Chapter 19
Mediation and Conciliation in Collective Labor Conflicts in South Africa

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19.1 Introduction

In South Africa, strikes resulting from failed collective bargaining processes are often protracted and regularly involve recourse by striking workers to unlawful means in pursuit of their objectives (including non-compliance with agreed or statutory strike procedures, damage to property and/or physical violence against so-called 'scabs', i.e., workers who continuing working during the strike).[1] During the latter half of 2018, for example, a strike by bus drivers in the public transport sector was accompanied by various incidents of violence against people and property. The strike also left millions of commuters stranded and caused large scale traffic chaos as well as millions in lost wages. Mediation efforts eventually resulted in a settlement.[2]

It stands to reason that the impact of industrial action of such an aggravated nature and scale goes beyond the mere wage-work bargain and in fact strikes at the very heart of the relationship between union and management. It undoubtedly also affects the relationship between strikers and their non-striking colleagues who may have been prevented from working during the strike.

[1] 'In fact, some union leaders are of the belief that violence is the only method of winning justice for the working man'. Department of Labor (2016). *Industrial Action Report*. Available at http://www.labor.gov.za/DOL/downloads/documents/annual-reports/departmental-annual-reports/2017/annualreport_2017.pdf. (Retrieved 14.02.2018) at 5.

[2] https://www.fin24.com/Economy/Labor/News/new-wage-offer-put-on-the-table-for-bus-drivers-20180506-2. (Retrieved 7 May 2018).

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In South Africa, this context has led to the development of a relatively unique process (at least from a European perspective) aimed at helping the parties to such acrimonious encounters to try to rebuild their relationship ex post facto. Unless this is attended to, the conflict potential between the parties involved will probably remain at an acute level and relations on the work floor will continue to be strained and conflictual. These Relationship-by-Objectives (RBO) interventions took hold in South Africa in the mid-1990s and were pioneered in South Africa by the now defunct Independent Mediation Services of South Africa.[3] They are built around the development by the parties of consensus-based objectives and action plans directed towards addressing relationship deficits and improving the quality of their engagement, particularly when their relationship has reached a breaking point, e.g., after a protracted or violent strike. The process, an example of which is provided further below, is independently facilitated by a team mediators.

The RBO programme has become an abiding feature of South African labor relations in certain industries.[4]

Another possibly unique feature of the South Africa collective dispute resolution landscape is the focus of late by the country's premier statutory labou dispute resolution body, the Commission for Conciliation, Mediation and Arbitration ('CCMA'), on dispute prevention processes to try to deal with the high incidence of strike action.[5] Despite these innovations, low trust and a high level of antagonism in labor relations remain a feature of the landscape.

19.2 The Low Trust Character of Labor Relations in South Africa

More than two decades after the dawn of democracy and the establishment of an entirely new and progressive labor relations framework through the Labor Relations Act, no. 66 of 1995 (the 'LRA'), adversarial bargaining—all too often accompanied by violent strike action—remains the dominant feature of labor-management relations in both private and public sector organizations in South Africa. This despite the Act's laudable aim to 'advance economic development, social justice, labor peace and the democratization of the workplace'.[6]

The state of workplace relations is partly born out by the most recent statistics from the country's premier labor dispute resolution institution, the Commission for Conciliation Mediation and Arbitration ('CCMA'). During its 2016–2017 financial year, the CCMA dealt with 188 449 dispute referrals, or 745 new referrals per working day—an increase of roughly 5% on the previous year.[7] According to the CCMA's

[3] For a brief history of IMSSA, see below and also Nupen (2013).

[4] Nupen, above, Footnote 3.

[5] See the text accompanying Footnote 21.

[6] Section 1.

[7] See CCMA Annual Report (2016–2017).

2017 Annual Report, just over 5000 of these concerned disputes arising from collective bargaining. The bulk were disputes involving complaints about individual and collective dismissals, alleged unfair discrimination and alleged unfair labor practices. This number excludes disputes that are dealt with by bargaining councils[8] or disputes that are channeled by disputants through private mediation service providers.

Further evidence of the sorry state of labor relations comes from the 2016 Industrial Action Report of the Department of Labor[9] where the following statement appears:

> The burden of industrial action remains a heavy one on South Africa's labor relations. Recent years have witnessed a few strikes of long duration as well as strikes marked by violence, intimidation of non-striking workers, damage to property and deaths. The [department's] annual Industrial Action Report shows an increase in the number of strike activity [per year] from 100 strikes in 2015 to 122 strikes in 2016 as well as an increase in the number of workdays lost from 903.921 in 2015 to 946.323 in 2016'.

According to the Report, most of the strikes were 'unprotected', i.e., did not comply with statutorily prescribed strike procedures. The number of strikes for 2016 was 4.7% more than in 2015 and resulted in 946 323 work days lost. This translates into 7.6 m work hours or 59 work days per 1000 employees. An estimated ZAR 161 million in wages was lost to secure an average increase of 8% p.a. Several factors could have contributed to the high incidence of strike action, including low levels of trust,[10] the lingering after effects of the country's apartheid history, continued economic disparities, political uncertainty and low levels of economic growth, rather than the regulatory framework itself.[11]

[8] Bargaining councils exist in both the private, municipal and public sectors. In the private sector a total of 38 such councils have been established by agreement between organized labor and employers for particular industries, e.g., road transport, motor industry and metal and engineering. For the public sector, the LRA establishes a coordinating council for the entire public sector below which several sectoral councils are established for specific sectors within the public sector. Municipalities are represented by one national council for the local government sector. The number of disputes dealt with by the various councils and private providers is not known.

[9] Available at http://www.labor.gov.za/DOL/downloads/documents/annual-reports/departmental-annual-reports/2017/annualreport_2017.pdf. (Retrieved 14.02.2018).

[10] See, e.g., 'Anglo boss calls for end to hostile labor relations'—https://www.fin24.com/Companies/Mining/Anglo-boss-calls-for-end-to-hostile-labor-relations-20150731. (Retrieved 14/02/2018) and 'Business meets Jacob Zuma on trust deficit'—https://www.businesslive.co.za/bd/national/2017-04-28-business-meets-jacob-zuma-on-trust-deficit/. (Retrieved 14/02/2018). And, further, Benjamin (2013).

[11] See Jordaan and Cillié (2016), at 153–4.

19.3 The South African Dispute Resolution System

19.3.1 The Statutory System: The Commission for Conciliation, Mediation and Arbitration

The cornerstone of the country's labor relations system is the LRA, part of a 'package' of laws regulating employment that were put in place after the country's first democratic elections in 1994. The Act provides for the creation and protection of certain fundamental employer and employee rights and also for the resolution of individual and collective disputes arising between employers, employees and trade unions (Bendix, 2010). While certain disputes *must* be heard by the Labor Court ('rights' disputes, e.g., involving alleged unfair discrimination, dismissal of strikers or large scale retrenchments) the key statutory organ responsible for dispute resolution is the Commission for Conciliation Mediation and Arbitration (CCMA).

The CCMA, whose establishment, functions and powers are governed by the LRA, has a tripartite structure. Its governing body consists of three representatives each from the State, organized labor and employers, plus an independent, non-executive chairperson. Each representative is nominated by the National Economic Development and Labor Council ('NEDLAC') and appointed by the Minister of Labor to hold office for a period of three years. The governing body appoints the Director of the CCMA, who manages and directs the activities of the CCMA, appoints, supervises the CCMA's staff and performs a number of other functions conferred by the LRA. The governing body also appoints commissioners[12] on either a full-time or a part-time basis and either as a commissioner or a senior commissioner, to perform the functions of the CCMA. Their remuneration, allowances and all terms and conditions of appointment of the commissioners are also determined by that body. The governing body furthermore determines rules of conduct for commissioners, who may be removed a from office for serious misconduct, incapacity, or a material violation of the code of conduct. The CCMA operates from 15 regional offices across the country and is headquartered in Johannesburg.[13] The CCMA is funded from by government and its services are in most cases offered free of charge.[14]

The LRA provides for two primary dispute resolution processes, i.e. conciliation and arbitration. Conciliation is an evaluative process in which the third party's role is to actively direct the parties to resolution of their dispute. He or she may also advise the parties on, e.g., their legal rights, perceived chances of success in arbitration and make non-binding proposals for settlement. In practice, CCMA commissioners typically provide a non-binding opinion about the perceived merits of each party's case in the light of legal norms to try and procure a quick settlement.

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[12] See below under 'Characteristics of the mediators and the mediation process' for more detail on the qualifications and appointment of commissioners.

[13] See Kwakwala (2010).

[14] For a history and assessment of the work of the CCMA, see Benjamin (2013).

In mediation, by contrast, the mediator at all times maintains his or her impartiality, does not express a view about the merits of a parties' case and does not assume sole responsibility for generating solutions but instead works together with the parties to assist them in finding the best solution to further their interests.[15]

The Act defines 'conciliation' very broadly to include mediation:[16]

> *The commissioner must determine a process to attempt to resolve the dispute, which may include*:
>
> (a) *mediating the dispute;*
>
> (b) *conducting a fact-finding exercise; and*
>
> (c) *making a recommendation to the parties, which may be in the form of an advisory arbitration award.*

It is therefore up to the commissioner to determine which process to follow in a particular dispute, i.e., to conciliate a dispute or mediate it in the more traditional sense of the term. As a rough rule of thumb, disputes of right—e.g., alleged unfair dismissals—where the jurisprudence is quite clear on what is permissible for an employer and what isn't—lend themselves to resolution through conciliation. Collective disputes and disputes for which no clear legal remedies exist (e.g., a complaint about promotion or some work-related grievance) are more suited for mediation.

A commissioner has the power to issue subpoenas compelling persons to appear at the proceedings or to disclose documents, and may even enter and inspect premises and seize any book, document or object that is relevant to the dispute.

The LRA does not express any preference for any particular mediation 'style'. As is evident from the definition of 'conciliation', it provides broad powers to commissioners to determine not only what process to follow but also to engage with the merits of a dispute in a highly evaluative but non-binding way.

Benjamin (2013: 46) notes that the CCMA has been playing an increasingly assertive role in conciliating mutual interest disputes:

> [T]he initial vision was for the CCMA to conciliate unresolved disputes arising from negotiations, once referred by a party to the dispute. In this regard, the original CCMA model reflected the conventional wisdom about the autonomy of collective bargaining and dispute resolution. Increasingly, however, the need to intervene at an earlier stage in key disputes that could have disruptive consequences for the labor market has been identified as a significant priority. This reflects the emergence of a more 'active' approach to conciliation, pursuant to which the CCMA offers to facilitate collective bargaining at an early stage and seeks to prevent disputes spiraling into disruption and violence. However, criteria have been developed to ensure that an appropriate balance is struck between the public interest in dispute prevention and the autonomy of collective bargaining.

Before employers or employees may participate in any form of industrial action, it is compulsory that an attempt at amicable resolution of the dispute must first be made. Here the parties to the dispute have a choice: if there is a collective agreement

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[15] For a useful summary of the differences between mediation and conciliation, see Sgubini et al. (2004).

[16] Section 135(3).

in place that provides for private mediation of the dispute before industrial action may be embarked upon, parties are bound to follow that process. Failing that, the industrial action would be unlawful and may result in legal sanctions, e.g., an injunction to stop the industrial action or claims for compensation for any damages suffered as a result of the unlawful action. If such a procedure exists, there is no need for the dispute to also be referred for conciliation by the CCMA.

However, absent an agreed dispute resolution procedure, the CCMA must first attempt to conciliate otherwise subsequent industrial action will be rendered unlawful. If parties fall under the jurisdiction of a bargaining council, the dispute must be dealt with in terms of the council's own dispute resolution procedure. While conciliation (and mediation in the case of private arrangements) is compulsory before industrial action can be embarked upon, there is no compulsion on the non-referring party to attend or actively participate in the conciliation process. In that case the commissioner will simply issue a certificate that the dispute is unresolved, leaving *either party* to the dispute free to embark on industrial action.

19.3.2 The Statutory System: Bargaining Councils

The CCMA is, however, not the only body that deals with labor disputes as the Act also provides for the establishment of so-called bargaining councils by employers and trade unions in particular sectors or industries. Bargaining councils are discussed below.

A number of bargaining councils have been established in both the private and public sectors. Once established, they provide for a limited form of 'self government' in the sectors or industries falling within their scope. Their primary functions include negotiation of collective agreements for, and the resolution of disputes arising in their sectors or industries. The latter is taken care of by commissioners (mediators and arbitrators) chosen by the employer and trade union parties to a council to serve on its dispute resolution panel for a renewable period. Bargaining council commissioners must be admitted as CCMA commissioners in order to serve on the conciliation or arbitration panels of a bargaining council: all bargaining council commissioners are therefore also CCMA commissioners, but the reverse is not true. They also have the same powers as CCMA commissioners. The key difference is that they are elected by the employer and trade union parties in the relevant industry to serve on a panel for an agreed period.

19.3.3 Private Dispute Resolution

Unless a party wants access to the arbitration services of the CCMA, or seeks access to the Labor Court to enforce certain statutory employment rights, there is no obligation on parties to a dispute to use the formal dispute resolution processes of the

CCMA to solve employment-related disputes. They may, instead, opt by agreement to use private mediation or private arbitration by an external neutral. This person may either be an independent mediator, or someone assigned by a private sector dispute resolution agency at the request of the disputing parties. Many of these private mediators also serve as CCMA commissioners or on the dispute resolution panels of bargaining councils.

Privatised dispute resolution in the employment field first developed in South Africa in the early 1980s, when Black (mainly African) workers were only beginning to be included in the protective framework of employment legislation. The statutory dispute resolution institution available at the time—the Industrial Court—lacked credibility among the emergent Black trade union movement (Bendix, 2010). The establishment of the privately sponsored and managed Independent Mediation Services of SA (IMSSA) served to fill that void by providing mediation and arbitration services at relatively modest fees. IMSSA subsequently transformed into a new organisation, Tokiso Dispute Settlement.[17]

Today, private dispute resolution continues to fill a void in individual and collective disputes yet its main disadvantage is cost: the fact that the services of the CCMA are generally free, limits the number of instances where private mediation (through external neutrals) is being used in individual disputes. Yet many collective agreements concluded both in bargaining councils and outside of them[18] provide for mediation by Tokiso or other private providers of dispute resolution services. Reasons why parties might opt for private mediation or arbitration vary. Initially there were concerns about the quality of CCMA commissioners so many parties opted for a 'better-the-devil-we-know' option and stuck with private mediators and arbitrators who were familiar to them. However, what quality concerns there may have been have addressed through the years of the organization's existence to the extent that the writer does not believe that quality is any longer a major concern. Still, private processes provide parties with choices they don't have with the CCMA or a bargaining council, even if they have to pay for that luxury. This includes freedom (by agreement) to choose the mediator or arbitrator; freedom (by agreement) to determine his/her terms of reference; and the ability to determine, again by agreement, the amount of time the parties would like to set aside for the resolution of the dispute.

[17]Before taking up an academic position in Belgium in 2014, the writer served on the mediation and arbitration panels of Tokiso and its predecessor, IMSSA.

[18]The mining industry, for example, has never been part of a bargaining council system. Instead, there is a long-standing practice in terms of which collective bargaining for the industry takes place at a centralised or industry level in terms of framework collective agreement entered directly between employers and trade unions active in the industry.

19.3.4 Initiating the CCMA Conciliation Process in Collective Disputes

Access to the conciliation services of the CCMA for any dispute is by way of application on a prescribed form. While time limits exist for referral of rights disputes, referral of collective disputes are not subject to the same constraints. However, once a dispute has been referred for conciliation, the CCMA has 30 days in which to attempt to resolve it. This period may be extended by agreement between the disputing parties.

Failing resolution of a collective dispute (referred to in the Act as a dispute over 'a matter of mutual interest') within the prescribed or agreed timeframe, either the employer or trade union (or a group of employees acting collectively if they are not unionized) may embark on industrial action. For employers this means they may implement a lockout whereas employees may embark on a range of actions, from picketing, to a work-to-rule to a full-blown strike. The exception is disputes in so-called essential services where strikes and lockouts are prohibited. In that case the unresolved dispute has to be resolved through arbitration.

During the 2016–2017 reporting period, the CCMA conciliated 5013 'mutual interest' disputes (i.e., arising from collective bargaining or industrial action) of which 3224 (64%) were settled.[19]

The LRA in Section 150 allows for the CCMA to offer, at its own initiative, its conciliation services to disputing parties if it is aware of a dispute that has not been referred to it, and if resolution of the dispute would be 'in the public interest'. The disputing parties are not compelled to accept the offer. For the reporting period 2016–2017 the CCMA successfully resolved 143 (out of 173) such disputes, giving a success rate of 83%. These interventions involved disputes in both the private and public sectors, and included both situations where strikes were in progress[20] and ones where imminent strikes were prevented as a result of the intervention.[21]

According to the director of the CCMA,[22] dispute prevention is now a strategic focus of the organization. Apart from using access to disputes via Section 150, the CCMA's more recent efforts include capacity building interventions (e.g., joint training in collaborative negotiation techniques) and piloting of a workplace mediation model in the Western Cape Fruit Sector.

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[19] CCMA Annual Report (2016–2017).

[20] See, e.g., https://www.enca.com/south-africa/petrol-strikes-continues-as-ccma-intervenes; http://www.4-traders.com/COMAIR-LIMITED-6492574/news/Comair-UASA-approaches-CCMA-for-urgent-Section-150-intervention-22190975/ and https://mg.co.za/article/2012-02-06-minister-supports-ccma-intervention-at-implats. (Retrieved 15.02.2018).

[21] CCMA Annual Report (2016–2017).

[22] Presentation to Annual SASLAW Conference, 2017—available at https://www.saslaw.org.za/index.php/conference-2017/2017-papers?download=627:8-sep-cameron-morajane-lra-dispute-resolution. (Retrieved 15.02.2018).

19.3.5 Initiating Private Mediation Processes in Collective Disputes

In a number of industries, e.g., mining, employers and trade unions have over more than three decades used private mediation preventatively (in case of deadlocks during collective bargaining and prior to industrial action) as well as reactively during instances of industrial action. Typically, their dispute resolution agreements (often included in a so-called framework or 'trade union recognition' agreement) will spell out which individuals or agencies the parties will use in the event of a dispute. Despite the existence of such an agreement, initiating the mediation process still requires the consent of all parties to the dispute, or their representatives (typically trade union officials). This consent will normally be given in a written agreement to mediate in which the following will, among others, typically appear:

1. The identity of the mediator.
2. The mediator's 'terms of reference'.[23]
3. Responsibility for the mediator's costs.[24]
4. Logistical arrangements.

In the absence of an agreed dispute resolution process as described above, in both individual and collective disputes employers and employees, or trade unions on their behalf, may by agreement with the counter party enlist the services of a practicing mediator directly, or work through an agency such as Tokiso. Organizations like Tokiso also provide joint negotiation training to employers and trade unions as well as relationship-building interventions.

From the writer's own experience, these latter initiatives are particularly useful in cases where a strike or lockout has caused substantial harm to the relationship between an employer and trade union.[25]

One of the earliest most famous examples in the South African context of a successful RBO involved Mercedes Benz (South Africa) and its majority trade union, the National Union of Metalworkers of SA ('NUMSA'). Nupen[26] recounts the story in these terms:

> The relationship between Mercedes Benz and NUMSA had been very strained and difficult for a number of years. In 1989, IMSSA became involved with the parties when it mediated a dispute over the termination of the employment of certain union members who were found to have participated in acts of misconduct during a demonstration in the plant. The dispute was settled through mediation and in terms of the settlement agreement the parties committed

[23] I.e., what the dispute is about and what powers the mediator has.

[24] Typically shared equally.

[25] For a personal account of his involvement in relationship-building processes and in mediation generally, see the reflections of Charles Nupen, one of South Africa's foremost and most experienced mediators: http://www.accord.org.za/ajcr-issues/%EF%BF%BCmediation-and-conflict-resolution-in-south-and-southern-africa/. (Retrieved 15.02.2018).

[26] Above, Footnote 25 at 90–93.

themselves to a Relationship by Objectives (RBO) exercise to set their relationship on a new footing.

A team of five IMSSA mediators ran the process.

At an initial site visit at a Mercedes Benz plant they found workers with wooden AK47s on their backs. At lunch time there were mock bayonet charges on effigies of management. White supervisors were carrying real weapons and the atmosphere on the shop floor was one of deep antagonism and hostility. This was the late eighties, and the political climate was still highly oppressive.

The RBO took place at a neutral country hotel venue, over four days. The company was represented by its chairman, numerous board members and 40 other managers from various levels in the company. The union was represented by two senior full-time union officials and 30 shop stewards from various plants around the country.

The team of mediators constructed a mini-parliament and the parties engaged each other on a range of matters of concern to them including compliance with the recognition agreement, racial discrimination, political issues, the development of a sound basis for future negotiations between the parties, selection, training and development of employees, the quality and nature of supervision, social responsibility of the company, consultation and participation by employees in decision-making within the company, timekeeping, job security, carrying of weapons in plant, and the management of political demonstrations in plant.

The mediators guided the debate along constructive lines and the parties were given a full opportunity to voice their opinions and were encouraged to set objectives to overcome the problems in their relationship. Consensus was reached on a series of 30 objectives to do this, and action plans were developed to give effect to the objectives. Responsibility was assigned to specific individuals and groups within each party to execute the action plans. Time limits were placed on this process.

In the course of the process, a change in attitude was perceptible on the part of individuals within each party towards one another and an atmosphere developed that was far more conducive to sound industrial relations. Workers and management spoke to each other in a way that was cathartic and moving, both sides speaking of the humiliation they had suffered at the hands of the other, and showing the hurt this had caused them. Mtutuzeli Tom, one of the union representatives who was to become President of NUMSA, said: 'It was the first time in our lives as a labor movement to sit and open our hearts to management and management to labor. IMSSA made it possible for the real issues to be looked at and we are still feeling the positive effects.' Ian Russell of Mercedes Benz agreed with this positive assessment: 'The IMSSA third party intervention at Mercedes Benz in … was a watershed in the Company's Industrial Relations history. Despite a history of emotionally explosive and uncontrollable industrial relations which had paralyzed the manufacturing plant for years, the parties were able to craft their own ground breaking constitution … the boundaries of the practices institutionalizing the relationship have been severely tested since then on many occasions but it has been the commitment to the structures from both sides coupled with the spirit of the RBO process that has enabled Mercedes Benz to enter the "new South Africa" with confidence and commitment to a long-term future in this magnificent country.'

The RBO program has become an abiding feature of our labor relations system with literally hundreds of interventions having taken place in the 24 years since the seminal experience at Mercedes-Benz.

19.4 The Use of Hybrid Processes

The LRA specifically allows for the use of hybrid conciliation and arbitration processes in so-called disputes of right, which includes the option of an arb-med process. The Act states in Section 138(3) that, provided all the parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation. In the case of 'mutual interest' disputes, the CCMA has no power to arbitrate—a commissioner may, at most, issue a non-binding 'advisory' award. Hybrid processes are generally used in so-called disputes of right involving, e.g., alleged unfair dismissal.

There are no limits to the ability of mediators acting in a private capacity to use hybrid processes in either rights or 'mutual interest' disputes, apart from the limitations provided for in the mediator's terms of reference or the collective agreement governing private mediation. Parties are thus free to include an option for mediators to make advisory awards or even make binding rulings on specific aspects when requested to do so by the parties. The author has personal experience of applying an arb-med process in wage disputes. The process works as follows:

> During the first (arbitration) phase, the parties present documentary and verbal evidence giving a background to the dispute, the motivations for their respective demands, as well as what they regard as a 'fair' wage. Sometimes experts are called to testify about this aspect. The matter is then adjourned for the arbitrator to consider the evidence and make a ruling. This is *not* disclosed to the parties. On the day the proceedings resume, the arbitrator 'swops hats' and assumes the mantel of a mediator and attempts to assist the parties to arrive at a settlement. Failing settlement, the award is disclosed.

Typically, in such cases, because the parties are unaware of the arbitration ruling, they will be under some pressure to compromise on their demands during the mediation to avoid the win-lose result that disclosure of the award would entail (Drummond, 2006).

19.5 Characteristics of the Mediators and the Mediation Process

19.5.1 Appointment of Mediators

CCMA commissioners are appointed on a full-time or part-time basis. Many of those employed part-time also practice as lawyers, independent HRM practitioners, labor relations consultants or ex-trade union officials. Some also serve on the panels of bargaining councils. Commissioners of the CCMA and bargaining councils undergo extensive compulsory training in employment law as well as mediation and arbi-

tration skills. Before admission as commissioner, they are also required to take a number of examinations.[27]

Commissioners may be disqualified on one of the following grounds: serious misconduct; incapacity (for reasons of health or performance); or a material violation of the Commission's code of conduct.[28]

Generally, parties are not able to choose their commissioner except in the case of disputes of mutual interest disputes in essential services.[29] As a quid pro quo for not being permitted to strike or lock out, disputing parties in such a service are permitted by Section 135(6)) of the LRA to agree to the appointment of a specific commissioner to attempt to resolve the dispute through conciliation and determine by agreement the commissioner's terms of reference. Failure to do so within the prescribed time frame will result in the CCMA making the appointment and determining terms of reference.

As a rule, only senior commissioners are used to mediate disputes of 'mutual interest'.

There are no prescribed requirements to act as a mediator in private practice, although a number of organisations provide training and certification for persons interested in acting as mediators. Generally speaking, however, access to the panels of providers like Tokiso is subject to some quality control (training and experience) to ensure that those serving on a panel are suitably qualified in terms of training and experience to act as mediators. There are no binding national standards that individuals must comply with to qualify and act as mediators.

The norm in private mediations is that disputing parties choose their mediator by agreement. Sometimes collective agreements provide for a default option if the parties to a dispute are not able to agree on the identity of the mediator by deferring to the private agency to appoint a suitable mediator.

In some industries, for instance the mining sector, a panel of mediators is agreed on by trade unions and employers from whose midst mediators are chosen on the basis of their availability.

19.5.2 Registration and Certification of Mediators

As stated earlier, commissioners of the CCMA must undergo a training program and pass a number of examinations before they can be appointed as such. According to information available on its website, the CCMA will not admit someone as a commissioner unless that person has, in addition and amongst others at least four

[27] See https://www.ccma.org.za/portals/0/downloads/Commissioner%20Appointment%20and%20Recruitment%20Process.pdf. (Retrieved 15.02.2018).

[28] Section 117.

[29] This is defined in Section 213 as 'a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population' or involves the parliamentary service or the South African Police Services.

years' experience in labor relations, labor law or in mediation-related processes (such as conciliation and facilitation); a relevant tertiary qualification: analytical and problem solving skills and good knowledge of the labor market. The person must also possess sound ethics.

For admissions to their 'employment' panel Tokiso, requires a minimum of a recognized mediation or arbitration training course (depending on which panel the applicant would like to serve); some experience in ADR; computer literacy and a good reputation. Applicants must also be independent in their profession or position (i.e., not linked to a particular employer or trade union, for example) and must meet vetting process for criminal and credit checks.[30]

A private sector initiative, the Dispute Settlement Accreditation Council ('DiSAC'),[31] was established in 2012 to promote voluntary (opt-in) quality standards and certification of mediators and arbitrators in commercial, employment and family matters.

19.5.3 Conducting the Process

Conciliation and arbitration processes are always conducted in the presence of the parties to the dispute and normally conducted by a single commissioner, although the CCMA has allocated teams of mediators in some instances given the complexity of a dispute. Formal intake sessions are not the norm in either the CCMA or in mediations conducted via private agencies. Other than the usual norms of party self-determination, voluntariness and confidentiality, there are no prescriptions in terms of how the mediation process should be conducted in either the CCMA or in private proceedings. In practice, however, outside of mediations in family disputes where joint session are mostly used, mediators tend to use a mixture of joint and side sessions. The writer has also been involved—in both private and CCMA processes—in mediations where the entire process was conducted and concluded in a joint session and others where, because of the level of animosity between the parties, the entire process was conducted in side session until the end when the parties were brought together if and when a settlement agreement had to be concluded.

Settlement agreements are, as a rule, reduced to writing and signed by the parties, where after they become enforceable as contracts. Private mediation agreements can be enforced through the civil courts, whereas arbitration by the CCMA is the prescribed process to resolve disputes about the interpretation or breach of a collective agreement.[32]

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[30] Information supplied by Tanya Venter, CEO of Tokiso in email correspondence dated 18/02/2018.

[31] http://disac.co.za. (Retrieved 15.02.2018).

[32] If entered into between an employer and registered trade union, the settlement agreement acquires the status of a collective agreement under the LRA.

19.5.4 Process in the Event of Deadlock

If conciliation by the CCMA fails, either party to a mutual interest dispute may give written notice to the other and embark on industrial action after 48 h have expired from the date and time of the notice. The same applies to unresolved disputes that have been submitted to private mediation. In essential services, however, industrial action is not permitted but either party may refer their dispute to compulsory arbitration by the CCMA.

19.6 Effectiveness of the System

19.6.1 The CCMA Conciliation Process

The CCMA has maintained a fairly respectable settlement rate of 64% in mutual interest conciliations.[33] In a report to the ILO on the effectiveness of the CCMA, the author Paul Benjamin (2013: 46) quotes an earlier report of the OECD[34]:

> As one of the great post-apartheid institutions set up in the early phase of building a national system of regulated flexibility, the commission acts as a social safety valve, dealing with numerous individual disputes between employers and employees as well as 'interest' cases, and acting as a conciliator and eventually arbitrator between employer bodies and unions. Despite its budgetary limitations, it has played a very positive role in limiting social tensions and in creating and preserving a deliberative labor policy. It now performs functions that go well beyond the terms of reference one would expect from its name.

Benjamin's own assessment of the institution's effectiveness in collective disputes reads as follows (2013: 46):

> The CCMA plays a diverse range of roles in the South African labor market and has repeatedly reshaped its capacities in response to changing labor market realities. Its credibility and legitimacy as an institution charged with dispute prevention and dispute resolution have enabled the CCMA to respond to the fallout of high levels of inequality and unemployment by playing an increasingly active role in facilitating consensus-seeking processes, both in the collective bargaining arena and in situations where there are potential job losses. In part, this flows from the active tripartite participation of the social partners in its governance. This has enabled the CCMA to offer its services to parties to facilitate complex negotiations and increasingly improve the calibre of collective bargaining. Its development of an integrated job saving strategy has resulted in the CCMA playing an innovative role in coordinating the responses of a wide range of public institutions with the capacity to assist to enterprises in distress and their employers. These initiatives point to the further contribution it will make in the years to come.

As far as the author is aware, there is no public data available about the level of satisfaction of users with the services of the CCMA. The same appears to be true of private agencies such as Tokiso.

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[33] CCMA Annual Report (2016–2017).

[34] Leibbrandt (2010).

19.7 Overall Assessment

Mediation in labor disputes—in both its private and statutory forms—has a relatively long history in South Africa and is firmly embedded in the employment context. Some of those involved as mediators early on in IMSSA, the predecessor to Tokiso, have also made their mark in the development of the country's constitutional democracy.[35]

Despite the excellent work done by private mediators and organizations like IMSSA, Tokiso and the CCMA, however, the South African labor environment remains volatile. As the Marikana tragedy showed,[36] strikes can quickly turn violent and even deadly. In this environment characterized by low trust, hostility and adversarialism, the need for early dispute resolution ('EDR') systems and processes is acute. While the CCMA has made early intervention one of its strategic priorities, there is little evidence of EDR being promoted by the relevant stakeholders, including private mediation providers, on a larger scale.

This is a key challenge for trade unions, employers, service providers and mediators. While fostering sound labor relations is, ultimately, the responsibility of trade unions and employers, mediators are ideally placed to assist parties not only in resolving their current dispute, but also help them deal with the underlying conflict that might have caused the dispute in the first place. One way of doing this, is to help the parties craft agreements that would promote early intervention when the next dispute is threatening to erupt.[37]

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[35] See Nupen, above n14 and also Van der Merwe, H.W. (Publication date unknown). 'Facilitation and mediation in South Africa: Three case studies', available at http://www.gmu.edu/programs/icar/pcs/vander~1.htm. (Retrieved 23/02/2018).

[36] See Elgoibar et al. (2016).

[37] For some thoughts on the roles mediators can play prior to, during and beyond the mediation process, see Jordaan and Cillié (2016). 'A multi-faceted role for mediators in civil and commercial disputes: implications for practice and mediator training'. Unpublished paper presented at the 6th International Biennial on Negotiation. Paris, 16–18 November 2016. Copies available from the author on request: barney.jordaan@vlerick.com.

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