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LECTURES

LABOR LAW REFORM – SOUTHERN AFRICA

Sarah Christie *

I'd like to tell you a little about the historical background of the dispute resolution institution that I am currently involved with, some details about what it does, its jurisdiction, how it works, its processes, and then, finally, a little about the decisions and their outcomes. I will talk also briefly about some of the controls or control mechanisms that have been put in place to guide the dispute resolution process. Some of these are called "controls" but in actuality they do not control the process as adequately as they should. Finally, I will look at what are perhaps the more difficult questions, those that relate to assessing the efficacy of the reform and which direction it's likely to go in the future. This model of dispute resolution, developed and currently being fine-tuned in its use in South Africa, has been adopted by other countries within Southern Africa, which will allow us to talk about its efficacy in other systems or societies.

Our story begins, for want of a better place, in 1994. Within a couple of months after election of the ANC government near the end of April, 1994,¹ a labor law conference was held in Durban. This is an annual event that was started by a number of universities in South Africa.² The then Minister of Labour Tito Mboweni was the keynote speaker; alongside him as main speaker was Tom Kochan, who had been talking about the second Dunlop Commission in labor management in the U.S. I was chairing that session and I was reading what the Minister or his speechwriter had written, when he suddenly departed from his text and looked at what he thought was the cleverest labor lawyer in South Africa.

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¹ See Mzabalazo, *A History of the African National Congress*, available at <http://www.anc.org.za/ancdocs/about/umzabalazo.html>.

² The annual Labour Law Conference is considered "a landmark on the Southern African industrial relations scene," and is sponsored by a number of universities, including the Centre for Applied Legal Studies, University of the Witwatersrand, and the Institute of Development and Labour Law, University of Cape Town. See description located at <http://www.uct.ac.za/depts/cml/dll/dllproj.htm>.

Not me, I'm afraid, but a fellow at the back of the hall. Minister Mboweni started making flowery talk about labor commissions, saying, "Let's have one of those for us, too." And so he announced, without any proper discussion, that there would be a task team to look into labor law reforms in South Africa. Although this was a fairly bold act, that's exactly what happened. Within just a few months a task team was put into place and, over the next five years, there's been a suite of labor laws enacted. The first, which was passed in 1996, was the Labour Relations Act,³ establishing the Commission for Conciliation, Mediation and Arbitration. Next there was a thorough overhaul of legislation regarding the minimum standards for working, which led to the Basic Conditions of Employment Act.⁴ Then came a pair of statutes: the Employment Equity Act,⁵ which deals with discrimination and various employment equity strategies, and because one of the wicked legacies of apartheid is the pitifully low skills base of South African workers, the Skills Development Act was passed.⁶ It established a sort of levy-cum-grant program, partly funded out of payroll, to strengthen industrial training and to create learning opportunities both for employees and for the unemployed.

Although this is not a lecture on the Labour Relations Act, I will very briefly give you a sense of its context. It is an odd law because it is called the Labour Relations Act and, while it supports and facilitates collective bargaining, there is no duty to bargain as exists in the U.S.⁷ It is only an empowering piece of legislation in the private sector. It permits parties to structure collective agreements through permanent institutions and to devise ad hoc agreements at the enterprise level. But at the sectoral or industry level, the collective bargaining agreements are embedded, almost, into a mini-parliament or a mini-legislature for that sector, industry or particular part of an industry sector. Such collective agreements can, if the parties to the agreements represent the majority of workers in that industry, be extended so that they become minimum law for that sector. The biggest group bargaining on behalf of workers is the Public Sector Coordinating Bargaining Council. There are, however, very small bargaining councils as well. In the private sector, for example, there is a bargaining council for the hairdressing sector in the town of Kimberley. This is not a world leader or anything like that. It is just about moribund, as many of them are. But they are really a structure, which is able to acquire content through agreement of unions and employers in those sectors.

³ Labour Relations Act 66 of 1995, 4 JSRSA 1-138 (1999).

⁴ Basic Conditions of Employment Act 75 of 1997, 4 JSRSA 1-240 (1999).

⁵ Employment Equity Act 55 of 1998, 4 JSRSA 1-263 (1999).

⁶ Skills Development Act 97 of 1998, 4 JSRSA 1-276 (1999).

⁷ SOUTH AFRICAN HUMAN RIGHTS AND LABOUR LAW YEARBOOK 2 271, 273 (Michael Robertson, ed. 1992).

Now what's odd about the Labour Relations Act is that, although its main thrust is collective bargaining, it also has a chapter that confers general protection on employees against unfair dismissal throughout South Africa. There are historical reasons why this protection exists in this form. In the mid 1970s, the Black labor movement really took the development of industrial strife to great levels. Although the ANC government might want to suggest that it was 'The Armed Struggle' that brought down apartheid, it was nothing of the sort. It was, in fact, the labor movement that brought down apartheid. The previous South African government saw this emerging strong labor movement and was anxious, deeply anxious about it. They had previously used parallel systems of control – one system for white workers and another for black workers, who were at the time not even recognized as workers for the purposes of general labor legislation. And so in the late 70s the then National Party Government adopted a labor law reform, with a poorly defined major premise that it would incorporate and control the black labor movement. Well, this reform didn't work. It simply didn't work at all. The black unions took what they wanted from the new systems of reform and carried on doing whatever they wanted from the old systems as well. The unions were not ready to be controlled, and government was powerless to control them.

A most interesting device created at the end of the 1970s was something actually borrowed from the United States but completely distorted in the South African experience. The reformers in South Africa looked at the concept of the unfair labor practice (ULP) in the U.S., took it and embedded it into the existing tribunal system of adjudication, where it took off on its own. At the time, the Industrial Court was the tribunal in South Africa with jurisdiction over the unfair labor practice. It had legislative or quasi-legislative powers as well as determinative powers. Because the definition of an unfair labor practice was so broad, the Court itself had the jurisdiction to create the content of the term and then it had to determine, as a question of fact, whether an unfair labor practice existed. Significantly, at its beginnings in the early 1980s this rather loose concept had no statutory content. The relevant provision of the Labour Relations Act defined unfair labor practice as "any labour practice which in the opinion of the industrial court is an unfair labour practice." The Court began to fashion a law of unfair dismissal incrementally out of its power to determine unfair labor practices. And the employers were caught hopping.

I should note that labor law in its modern form did not really exist at that time. There was the common law of master and servant and there was a little bit of criminal law to outlaw strikes (these strikes were dealt with under the Riotous Assemblies Act).⁸ There really wasn't very much else.

⁸ Riotous Assemblies and Criminal Law Amendment Act 27 of 1914.

On top of this lack of legal structure, all of a sudden young, fairly left-wing lawyers were dumping on the Industrial Court, making references to the Conventions and Recommendations of the International Labour Organisation as well as references to employment standards from various other countries. South Africa had been a member of the ILO, but it was suspended in 1964 because of its continued practice of apartheid. However, it had never been formally disbarred. Instead, South Africa simply did not participate in the ILO. Before it was excluded, South Africa had ratified a number of conventions. It was these conventions, and even others that had not been ratified, that started emerging in argument before the Industrial Court and became the foundation of our law of employment as part of the unfair labor practice regime. The most important of these ILO Conventions for the development of fairness in the workplace was Convention 158, which dealt with termination at the instance of the employer.⁹

What also happened in the early 1980s, alongside the failure of the regulatory framework, was the emergence of an independent non-government organization called the Independent Mediation Service of South Africa.¹⁰ That body, which carried the acronym IMSSA, was foreign-donor funded. It gained a lot of support from America from the Federal Mediation Conciliation Service, from members of the American Arbitration Association, and also from the British equivalent: the Advisory Conciliation and Arbitration Service. IMSSA also received other donor funding out of Britain, Europe, Canada, and the United States. A small group of mediators and arbitrators was trained. The British trained the mediators and the Americans trained the arbitrators because there was greater specialization and greater experience in labor arbitration in this country than there was, and still is, in Britain. This body, IMSSA, quickly became well respected by both unions and employers and demonstrated remarkable success both in deepening peoples' understanding of collective bargaining, reducing adversarialism in the bargaining process, enhancing the quality of settlements, and giving outcomes that the people supported.

This was a great contrast to the statutory mechanisms available for resolving labor disputes. We had always had a conciliation service in South Africa but that service was becoming more and more hopeless. When the new government came in to operation in 1994, employment disputes that were referred to statutory conciliation did not settle. A little over 10 percent of cases settled at conciliation while nearly 90 percent remained unresolved. So when the Labour Minister's task team was put together to try and fashion a dispute resolution mechanism to support the Labour Relations Act, they looked at what they had and found it wanting. They

⁹ C158 Termination of Employment Convention, 1982 REF Convention concerning Termination of Employment at the Initiative of the Employer, *available at* <http://ilolex.ilo.ch:1567/scripts/convde.pl>.

¹⁰ MICHAEL KITTNER ET AL., *LABOUR UNDER THE APARTHEID REGIME* 64 (1989).

then looked both at what IMSSA had done and at various other models in different jurisdictions, particularly Australia.¹¹ They decided that what was needed was a body that stood outside of the government, but remained linked to some extent to the Ministry of Labour, and had tri-partism at the heart of the body. This formula was also based on South Africa's negotiated settlement of white minority rule. Throughout the early 90s we were strongly aware of the success that South Africa had negotiated its way into democracy; since it was not a revolutionary transfer in the classic sense of the word. Given the apparent success of the negotiated government, the labor law reform was also negotiated. The state recognized that they would have to have some organization that would be able to resolve disputes within the public sector, and it was impossible to do those within the dispute resolution body embedded in the Department of Labour itself.

The CCMA conciliation service was born out of that negotiation experience. How it functions is that it has a tri-partite governing body. They are drawn from the state, labor, and management. It has jurisdiction over the entire country, including the private and the public sectors, except for the Armed Forces and one or two other minor exclusions. It has jurisdiction to resolve disputes as well as to try and prevent disputes from arising. Its core tasks are to conciliate disputes that have occurred, and to arbitrate those that are unresolved at conciliation. It doesn't arbitrate all unresolved matters, as certain disputes can't be struck over – that is matters of mutual interest, typically wage disputes. But there are other matters of mutual interest and certain kinds of disputes that are determined by trial in the Labour Court, which is a specialist court equivalent to the High Court that also has its own appellate court. At the level of dispute prevention the CCMA has really a facilitating function. This is to try and establish better bargaining arrangements and to facilitate enterprise forums, which they call workplace forums. These have not worked very well, because the structure of the workplace forum has to be union driven. The major union federation is COSATU.¹² Unlike the United States we do not have a single AFL-CIO. The unions, mistakenly in my view, assume that if there's anything that management wants there must be something wrong with it. Not all of them take that view, but a sufficient number do to make these processes work not very well.

DISPUTE RESOLUTION IN THE CCMA

Let's turn to what the CCMA actually does. Its declared aims are to help transform South Africa's labor relations by promoting an integrated, expedited, high quality, simple dispute settlement service, and to promote

¹¹ See discussion of The Industrial Relations Commission in the Australian Industrial Registry, *General Information* (August 1999), available at <http://www.airc.gov.au>.

¹² See KITTNER, *supra* note 12, at 9 (discussing duties of COSATU, or the Congress of South African Trade Unions).

effective strategies within workplaces and through workplace forums to preempt or manage conflict. Now, how do they do this?

A. The Conciliation Process

I will talk first about dispute resolution, then I will talk about dispute prevention. The CCMA's dispute resolution processes are triggered by a request for conciliation. A party, typically a union or an individual worker, refers a dispute. You don't have to be a member of a union as individuals have access to the CCMA and can declare both collective and individual disputes. A referring party fills out a very simple form called a Request for Conciliation. It simply says "I am in dispute with party 'X' and I request the CCMA to conciliate." There are no formal barriers to access; none at all. There is no need for a formal declaration of deadlock, which used to be a mandatory condition. There are also no qualifying periods of employment as there are in some countries, such as six months or a year of continuous service. There is no fee for lodging a complaint and a bare allegation of dispute is all that triggers the conciliation process. So, one simply must allege that there is an employment relationship and that the parties to that relationship are in dispute.

Indeed, the only barrier is that non-employees do not have access to the CCMA; thus somebody who is an independent contractor cannot resolve a dispute with his 'employer' through the CCMA. Currently, there is a lot of case law about the definition of 'employment' and 'employment relationship' and who is an employer, but I won't get into that now. A dispute regarding an employee's dismissal must be referred within thirty days of the dismissal, and disputes regarding discrimination must be referred to the CCMA within six months. There is a provision, however, for condonation, which allows for late filing if good cause is shown. With other types of disputes there is no formal restriction or statute of limitations, as you would call it here.

I need to say something about the caseload. We are a poor country with massive disparities in wealth and poverty; approximately one quarter of the country's population is without a formal job. So there is a great deal of job hoarding and despair when people lose their jobs. As a result, it is seen as perfectly rational for an employee who has lost his job, whether fairly or unfairly, to just send off a Request for Conciliation. These requests can be done very informally – including submission by fax, but luckily not yet by e-mail. When I used to run the CCMA in Cape Town I would go in, say on a Sunday afternoon, and see the different fax machines all over the building. I would see this stuff pour out all over the floor. I was tempted sometimes to just pick it up and just chuck it in the rubbish can. But of course you cannot do that, these are real people in those bits of paper. And because of the pitifully low level of education, some of these were barely legible, barely comprehensible. It is very difficult to identify who is the proper employer or even what is the name of the employee. So

we would put them in a holding bay and I call these "No Name." And if anybody who signed him or herself "Happy of Montague Gardens" and happens to present him or herself saying, "I'm he or she," then we could say, "You are a very dismal fellow. Now off you go, and do it properly."

This anecdote raises the question of how much help the CCMA should give employees seeking to file a dispute. Some of our case management staff are perhaps too helpful. They would say, "Well, people are poor, people are illiterate. We must help them fill out the forms." I say, "No, we don't. That is not our job. Yes, people may be illiterate but even so, every illiterate person knows somebody who isn't." And the very least we can do is to require that documents be legible. In India they will find a person to write for you and perhaps even to declare, "There she left her mark," so to accredit the document.

Now, when the Establishment Secretariat was setting up the CCMA in 1996 (the Act was passed in 1995 and we opened our doors for business on the 11th of November, 1996 Armistice Day; coincidentally also the day in the former Rhodesia of Ian Smith's Unilateral Declaration of Independence from Britain),¹³ the office had to do forecasting to estimate the enhanced jurisdiction of the CCMA over previously existing dispute resolution agencies. To do this, the Establishment Secretariat looked at the current caseload. They did a bit of factor analysis and came up with a figure. That figure was out by 100%. In other words, they were 100% wrong or they were half right, depending on which way you look at it. The E.S. office estimated that 33,000 disputes would occur nationally. In fact, there were 66,000 in the first year, that is the first full year of operation, which was 1997. And that number has gone up, as people get to know more about the CCMA the caseload has increased. There is still an increase, although we are experiencing a leveling out. Now that's a lot of cases for a country whose total population is 44 million.¹⁴ And I have already told you that 25% of these 44 million people don't have a job. So, in comparison, the level of dispute is extremely high for the level of employment. I'll say something at the end as to what that means and what that should be.

Seventy-five percent of the cases or disputes that are referred to the CCMA are about unfair dismissals and 2% deal with alleged unfair labor practices. There's still a residual statutory unfair labor practice available as a claim but it will probably go away completely in the near future. Now all it includes are disputes about promotion, training, deployment and disciplinary action falling short of dismissal. This would cover all of your discrete separate torts or what we would call delicts, this term coming from Roman law. About 5% of the cases are matters of mutual interest and 10%

¹³ See Modern History Sourcebook, available at <http://www.fordham.edu/halsall/mod/1965Rhodesia-UDI.html>.

¹⁴ CIA World Factbook (citing South African population of 43,586, 097), available at <http://www.cia.gov/cia/publications/factbook/geos/sf.html>.

concern claims for severance pay for dismissal for operational requirements, retrenchment or redundancy. We also have a minimum compensation level in place for these types of claims; it is very low but the statute fixes it at one week of pay for every completed year of service.

How does the CCMA work? To begin, we are responsible for nine provinces in South Africa. And these are very different kinds of provinces, much like America some are large and some are small. For instance, the province of Gauteng, which is where 40% of the economic activity takes place, is very small, as compared to the province known as the Northern Cape, which has 30% of South Africa's landmass but only 2% of the population and, luckily also only 2% of the employment disputes. Within each province, we have a couple of satellite offices, apart from the main office. We don't have many offices in total, however, so it places some constraints and stress on how we as an organization work. This is where the fax machine becomes very useful.

We have fulltime commissioners who conciliate and arbitrate and we have part-time commissioners who conciliate and arbitrate. The term 'part-time' is slightly a misnomer. Instead, these commissioners are really ad hoc, and called on a needs basis only. Some of them are based at the centre of the provincial office where they work within the CCMA building. Others are country-based, working from their homes or other institutions such as law firms and universities. These part-time commissioners may give us one or two days a month, since it is on a need basis it is sometimes a little more and sometimes a little less. They get their instructions by e-mail and by fax. Then they go out and arbitrate or conciliate on their own.

In addition, there are no secretarial services. Indeed, we give these part-time commissioners almost nothing to work with. Because the Labour Court has insisted that the CCMA record all arbitrations, we now issue the part-time commissioners a little el-cheapo recording device housed in a brief case. That, however, is the only equipment they have. Many of them take down the evidence for themselves on laptops and they have a cell phone. That's a must. Because it's an itinerant service, they work in different sorts of buildings, setting up shop in community halls and municipal libraries. One commissioner told me that he was convinced his community hall was actually a stable. Well, at any rate, these are multi-purpose spaces. In one town, the arbitration venue was simply a passageway where they had closed some doors and boarded up one end. One of our commissioners has got an A4-sized paper, which he has had plastic laminated. He has the CCMA logo on the one side, and presstik or tic-tac or whatever you call it here on the other side. When he gets to a new place and is directed to the hearing room, he sticks it on the door and there you have it, instant, virtual CCMA offices.

Well we've settled that these commissioners work very hard, but what do they do? For the most part, they conciliate. Most of the cases brought to the CCMA are settled in conciliation; indeed, 78% of all cases

that are closed by the CCMA are settled in this way. The conciliating process is fairly tough and it is very robust. This led to a few perception problems with the process. For instance, I used to handle a lot of complaints from the public. Some users, including workers and employers, unions and employee organizations, would complain about a commissioner being a bully, or being biased. But often times when we got a complaint like this, it would emerge from the investigation that what the party was angry about was having been scared, or having been made uneasy. I would then find myself having to draft letters that said something like, "Commissioner Smith joins me in regretting his overly robust language, however...." And then the 'however' would make it clear that conciliators do not simply chair a meeting; that is simply not their job. Conciliation is an uncomfortable process for some participants because they come in with a view and they think that they are right. A conciliator's job, however, and it's a little bit like a good cross-examiner, is to make you feel uneasy about the view you hold so that you are more likely to come to a mutual agreement on settling the dispute.

What we call "panel beating" is a phenomenon that happens very often. Sometimes it is done during the plenary session and sometimes it is during a side caucus between the parties. Now let me tell you what I mean by "panel beating." Because the CCMA is a statutory service, not private, the commissioner has got some powers. When I was at the CCMA, my practice was to always say to the staff, "Please don't use those powers. Just tell the parties you've got them." This was in the hopes that we could use the powers as an implied threat, and avoid the perception that the commissioner was "beating up" on a party. And so we used to do this through the ruse of "I'm a bit confused here." Now, however, we have been conciliating for such a long time, and the participants are more aware of what we can and can't do, so we can't use these powers as an idle threat that way any more. But certainly at the beginning of the CCMA implementation we could use the faux naïve way of saying "I am a little confused here. What does the Act say? Doesn't it say such and such? Ah, yes, see?" In fact, we have an elderly commissioner who's an absolutely wonderful arbitrator and also very skilled at using this tactic. His looks suggest his name might be, you know, Sir Edward Fitz William Hugh Smythe. And he has a very posh accent. He speaks fluent Zulu, he has a smattering of Xhosa and his formal Afrikaans is impeccable. And so he uses this language as a completely manipulative device. He doesn't always let on at the beginning of a conciliation exercise that he can speak various indigenous languages. He lets various things happen, lets people speak in the vernacular, and then he may say in Zulu or in Xhosa, "I wonder if that is helpful?" or "That will not be perceived as kind, I really think the employers are concerned."

Now, is that wrongly manipulative? No. I consider that as part of the job, to show the destructive nature of language that is used and to try

and get people to comport themselves in a way to appropriately get to the problem solving stage. And sometimes the conciliation process is also about forcing people to consider, "What are you going to do when you go home? What are you going to do when we don't settle?" So we force the parties to confront these questions and often face a reality check and that is not a comfortable process. This is what we term "panel beating," but it works and gets results. And a commissioner may say to the unhappy parties, "Blame me if you have to blame someone for the outcome because that is our job." Parties settle and one can always say Commissioner Christie twists arms. Of course I could say in return, "But your arm twists so easy!"

B. The Arbitration Process

Now, those matters that do not settle go on to arbitration. These commissioners are appointed by the tripartite Government Body, and not by the CCMA. That governing body is looking broadly at the industrial relations capacity, or the acceptability and the credibility of the dispute resolver – the commissioner. The Governing Body is not a judicial services commission. They are not lawyers and sometimes the people that have arbitrated are not appropriately trained or prepared to arbitrate the cases that come before them. They simply lack the necessary skills. For instance, one of our commissioners is an absolutely hopeless arbitrator. Why? Because he doesn't like to make decisions. In fact, he is a natural mediator, and an excellent conciliator. While he is not a lawyer, he knows enough law to be an effective conciliator. However, he is not comfortable working in the arbitral mode. At first, he felt he ought to arbitrate and it was a failing on his part if he did not. But finally he was convinced and accepted that we need people like him to do that work, that conciliation that he is incredibly good at doing. Unfortunately, not all people have the self-knowledge that he has to know the limits of his desires, as well as the limits of his comfort zone; we are lucky that he does. And nowhere in the world is there yet an effective device to get rid of people who are unfit for judicial office. Every country knows they exist but it remains a problem. So CCMA commissioners are appointed with generic powers, and the power to arbitrate and conciliate is embedded in their appointment. Consequently, the Governing Body can in terms of law appoint commissioners either to conciliate or to arbitrate, or even to do both, but because they have left them with these plenary powers it has caused some problems.

Let's assume that you get to the end of the conciliation process and your matter is not resolved. As I mentioned previously, the next stage is a request for arbitration. So a request for arbitration always arises out of the failure of conciliation. I told you a moment ago that in a Request for Conciliation you simply allege a labor dispute, you give a little bit of detail, but that there is not a pleading involved; the paperwork is a request for a process. At the end of that process there is a certificate that says that that

process has failed and that the dispute, as alleged, remains unresolved. The next step is arbitration, assuming that it is an arbitral dispute. At this stage we will still have no pleadings. The arbitrator's job is to identify the dispute and to determine its scope. The statute provides¹⁵ that the duty of the commissioner is to resolve the "real" issues in dispute, and not the alleged issues, quickly, fairly, and with a minimum of legal formality. That is the arbitrator's jurisdiction. So it is quintessentially an investigative approach or investigative jurisdiction, or an inquisitorial one, and not an adversarial jurisdiction.

Now I think that the Founding Fathers, and they were all fathers, were right to choose an investigate approach. But what happens in practice has been difficult. Unless you have decent terms of reference, what on earth are you investigating? The arbitrator doesn't know what to look for in determining the "real" dispute. You know, say it's an unfair dismissal case, but there may be other jurisdictional problems. For instance, the CCMA has jurisdiction to resolve disputes about dismissals if the dismissal is for a reason related to the capacity or conduct of the employee. It does not have the power to resolve unfair dismissal disputes when the reason for the dismissal is related to the operational requirements of the undertaking. Those disputes must be referred to the Labour Court;¹⁶ the CCMA also does not have jurisdiction unless consent is given by the parties to resolve disputes alleging discrimination.¹⁷ Because there have been no pleadings and no pre-arbitration meetings, these important jurisdictional questions often emerge only during the course of a hearing.¹⁸ This is also true because if the parties are represented at all, it is usually by non-lawyer officials from unions or employer organizations who don't know how to raise the issue until they are before the arbitrator.

Many labor consultants have reinvented themselves as trade unionists. We have seen the creation of extremely tiny little unions and employee organizations; indeed that has almost been a growth point in the South African economy, the proliferation of unions and employer organizations. But the exclusion of legal representation during the arbitration process has not worked very well. It was assumed by the lawmaker that lawyers prolong rather than curtail proceedings, and so we have preferred to keep them out. If you have very good arbitrators who are properly investigative, then perhaps this holds true and yes maybe parties don't need lawyers. But when you've got desperately incompetent parties, and you give that dispute to an arbitrator who is less skilled, the arbitrator may find that as he does his job he or she is really making the case for

¹⁵ § 138 of the Labour Relations Act 66 of 1995, 4 JRSRA 1-179 (1999).

¹⁶ § 191(5)(b) of the Labour Relations Act 66 of 1995, 4 JRSRA 1-189 (1999).

¹⁷ § 10 of the Employment Equity Act 55 of 1998, 4 JRSRA 1-266 (1999).

¹⁸ Although there is provision in the CCMA Rules (Rule 12) for holding a pre-arbitration hearing, this is seldom done.

someone. As a result, there is a real tension between the arbitrator's duty to find the truth and to umpire what has been heard. And, if the arbitrator is too interventionist, the accusation may properly be made that the arbitrator is ignoring the onus of proof in a particular case. This may well lead to accusations of bias.

Arbitration does not only occur under the CCMA; we also have voluntary arbitration in South Africa, this is the IMSSA type model that I mentioned earlier. The jurisdiction of the voluntary arbitration process is much broader than the CCMA. Any kind of employment dispute can be arbitrated, much as is the case in the United States. We can have arbitration either out of collective agreements or arbitration by ad hoc agreement. It could also be agreed upon once the dispute has arisen or it could be embedded within the contract of employment. It is still a moot point whether one is permitted to subordinate individual substantive rights to arbitration or whether only the process rights. In other words, whether it is permitted to refer to arbitration issues that would otherwise be litigated. There has also been a recent case in which the labor court has taken the view that a party could in terms of a collective agreement abandon a substantive right. That question has not gone to our Constitutional Court and, at this time, I should say that it is not clear that that would pass constitutional muster.

To complicate matters further the Act allows an arbitrator, who although appointed by the Government Body is a commissioner in the CCMA, during the course of arbitration to suspend the arbitration and go directly into the conciliation process.¹⁹ And the arbitrators occasionally do exactly that, but it is extremely risky because of the problem of possible or perceived bias. I know from personal experience that some arbitrators push for conciliation when they are getting into trouble. For instance, at the start the case looked jolly easy, but it's now going on forever and becoming a bit of a matzah pudding and nobody really knows what's going on. The commissioner who is trying to duck making an award may ask, "Is this a good time to talk? Should we just talk about this? Are we all comfortable with that?" Assuming everybody else is feeling comfortable, that's fine. But what if there is a real fear by a party that the case is being lost. At that point there's an intervention by the commissioner who says, "Can we talk settlement?" Is that not a corruption of the process? Of course it happens all the time in litigation: halfway through a trial a party folds, or they talk and they settle. But that is the parties' own choice and it is very different from the commissioner or the judge initiating that process because it could be that what is being heard is "I can't handle this." Or "I am bored, or you're irritating me," or whatever. It is Judge Judy kind of stuff. But, South Africa is a rough country and, unfortunately, with a huge caseload, sometimes commissioners cut corners to induce a settlement mid-way

¹⁹ § 138 (3) of the Labour Relations Act 66 of 1995, 4 JSRSA 1-179 (1999).

through an arbitration hearing. Even so, often times the people afterwards say in effect thank goodness we settled.

The remedies that an arbitrator can give in the CCMA are on their face very broad. The statute says that the arbitrator can fashion “any appropriate award”²⁰ that gives effect to any collective agreement, and to the main objects of the Act. These are very broad fairness standards. But there are certain areas in which the remedies are fixed. The most important one, and I haven’t got time to go into it now, is in unfair dismissal disputes. Remedies are capped at a maximum of twelve months compensation for any unfair dismissal.²¹

Because of the delays in resolving disputes that have arisen due to the number of disputes that are being referred to the CCMA, the actual language of the Act relating to compensation for unfair dismissal has become problematic. It says that “compensation must be equal to the remuneration that the employee would have been paid between the date of the hearing of the arbitration.”²² This becomes a nightmare if the case takes six months to get to arbitration and this delay is due to the administrative inefficiency within the CCMA, not the parties. And if there was some unfairness, but not very much, it is not “appropriate” – to use the language of the Act – to award an employee six months pay for some procedural irregularity in pre-dismissal procedures – particularly if the person was a senior manager, a big earner and who by the time the matter gets to arbitration is earning more than he or she was before the dismissal. Faced with this possibility, commissioners have sometimes simply ignored the Act, which they under the statute itself are not permitted to do, and have said in warm and woolly language, “It cannot have been the intention of the legislature to impose this lunacy on an employer and I therefore give you two weeks remuneration.” Some employees have accepted these reduced settlements because they fear if they want to enforce what the statute allows, the employer will counterclaim, and try and get the award set aside on some irregularity within the award. And so commissioners have done a bit of ducking and diving around the statutory rigidity.

This ducking and diving around the statute has been extremely unsatisfactory. As a commissioner you are a servant of the law and you’ve got to comply with it even if you think it’s an idiocy. The only proper way to address the situation is that the law must be changed. But it is not for you, as a commissioner, to disrespect the legal framework. Even the Labour Appeal Court has looked for a gap in this statutory framework. As a result, it has ruled that although the statutory formula regarding

²⁰ § 138(9) of the Labour Relations Act 66 of 1995, 4 JSRSA 1-179 (1999).

²¹ The Labour Court has enhanced jurisdiction to award up to twenty-four months remuneration if it finds unfair discrimination, or breach of freedom of association or if the employer in effect abused the law that allows termination for operational requirements.

²² § 194(1) of the Labour Relations Act 66 of 1995, 4 JSRSA 1-190 (1999).

compensation is fixed, the decision whether to grant compensation at all, even if the commissioner has found that the dismissal was unfair, is a discretionary and not a mechanical activity.²³ So if it has been nine months since the dismissal, the commissioner looks at the factors surrounding the case and can say nine months remuneration is too much. And because it's an all-or-nothing approach, you either get nothing or you get nine months remuneration. Usually in such a case the worker ends up getting nothing, because fairness dictates that nine months is way too much compensation for the dismissal.

C. Possible Areas for Improvement

Proposed amendments to the Labour Relations Act will have to deal with a lot of the anomalies that have developed over the first three years of its existence. One of these is to reduce the process costs, both to employers and to a lesser extent to employees. We've been able, administratively to make improvements, but we cannot do all without some destruction to the statute.

Here is an example of how we can vary our case processing to reduce or shift the procedural burden. Many of the conciliations do not involve representatives and the employer is a small enterprise employing below, let's say, thirty employees. In this situation we may conciliate by bringing the employee into the CCMA but saying to the employer, in effect, stay where you are to run your business, but be by the side of the phone at such and such a time. We will bring the employee in and we will conciliate this over the phone. We phone the employer and, if they're in town, we'll pay for the call but if the employer is out of town, we may require them to phone the CCMA back as the *quid pro quo*. We then have the employee in a room with the commissioner and the employer on a speakerphone. We tell the employer that they're on the speakerphone. And, I've discovered, if you ask the employer to speak first you can pick up a lot about the dispute while the employer talks and explains why he or she fired the worker. While this is going on you watch the reaction on the face of the worker. Without anything having been said, before even asking the worker for a comment, you as the listener can start to test and probe. The employer has no idea that you have been reading the worker's face and other physical reactions. That kind of thing can reduce the process costs enormously. We can even take evidence over the phone in this way.

Amendments in the pipeline may also bring conciliation and arbitration much closer together for individual dismissal disputes. Then we will not have two discrete processes of conciliation and arbitration. There will be one continuous process, which will be preceded by an attempt to settle by way of conciliation. The CCMA may have a panel or roster of

²³ *Johnson & Johnson (Pty) Ltd. v. Chemical Workers Industrial Union*, (1999) 20 ILJ 89 (LAC).

conciliating commissioners. The employer and the worker come in ready to have that dispute resolved that particular day. The commissioner explores if there are prospects for settlement. If it seems that the matter might settle then it will be passed to a conciliator. If not, it will go straight into arbitration. This decision to send straight to arbitration might be because the parties are too far apart in terms of their positions and there are material disputes of fact that can only reasonably be resolved by hearing evidence. We have already experimented with this by having two commissioners work together to resolve a number of disputes involving different parties. In order to avoid too much seepage between facilitation and arbitration, the one commissioner may arbitrate the disputes that the other has conciliated, and vice versa.

DISPUTE PREVENTION IN THE CCMA

Let me end by saying something about dispute prevention, and then something about the assessment of the efficacy of the system. I said earlier that, from the beginning, the declared goal of the CCMA was to manage conflict and to have effective strategies for dispute prevention. The efforts that we've already employed help people improve the quality of their collective bargaining relationships. I would like to give you an example from the metal industry. During the apartheid era, South Africa was an extremely inward looking economy with a lot of import substitution and high tariff barriers. It's been frightened, as many countries have been but more so perhaps than some, of globalization. The unions are fearful of what they perceive to be inevitable job losses from globalization. Collective bargaining has been narrow, and focused mostly on direct labor costs. Unions tend to resist exploring non-wage costs and have resisted looking at imaginative ways of work organization. They have positional bargaining, adversarial bargaining, which is not smart.

There was a bit of a breakthrough in the bargaining council for the metal industry in the late 1990s. The employees negotiated within this council, which regulates quite an important sector. About 400,000 employees are covered by the Main Agreement in the council. All the employers who were members of the council agreed to a twelve-month moratorium on job losses throughout the sector, in return for which there was a commitment to reexamine the way they do business with each other, to re-look at the regulation of working time and to explore various flexibility arrangements and their committee structure, such as how they exempted certain people, particularly small or medium enterprises from the scope of the agreements, and the regulatory framework. They also agreed that their behavior, simply at a courtesy level was highly inappropriate, very aggressive and very hostile. They got an outside facilitator from the CCMA to come in. That person worked with them making incremental progress over nearly a year. What has been interesting is that the unions' prior obsession with statutory consultative requirements has disappeared.

They've moved on. There are the beginnings of employment growth, profitability is up and they are getting their exports moving. They look much more intelligently at the auto sector, the electronic components sector and the other manufacturing sectors to fashion arrangements that are appropriate for them.

Another strategy is to trawl our own database. Our electronic case management system can, for instance, target a party with a high number of referrals. These are primarily the unions. We can then approach a union and ask why it is that in a specific period the union had referred, say, seventy-four cases. That would appear to be an odd or inappropriate ratio of cases to employees. What is wrong? Is it that the union is not screening properly? Or is it this particular fruit packing company, what's the matter with them? Are your organizers no good? What's the matter with your shop stewards? Do you need to improve your own administrative systems, or your own collective bargaining, or do you want the CCMA to send someone out to come to talk to you? That is, by asking these questions, we help the primary users of the CCMA to check and see if they have an internal problem or if it is truly an employment-related or industrial collective problem. So we are able to use our data to try and tweak the referring parties.

Now, unfortunately, that approach doesn't work with unorganized people, and it doesn't work with micro-enterprises. For those sorts of people we have to have the general, you know, spray and pray kind of approach, the general public presentations. And most employers, particularly small employers, won't go to those sorts of things, indeed they only go when they're in trouble. So it is very difficult to reach certain kinds of people. We have also tried radio. We try different sorts of things and especially the cheapest possible routes to go without generating too much paper, because that is simply dumped in a corner.

There is also a particular problem of communication because we have an extremely "free to be me/free to be you" kind of constitution in South Africa. You met Judge Albie Sachs, when he was a guest of your university. He was a prime mover behind the constitutional provision designating eleven official languages for South Africa. Although English is the *lingua franca* it continues to be perceived to be the language of the colonizer and no other indigenous language is sufficiently dominant to be the single language of government. So if we published everything only in English we would get complaints and, in addition, most of the indigenous languages are regional. So we try to appoint commissioners who are multilingual so that cuts down the costs of interpretation. Speaking from my own experience, I can't draft in Afrikaans but I can speak it and I can read it. So I let a witness testify in Afrikaans and I say if there's anything I don't understand I'll tell you. And it is all being recorded so I can, if need be, play it back afterwards and scratch my head. But this cuts down on time and therefore also on costs.

ASSESSING THE EFFECTIVENESS OF THE CCMA

Now, how do we try to assess our efficiency and our efficacy? We really have two kinds of indicators; neither one, however, is perfect. One is obviously internal efficiencies and here we would look at an age analysis of cases referred for conciliation and arbitration if not settled. A performance indicator for individual rights disputes is three months from date of referral to the outcome of arbitration if there is to be one. We are not there; in fact it is closer to six months and it needs to come down. But we need to refine that indicator as well. We need to have some weighted averages. For instance if you can manage, say, to complete 80% of all cases within three months you don't have to worry too much. So we need to increase the number of cases we are concluding within three months and then to explore the pathologies of the others because a crude average doesn't tell you enough and we are exploring a more nuanced approach. We also have individual performance criteria for the commissioners, by reference to caseload and to rates of settlement in conciliation. It is difficult to assess the quality of the outcomes of conciliation, however, because that lies in the hands of the parties.

In arbitration we identify caseload plus a negative indicator: delay in issuing awards within fourteen days, which is the statutory requirement. As far as quality is concerned, we look also at the number of awards that are set aside on review by the Labour Court. That too is a difficult measurement, because it depends on the vagaries of litigation, such as whether a party took a matter on review and also, in our humble opinion, the courts don't always get it right. So a far more qualitative approach is needed for arbitration. But there is no doubt that we work our commissioners very hard. It is not a job for the fainthearted. And it is also not a job you can do everyday, it's a little like being an industrial social worker. Your customers are very needy, very greedy. That is a problem of many social service providers. They are high on complaints but low on gratitude. And so whenever we did get a thank you letter, which we did from time to time, I would quickly scan it into the computer and email to everybody in the office to say well done to the particular commissioner or case management officer.

A more difficult performance indicator is the impact of a dispute resolution service on the labor market. I do not believe that user satisfaction is an appropriate indicator. Or perhaps I should qualify that. I think user satisfaction is useful but not sufficient. Another useful indicator is the level of labor peace and the absence of visible social conflict. But also more valuable is the impact on the labor market as far as job creation is concerned and the nature as well as the quality of those jobs. Not only do we have a problem in South Africa with unemployment; but we also have disparities that are Brazilian. Our Gini coefficient is the highest in the world. You talk about the working poor in the U.S., but try Africa, it is far, far worse and the poverty is enormous. But I think what we have to do is to

say, let's take the Western Cape, my own province. We have 14% of the population and we would be doing well if we generate only 12% of the disputes. So you ought to have declining levels of conflict and disputes and increasing level of employment in increasing quality of work. Our next task will be to reach the ideal levels represented by those indicators. What we do then is find the appropriate indicator and work on the items that get us close to achieving them. We are not there yet but I think we're doing good work.

CONCLUSION

I will end with a comment on why we have such an open door policy at the CCMA. We have an open door because our country needs it. We need it for political reasons. We need it because access to justice in the past has been so very, very poor. The CCMA represents probably the most important place where poor people get some kind of justice. I think it's good for social relations and for political stability. It is important that our country provides some kind of redress, modest though it is. Because of the kind of work we do and because of the way we work, I think we are highly unlikely in South Africa to get huge populist insurrection through failures of government that one sees in other places. At the individual level, very interesting things have been happening within workplace relationships at the micro level. The kind of stereotyping that we've had in the past is reducing every day in small little encounters. A very angry, hostile white Afrikaner who votes to the right of Genghis Khan comes in to the CCMA. He meets a Black woman commissioner. He's terrified and he may be deeply resentful. But he finds someone who is helpful, cheerful, resourceful, and imaginative and she may even make him laugh. He goes away a happy boy and he sings her praises. Even if that does not happen, if an employer party for instance, feels antipathy towards the employee, and resents the outcome of the process, at the level of the individuals there is an enormous amount of transformation occurring every day in small encounters.

The CCMA and the University of Cape Town are also working with other countries in Southern Africa. Sometimes we are working with Government institutions, sometimes with individual employers or employers associations. For example, we are working in Malawi with the Tobacco Growers Association, or with the labor and employment ministries in Lesotho, Swaziland, Botswana and Namibia so that some of these experiences are exported to countries in the Southern African region. We will have to wait a while for Mugabe to go but even in Zimbabwe, there will be change. And so, I will leave our conversation there, on this positive note of the changes coming in the future.