odd and unjust.

[81] Section 38 of the *Labour Code Order* 1992.

It is hardly surprising that in the year 2000, when significant changes to the *Labour Code* were made, section 38 was amended to allow for appeals against decisions of the Labour Court. It will be recalled that the *Labour Code Amendment Act* 3 of 2000 created the Labour Appeal Court.

## 2.4. The Directorate of Dispute Prevention and Resolution (DDPR)

The DDPR is the equivalent of the CCMA in South Africa. It was established as a juristic person independent of the Government, political party, trade union, and employers or employees' organisation.[82] The functions of the DDPR are:

(a) To attempt to prevent and resolve trade disputes through conciliation;
(b) To resolve trade disputes through arbitration;
(c) To advise employers, employers' organisations, employees and trade unions on the prevention and resolution of trade disputes and;
(d) To compile and publish information about its activities, statistics on dispute prevention and resolution and significant arbitration awards."[83]

### *2.4.1. Jurisdiction of the DDPR with respect to unfair dismissal disputes*

The jurisdiction of the DDPR is set out in section 226 (2) of the *Labour Code (Amendment) Act* 3 of 2000. This includes unfair dismissals that do not fall under the exclusive jurisdiction of the Labour Court, namely dismissals on the grounds of misconduct and capacity.[84] The parties must first conciliate their dispute and, it is only when conciliation fails that their dispute can proceed to arbitration. Some litigants have a tendency to skip arbitration and approach the Labour Court for adjudication of their dispute. The courts do not allow that the proper forum should be bypassed in that manner.[85]

---

82 Section 48B of the *Labour Code Amendment Act* 2000.
83 Section 46 B (5) of the *Labour Code Amendment Act* 2000.
84 Reasons for unfair dismissal that fall under exclusive jurisdiction of the Labour Court as outlined by section 226(2) (1) (c) of the *Labour Code* are; participation in a strike, as consequence of a lockout, or related to operational requirements of the employer.
85 See *Kabelo Teisi v Minopex Lesotho (Pty) Ltd* LC/56/2013 where the court discusses the jurisdiction of the DDPR in detail and referred back the matter to the DDPR where it was clear that it fell within the jurisdiction of the DDPR.

### *2.4.2. Time limit for referring disputes in the DDPR.*

A party may refer a dispute relating to unfair dismissal within a period of six months from the date of dismissal.[86] The fact that the period of six months has been provided is a significant indication that the legislature intended that the resolution of unfair dismissal disputes should not be unduly delayed. However, where a dispute is referred late, a party has to file a written application for condonation of the late filing of the referral.[87] In *Melane v Santam Insurance Company*,[88] the court held that in considering whether condonation should be granted certain factors have to be taken into account: the degree of lateness, the explanation thereof, the prospects of success and last the importance of the case.

The courts have acknowledged that delays in employment disputes prejudice all the parties. Both the employer and employee are affected since in some instances evidence maybe distorted because of fading memories of potential witnesses. In the case of *Teba & Others v Lesotho Development Authority*,[89] the court stated that an inordinate delay induces a reasonable belief that a losing party accepted the decision and condonation in those circumstances without reasonable explanation, could undermine finality to litigation and cannot be in the interest of justice.

### *2.4.3. Conciliation at the DDPR*

The DDPR operates a dispute settlement machinery generally referred to as 'Con-Arb' i.e. Conciliation and Arbitration. The system entails that every arbitration be preceded by a conciliation process. Con-arb has some disadvantages. Arbitrators get to arbitration with the knowledge of the information transpired during conciliation and may be influenced by the conduct of the parties in conciliation.[90] One of the advantages of conciliation is that some

---

86 Section 227(1) (a) of the *Labour Code Amendment Act* 3 of 2000.

87 Reg 4(1) of the *Labour Code (Directorate of Dispute Prevention and Resolution Regulations,* 2001.

88 *Melane v Santam Insurance Company* 1962(4) SA 331 at 532; also see *Mojalefa Phomane v C&Y Garments (Pty) Ltd* LC/REV/362/06 (unreported); *Comfort Telephone Taxis Pty (Ltd)v DDPR* & *Motlatsi Makoala* LAC/REV/15/2010.

89 *Teba & Others v Lesotho Development Authority* LAC/CIV/A/06/2009.

90 See Alan Rycroft, "Rethinking the Con-arb Procedure" (2003) 24 *ILJ* 699 at 707.

parties reach a settlement at conciliation, a practice generally encouraged in the settlement of labour disputes. Conciliation process is private, informal, and parties are free to deliberate on their issues and negotiate.

Each party will describe the situation, giving rise to the dispute and the dispute itself. The parties will agree on the issues of disagreement and will then be encouraged by the conciliator to examine possible solutions to their dispute. When they ultimately agree on possible solutions, they will formulate an agreement. Conciliator only assists the parties to find their own solution and to craft an agreement which they can both commit themselves.[91] In practice however, some parties do not abide by the terms of the settlement agreement.[92]

### *2.4.4. The Pre-Arbitration Conference*

Where the matter is not settled at conciliation, and has to proceed to arbitration, the parties are required attempt to shorten proceedings in a pre-arbitration conference. The parties are required to attend to an exhaustive list of matters that are intended to clarify issues and shorten proceedings.[93] The list includes, amongst others, identifying facts that are common cause and those that are in dispute.

Pre-hearing conferences help to explore options to try to expedite the resolution of a dispute, rather than proceed to trial in respect of issues that are uncertain. The Court of Appeal in *Pitso Ramoepana v DPP & Another*[94] emphasised that the purpose of pre-trial conference is to avoid pointlessly long trials.

### *2.4.5. Postponements in the DDPR*

---

91 See Paul Pretorius, *Dispute Resolution* (1st edn Juta 1993) pg 130.

92 See also John Grogan, *Workplace Law* (13th edn Juta & Co 2020) at 45, where the author discusses how con-arb process takes place in South Africa. See also Alan Rycroft, "Rethinking Con-arb Procedure" (2003) 24 *ILJ* 699 at 706 where the author discusses the impact of con arb on the parties.

93 Reg 22(2) of the *DDPR Regulations* 2001.

94 *Pitso Ramoepana v DPP & Another* C of A (CIV)/33/2018 [2018] LSCA 44 (1st November 2019).

Proceedings may be postponed by consent of all the parties and where such a request is made ten days before the date scheduled for hearing parties need not attend.[95] It appears somewhat odd that a postponement made prior to ten days before the hearing appears to be automatic. There is a danger that delays could be caused as a result of this practice. A formal application is needed for postponement where parties fail to agree on a postponement, or where the request for postponement is made within ten days of the date scheduled for hearing. A postponement is not a right but an indulgence given to parties on good cause shown.[96]

The court, in *Mampho Khaketla and Another v DPP*[97] neatly summarises the principles relating to postponements and stated that "in principle parties in a litigation have a right to access the courts and for their disputes to be speedily tried towards a resolution of the dispute between them. This is a recognised human procedural right and obtains throughout the pre-trial, trial and post-trial phases in litigation." The court went further to say "it is entrenched principle of law that an application for postponement is a search for indulgence as opposed to asking for a right or the application for normal trajectory in the proceedings. Thus, this renders it explainable that for a dispensation to be given, whoever seeks for it, must justify it with a compelling reason". All this means that the DDPR will not grant postponement in circumstances where there are no valid reasons and to avoid situations where parties seek postponements just to waste time.

### *2.4.6. Legal representation in the DDPR*

Representation by a legal practitioner in the DDPR is not as of right. That is, it may be allowed where both parties agree or, where the arbitrator concludes that legal representation is necessary due to the nature of legal principles raised, complexity of the dispute or to balance the scale between the opposing parties so that representatives of equal ability deal with the

95 Reg 25 of the *Labour Code (DDPR Regulations*) 2001.
96 See *Real Estate Services (Pty) Ltd v Smith* (1999) 20 ILJ 196.
97 *Mamphono Khaketla and Another v DPP* CRI/T/98/2017 [2022] LSHC 40 (2 June 2022).

arbitration.[98] Section 228 A of the *Labour Code Amendment Act* provides that a party to a dispute maybe represented only by:

a) a co-employee;
b) a labour officer, in the circumstances contemplated in section 16(b);
c) a member, an officer, in a registered trade union or employers' organisation; or
d) if the party to the dispute is a juristic person, by a director, officer or employee.

There is an anomaly in section 228 A of the *Labour Code*, which provides for representation by a trade union or employer's organisation. This became apparent in *Letsosa v Standard Lesotho Bank and Another*,[99] where the official of the employer's organisation who represented the employer was a trained lawyer. The employee complained that he was disqualified from representing the employer. The Labour Court disagreed. This is because section 228A (a) (c) of the *Labour Code* allows for such representation.

Sometimes parties agree between themselves that there should be legal representation only to complain after the award goes against them. This was the case in *Standard Lesotho bank v Polane*. [100] The bank manager who represented the bank agreed that the employee be represented by a legal practitioner. When the award went against the bank, it sought a review on the basis that allowing an employee legal representation when the employer was not legally represented was an irregularity. The Labour Court disagreed and held that the bank was simply causing a delay and bringing a review application as an afterthought.

There can be no doubt that keeping the case free of legal practitioners can reduce the time within which disputes may be determined. Some lawyers tend to delay proceedings in a number of ways. First, they are trained to deal with technicalities and may therefore stall the proceedings by resorting to technical objections. They are sometimes prevented from attending to cases because they are too busy or even double booked. They have a tendency to give matters

98 Section 228A (2) of the *Labour Code Amendment Act*, 2000 [the list of factors in the aforementioned section is not exhaustive; see *CCMA & Others v The Law Society of the Northern Provinces & Other*s (2013) 34 ILJ 2779 (SCA) at paragraph 21.
99 *Letsosa v Standard Lesotho Bank and Another* LC/REV/10/2011[2014] LSLC 15 (19 May 2014).
100 *Standard Lesotho bank v Polane* LC/REV/77/2007[2009] LSLC 20 (20 October 2009).

in the higher courts preference over the lower courts and tribunals. Collier, in her article noted, "lawyers make the process legalistic and expensive and that a high degree of legal representation would both undermine endeavours to resolve these disputes expeditiously and tilt the balance unfairly in the favour of employers".[101]

Despite the disadvantages of having legal representation at the DDPR, there are also advantages. Legal representation may be essential to a favourable outcome to the proceedings. A seasoned lawyer has full understanding of the law and processes.[102] Lawyers also play a vital role as they assist the arbitrator to identify all relevant issues and applicable law. Neil Van Dokkum in his article opined that:

> Commissioners are often too busy to research properly points of law and if an arbitrator fails to consider an essential aspect of the dispute, whether factual or legal, the award could be reviewed on the basis that the arbitrator did not apply his or her mind to the facts and /or law. Given the inordinate delays associated with taking an award to review, it might be argued that it would be in conformity with the objects of the Act if the arbitrator allowed legal representation, as this could ensure that all relevant issues of law and fact are traversed, making for a better award, and hopefully avoiding review and consequent delays.[103]

### *2.4.7. Enforcement of DDPR awards*

Once the DDPR has granted an award, it becomes final unless it is reviewed and set aside or rescinded. Where a party does not comply voluntarily with the award, the successful party is entitled to take the award for enforcement by the Labour Court.[104] The Labour Court is empowered to enforce it by way of imprisonment of a judgement debtor where an award is not complied with for no just cause. An award of the DDPR may be rescinded or varied by a party within ten days of the applicant becoming aware

---

101 Debbie Collier, "The Right to Legal Representation at CCMA and at Disciplinary Enquiries" (2005) 26 ILJ pg 9.

102 Mohammad Masoud, "The Importance of Legal Representation" http/www.masoudlaw.com>accessed 12 April 2023, See also Paul Pretorius, *Dispute Resolution* (1st edn Juta & Co 1993) at 192.

103 Neil Van Dokkum, "Legal Representation at the CCMA" (2000) 21 *Industrial Law Journal* 836 @ 843; Also See Debbie Collier, "The Right to Legal Representation at the CCMA and at Disciplinary Enquiries" (2005) 26 *Industrial Law Journal* pg 9; Paul Benjamin, "Legal Representation in Labour Courts" (1994) 15 *Industrial Law Journal* 250.

104 Section 34 of the *Labour Code Order* of 1992 read with section 228E (5) of the *Labour Code Amendment Act* 2000.

of it.[105] The important point that bears emphasis here is this: where there is non-compliance with a DDPR award, the DDPR does not have the power to enforce its own awards; the successful party must resort to the Labour Court to institute another case, namely enforcement proceedings that can often take a long time to be finalised given that the Labour Court is understaffed.

### *2.4.8. The statistics don't lie*

It can be seen from the discussion above that the intention of the legislature with the enactment of the *Labour Code Amendment Act* of 2000 was to ensure that disputes in the DDPR are resolved effectively and speedily. This being said, the statistics published by the DDPR show that it is struggling. In the 2020/2021 financial year, the DDPR had one thousand, five hundred and forty-seven (1547) disputes referred to it. Two hundred and seventy-seven (277) were resolved by conciliation and four hundred and twenty-one were resolved by arbitration. Six hundred and ninety-nine (699) disputes remained unresolved. The other disputes were either withdrawn or referred to adjudication.[106]

In 2021/2022, one thousand nine hundred and thirty disputes were referred in the DDPR, four hundred and eighty-two (482) disputes were resolved through conciliation and five hundred and two (502) were resolved through arbitration. Six hundred and ninety 690) disputes were unresolved. The remaining disputes referred were either withdrawn, removed for non-prosecution or referred to adjudication.[107] The DDPR reports reflect that there are only ten arbitrators serving the entire country. Two arbitrators serve the northern region, seven arbitrators serve the central region and one arbitrator serves the southern region. The report also shows that there is a high number of review applications that are instituted in the Labour Court that prevent execution of awards.

---

105 Reg 29 of the *Labour Code Amendment (DDPR*) *Regulations,* 2001.
106 DDPR Annual Reports 2020/2021.
107 DDPR Annual Report 2021/2022.

## 2.5.Labour Court (after the Labour Code (Amendment) Act of 2000)

### 2.5.1 *Time limits for referring an unfair dismissal dispute*

As indicated above, section 70 of the *Labour Code*, which provided a time limit of six months for referring unfair dismissal disputes, was repealed by the *Labour Code (Amendment) Act* of 2000. These disputes are now regulated by the provisions of section 227(1) read with section 227(5) of the *Labour Code* (as amended). Section 227 is titled "Settlement of disputes of right" and it reads as follows:

(1) Any party to a dispute of right may, in writing, refer that dispute to the Directorate-
   (a) If the dispute concerns an unfair dismissal, within 6 months of the date of the dismissal
   (b) In respect of all other disputes, within 3 years of dispute arising.
(2) Notwithstanding subsection (1), the Director may on application, condone a late referral on good cause shown.
(3) The party who refers the dispute shall satisfy the Director that a copy of the referral has been served on all the other parties to the dispute.
(4) If the dispute is one that should be resolved by arbitration, the Director shall appoint an arbitrator to attempt to resolve the dispute by conciliation, failing which the arbitrator shall resolve the dispute by arbitration.
(5) If the dispute is one that should be resolved by the adjudication in the Labour Court, the Director shall appoint a conciliator to attempt to resolve the dispute by conciliation before the matter is referred to the Labour Court.
(6) If the dispute is resolved-
   (a) The conciliator or arbitrator shall issue a report; and
   (b) The settlement shall be reduced to writing and signed by the parties to the dispute.
(7) If a dispute contemplated in subsection (4) remains unresolved after the arbitrator has attempted to conciliate it, the arbitrator shall resolve the dispute by arbitration.
(8) If a party to a dispute contemplated in subsection (4) fails to attend the conciliation or hearing of an arbitration, the arbitrator may
   (a) postpone the hearing;
   (b) dismiss the referral; or
   (c) grant an award by default.
(9) If a dispute contemplated in subsection (5) remains unresolved after 30 days from the date of referral-
   (a) the conciliator shall issue a report that the dispute remains unresolved;
   (b) any party to the dispute may make an application to the Labour Court.

The Labour Appeal Court in *Kuleile Lepolesa and Others v Sun International of Lesotho (Pty) Ltd t/a Maseru Sun and Lesotho Sun (Pty) Ltd*,[108] when interpreting section 227(1) read with section 227(5), held that disputes that are subject to resolution by the Labour Court must be referred to the DDPR for conciliation before being taken to the Labour Court for resolution through adjudication.

In *Lesotho High Development Authority v Ntjebe*,[109] however, the Court of Appeal came to a different conclusion. It held that section 227(1) (a) and (b) is a limiting provision that applies to a referral of disputes of right to the DDPR and since the claims were in the Labour Court section 227(1) had no application to the matter and the matter need not be referred to the DDPR, which would include a referral for conciliation under section 227 (5) of the *Labour Code Amendment Act 3* of 2000.

Despite the ruling of the apex court in *Lesotho Highlands Development Authority v Ntjebe,* It would be a good idea if all unfair dismissal disputes (even those that fall within the jurisdiction of the Labour Court i.e. those that are based on operational requirements) are compulsorily referred for conciliation by the DDPR before they go for resolution by either arbitration or adjudication in the Labour Court. ADR (including conciliation) has many benefits, including that it resolves disputes in a much quicker manner, as has been shown above.[110]

The Labour Court also has jurisdiction in respect of reviews of DDPR awards. If a party is dissatisfied with the award, he or she may lodge a review application with the Labour Court within thirty days of the handing down of the DDPR award.[111] On good cause shown the Labour Court may condone late filing of the application.

---

108 *Kuleile Lepolesa and Others v Sun International of Lesotho (Pty) Ltd t/a Maseru Sun and Lesotho Sun (Pty) Ltd* LAC/CIV/03/2010; See also *LHDA v Mantsane Mohlolo & 10 Others* LAC/CIV/07/2009.

109 *LHDA v Ntjebe and Others* (C OF A (CIV) 7/2012) [2012] LSCA 51 (19 October 2012.

110 See Alan Rycroft, "Rethinking the con –arb Procedure" (2003) 24 699 @ 710; Paul Pretorius, *Dispute Resolution* (1st edn Juta & Co 1993) @ 167.

111 Section 228F (1) of the *Labour Code Amendment Act* 2000.

### *2.5.2. The review of DDPR Awards*

The Labour Court may set aside an award on any grounds permissible in law and any mistake of law that materially affects the decision.[112] Any grounds permissible in law are common law grounds of review, which include irregularity in the conduct of the proceedings.[113] The court in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*[114] gave guidance on how to ascertain review grounds. It stated that:

> In order to establish review grounds in law it must be shown that the decision-maker failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice… such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle; or that the decision-maker misconceived the nature of the discretion conferred upon him and took into account irrelevant consideration or ignored relevant ones; or that the decision of the decision-maker was grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner afore stated.

A review concerns itself with the manner in which a tribunal comes to its conclusion rather than with its result. An appeal on the other hand is concerned with the correctness of the result.[115] The role of a reviewing court is to focus on the process and on the way in which the decision maker came to the challenged conclusion. In distinguishing a review from an appeal, the Labour Court in *Lephallo Mosebo v Phakoe Freight Motor Parts (Ltd) Pty & others*[116] said, "in our view, as authority shows, where a litigant challenges the allegedly incorrect decision on the facts or law, that is an appeal. Where the challenge is on the procedure for reaching the decision, it is a review."

---

112 Section 228F (3) of the *Labour Code Amendment Act* 2000. It should be noted that the principal law is amended in section 228F by replacing Labour Appeal Court with the Labour Court by section 5 of the *Labour Code Amendment Act* of 2006.

113 In *Lesotho Electricity Company v Ramoqopo* LAC/REV/121/05, the Labour Appeal Court in ruled that even where the arbitrator makes an error of law, it does not automatically follow that his or her decision would be set aside. The test would be whether she applied her mind bona fide to the matter and whether there is prejudice suffered by the litigants. The Court stated that the standard is not the same as in judicial review of administrative actions.

114 *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988(3) SA 132 at 152; also see *Lesotho Express Delivery Services (Pty) Ltd v The DDPR & Another* LC/REV/18/2010.

115 *Coetzee v Lebeaa NO & Anor* (1999) 20 ILJ 129 LC.

116 *Mosebo v Phakoe Freight Motor Parts (Pty) Ltd & others* LC/REV/79/09[2012] LSLC 2 (19 January 2012).

DDPR awards are not challenged by way of appeal but a review. It is no doubt that the intention of the legislature was to make them somewhat final. To ensure that finality is achieved in administrative matters, decisions are challenged by way of review not appeal.[117] An appeal is a re-hearing of both the merits and the law based on the record of the tribunal. This procedure is prone to causing delays because the court is required to reconsider the evidence on record, which has been considered in the tribunal.

### *2.5.3. Reviews and stay of execution of DDPR awards*

The noting of an appeal at common law has the effect of staying execution of the judgement or decision appealed against. In the case of a review, however, unless there is an order of court or statute, or rule of court to the contrary, the filing of a review application per se does not have the effect of staying execution of the decision sought to be reviewed.[118] Some of the employers in Lesotho have a tendency of instituting review applications in the Labour Court and obtaining orders that stay execution of DDPR awards pending finalisation of the review proceedings, as a dilatory mechanism to evade payment of compensation or reinstatement as the case maybe.[119]

### *2.5.4. Dismissal of a case for want of prosecution*

The Labour Court may upon application by the respondent, or of its own motion, order any originating application to be struck off the roll for want of prosecution.[120] In an application for dismissal of a review application for want of prosecution, the court exercises a discretion. When doing so, the court usually considers the following factors; the length of delay, the explanation given thereof, and the prejudice caused to the other party. These factors are interrelated and not individually decisive.[121] In the case of *Lesotho Electricity Corporation v*

---

117 Cora Hoexter, *Administrative Law in South Africa* (2nd edn Juta & Co 2012) 532; see also *Yuen v Minister of Home Affairs* 1998(1) SA 958.

118 *JDG Trading (Pty) Ltd t/s Supreme Funishers v Monoko & Others* LAC/REV39/04 [2006] LSHC 173.

119 See for example *Moosa and Another v DDPR and Another* LC/REV/570/2006 where after obtaining a stay of execution the employer failed to prosecute the review application, which was eventually dismissed for lack of prosecution.

120 Rule 7(2) of the *Labour Court Rules* of 1994.

121 See *Autopax Passengers Services (Pty) Ltd v Transnet Bargaining Council & Others* 2006 (27) ILJ 2574 LC

*Mpaiphele Maqutu & Other*, [122]the court found that applicant for review had no interest in pursuing the matter to finality but rather to circumvent the execution of the award. The application was consequently dismissed for lack of prosecution.

Justice demands that an action be dismissed when there have been long periods of inaction. This is based on the principle of *vigilantibus non dormentibus lex subveniunt* (the law assists those that are vigilant with their rights and not those that sleep on them).[123] In *Sishuba v National Commissioner of SA Police Service,*[124] the court observed that the focal point in considering whether to dismiss legal proceedings is justice and fairness to both parties. The conduct of a party that is applying for dismissal can also be a determining factor.[125]

Since institution of an application for dismissal of a matter that is not prosecuted involves expenses or costs to a party who applies for such dismissal, it would appear that a provision in the rules that stipulates that an application should automatically lapse if not prosecuted within a specified time would be ideal.

### *2.5.5. The downside of having a single Labour Court in Lesotho*

The fact that there is currently only one Labour Court serving the entire country seems to give employers the latitude to avoid immediate execution of the DDPR awards. They institute review applications and apply for an order for stay of execution of the award, knowing that it would take a long time before such review applications could be heard. It is worth noting that for the ordinary civil cases there are eleven (11) Magistrate Courts in Lesotho, but only one Labour Court. This begs the question why labour disputes are not accorded the same treatment. A single Labour Court is an impediment to parties from other districts, particularly those that are far from the seat of the Labour Court, to access justice because of the sheer expense involved in travel as well as costs of litigation.

---

122 *Lesotho Electricity Corporation v Mpaiphele Maqutu & Others* LC/REV/41/2012; see *Eclat Evergood Textile (Pty) Ltd v Rasephehi* LC/REV/03/08 where a review application was dismissed due to a delay of seven months.

123 See *Bezuidenhout v Johnston NO & Others* (2006) 27 ILJ 2337 LC @ para 34.

124 *Sishuba v National Commissioner of SA Police Service* (2007) 28 ILJ 2073 (LC) at para 16.

125 See *Numza v Paint & Ladder (Pty) Ltd* [2017] 11 BLLR 1105.

There is no provision in the Rules requiring a party who applies for review to pay security that is sufficient to satisfy the award. An introduction of such a rule could at least reduce the level of abuse by a party who is liable to fulfil a judgement and is reluctant to do so.

## 2.6. The Labour Appeal Court

The *Labour Code (Amendment) Act* of 2000 created the Labour Appeal Court, with the jurisdiction to hear appeals from the Labour Court. The Labour Appeal Court was established as a final court of appeal in respect of all labour judgements, and or orders made by the Labour Court.[126] The intention of the legislature was to ensure finality in litigation. The Court is presided over by a judge of the High Court, who sits with two assessors nominated by the employer members of Industrial Relations Council (IRC) and, one from a panel of employee members.[127]

### *2.6.1. The Labour Appeal Court no longer the final court of appeal in labour matters*

It is noteworthy that the Labour Appeal Court did not remain a final court of appeal in labour matters for long. It will be recalled that, when the Labour Appeal Court was established, the *Labour Code (Amendment) Act* of 2000 stated, "subject to the Constitution of Lesotho, no appeal lies against any decision, judgment or order given by the Labour Appeal Court". This position changed following the decision in the case of *Ts'euoa v Ministry of Labour and others.*[128] The appellant had lost a case before the Labour Appeal Court. He then applied to the Court of Appeal (the highest court in Lesotho) for leave to appeal against the decision of the Labour Appeal Court. The application was dismissed.

Subsequent to his failure to obtain leave to appeal, on the basis that no appeal was possible from the Labour Appeal Court to the Court of Appeal, Ts'euoa challenged the constitutionality

126 Section 38 (2) of the *Labour Code Amendment Act* 3 of 2000.
127 Section 38(3) of the *Labour Code Amendment Act* 3 of 2000.
128 *Ts'euoa v Ministry of Labour& Others* 2005-2006 LAC 248.

of absence of a right to further appeal to the Court of Appeal.[129] The Constitutional Court found that section 38A (4) was unconstitutional to the extent that it provided that there is no appeal against the decision, judgment, or order of the Labour Appeal Court.

The matter went to the Court of Appeal. On appeal, the employee argued that section 38A (4) violated the constitutional right to equality before the law and equal protection of the law, in that employees who are not public officers are regulated by the *Labour Code* (as amended). Their disputes have to go through the line of DDPR, Labour Court and the Labour Appeal Court. Public officers on the other hand could resort to the High Court if aggrieved by the decisions of their employers or their tribunals and finally appeal to the Court of Appeal.

The respondents argued that section 38 A (4) does not deprive applicant of the opportunity of accessing justice. The justification for it was that Parliament intended to expedite and simplify the finalisation of trade disputes, and that such finalization is rationally and directly connected to the legitimate governmental purpose of ensuring and promoting the rule of law.

The Court of Appeal found that there was no justification for treating private sector employees in such a materially different and inferior way to public sector employees, and other litigants. The Court considered the composition of the Labour Appeal Court and noted that it consists of a judge and two assessors. The decisions on matters of fact are by the majority whereas the judge only decided questions of law alone. The court contrasted the composition and appointment of the Labour Appeal Court with the composition and appointment of judges of the Court of Appeal. In the latter three to five judges presided over a matter and are appointed by the Judicial Service Commission.

Based on all the above, the Court of Appeal held that it had not been shown that the differentiation was reasonably and demonstrably justified in a free and democratic society. It was also not shown that this differentiation was proportional. The state was found to have failed to justify the infringement of the right to equality before the law and equal protection of the law. Following this decision, the *Labour Code* was amended in 2010 to make provision for

[129] *Ts'euoa v Ministry of Labour and Employment* CC 04/ 2005 (NULL) [2007] LSHC 141 (27 November 2007).

litigants aggrieved by the decisions of the Labour Appeal Court to appeal against such decisions to the Court of Appeal, but only if the grounds of appeal raised questions of law but not facts. Section 38 AA (2) of the *Labour Code (Amendment)* Act 2010 reads as follows:

> A person aggrieved by any judgement or order of the Labour Appeal Court in its appellate jurisdiction may appeal to the Court of Appeal with leave of the Court of Appeal or upon a certificate of the judge who heard the Appeal on any ground of appeal which involves a question of law but not a question of fact.

As to the meaning of 'questions of law', in *Chen Yun Bo v Paballo Martin Theko and Others*,[130] the Labour Appeal Court stated that a question of law has three meanings. First, it is a question, which the court is bound to answer in accordance with the rule of law. Second, is the question of what the law is and third, is to distinguish between questions of law and fact. It also stated, "an appeal on the question of law means an appeal in which a question for argument and determination is what the true rule of law is on a certain matter."[131] This could only have been intended by the legislature to make the Labour Appeal Court a court of final jurisdiction in any other matters.

### 2.7. The public private sector divide in the resolution of unfair dismissal disputes

The decision of the Court of Appeal in *Minister of Labour and Employment v Ts'euoa* brought into sharp focus the different treatment accorded to labour disputes in private and public sectors. The Court of Appeal commented that:

> [I]n Lesotho a two stream labour law dispensation has evolved. Employees who are not public officers (as defined) are regulated by the Labour Code (as amended). Their disputes, broadly stated, must progress through the Directorate, Labour Court and Labour Appeal Court. Public officers, a substantial part of Lesotho workforce in formal employment, are however in significant respects exempted by the Labour Code (Exemption Order 1995 (Legal Notice No.22 of 1995 made in terms of s.2 (2) (b) of the Labour Code. The net effect is that public officers aggrieved by the decisions of their employers or tribunals within the public service may resort to the High Court and thereafter (in appropriate matters with leave) this court.

However, the promulgation of the *Public Service (Amendment) Act* of 2007 introduced another route under which public sector employees should follow when they challenge their unfair

[130] *Chen Yun Bo v Paballo Martin Theko and Others* 2014] LSLAC 1 (27 January 2014).
[131] *Chen Yun Bo v Paballo Martin Theko and Others* 2014] LSLAC 1 (27 January 2014) para 4.3.

dismissal. The Act provides that public sector employees challenging their unfair dismissal should lodge an appeal with the Public Service Tribunal. From the reading of the Act, the current position is that where public officers have undergone disciplinary proceedings, and only then, would they be required to appeal to the tribunal, and then to the Labour Court. Once the Labour Court has made a decision, such a decision is appealable to the Labour Appeal Court.[132] The aggrieved party can further appeal to the Court of Appeal but only if the ground for appeal is on the question of law.[133]

In *PS Ministry of Labour and Employment v Nthoateng Russell*, [134] the Respondent had challenged her dismissal in the High Court on review in circumstances where she had been dismissed after a departmental disciplinary hearing. The High Court reviewed and set aside her dismissal. On appeal, the Court of Appeal ruled that the Respondent ought to have challenged her unfair dismissal by lodging an appeal in the Public Service Tribunal as directed by section 30 of *the Public Service Amendment Act* of 2000.

It appears unfair that private sector employees should be limited to challenging the award of the DDPR in respect of unfair dismissal determination in the Labour Court, while public sector employees have an opportunity to challenge their unfair dismissal directly in the High court in certain circumstances.[135] This means that unfair dismissal disputes will only have to travel through two courts, from the High Court to the Court of Appeal.

## 2.8. Summary

From the discussion in this chapter, it is apparent that there are many factors that contribute towards delay in the resolution of unfair dismissal disputes. These factors range from rules applied in different forums, conduct of litigants and their legal representatives, shortage of presiding officers. Inconsistency of the implementation of exclusive jurisdiction of the Labour Court and Labour Appeal Court also causes delay in resolving disputes of unfair dismissal

132 Section 38 A (1) of the *Labour Code Amendment Act* 2000.
133 Section 38 AA (2) of the *Labour Code Amendment Act* 2010.
134 *PS Ministry of Labour and Employment v Nthoateng Russell* C of A (CIV) 27/2021.
135 Where a public sector employee is dismissed without a disciplinary hearing in circumstances where he is entitled to one, the employer would have acted ultra vires and a review would be available in the High Court.

cases as litigants are no longer sure of which route to take when instituting their claims. Given the many challenges that exist in Lesotho, the next chapter will identify the possible lessons that Lesotho can learn from the South African experience.

## CHPTER THREE

# 3. Resolution of Unfair Dismissal Disputes in South Africa: A comparative perspective

## 3.1. Introduction

As pointed out before, South Africa has proved to be ahead of Lesotho when it comes to resolution of unfair dismissal disputes. This chapter will discuss the institutions that are tasked with resolution of unfair dismissal disputes in South Africa. In doing so, focus will be on their legislative framework and rules applicable, to see how they contribute to achieving effective and speedy resolution of unfair dismissal disputes.

The system of labour dispute resolution is one of the cornerstones of the *Labour Relations Act* 66 of 1995 (the LRA).[136] The *LRA* covers all employees, excluding members of National Intelligence Agency, members of South Africa Secret Service and soldiers. Public servants are included within the ambit of a single *LRA*.[137] Thus, the terms and conditions of employment within the public service and disputes arising pursuant thereto are covered by the *LRA*.

The resolution mechanism of unfair dismissal disputes under the *LRA* requires conciliation, arbitration, reviews to the Labour Court and further appeals to the Labour Appeal Court. Appeals from the Labour Appeal Court are finally referred to the Constitutional Court. Prior to the amendment of the *Constitution of South Africa* in 2012, the Supreme Court of Appeal entertained appeals from the Labour Appeal Court.[138]

---

136 Annali Basson & Others, *Essential Labour Law* (4th edn Labour Law Publications 2005) pg 335.

137 Section 2 of the *Labour Relations Act* 66 of 1995; Also see Sue Albertyn & Others "Dispute Resolution and the Public Service" (1999) 20 *ILJ* pg 1430.

138 Section 168(3) of the *SA Constitution Seventeenth Amendment Act* of 2012. This provision reads: The Supreme Court of Appeal may decide any matter arising from the High Court of South Africa or a court of status similar to the High Court of South Africa, except, in respect of labour or competition matters to such extent as may be determined by an Act of Parliament. See also *National Union of Public Service and Allied Workers obo Mani and Others v Lotteries Board* 2014(3) SA 544 para 40 read with footnote 26; Also see Aton Steenkamp "The Jurisdiction of the Labour Courts in 2014" *ILJ* pg 2679.

### 3.2. The Commission of Conciliation, Mediation and Arbitration (CCMA)

The CCMA is a statutory labour dispute resolution body established by the *LRA*. It was established as an effective and prompt one-stop shop for the resolution of disputes to promote labour peace; it conducts conciliation, mediation or arbitration where appropriate; it is manned by well-trained professional commissioners who are subject to a code of conduct and their performance is subject to periodic reviews.[139] It is equivalent or similar to the Directorate of Dispute Prevention and Resolution (DDPR) in Lesotho. One of the objectives of the *LRA* is to promote effective resolution of labour disputes.[140] It follows therefore that it is for this reason that the CCMA was established. The CCMA is independent of the State, any political party, trade union, or employers' organizations.[141] Like the DDPR in Lesotho, the CCMA's governing body is tripartite and consists of representatives of organized labour, organized business and representatives of the state.

Section 115 of the *LRA* provides for functions of the CCMA. It must attempt to resolve, through conciliation, any dispute referred to it in terms of the *LRA*. If a dispute referred to it remains unresolved after conciliation, the CCMA must arbitrate the dispute if so required that such a dispute be resolved through arbitration. It is crucial to note that parties must first have to request that their dispute be arbitrated[142] The CCMA must also arbitrate a dispute which remains unresolved after conciliation, and in respect of which the Labour Court has jurisdiction, if all the parties to the dispute consent to the arbitration under the auspices of CCMA.[143]

---

139 See the "Explanatory Memorandum to the LRA Bill" 1995 *ILJ* at pages 327- 328.

140 Tembeka Ngcukaitobi, "Sidestepping the Commission for Conciliation, Mediation & Arbitration: Unfair Dismissal in the High Court" (2004) *ILJ* pg 2; The Explanatory Memorandum to the LRA Bill (1995) *ILJ* at pages 327- 328.

141 Section 113 of the *LRA* of 1995.

142 Section 115(1) (b) (i) of the *LRA* of 1995.

143 Section 115 (1) (b) (ii) of the *LRA* of 1995.

### *3.2.2. Territorial Jurisdiction of the CCMA*

The CCMA has a national jurisdiction and maintains offices in all the provinces of South Africa. A dispute is conciliated and arbitrated in the province where the cause of action arose, unless a senior commissioner in the CCMA head offices directs otherwise.[144] The fact that there are CCMA offices in every province is a positive move towards discharging one of the main objectives of the *LRA*, which is speedy and effective resolution of labour disputes.[145]

### *3.2.3. Bargaining Councils and Dispute Resolution*

The CCMA may also accredit bargaining councils to conduct conciliation and arbitration within their sectors.[146]A dismissed employee who alleges unfair dismissal may refer a dispute to a bargaining council where it has jurisdiction. Thus, the primary dispute resolution for unfair dismissal cases is the bargaining council, and only if there is no council with jurisdiction does conciliation and arbitration take place under the CCMA.[147] Arbitration may also be conducted by agreement, a private arbitrator appointed by collective or other agreement. As Darcy du Toit and others point out, the intention of the *LRA* was to shift part of the burden of dispute resolution from the CCMA to private processes and to give parties or councils greater control over such processes in order to tailor them to their needs.[148] However, it is alleged that many bargaining councils do not acquire accreditation from the CCMA to conduct conciliation and arbitration within their sectors but rely on the *LRA*'s procedures.[149]

---

144 Darcy du Toit & Others, *Labour Relations Law: A Comprehensive Guide* (6th edn LexisNexis 2015) pg 118.

145 See Anton Steenkamp and Another "Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential" [2012] *Acta Juridica* at 122.

146 Section 117 of the *LRA* of 1995.

147 Tembeka Ngcukaitobi, "Sidestepping the CCMA: Unfair Dismissal in the High Court "(2004) *ILJ* pg 3. Also, see *National Bargaining Council for the Freight Industry & Another v Carlbank Mining Contracts (Pty) Ltd & Another* [2012] ZALAC 11.

148 Darcey du Toit and Others, *Labour Relations Law: A Comprehensive Guide* (6th edn LexisNexis 2015) pg 171.

149 Hanneli Bendeman, "An Analysis of the Problems of the Labour Dispute Resolution in South Africa: Alternative Dispute Resolution" *Law of South Africa*. June 25, 2006<http//www.accord.org.za> accessed on 15th April 2023.

### *3.2.4. CCMA Awards*

The CCMA awards made pursuant to an arbitration process under the *LRA* are final and binding.[150] These awards may be enforced as if they were orders of the Labour Court. There is no right of appeal against arbitration awards issued by the CCMA. However, an applicant who alleges the existence of a defect in the arbitration award made under the auspices of CCMA may apply to the Labour Court for a review and setting aside of the reward.[151] O'Regan J in the case of *Fredericks & Others v MEC for Education and Training, Eastern Cape*[152] held that "A power of review is not a power to determine a dispute. It is a power to correct irregularities in a previous process." If upon review, the Labour Court does not agree with the decision of the CCMA, it is not able to substitute its decision for the decision of the CCMA unless there is a reviewable error.[153] The same reasoning was adopted by Conradie J in the case of *Chirwa v Transnet Ltd & Others:*[154]

> If an application for the review of administrative action succeeds, the applicant is usually entitled to no more than a setting aside of the impugned decision and its remittal to the decision-maker to apply his mind afresh. Except where unreasonableness is an issue the reviewing court does not concern itself with the substance of the applicant's case and only in rare cases substitutes its decision for that of the decision-maker. The guiding principle is that the subject is entitled to a procedurally fair and lawful decision, not to a correct one. Under the *LRA*, the procedure to have a dismissal overturned or adjusted involves a rehearing with evidence by the parties and the substitution of a correct decision for an incorrect one. The scope for relief consequent upon such an order is extensive. It is quite unlike that afforded by an administrative law review.

An employer seeking review may be required to pay security to the Labour Court. The operation of an award is not suspended pending a review, unless the employer furnishes security equivalent to 24 months 'salary if the employee is reinstated or equal to the compensation granted the employee.[155]

---

150 Section 143(1) of the *LRA* of 1995.
151 Section 145(1) of the *LRA* of 1995.
152 *Fredericks & Others v MEC for Education and Training, Eastern Cape* 2002(3) SA693 CC.
153 Tembeka Ngcukaitobi, "Sidestepping the Commission for Conciliation, Mediation & Arbitration: Unfair Dismissal in the High Court" (2004) *ILJ* pg 19.
154 *Chirwa v Transnet Ltd & Others* [2007] ZACC 23, 2008 (4) SA 367 (CC).
155 Section 145(8) of the *LRA of 1995;* see also John Grogan, *Dismissals* (4th edn Juta & Co 2022) pg 504.

In the case of *Rustenburg Local Municipality v South African Local Government Bargaining Council and Others,*[156] the Labour Court clarified the issues relating to the payment of security to stay an arbitration award pending the review proceedings. The Court emphasised that section 145(8) of the *LRA*, which states that review proceedings do not stop the enforcement of an arbitration award unless the applicant furnishes security, was introduced to discourage review applications, which had little or no prospects of succeeding at Labour Court.

The fact that one cannot lodge an appeal against CCMA awards in a way compels the parties to disguise and challenge the correctness of the decision of the arbitrator through a review process, while they are supposed to challenge the correctness of the procedure. Noko notes that it would be proper to deny parties a right of appeal in private arbitrations where the parties themselves have chosen to write out or waive their right to appeal in their arbitration agreement.[157] He further argues that denying parties a right of appeal against arbitration award is discriminatory because other litigants in the civil courts enjoy such a right.

Commissioners may rescind awards at their discretion or on application by the parties if the award was erroneously sought or erroneously made in the absence of any party or, granted as a result of a mistake common to the parties or to correct an ambiguity or obvious error.[158] The power to rescind however does not entitle a commissioner to substitute the award with an entirely new one.

Non-compliance with the CCMA arbitration awards constitutes contempt, and may be enforced by contempt proceedings in the Labour Court.[159] This has however been removed by the amendment of section 143 of the *LRA*. There is no need any longer to make the award an order of the Labour Court for purposes of contempt. Similarly, the amendment enables an employee to enforce an award sounding in money directly by presenting a copy of the award certified by the CCMA to the deputy Sherriff. There is no need any longer to issue a writ of execution out

156 *Rustenburg Local Municipality v South African Local Government Bargaining Council* (2017) 38 ILJ 2596 (LC).
157 Mokati Victor Noko, "Legal Representation at the CCMA" (LLM Thesis University of Pretoria 2017) pg 31.
158 Section 144 of the *LRA* of 1995.
159 Section 145 of the *LRA* of 1995 as amended.

of the Labour Court.[160] In respect of enforcement of award, sounding in money the judgement creditor can now file a writ with the sheriff after obtaining a copy of the award certified by the CCMA. This is a welcome development towards uncomplicated, simplified and cost-effective process for those armed with arbitration awards.[161]

### *3.2.5. Legal Representation at the CCMA*

The issue of legal representation at labour adjudication and arbitrations is said to have been a matter of some controversy.[162] Legal practitioners are given a right of appearance before the CCMA for purposes of arbitration.[163] This right of appearance is not extended to conciliation proceedings.[164] Where parties are involved in a dispute that would normally be adjudicated by the Labour Court, but in terms of section 141(1) of the *LRA* the parties have agreed to have their matter arbitrated by the CCMA, legal representation is permitted.[165] There is no right to legal representation at any stage of proceedings arising from incapacity and misconduct dismissals.[166]

The provisions that prohibited legal representation at the CCMA was challenged in the case of *Netherburn Engineering CC t/a Netherburn Ceramic v Mudau and Others*.[167] In this case, following a dismissal of an employee who challenged the dismissal at the CCMA, the managing member of Netherburn Engineering CC appeared at the CCMA arbitration, accompanied by his attorney. The attorney duly applied for permission to represent his client on the grounds that the matter was complex, the managing member has little experience in

---

[160] Anton Steenkamp, "The Labour Courts in 2014: the position after the promulgation of the Superior Courts Act and in the light of the Amendments to Labour Legislation" (2014) 35 *ILJ* pg 2678.

[161] Sizwe Buthelezi, "Enforcement of CCMA Default Awards" (October 2012) DR.

[162] Paul Pretorius, "Legal Representation in the Industrial Court" (1986) *ILJ* pg 18; Paul Benjamin, "Legal Representation in the Labour Courts" (1994) *ILJ* pg 250.

[163] Section 138(4) of the *LRA* of 1995.

[164] Section 135(4) of the *LRA* of 1995.

[165] Neil van Dokkum, "Legal Representation at the CCMA" (2000) 21 *ILJ* pg 838; also see John Grogan, *Workplace Law* (13th edn Juta & Co 2020) pg 447.

[166] Rule 25 of the *CCMA Rules*; also see the article by Debbie Collier, "The Right to Legal Representation at the CCMA and at Disciplinary Enquiries" (2005) 26 *ILJ* pg 1.

[167] *Netherburn Engineering CC t/a Netherburn Ceramic v Mudau & Others* (2003) 23 ILJ 1712 (LC).

labour matters and that the employee was represented by an experienced union official. The commissioner refused an attorney's request and ultimately found in favour of the employee.

Netherburn CC took the matter on review, where it challenged the commissioner's decision to exclude the lawyer, his refusal to postpone the matter, and the award itself. In making the decision, the court considered whether there was a rationale behind differentiation of treatment, that is whether parties were treated differently. Although the court acknowledged that the law relating to legal representation at misconduct and incapacity dismissal proceedings was inconsistent with legal arbitration proceedings generally, it was of the view that there was no differentiation as regards the qualified right of legal representation between the employer and its former employee. Both employer and employee were on the same footing, the court reasoned, there was no inequality.

The issue of legal representation was also determined in the case of *CCMA and Others v Law Society of the Northern Provinces*[168]. The Supreme Court of Appeal considered the history of Rule 25(1), which limits legal representation in the CCMA and held that the fact that the rule distinguishes between different kinds of cases, does not render the rule irrational. There is no unqualified constitutional right to legal representation before administrative tribunals.

There are conflicting opinions in relation to a right of legal representation in arbitration proceedings. Those who advocate for unavailability of such right argue that a high degree of legal representation would disregard efforts to try and resolve these disputes speedily and tilt the balance unfairly in favour of employers.[169] This is more so because most employers would always opt to be represented by legal practitioners while most employees may not afford a legal practitioner.

168 *CCMA & Others v Law Society of the Northern Provinces* [2013] 11 BLLR 1057 (SCA).
169 Paul Benjamin, "Legal Representation at the Labour Courts" (1994) 15 *ILJ* pg 260.

Zondo JP (as he then was) in the case of *Netherburn Engineering t/a Netherburn Ceramic v Mudau & Others* (cited above) also held a view that legal representation in arbitration proceedings contributes to delay and ineffective resolution of labour disputes. He stated that:

> Anyone who has had anything to do with our labour law and dispute resolution system in the labour field will know that, by far, the majority of cases that affect employers and employees and that consume public resources are dismissal cases and most of the dismissal cases are those relating to speedy, cheap and informal dispute resolution system. If you failed to achieve that goal in regard to disputes concerning dismissals for misconduct, you would never achieve that goal in respect of the entire Act. If one has to look at the cases in which the Act provides for legal representation, one will note a common denominator to the cases. That is all of these cases occur very seldom. Indeed, they are few and far between. Furthermore, the issues that arise in most of them are quite technical, for example, demarcations, essential services and others. If provision was made for an absolute or general right to legal representation in respect of such disputes, that will make a serious contribution towards taking our new dispute resolution system in the 1995 Act back to the pre 1994 dispute resolution system under the *Labour Relations Act* 28 of 1956 which had become totally untenable by the time 1995 Act was passed. That cannot be done.[170]

The opponents of legal representation at CCMA further argue that lawyers make arbitration proceeding legalistic and expensive. They are also responsible for delaying the proceedings due to their unavailability and the approach they adopt.[171] They normally opt for over- technical approach in proceedings. Baxter though in agreement with this assertion accurately reasoned that:

> Of course, a lawyer can abuse procedure. But the remedy lies in the hands of the tribunal's chairman. Most tribunals are empowered to make punitive orders as to costs, and the chairman may rule undesirable behaviour and technical hair splitting out of order. Observing from an admittedly partisan point of view, the writer's experience is that a party's case before tribunal is usually better organized and more efficiently presented when he is represented by a lawyer.[172]

Collier argues that should there be a change to rules relating to legal representation at the CCMA, that would bring consistency to the law, which currently, arbitrarily differentiates between misconduct and incapacity arbitrations and all other arbitrations.[173] Neil van Dokkum

---

170 *Netherburn case* at pg 1725.

171 Debbie Collier, "The Right to Legal Representation at the CCMA and at the Disciplinary Enquiries" (2005) 26 *ILJ* pg. 9.

172 Lawrence Baxter, *Administrative Law* (Juta & Co 1984) pg. 252.

173 Debbie Collier, "The Right to Legal Representation at the CCMA and at Disciplinary Enquiries" *ILJ* 2005 (26) pg. 9.

also supports the idea of having legal representation at arbitration proceedings and maintains that, it must be realized that legal practitioners are trained and offer valuable skills, which need to be kept in check by the arbitrator to ensure that fairer and more equitable results are obtained.[174] He further reasoned that it is a very narrow thinking to consider legal practitioners as only being capable of adversarial litigation and injecting undue formality and raising technicalities in proceedings.[175] Landman J *in Netherburn Engineering* (cited above) held strong sentiments in support of having legal representation at the CCMA. He stated that:

> There are no rational reasons to deny a right to legal representation to an employee or his or her employer in arbitrations about dismissals allegedly occasioned by operational requirements, and not where the capacity the conduct or capacity of the employee is concerned. There is in particular no rationality in permitting a right of legal representation in disputes about discipline falling short of dismissal (where job security is not in jeopardy) and conduct and capacity dismissals. In these cases, the stakes are so much higher and the consequences. On the other hand, it is neither fair, nor does it encourage nor reward entrepreneurship and investment on the part of the employer if the employer is bound to keep in employment employees who do not abide by the rules of morality or who are unfit for the post. An employer too, may require legal representation, to ensure that a fair and valid dismissal of such an employee is upheld.

### 3.3. Unfair dismissal disputes resolution in the Public Service

As we have seen, the *LRA* has a general application in respect of all sectors of employment except those that are specified in section 2. In relation to the public service there is a bargaining council that is dedicated to the whole of the public service which is called Public Service Co-ordination Bargaining Council (PSCBC).[176] This PSCBC also has jurisdiction in respect of any sector in the public service designated in terms of section 37.[177] The public sectors to which the bargaining council has jurisdiction may be designated by the PSCBC.[178]

---

174 Neil van Dokkum, "Legal Representation at the CCMA" (2000) 21 ILJ pg. 842.
175 Neil van Dokkum, "Legal Representation at the CCMA" (2000) 21 *ILJ* pg. 842.
176 Section 35 of the *LRA* of 1995.
177 Section 35(b) of the *LRA* of 1995.
178 Section 37 of the *LRA* of 1995.

The PSCBC may perform all functions of a bargaining council in respect of matters regulated by the rules, norms and standards applicable to the entire public service.[179] PSCBC may also perform functions of a bargaining council in respect of matters that apply terms and conditions of service to two or more sectors or matters that are assigned to the state as an employer to the public service and are not assigned to the state as an employer in any sector.[180] The fact that there are bargaining councils in respect of the public service certainly benefits the dispute resolution and absorbs some disputes from the mainstream that commences with the CCMA, and potentially aid in achieving speedy and effective resolution of disputes in the public service.

Parties to a matter referred to the bargaining council may turn an agreement made in respect of the dispute referred to it into an award of the CCMA, unless the collective agreements provide the contrary.[181] The CCMA is the first step in nearly all disputes arising under the *LRA*.[182] In South Africa, the fact that both the Labour Court and the High Court have jurisdiction over an administrative action, some public service employees have a tendency to ignore the labour tribunals established under the *LRA* and choose to approach the High Court, and institute a review application challenging their dismissal citing that it is an administrative action.

The court in *Chirwa v Transnet Ltd and Others*[183] has, however, finally settled that a dismissal of a public servant by public authorities does not constitute a reviewable administrative action. The Constitutional Court ruled that the Labour Court has exclusive jurisdiction over all matters reserved for it in terms of the *LRA*. If public servants could approach either court, it would mean that they would enjoy a significant advantage over other employees.

---

179 Section 36(2) of the *LRA* of 1995; See Sue Albertyn & Others, "Dispute Resolution in the Public Service" (1999) 20 *ILJ* pg 1440.

180 Section 36(2) (b) and (c) of the *LRA* of 1995.

181 Section 51(8) of the *LRA* read with section 143 of the *LRA* of 1995.

182 John Grogan, *Workplace Law* (13th edn Juta & Co 2020) pg 450; Also see Basheer Waglay, "The Proposed Re-Organisation of the Labour Court and the Labour Appeal Court" (2003) 24 *ILJ* pg 1227.

183 *Chirwa v Transnet Ltd & Others* [2008] 29 ILJ pg 73, The same ruling was reached by an English case of *East Berkshire Health Authority Exparte Walsh [1884] ALL ER 425 CA* where it held that simply because an employee was employed in the public service did not make a dismissal from it a matter of public law.

It is important to observe that the position in South Africa, concerning what is an administrative action is governed by the *Promotion of Public Administrative Justice Act* of 2000 (PAJA).[184]

### 3.4. The Labour Court

The Labour Court is established under the *LRA*,[185] and consists of a Judge President, a Deputy Judge President and Judges.[186] Labour Court proceedings are presided over by a single judge. The Labour Court has exclusive jurisdiction in respect of all matters reserved for it by the *LRA*,[187] and its judgements are subject to appeal only to the Labour Appeal Court. In exceptional cases, disputes from the Labour Court may go straight to the Constitutional Court. The Labour Court is the court of both law and equity.[188]

The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the South African Constitution, which arises from employment and from labour relations, disputes over constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the state in its capacity as an employer and over the application of any law for the administration of which the Minister is responsible. [189]

As briefly discussed above, that litigants take advantage of concurrent jurisdiction of both the Labour Court and the High Court, the meaning of 'concurrent jurisdiction' was clarified in the case of *Langeveldt v Vryburg Transitional Local Council.*[190] The court ruled that the word

---

184 Section 1 of the *Promotion of Public Administrative Justice Act* of 2000 *(PAJA)* defines administrative action as any action taken or failure to take a decision by a natural or juristic person, other than an organ of a state, when exercising a public power or performing a public function in terms of the empowering provision, which adversely affects the rights of any person and, which has a direct external legal effect.

185 Section 151 of the *LRA* of 1995.

186 Section 153 of the *LRA* of 1995.

187 Section 157(1) of the *LRA* of 1995.

188 Section 151(1) of the *LRA* of 1995, Also see John Grogan, *Workplace Law* (13th edn Juta & Co 2020) pg 452.

189 Section 157(2) of the *LRA* of 1995.

190 *Langeveldt v Vryburg Transitional Local Council* (2001) 22 ILJ 1116 (LAC); also see *Gcaba v Minister of Safety & Security (2009) 30 ILJ 2623 CC*; *Chirwa v Transnet Ltd & Others* [2008] 29 ILJ 73*; In Fredericks V MEC for Education and Training Eastern Cape* 2022 (2) SA 693, a unanimous Constitutional Court

concurrent was intended to extend the jurisdiction of the Labour Court to matters over which it otherwise would have lacked jurisdiction not to give equivalent jurisdiction to the two courts in labour matters.

Dismissed employees may also institute actions against their employers to hold them to the terms of their contract of employment, or to claim damages for breach of the same in the Labour Court or the High Court.[191] However, in contractual claims employees must prove their actual financial loss and defences may be open to the employer, which may not succeed under the *LRA*. This was discussed by the court in *Pilanesberg Platinum Mines v Ramabulana.*[192]Waglay JP said:

> Had I found that the appellant did in fact breach the agreement the only relief open to her was either specific performance or damages. In view of the facts of this case, it would not be appropriate to grant her specific performance. With regard to damages, as I said earlier there was a duty upon the respondent to prove the quantum of her damages, to simply demand damages in the quantum that she would earn until her retirement is totally misconceived. Damages in a breach of contract need to be proved, she failed to prove any, nor does she allege that she had been out of work from the date of her employment being terminated. In the circumstances had the respondent proved breach, she would not in law be entitled to any relief.

The facts of *Pilanesberg Platinum Mines's* case are that the respondent employee was employed as a SED Manager by the appellant mining company in terms of a written contract of employment. On the 17th May 2012, she was escorted out of the employer's premises and taken to her place of residence for her own safety because the local community within which she operated did not like the manner in which she was conducting the affairs of the employer. A few days later, a meeting was convened to discuss the termination of her employment. Nothing came out of that meeting, and some two months later the employer furnished her with severance and settlement agreement offering her four months' salary to end the employment contract. The employee lodged her claim in the Labour Court, which found in her favour, but lost on appeal in the Labour Appeal Court.

---

confirmed that the purport of section 157(2) of the LRA is not to take away the original jurisdiction of the High Court but to confer a concurrent jurisdiction of the Labour Court.

191 Section 77(3) of the *SA Basic Conditions of Employment Act* 75 of 1997. It reads: Jurisdiction to entertain claims to hear and determine any matter concerning a contract of employment is conferred on both the Labour Court and the civil courts.

192 *Pilanesberg Platinum Mines v Ramabulana* (2019) 40 ILJ 2723 (LAC).

### 3.5. The Labour Appeal Court

The Labour Appeal Court is established by the *LRA*,[193] and consists of a judge president, Deputy Judge and other full time or acting judges of appeal. The bench of the Labour Appeal Court always consists of three judges.[194] In certain cases, a Judge President may direct that the Labour Appeal Court sits as a court of first instance.[195] To demonstrate the need for effective and speedy resolution of labour disputes there are specific time frames within which parties must file notice of appeal specifying the finding of the facts and the conclusions of the law that are appealed against. Notice of appeal must be delivered within fifteen days of leave to appeal being granted.[196] Notice of cross appeal must be delivered within ten days of delivery of the notice of appeal. If the appellant does not comply with the rules, the matter will be struck off the roll.[197] The Labour Appeal Court is the final court of appeal in respect of all judgements and orders of the Labour Court in matters within its exclusive jurisdiction.[198]Judgements of the Labour Appeal Court are binding on the Labour Court and the CCMA.[199]

### 3.6. The Constitutional Court

Litigants dissatisfied by the decisions of the Labour Appeal Court in relation to labour matters that raise a constitutional issue may further appeal to the Constitutional Court. As alluded to earlier parties may also go directly from the Labour Court to the Constitutional Court in exceptional cases. One example is the recent case of *Union for Police Security and Corrections Organization v South African Custodial Management Pty Ltd & Others.*[200] In this case, Khampepe J emphasized that it is not every case that is given audience in the Constitutional

193 Section 167(2) of the *LRA* of 1995.
194 Section 168(2) of the *LRA* of 1995.
195 Section 175 of the *LRA* of 1995.
196 Rule 5.1 of the *Rules for the conduct of proceedings in the Labour Appeal Court of South Africa.*
197 Rule 5.5 of the *Rules for the conduct of proceedings in the Labour Appeal Court of South Africa*
198 Section 167 of the *LRA.*
199 Section 183 of *LRA* of 1995. See also Vuyani Ngalwana, "The Supreme Court of Appeal is Not The Apex Court in All Non Constitutional Appeals" (2006) 27 *ILJ* pg 2000. In this article, the writer discusses jurisdiction of the Labour Appeal Court of South Africa in detail, and concludes that the Labour Appeal Court is the apex court in respect of all labour law appeals with no constitutional twist. This discussion was however, before the amendment of the South African Constitution which puts in clear writing that the Supreme Court of Appeal no longer has jurisdiction to determine appeals from the Labour Appeal Court.
200 *Union for Police Security and Corrections Organisation v South African Custodial Management Pty Ltd & Others* [2021] ZACC 26.

Court, for it to do so, its jurisdiction must be engaged and it must be in the interest of justice for leave to appeal to be granted. He strongly stressed that:

> Few things are as sacrosanct to a constitutional democracy founded on the rule of law as the peaceful resolution of disputes in an accessible legal forum. Thus, where that democracy entrenches labour rights, thereby appreciating the unique and significant nature of matters involving a person's livelihood, and creates fora in which labour disputes are to be ventilated and peacefully resolved, it is of utmost importance that the right of access to those fora is safeguarded. It is precisely this recognition that is embedded in the rule that costs in labour disputes do not follow the result. Regrettably the Labour Court in this matter departed from this cardinal rule without providing reasons for doing so, and this Court is now called upon to correct that departure.

In extreme exceptions, parties may refer their labour disputes to Constitutional Court directly. There is no further appeal against the decision of the Constitutional Court. Its judgements form precedent in labour and employment law and bind all lower courts. [201]

### 3.7. Summary

In South Africa, it is evident that the CCMA is the pillar of dispute resolution mechanisms established under the LRA. The exclusion of the Supreme Court of Appeal from hearing appeals arising from labour disputes could, no doubt, have been to limit the forums through which such disputes have to travel, and to ensure speed and finality in their resolution.

Bargaining councils established under the LRA undertake an important role of relieving the CCMA from the burden of dispute referrals and this, undoubtedly, is a positive step towards achieving speediness and effectiveness of resolution of labour disputes in particular unfair dismissal disputes. Not allowing legal representation in conciliation proceedings and in arbitration of disputes arising out of incapacity and misconduct avoids technicalities that maybe raised by legal practitioners and delay the process. As seen, civil courts are also reluctant to entertain disputes that are characterized as labour matters and this undoubtedly contributes to consistency in respect of labour dispute resolution forums.

[201] John Grogan, *Workplace Law* (13th edn Juta Co 2020) pg 459.

# CHAPTER FOUR

## 4. Conclusions and recommendations

### 4.1. Introduction

The Courts (both in Lesotho and South Africa) have repeatedly emphasised that employment disputes are by their very nature urgent and require speedy resolution. The speedy and effective resolution of unfair dismissal disputes is important for both employers and employees. For employees, the failure to resolve such disputes timeously can often leave them without an income whilst their case drags on for many years. This also creates uncertainty. The same thing can also be said as far as employers are concerned. This is so because, when an employee is dismissed and then challenges their dismissal, the employer is often left in a predicament: to fill the vacancy left by the employee or not to fill such vacancy. If the employer decides to go for the former option and the dismissed employee wins their case and the court orders reinstatement years later after the date of dismissal, this can put the employer in a very difficult situation; especially in circumstances where the employer is also ordered to pay the employee their salary from the date of the (unfair) dismissal up to the date of reinstatement.

In Lesotho, when reading the *Labour Code*, it is apparent that one of the main purposes of this piece of legislation is to ensure that unfair dismissal disputes are indeed resolved as quickly as possible. However, this study has shown that things are not working as the legislature had intended. In fact, it can be said that the legislature appears not have been able to figure out the best approach in light of some of the amendments that have been made to the *Labour Code* since 1992.

The statement of the research problem is set out in detail in chapter 1 and can be summarised as follows. With respect to unfair dismissal disputes in the private sector, before they are finalised, such disputes may have to proceed through the DDPR, the Labour Court, the Labour Appeal Court and the Court of Appeal. This long process often takes years. Along the way, in each forum, there are rules that govern the conduct of the legal proceedings. In some instances, the rules are drafted in a way that does not promote speedy resolution of disputes whilst in some instances the parties are able to exploit some of the loopholes that exist in the rules (and indeed the *Labour Code* itself).

It was against this backdrop that this study sought to answer the following question: to what extent do the labour disputes resolution mechanisms in Lesotho ensure speedy and effective resolution of unfair dismissal disputes? In order to determine the main objective, the following secondary objectives were set:

a) To identify the reasons as to why speedy resolution of unfair dismissal disputes is so important for both employers and employees.
b) To critically discuss the structure that exists in Lesotho with respect to the resolution of unfair dismissal disputes.
c) To identify the causes of delays in the various fora, particularly in the DDPR and the Labour Court.
d) To critically discuss how unfair dismissal dispute resolution works in South Africa, and to determine what lessons (if any) Lesotho can learn from the South African experience.

It is submitted that the abovementioned objectives were achieved in the preceding chapters of this study. This chapter draws conclusions and makes recommendations for the way forward in Lesotho.

## 4.2. Conclusions

### *4.2.1. Final analysis: labour dispute resolution in Lesotho*

The main objective of chapter 2 of this study was to critically discuss the unfair dismissal dispute resolution mechanisms that exist in Lesotho; this involved a discussion of the relevant rules in each forum and/or court. A special emphasis was placed on the DDPR and the Labour Court.

The chapter began by providing some historical context. It was shown that before 1992 when the *Labour Code* was enacted, there was no specialised court and/or tribunal in Lesotho that heard and resolved labour disputes. The result of this was that such disputes were heard by the 'ordinary' or mainstream civil courts, in particular the Magistrate Courts and the High Court.

The problem though is that 'ordinary' courts of law are often associated with problems that do not suit the resolution of labour disputes, in particular unfair dismissal disputes. Consequently, in numerous developed countries of the world, the need has developed to institute tailor-made dispute resolution institutions for labour disputes that function separately from the ordinary courts. In Lesotho, the enactment of the *Labour Code* in 1992 shows that the legislature was fully aware of this fact. This is so because the *Labour* Code established the Labour Court as an institution specially meant for resolution of labour disputes.

To avoid a lengthy hierarchy of appeals, the *Labour Code* provided that the Labour Court shall be the first and final court as far as disputes that fall within its jurisdiction are concerned, such as unfair dismissal cases. Assuming that the Labour Court did in fact have the manpower to hear cases and to deliver judgments timeously, having the court as the first and final court in labour matters would certainly promote the speedy resolution of such disputes. The danger though with this approach is that the officers who preside over cases in the Labour Court are human beings who are bound to make mistakes. Denying the parties the right to appeal means that there is no way of correcting the mistake. Thus, the establishment of the Labour Appeal Court in terms of the *Labour Code (Amendment) Act* of 2000 was a move that should be welcomed and commended.

As was also shown in chapter two of this study, *Labour Code (Amendment) Act* of 2000 also established the DDPR (which is the equivalent of the CCMA in South Africa). The decision of the Constitutional Court in *Mohlomi v Minister of Defence,*[202] reminds us that inordinate delays in litigating damage the interest of justice. As the court put it:

Rules that limit time within which litigation may be launched are also common in Lesotho. The *Labour Code* specifically provides for a time limit within which unfair dismissal claims can be referred to the DDPR i.e. within 6 months from the date of the dismissal. If the law permitted unfair dismissal disputes to be referred years after the date of the dismissal, this would prolong uncertainty for employers and employees. Both the employer and the employee can also be affected in the sense that they may not have witnesses still available to testify on their behalf. The evidence would not be reliable as memories have probably grown dim. Documents too might be lost. All this impacts on the judge's or arbitrator's ability to properly resolve the matter. More importantly, a long delay in finalising an unfair dismissal dispute can be sufficient in itself for a court to find that it is not reasonably practicable to reinstate the employee who was unfairly dismissed.[203] Thus, it can be said that 6 months window provided for under the *Labour Code* promotes the speedy resolution of unfair dismissal cases that fall within the jurisdiction of the DDPR, namely dismissals based on misconduct or poor performance.

The main role of the DDPR is to prevent and resolve labour disputes through conciliation and arbitration. In conciliation, the conciliator does not have the power to make a binding decision; the conciliator merely facilitates negotiations so that the parties can reach a settlement agreement that is acceptable to both of them. Unlike litigation/adjudication, conciliation is meant to be non-adversarial. This being so, conciliation tends to resolve disputes much quicker than litigation/adjudication. The establishment of the DDPR and the focus on ADR was a move in the right direction, and should be commended.

If a dispute remains unresolved after conciliation, the next phase is that of arbitration where the arbitrator has the power to make a binding decision. The DDPR has rules that regulate how arbitration hearings should be conducted.[204] Regulation 25 deals with postponements, and

[202] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at 129-130.
[203] *Republican Press (Pty) Ltd v CEPPWAWU & GUMEDE and Others* (2007) 11 BLLR 1001.
[204] Reg 18 and 19 of the *Labour Code (DDPR Regulations*) 2001.

provides that a request for a postponement must be made at least 10 days before the hearing date. A formal application is needed for postponement where parties fail to agree on a postponement or where the request for postponement is made within ten days of the date scheduled for hearing. In such circumstances, the general principle that says a postponement is an indulgence and that, whoever seeks for it, must justify it with a compelling reason ensures that justice is not delayed. In a word, this ensures that the parties to arbitration proceedings cannot delay finalisation of the matter by seeking postponements when there are no valid reasons.

Once the arbitrator has heard all the evidence, the *Labour Code* states that the arbitrator has to provide an award within thirty days after the conclusion of the arbitration hearing. Again, this is meant to ensure that cases do not drag on for a long time simply because an arbitrator has not provided the parties with an award.

With respect to the issues of legal representation at the DDPR, the *Labour Code* makes it clear that it is not a right to have legal representation during arbitration proceedings. It may be allowed where both parties agree or where the arbitrator concludes that legal representation is necessary due to the nature of legal principles raised, complexity of the dispute or to balance the scale between the opposing parties.

Yes, allowing lawyers to participate can prolong the proceedings because they tend to raise legalistic or very technical objections. However, the law as it stands does not put an absolute bar on legal representation at arbitration proceedings, and section 228(A)(2) gives an arbitrator a wide discretion that has to be exercised judicially. Section 228(C) provides that the arbitrator may conduct the arbitration in a manner that he considers appropriate in order to determine the dispute with the minimal of legal formalities. This being so, if legal representation is permitted, the arbitrator should keep the lawyer in check thereby ensuring that the proceedings are conducted in a fair manner.[205] It is respectfully submitted that lawyers actually play an important role as they assist the arbitrator to identify all of the relevant issues and the applicable

[205] Van Dokkum "Legal Representation at the CCMA"( 2000) 21 *ILJ* 836 at 843.

law. It is a far better approach for the arbitrator to recognise the benefits of the skills afforded by lawyers.[206]

Even if the *Labour Code* and/or DDPR Regulations contain provisions that promote the speedy resolution of labour disputes, all this will not mean much if the DDPR is not provided with the resources that it requires to function effectively. The statistics that were discussed in chapter 2 show that the DDPR receives a lot of referrals each year; about 1500. However, the statistics also showed that the DDPR only has 10 arbitrators throughout the country. It is concerning that a high number of disputes remain unresolved; this is not consistent with the idea that labour disputes should be resolved expeditiously.

As was shown in chapter 2 of this study, a party that is not satisfied with an award made by the DDPR can challenge it by instituting review proceedings at the Labour Court. This is the only way to challenge an award since appeals are not allowed. Like the DDPR, the Labour Court has its own set of challenges that cause delays. Firstly, there is only one Labour Court in the entire country, which is situated in the capital city. Secondly, like the DDPR, the Labour Court is understaffed; currently, there are a Court President and only two 'Deputy Presidents' who are expected to hear all the matters that are referred to the court.

All this means that cases often take years to be finalised in the Labour Court. Employers are fully aware of this fact. Again, as was shown in chapter 2 of this study, what usually happens is that, after an employer loses a case at the DDPR, the employer institutes a review application in the Labour Court and then applies for order that stays the execution of the DDPR award pending finalisation of the review application. Once the stay is granted, the employer then sits back and does nothing to prosecute the review application, perhaps in an attempt to frustrate the employee until he or she gives up the fight.

206 Van Dokkum "Legal Representation at the CCMA" (2000) 21 *ILJ* 836 at 843.

It is respectfully submitted that the Labour Court should not tolerate such conduct. The court has the power, on application, to dismiss cases for want of prosecution. The idea that justice demands that an action be dismissed when there has been long periods of inaction is based on the maxim *vigilantibus non dormientibus lex subveniunt* (meaning the law assists those that are vigilant with their rights and not those that sleep on them).[207] This being said, an application to have a case dismissed can also take some time to be finalised thus adding more delay. Would it not be better if the Rules of the Labour Court simply provided that a review application will automatically lapse if it is not prosecuted within a certain period of time? The answer to this question will be provided when recommendations are made below.

When the Labour Code was enacted in 1992, the Labour Court was the first and final court for matters that fall within its jurisdiction. Currently, post the *Labour Code (Amendment) Act* of 2000 and the *Labour Code (Amendment) Act* of 2010, an unfair dismissal case could start at the DDPR, then progress through the Labour Court (on review), the Labour Appeal Court (on appeal) and finally the Court of Appeal (in a second appeal provided that the grounds of appeal raise questions of law). Given that labour disputes have to be dealt with expeditiously and finalised as quickly as possible, a lengthy hierarchy of appeals should be avoided when it comes to such disputes.[208]

In Lesotho, it is apparent that there is indeed a lengthy hierarchy of appeals. This lengthy process that often takes years to be completed can only favour employers who tend to have more resources than employees who may not even have an income because their employment was unfairly terminated. Yes, litigants should not be denied the right to appeal but surely the number of courts that are in the 'appeals chain' can and should be reduced.

In respect of unfair dismissal disputes emanating from the public sector, it has been shown in chapter 2 that they are treated differently from disputes that come from the private sector. A public sector employee, who is dismissed without a hearing where he is entitled to one, has an

---

207 *Bezuidenhout v Johnston NO & Other* (2006) 27 ILJ 2337(LC).

208 Stefan Van Eck, "The Constitutionalisation of Labour Law: No place for a Superior Labour Appeal Court in Labour Matters (Part 1): Background to South African Labour Courts and the Constitution" 2005 *Obiter* at page 552.

opportunity to review his unfair dismissal in the High Court and he can then proceed to the Court of Appeal. However, private sector employees have to refer their unfair dismissal claims to the DDPR, then travel through the Labour Court for review, Labour Appeal Court and Court of Appeal. This is unfair to private sector employees, as their disputes have to travel through many courts before they reach finality.

The aspect of exclusivity of jurisdiction of the DDPR, Labour Court and Labour Appeal Court in respect of labour matters provided for in the *Labour Code* has created uncertainty; the Court of Appeal has not been consistent in upholding the exclusive jurisdiction of these forums. As illustrated earlier, a large number of cases have been decided by the Court of Appeal upholding exclusivity only to be departed from in the case of *Ministry of Trade and Industry and Others v Seleke,*[209] thus confounding the situation. The *Labour Code* is very clear that the jurisdiction of the civil courts is ousted in respect of matters provided for in the *Labour Code*. The fact that the Court of Appeal has not followed a long line of its cases on the issue is regrettable and may contribute to delay, as litigants will be confused as to the correct forum to institute their unfair dismissal claims.

### *4.2.2. Final analysis: lessons from South Africa*

Given the many challenges that exist in Lesotho, chapter 3 of this study consisted of a comparative study in order to determine what lessons (if any) Lesotho can learn from the South African experience.

A comparison with South Africa reveals that the CCMA which is the equivalent of the DDPR has the advantage that it can accredit what are called bargaining councils. These bargaining councils undertake conciliation and arbitration under the auspices of the CCMA. Their awards are enforceable as though made by the CCMA. This approach introduces the strength in numbers of bodies that resolve labour disputes.

[209] *Ministry of Trade and Industry and Others v Seleke* C of A (CIV) 41/2021.

With regard to the enforcement of the DDPR awards, it has been noted that they are enforced by the Labour Court, mainly through imprisonment. This should be contrasted with South Africa where it is no longer necessary to take the CCMA awards to the Labour Court for enforcement either by way of writ of execution or by contempt, as was the position before. It would appear that in Lesotho the criminal character of enforcement of employers' obligation drags on because there is no position for issuance of a writ of execution against the property of the judgment debtor. In this regard therefore, the law in Lesotho is lagging behind that in South Africa.

The addition of the Court of Appeal in the hierarchy should be contrasted with the approach in South Africa where the Supreme Court of Appeal was removed from the hierarchy of courts that have jurisdiction over labour matters. This happened to cut a long chain within which labour disputes should travel.

### 4.3. Recommendations

In the light of the above discussions, it is first recommended that, since the Court of Appeal has confounded the issue of jurisdiction of the labour courts and tribunals and created uncertainty, an appropriate amendment be introduced to reinforce the exclusion of the civil courts' jurisdiction in labour matters of whatever nature. This will enable dedicated labour courts and tribunals to effectively determine labour disputes. Labour courts should also be established to serve the regions, north, south and central.

Second, time frames should be introduced prescribing periods within which unfair dismissal claims should be referred to the Labour Court. Employers should be able to order their affairs without risking being taken to court on future uncertain date for unfair dismissal for operational requirements. Third, it is also recommended that just like in the case of the DDPR, Labour Court should be required to deliver judgement within a specified period of time from final date of hearing. Since the process is adversarial and adjudicative, a period of three months is suggested.

Fourth, with regard to the DDPR, the South African model should be adopted. There should be bodies accredited by the DDPR to carry out conciliation and arbitration under the auspices of the DDPR. Private arbitration should be undertaken and legal framework recognizing those awards in labour disputes should be adopted. Fifth, there should be more arbitrators employed, who enter into performance contracts. Their work should, by law, be subject to periodic review. Legislation should provide that execution of awards of the DDPR, which concern in most cases single employee, should not be stayed pending review. Where the employer seeks stay of execution of the award, he should be required to furnish security for payment of the full amount of the award failing which the award should be executed.

Sixth, execution of the DDPR award should be removed from the Labour Court. A person in whose favour an award sounding in money is made, should be able to issue a writ of execution against the property of the judgement debtor without having to institute enforcement proceedings in the Labour Court. Similarly, failure to comply with an award amounting to contempt should be enforced by the DDPR. Seventh, since conciliation plays an important role in expediting resolution of disputes, it is recommended that it should be applicable at every stage of the referral of unfair dismissal claims whether in the DDPR or in the Labour Court irrespective of the grounds upon which the claim for unfair dismissal is based.

Lastly, given the problems presented by the composition of the Labour Appeal Court, it is recommended that either of the two things should happen. First, the Labour Appeal Court should be maintained but assessors be replaced by two judges who will preside over any particular appeal, and it should be the final court of appeal. Alternatively, the Labour Appeal Court should be abolished and the Labour Court be elevated to the level of the High Court and appeals should be noted directly to the Court of Appeal from the Labour Court. Finally, in relation to dismissal of cases for want of prosecution, rather than parties be required make applications to dismiss such cases, the *Labour Court Rules* should be amended to provide that if a case is not prosecuted within a specified period, it should automatically lapse. This should apply in respect of both appeals and reviews as well.

## BIBLIOGRAPHY


Case Law

*Attorney General v Lesotho Teachers Trade Union & Others* 1995-1999 LAC 119

*Autopax Passengers Services (Pty) Ltd v Transnet Bargaining Council & Others* 2006 (27) ILJ 2574 LC

*Bezuidenhout v Johnston NO & O*thers 2006 (27) ILJ 2337 (LC)

*CCMA & Others v The Law Society of the Northern Province* [2013] 11 BLLR 1057 (SCA)

*Chen Yun v Paballo Martin Theko & Others* 2014 LSLCA 1 (27 January 2014)

*Chirwa v Transnet Ltd & Others* [2007] ZACC 23

*CGM v LECAWU & Others* 1999- 2000 LLR-LB 36

*Coetzee v Lebeea NO & Another* (1999) 20 ILJ 129 LC

*Comfort Telephone Taxis (Pty) Ltd v DDPR & Motlatsi Makoala* LAC/REV/15/2010

*East Berkshire Health Authority Exparte Walsh* [1884] ALL ER 425

Eclat *Evergood Textile Pty Ltd v Rasephehi* LC/REV/03/ 2008

*Ekkerhrst Oosterhuis v Bishop Phillip Mokuku* LC/02/1994

*Fredericks & Others v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693

*Hoohlo v LEC* C of A (CIV) 9/2020 [2020] LSCA 23

*Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132

*JDG Trading (Pty) Ltd t/a Supreme Furnishers v Monoko & Others* LAC/REV/o4 [2006] LSLC 173

*Kabelo Teisi v Minopex Lesotho (Pty) Ltd* LC/REV/56/2013

*Kuleile Lepolesa & Others v Sun International of Lesotho (Pty) Ltd t/a Maseru Sun and Lesotho Sun (Pty) Ltd* LAC/CIV/03/2010

*Langeveldt v Vryburg Transitional Local Council* (2001) 22 ILJ 1116

*Lesotho Clothing & Allied Workers Union v CGM Industrial* (Pty) Ltd [1999] LSHC 34 (16 April 1999)

*Lesotho Electricity Company v Ramoqopo* LAC/REV121/2005

*Lesotho Express Deliver Services (Pty) Ltd v The DDPR & Another* LC/REV/18/2010.

*Lesotho Highlands Development Authority v Mantsane Mohlolo & 10 Others* LAC/CIV/07/2009

*Lesotho Highland Development Authority v Ntjebe & Others* C of A (CIV)7/2012 [2012] LSCA 51 (19th October 2012)

*Lesotho Highlands Development Authority v Ralejoe* LAC/CIV/APN/03/2006

*Lephallo Mosebo v Lesotho Freight Motors Parts (Pty) Ltd* LC/REV/79/2009 [2012] LSLA 2 (19th October 2012)

*Lesotho Revenue Authority v Lichaba* C of A (CIV) 21/2019

*Lucy Lerata & Others v Scott Hospital* 1995-1996 LLR- LB 6

*Mafokase Letsosa v Standard Lesotho Bank & Another* LC REV/10/2011 [2011] LSLC (19 May 2011

*Makhutla v Lesotho Agricultural Development Bank* 1995-96 LLR-LB 191

*Mamphono Khaketla & Another v DPP* [2022] LSHC 40

*Maseru Pre School & School Board v Motsusi & another* LC/REV/80/2013

*MEC for Economic Affairs, Environmental & Tourism, Easter Cape v Kruizenga* 2010 (4) SA 122 (SCA)

*Melan v Santam Insurance Company* 1962 (4) SA 331

*Minister of Safety & Security* (2009) 30 ILJ 2623

*Ministry of Labour & Employment & Others v Nthoateng Russel* C of A (CIV) 27/2021

*Ministry of Labour & Employment & Others v Ts'euoa* C of A (CIV) 01/2008

*Ministry of Trade &Industry 7 Others v Seleke* C of A (CIV) 41/2021

*Mohlomi v Minister of Defence* 1997 (1) SA 124

*Mojalefa Phomane v C & Y Garments (Pty) Ltd* LC/REV/362/2006 (Unreported)

*Mokatsela v Econet* C of A (CIV) 84/2019

*Mokhali Shale v Mamphele Shale & Others* C of A (CIV35/2019

*Mokotjo v Miles Kennedy Chairman of the Board & Mothae Diamonds (Pty) Ltd & Others* C of A (CIV) 9/2020

*Moosa & Another v DDPR & Another* LC/REV/570/2006

*National Bargaining Council for the Freight Industry & Another v Carlbank Mining Contracts (Pty) Ltd& Another* [2012] ZACC 11

*National Federation of Organisations of the Disabled (LNFOD) v Mojalefa Lobhin Mabula & the DDPR* LAC/CIV/A/07/2010

*National Union of Public Service & Allied Workers obo Mani & Others v Lotteries Board* 2014(3) SA 544

*National University of Lesotho v Thabane* C of A (CIV) 67/2019 [2019] LSCA 55

*Netherburn Engineering CC t/a Netherburn Ceramic v Mudau & Others* (2003) 23 ILJ 1712 LC

*Numza v Paint Ladder (Pty) Ltd* [2017] 11 BLLR 1105

*Pilanesberg Platinum Mines v Ramabulana* (2019) 40 ILJ (LAC)

*Pitso Ramoepana v DPP & Another* C of A (CIV) 33/2018 [2018] LSCA 44 (14 November 2018)

*Queen Komane & Another v City Express Stores (Pty) Ltd* LAC/CIV/A/05/2005

*Real Estates Services (Pty) Ltd v Smith* (1999) 20 ILJ 196

*Republic Press (Pty) Ltd v CEPPWAWU & Gumede & Others* (2007) 11 BLLR 1001

*Rustenburg Local municipality v South African Local Government Bargaining Council* (2017) 38 ILJ 2596 (LC)

*Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2007 (1) SA 576

*Security Lesotho v Lebohang Moepa & Others* CC 12/2014

*Seeiso v The DDPR & Others* LC/REV/43/2009

*Sishuba v National Commissioner of SA Police Service* (2007) 28 ILJ 2076 (LC)

*Standard Lesotho bank v Polane* LC/REV/77/2007 [200] LSLC 20 (20 October 2009)

*Tao Ying Metal Industrial (Pty) Ltd v Pooe & Others* 2007 (5) SA 146

*Teaching Service Commission & Others v Learned Judge of the Labour Appeal Court & Others* C of A (CIV) 21/2007

*Teba & Others v Lesotho Highlands Development Authority* LAC/CIV/A/06/2009

*Tlali v Attorney General* 2000-2004 LAC 510

*Toyota SA Motors (Pty) Ltd v CCMA & Others* 2016 (37) ILJ 313 CC

*Ts'euoa v Ministry of Labour & Employment* CC/04/2005 (NULL) [2007]

*Ts'euoa v Ministry of Labour& Others* 2005-2006 LAC 248

*Union for Police Security & Corrections Organisations v South African Custodial Management (Pty) Ltd & Others [*2021] ZACC 26

*Vice Chancellor & Another v Professor Alan Femi Lana* C of A (CIV) 10/ 2002

Books

Basson A & Others, *Essential Labour Law* (4th edn Labour Law Publication 2005)

Baxter L. *Administrative Law* (Juta 1984)

Du Toit D & Others, *Labour Relations Law, A Comprehensive* Guide (6th edn LexisNexis 2015)

Hoexter C *Administrative Law in South Africa* (2nd edn Juta 2012)

Grogan J *Dismissal* (4th edn Juta 2022)

Grogan J. *Workplace Law* (13th edn Juta 2020)

Landman A & Van Niekerk A *Practice in Labour Courts. Practice and Procedure in the Labour Court and Labour Appeal Court of South Africa* (Juta & Co 1998)

Journal Articles

Albertyn S & Others, "Dispute Resolution in the Public Service" (1999) 20 *ILJ*

Batchelor B and Others, "Incorporating Afrocentric Alternative Dispute Resolution in South Africa's Clinical Legal Education" (2021) 25 *Law Democracy & Development*

Benjamin P, "Legal Representation in Labour Courts" (1994) 15 *ILJ*

Bowal P, "The New Ontario Judicial Alternative Dispute Resolution Model" (1995) *Alberta Law Review* 207

Debbie C, "The Right to Legal Representation at CCMA and at Disciplinary Enquiries" (2005) 26 *ILJ*

Dokkum N, "Legal Representation at the CCMA" (2000) 21 *ILJ*

Le Roux P "Substantive Competence of Industrial Courts' (1987) *ILJ*

Ngcukaitobi T, "Sidestepping the CCMA: Unfair Dismissal in the High Court" (2004) *ILJ*
Ngalwana V, "The Supreme Court of Appeal is not The Apex Court in All Non Constitutional Appeals" (2006) 27 *ILJ*

Nyane H, "Abolition of criminal defamation and retention *scadulum magnatum* in Lesotho" (2019) 19 *African Human Rights Law Journal*

Pretorius P, "Legal Representation in the Industrial Court" (1986) *ILJ*

Rycroft A, "Rethinking Con-arb Procedure" (2003) 24 *ILJ*

Steenkamp A, "The Labour Courts in 2014: the position after Promulgation of the Superior Courts Act and in the light of the Amendments to Labour Legislation" (2014) *ILJ*

Steenkamp A and others, "Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls, and Potential" [2012] *Acta Juridica*

Van Eck S, "The Constitutionalisation of Labour Law: No place for a Superior Labour Appeal Court in Labour Matters Part 1 Background to South African Labour Courts and the Constitution"(2005) *Obiter*

Van Eck S, "The Constitutionalisation of Labour Law: No place for a Superior Labour Appeal Court in Labour Matters Part 2 Erosion of the Labour Court's jurisdiction" (2006) *ILJ*

Waglay B, "The Proposed Re-Organisation of the Labour Court and the Labour Appeal Court" (2003) 24 *ILJ*

Dissertations

Noko M, "Legal Representation at the CCMA" (LLM Dissertation University of Pretoria 2017)

Electronic sources

Bendeman H, "An Analysis of the Problems of the Labour Dispute Resolution in South Africa: Alternative Dispute Resolution" (25 June 2006) *Law South Africa* <http//www.acord.org.za>accessed on 15 April 2023

Buthelezi S, "Enforcement of CCMA awards" (October 2012) *Derebus* <http://www.saflii.org/za/journals/DEREBUS/2012/37 > accessed on 14th March 2023

Gay M and Others, "Report on review of Malaysia's Dispute Resolution System" (2020) Geneva: International Labour Office <http://www.ilo.org/publns> accessed on 19th January 2023

Masoud M, "The Importance of Legal Representation" <http//www.masoudlaw.com>accessed 12 April 2023

Stevenson R, "The Pros & Cons of Conciliation of Workplace Claims" (5 August 2021) <http//www.workplace-lawyers.com.au>accessed on 29th January 2023

Teague P, "Resolving Workplace Disputes in Ireland: The Role of Labour Relations Commission" (10 April 2013) Working Paper No. 48 <http//www.ilo.org/ifpdial/information-resources/publication> accessed on 10 January 2023

Legislation

*Constitution of Lesotho* of 1993
*South African Constitution Seventeenth Amendment Act* of 2012
*Court of Appeal Rules* of 2006
*Employment Act* 16 of 1964
*Employment Act* 22 of 1967
*Employment of Women and Children Proclamati*on 71 of 1937
*Labour Appeal Court Rules* of 2002
*Labour Code Amendment* Act 3 of 2000
*Labour Code Amendment Act* of 2006
*Labour Code Amendment Act* of 2010
*Labour Code Amendment (DDPR) Regulations* of 2001
*Labour Code (Conciliation and Arbitration Guidelines) Notice,* 2004
*Labour Code Order* No 24, of 1992
*Labour Court Rules* of 1994
*Labour Relations Act* 66 of 1995
*Master and Servant Act* 15 of 1856
*Public Service Act* of 2005
*Public Service Amendment* Act 3 of 2007

*Rules for the Conduct of Proceedings in the Labour Appeal Court of South Africa*

International Instruments

*Minimum Wage Fixing Convention No*. 131 of 1970

*Examination of Grievances Recommendation* 1967 (No.130)

*Voluntary Conciliation and Arbitration Recommendation,* 1957 (No.92)