

**REDEFINING THE ROLE OF LEGAL REPRESENTATION AT CCMA IN LIGHT OF
THE CONSTITUTIONAL MANDATE OF THE SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

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DECLARATION

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I, Evans Bafana Malunga, declare that the dissertation entitled *Redefining the role of legal representation at CCMA in light of the constitutional mandate of the South African Human Rights Commission* is my own work and that all materials I have used have been acknowledged by means of quotation marks or complete references.

EVANS BAFANA MALUNGA

SIGNATURE

DATE

ABBREVIATIONS

CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act as amended
GNP	Gauteng Northern Provinces
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act [as amended]
PAJA	Promotion of Administrative Justice Act
SAHRC	South Africa Human Rights Commission
SAHRC Act	South African Human Rights Commission Act, 2013 (Act No. 40 of 2013)
SCA	Supreme Court of Appeal
UK	United Kingdom

CHAPTER 1: INTRODUCTION

1.1. Overview

The Labour Relations Law in South African has undergone a series of changes to be where it is currently.¹ During the apartheid era, South Africa's Labour Relations Laws were based on racial categorisation and trade unions reflected this racial categorisation as black employees were not permitted to join registered trade unions.² Parallel legislations³ were introduced to intensify this racial divide.

Despite the democratisation of the Labour Relations Laws, by 1995 the labour dispute mechanism in South Africa still remained very ineffective in resolving labour disputes quickly.⁴ South Africa's Government legitimate goal, which is also captured in the Preamble and purpose of the LRA, was to provide simple procedures for the resolution of labour disputes in compliance with the International Labour Organization's standards. The delay in resolving labour disputes was a concern to the Government. This concern was also echoed by the Labour Appeal Court in *Netherburn Engineering cc/ta Netherburn Ceramics v Mudau 2009 4 BLLR 299 (LAC)*. The LAC⁵ attributed the cause of the delay in resolving labour disputes speedily and cheaply to Legal Practitioners.⁶ Before the transition, the rate of speedily resolving labour disputes was also far less.⁷ Currently and with the limitation of legal representation in certain stages of the CCMA proceedings, the rate of successfully resolving labour disputes speedily has since increased.⁸ The current LRA dispute resolution mechanism is, amongst other things, to advance social justice and labour peace.⁹ Does this mean that Legal Practitioners have no role in the labour dispute resolution at the CCMA at all? To be able to answer this question, it is important to examine the role of Legal Practitioners in a democratic dispensation.

Legal representation in a democratic dispensation must be protected because it assists in the interpretation and application of the law. In *CCMA v Law Society Northern Provinces*¹⁰ the court was quick to point out that *[a] right to legal representation exists for the benefit and protection of litigants*. Legal Practitioners have a role to play in democratic countries such as South Africa in order to strengthen our legal system and rule of law. Their role is, *inter alia*, to contribute to the drafting of

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1. Du Toit *et al Labour Relations Law a comprehensive guide* (2006) 6.
 2. Du Toit *et al Labour Relations Law a comprehensive guide* (2006) 8.
 3. *Labour Relations Act of 1956 and the Black Labour Relations Regulations* of 1953.
 4. *Explanatory Memorandum on the Labour Relations Bill* (1995) 16 319.
 5. At paras 44 to 46.
 6. *Explanatory Memorandum on the Labour Relations Bill* (1995) 16 ILJ 319.
 7. Du Toit *et al Labour Relations Law a comprehensive guide* (2006) 22.
 8. CCMA Annual Report 2016/2017 page 10.
 9. S 1 of the LRA.
 10. *CCMA v Law Society Northern Provinces* 2013 ZASCA 118 para 3.

legislations that will promote and strengthen our democracy.¹¹ The fundamental role of Legal Practitioners is that of a well-informed champion who is able to advice on the law and procedures.¹² Legal practitioners may play a role in reaching settlements in the process of Alternative Dispute Resolution (ADR).¹³ Werner Kruger¹⁴ argues that the basis that Legal Practitioners tend to cause delay and make the CCMA proceedings legalistic cannot only be attributed to them. He submits that the trade union and employers' organisation's officials are also capable of causing delay and making the process legalistic. He states that these officials have legal qualifications too and have extensive experience in labour law to do the very same things CCMA rely on to exclude Legal Practitioners at certain stages of CCMA proceedings. He is of the view that where a party is represented by a trade union official or employer's organisation, legal representation must be automatically allowed. At pages 62 to 63, he submits that CCMA Commissioners are masters of their proceedings and have huge powers which they can invoke to prevent Legal Practitioners from abusing the CCMA proceedings [especially when they attempt to cause undue delay or make the process unnecessarily legalistic].

It is also my view that Rule 25 must be directed at managing the processes than to managing Legal Practitioners. This is so because the delay caused by Legal Practitioners could also be done and attributable to trade union officials and employers' organisation's officials who were granted absolute right to represent parties during proceedings at CCMA. Commissioners at the CCMA are qualified persons¹⁵ who must be able manage Legal Practitioners when they start to raise technical issues rather than to exclude them.¹⁶ Instead of excluding Legal Practitioners, other countries¹⁷ have developed guiding principles for Legal Practitioners who represent clients in the ADR processes. The Law Council of Australia has developed and adopted guidelines for legal practitioners in mediations¹⁸. These guidelines were developed to provide assistance to lawyers who represent clients in mediation. One of the role of a Legal Practitioners mentioned is that a Legal Practitioner must "*approach mediation as a problem-solving exercise and help clients best present their cases*" [emphasis added]. The Malaysian bar has also prescribed the role of lawyers in mediation¹⁹. It is stated in the Malaysian guidelines that Legal Practitioners must adhere to the rules of mediation, seek solutions which are

11. Zacharais (2009) *Lawyers' Role in Contemporary Democracy*.

12. http://www.malaysianbar.org.my/adr_arbitration_mediation/the_role_of_lawyers_in_mediation_what_the_future_holds.html. Accessed on 05 June 2017.

13. Johan Brand et al commercial mediation 2015 p 47.

14. Kruger *Legal representation at disciplinary hearings and before CCMA* (LLM dissertation 2012 UP).

15. S 117 (1) of the LRA.

16. Johan Brand et al commercial mediation 2015 p 47.

17. Australia and Malaysia.

18. http://www.lawsocietyasa.asn.au/PDF/Mediation_Guidelines_for_Lawyers.pdf. Accessed on 05 June 2017.

19. http://www.malaysianbar.org.my/adr_arbitration_mediation/the_role_of_lawyers_in_mediation_what_the_future_holds.html. Accessed on 05 June 2017.

beneficial to all parties as far as possible. Mahtma Ghandi said “*the true function of a lawyer is to unite parties driven asunder*”.

The CCMA was created by LRA to be a forum in which labour disputes are settled through the ADR.²⁰ The CCMA Rules must therefore be aimed at managing incidences that seek to undermine efficiency in resolving disputes.²¹ These rules may from time to time be amended to enhance efficiency. Buchner²² is of the view that the disadvantages of disallowing legal representation at certain stages of the CCMA proceedings outweigh the advantages of achieving a cheap and non-legalistic system of speedily resolving disputes. He submits that causing delays and making the proceedings to be legalistic cannot not only be attributable to Legal Practitioners. Office bearers or officials of trade union or employers’ organisation who are legally qualified and well experienced in labour law are capable of doing the very same things which are attributable to Legal Practitioners. Buchner seems to suggest that to exclude legal practitioners and allow these capable office bearers or officials may encroach on the right to equal protection before the law and right to *reasonable and fair administrative action*.²³

The South African Human Rights Commission (SAHRC) is constitutionally mandated to protect the rights contained in chapter 2 of the Constitution.²⁴ The protection mandate of these rights is carried out by Legal Practitioners.²⁵ In the event that any of these rights are violated, the Constitution requires the SAHRC to take steps to secure appropriate remedy.²⁶ To be able to secure appropriate remedy, the SAHRC must bring proceedings in a competent tribunal on behalf of a person whose right has been violated.²⁷ The CCMA is a tribunal²⁸ in which the SAHRC may bring proceedings in case the right to fair labour practice, contained in the Bill of Right,²⁹ has been violated.

The Constitution has placed this important obligation to defend the Bill of Rights on the SAHRC.³⁰ Any law or conduct which undermines the obligation placed on another by the Constitution, is invalid.³¹ The rights contained in chapter 2 are subject to the limitations in section 36 of the Constitution. The obligation to defend these rights imposed on the SAHRC cannot be limited under section 36 but must be fulfilled.³² For

20. S 115 (1) of the LRA.

21. S 115 (2A) of the LRA.

22. Bucher *The constitutional right to legal representation during disciplinary hearing and proceedings before CCMA* (LLM thesis 2003 University of Port Elizabeth) p 60.

23. *Id.*

24. S 184 of the Constitution.

25. See SAHRC’s submission on *Legal Practice Bill* (2013) para 6: www.sahrc.org.za.

26. S 184 (2) (b) of the Constitution.

27. S 13 (3) (b) of the SAHRC Act.

28. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 ZACC para 124.

29. S 23 of the Constitution.

30. S 184 of the Constitution.

31. S 2 of the Constitution.

32. S 2 of the Constitution. S 2 uses *must* which indicates peremptoriness.

the SAHRC to fulfil its obligations in terms of the Constitution, section 181 (4) of the Constitution read with section 4 (3) of the SAHRC Act requires other organs of state not to interfere or hinder the SAHRC from performing its obligations. This raises a question whether the CCMA is an organ of state as defined in section 239 of the Constitution? This question was answered in the affirmative by the Constitutional Court.³³

The CCMA may make rules regulating the right of any party to be represented by any person or category of persons in conciliation or arbitration proceedings, including the regulation or limitation of the right to be represented in the proceedings.³⁴ On 17 March 2015, the Rules for the conduct of proceedings before CCMA No. 38572 were publicised. These Rules contain Rule 25 which is at the centre of this mini-dissertation. Rule 25 regulates representation before the CCMA and the relevant provisions are discussed in chapter 2 below.

Various writers³⁵ have also discussed Rule 25 and added their opinions to the discourse.

Jacques Johan Buchner and Werner Kruger have been discussed above. NR Nchabeleng³⁶ argues that a Commissioner as a Presiding Officer in the arbitration must be capable of dealing with Legal Practitioners who attempt to raise technical issues which may be a hindrance for speedy resolution of disputes. He further submits that there are skilled and professional legal practitioners who can be able to assist Commissioners in understanding the issues in dispute and interpret the law with a view to resolve them speedily. He further submits that the use of Legal Practitioners may also contribute to the reduction of decisions of Commissioners in such matters being taken on review to the Labour Court³⁷. It is clear that Nchabeleng is of the view that legal representation must be allowed and would be of great assistance to Commissioners in as far as the interpretation of the law is concerned.

Despite the detailed valuable discourse on Rule 25, this dissertation has identified some gaps and seeks to contribute meaningfully to the existing discourse.

33. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 (CC), the minority judgment confirmed that "[t]he CCMA is an entity created by the LRA and designed to fulfil the objectives of the LRA. It performs a public function by, among other things, providing an infrastructure for resolving labour disputes. It is therefore an organ of state within the meaning of section 239 (b) (ii) of the Constitution which exercises public power in terms of the LRA" (para 200).

34. S 115 (2A) (K) of the LRA.

35. NR Nchabeleng. Kruger *Legal representation at disciplinary hearings and before CCMA* (LLM dissertation 2012 UP). Bucher *The constitutional right to legal representation during disciplinary hearing and proceedings before CCMA* (LLM thesis 2003 University of Port Elizabeth) p 60.

36. Nchabeleng *The constitutionality of Rule 25 of the CCMA Rules* (LLM dissertation 2015 North-West University)

37. *Id*, pages 37-38.

1.2. Problem statement

Rule 25 (1) does not expressly specify the SAHRC as a competent institution to represent parties in disputes before CCMA.³⁸ The SAHRC is constitutionally mandated to investigate allegations of violation of any right contained in the Bill of Rights. In terms of the SAHRC Act, the SAHRC is competent to bring proceedings in the court of law or any tribunal on behalf of the person whose right is violated (Complainant). The purpose of bringing proceedings is to secure appropriate redress on behalf of the Complainant. The investigation of complaints and institution of proceedings are the functions of the SAHRC's legal services which employs legal practitioners³⁹.

Rule 25 in its current form, may be perceived as interfering with the SAHRC's mandate to protect human rights and represent members of the public at CCMA.

The courts⁴⁰ and academic writers⁴¹ have dealt with legal representation as it relates to admitted attorneys and advocates in practice and not as it relates to the SAHRC.

By the end of March 2014, members of the public lodged 527 labour relations complaints to the SAHRC.⁴² The SAHRC referred those complaints to CCMA without conducting investigation and providing representation⁴³. The referral of these complaints by the SAHRC to CCMA without conducting investigation and providing representation to public members may be perceived as an abdication of its constitutional mandate.

There is a disconnection between Rule 25 (1) and the constitutional mandate of the SAHRC in the sense that the CCMA as an organ of state⁴⁴ is required, by virtue of section 181 (3) of the Constitution, to assist the SAHRC through legislative and other measures to be effective in the exercise of its mandate. CCMA is by virtue of section 181 (4) of the Constitution not required to hinder the SAHRC in executing its functions and powers in any manner.

38. Rule 25 expressly excludes the SAHRC. SAHRC is not a trade union. It is also not an employers' organisation.

39. See para 6 of the SAHRC' submission on the *Legal Practice Bill*: <http://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20-%20LEGAL%20PRACTICE%20BILL%20FINAL%20to%20Parliament%2012%202%2013%20Marke%20%20%20.pdf> [Accessed on 06 January 2017].

40. *Netherburn Engineering cc/ta Netherburn Ceramics v Mudau* 2009 4 BLLR 299 (LAC), *Law Society of the Northern Provinces v Minister of Labour and others* 2013 (1) SA 468 (GNP) and *CCMA v Law Society of the Northern Provinces* 2013 ZASCA 118.

41. JJ Bucher, W Kruger and NR Nchabeleng mentioned above.

42. SAHRC Trend Analysis Report p 15: www.sahrc.org.za.

43. SAHRC Trend Analysis Report p 13: www.sahrc.org.za.

44. See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 (CC) para 200.

1.3. Research questions

The constitutional mandate of the SAHRC read within the context of Rule 25 (1) raises the following questions:

1.1.1. Does Rule 25 (1) encroach on the constitutional mandate of the SAHRC?

1.1.2. Does Rule 25 (1) perpetuate vulnerability for non-trade union employees?

1.1.3. Does the SAHRC abdicate its mandate when it refers Labour relations cases to the CCMA without conducting investigation and providing representation to public members involved in labour disputes?

This dissertation intends to address these questions and attempt to provide recommendations which may be considered to address the impasse created between Rule 25 (1) and the constitutional mandate of the SAHRC.

1.4. Research methodology and outline of chapters

Although the issue of legal representation has been dealt with extensively by our courts and other writers, this dissertation's main focus is to explore if Rule 25 encroaches and interferes with the SAHRC's constitutional mandate to take appropriate steps to redress any violation of human rights contained in the Bill of Rights.

The content analysis of dissertations of other writers, judgments, internet and newspaper articles as well as books was undertaken. A comparative survey of Canadian Human Rights Commission ("Canadian Commission) and Commission for Equality and Human Rights ("UK Commission) as it related to their operation of protecting human rights was also undertaken. In case there are glitches and gabs identified, recommendations to improve the South African system are provided.

Chapter 2 deals with the mandates of the CCMA and SAHRC. Chapter 3 deals with the impact of Rule 25 on the non-union employees. Chapter 4 focuses on comparative discussion and chapter 5 captures the analysis, findings, recommendations and concluding remarks.

2.1. Mandate, functions and processes of the CCMA

Section 23 of the Constitution grants everyone the right to fair labour practices. This right gives a security of jobs to employees⁴⁵. Section 23 was given effect to by the LRA⁴⁶. One of the purposes of the LRA is to *promote the effective resolution of labour disputes*⁴⁷ between employers and employees. The CCMA was therefore established by section 112 of the LRA as an independent institution to achieve this purpose. It is independent of the state, any other organisation, institution or political party.⁴⁸ It is also a tribunal within the scope of section 34 of the Constitution and is required to resolve disputes by the application of the law in a lawful, reasonable and procedurally fair manner⁴⁹.

The main functions of the CCMA are contained in the provisions of the LRA and are to conciliate disputes emanating from workplace,⁵⁰ arbitrate certain categories of disputes that were not resolved at the conciliation stage,⁵¹ facilitate the establishment of workplace forums and statutory councils,⁵² consider applications for accreditation and subsidy by bargaining councils and private agencies,⁵³ and provide support for essential services committee.⁵⁴

The CCMA deals with myriad of different disputes. It is therefore important to set out disputes which may be referred to CCMA for conciliation and those that may be escalated to the arbitration.

Disputes for conciliation

2.1.1. dispute concerning the interpretation or application of the provision of chapter II.⁵⁵

2.1.2. dispute about disclosure of information.⁵⁶

2.1.3. disputes about interpretation or collective agreements in instances where the agreement does not provide for dispute resolution procedure, the procedure

45. *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 ZACC para 55.

46. *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 ZACC paras 50 and 56.

47. Section 1 (d) (iv) of the LRA.

48. S113 of the LRA.

49. *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 ZACC para 112.

50. S 115 (1) (a) of the LRA.

51. S 115 (1) (b) of the LRA.

52. S 80 of the LRA.

53. S 127 of the LRA.

54. S 70 of the LRA.

55. S 9 of the LRA.

56. S 16 of the LRA.

provided is not ineffective to resolve disputes or one party frustrates the process.⁵⁷

2.1.4. disputes about the agency shop and closed shop agreements.⁵⁸

2.1.5. dispute about determinations made by the Minister in respect of proposals made statutory councils.⁵⁹

2.1.6. dispute about the interpretation or application of Parts A and C to F of chapter III.⁶⁰

2.1.7. disputes about picketing.⁶¹

2.1.8. disputes relating to essential services.⁶²

Anyone who wants to refer any of the above disputes for conciliation must do so by completing and submitting a LRA 7.11 form.⁶³ If the dispute is about dismissal, the LRA 7.11 form must be submitted within 30 days from the date of dismissal.⁶⁴ If the dispute relates to unfair labour practice, then a referral must be made within 90 days.⁶⁵ A Commissioner must be appointed to resolve the dispute within 30 days.⁶⁶ If the referral is made outside the prescribed timeframes, then a substantive application for condonation must accompany the referral.⁶⁷ In the event that no application for condonation has been filed, CCMA will have no jurisdiction.⁶⁸

Disputes for arbitration

2.1.9. dispute about disclosure of information.⁶⁹

2.1.10. dispute about organisational rights.⁷⁰

2.1.11. dispute about the interpretation or application of collective agreements.⁷¹

2.1.12. disputes about agency shop and closed shop agreement.⁷²

2.1.13. disputes about Ministerial determinations.⁷³

2.1.14. disputes about disclosure of information to workplace forums.⁷⁴

57. S 24 (2) of the LRA.

58. S 24 (6) of LRA.

59. S 44 and 45 of the LRA.

60. S 63 of the LRA.

61. S69 (8) & (10) of the LRA.

62. S 74.

63. Rule 10 of the CCMA Rules.

64. S 191 of the LRA.

65. S 191 of the LRA.

66. S 135 of the LRA.

67. 191 (2) of the LRA.

68. Du Toit *et al Labour Relations Law a comprehensive guide* (2006) 106.

69. S 16 of the LRA.

70. S 21 & S22 of the LRA.

71. S 24 (2) to (5) & S147 (1) (a) of the LRA.

72. S 24 of the LRA.

73. S 44 and S 45.

74. S 89 of the LRA.

- 2.1.15. disputes relating to unfair dismissal for conduct or capacity or where the employer has employment intolerable or where the employee is not aware of the reason for the dismissal.⁷⁵
- 2.1.16. dispute relating to unfair dismissal based on operational requirements.⁷⁶
- 2.1.17. disputes relating to unfair labour practice.⁷⁷

Anyone who wants to refer any of the above disputes for arbitration must do so by completing and submitting a LRA 7.13 form.⁷⁸

In terms of sections 115 (2A) (k), the CCMA may make rules regulating the right of any party to be represented by any person or category of persons in conciliation or arbitration proceedings, including the regulation or limitation of the right to be represented in the proceedings. On 17 March 2015, the Rules for conduct of proceedings before CCMA No. 38572 were publicised. These Rules contain Rule 25 which is the centre of this mini-dissertation. I intend to only make reference to relevant provisions of Rule 25 which this mini-dissertation seeks to challenge. The challenge is based on the fact that these provisions exclude the SAHRC as a constitutionally mandated institution to represent any person whose rights in the Bill of Rights have been violated.

Rule 25 (1) (a) provides that *[i]n conciliation proceedings a party to the dispute may appear in person or be represented only by-*

- (i) *if the party is an employer, a director or employee of that party and, in addition, if it is a close corporation, a member of that close corporation;*
- (ii) *any office bearer, official or member of that party's registered trade union or registered employers' organisation;*
- (iii) *if the party is a registered trade union, any office bearer, official or member of that trade union authorised to represent that party; or*
- (iv) *if the party is a registered employers' organisation, any office bearer or official of that party or a director or employee of an employer that is a member of that employers' organisation authorised to represent that party.*

Rule 25 (1) (b) provides that *[s]ubject to paragraph (c), in any arbitration proceedings a party to the dispute may appear in person or be represented only by-*

- (i) *a legal practitioner; or*
- (ii) *an individual entitled to represent the party at conciliation proceedings in terms of sub-rule (1) (a).*

75. S 191 (5) (a) of the LRA.

76. S 191 (12) of the LRA.

77. S 191 (5) (a) of the LRA.

78. Rule 18 of the CCMA Rules.

Rule 25 (1) (c) provides that *[i]f the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, a party is not entitled to be represented by a legal practitioner in the proceedings unless-*

- (i) *the commissioner and all other parties consent;*
- (ii) *the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-*
 - (a) *the nature of the questions of law raised by the dispute;*
 - (b) *the complexity of the dispute; and*
 - (c) *the comparative ability of the opposing parties or their representatives to deal with the dispute.*

From Rule 25 (1) (a), it is explicit that the SAHRC is not permitted to represent any person at a conciliation stage. In terms of Rule 25 (1) (b), if the SAHRC requires its employee who is not Legal Practitioner, the Commissioner cannot permit that employee to represent a party in a dispute.⁷⁹ In Rule 25 (1) (c), no Legal Practitioners or any of the SAHRC's employees can represent a party in a dispute. There is an apparent conflict between the provisions of Rule 25 and the constitutional mandate of the SAHRC which is discussed in detail below. Let me demonstrate this conflict by way of example- a member of a public is an employee at a company X and his right to fair labour practice is violated by his employer. The employee does not belong to a Trade Union. The employee decides to approach the SAHRC, whose constitutional mandate is to protect the Bill of Rights and bring proceedings in a competent tribunal (CCMA) to secure appropriate redress on behalf of that employee⁸⁰, for assistance. In case the SAHRC decides to investigate the matter and bring proceedings to CCMA within the prescribed timeframes, Rule 25 will stand in the way of the SAHRC because it excludes it from representing that employee. In *Mavundla v Vulpine Investments 9 2000 BLLR 1334* the Labour Court held that even if parties in the dispute agree on legal presentation to be permitted, the Commissioner may not depart from the express provision which excludes it. In essence, if the provisions of Rule 25 do not specify the SAHRC as a competent agent to represent parties in the proceedings of the CCMA, the Commissioner may not exercise his or her discretion to permit it. If he or she permits it despite the express provision which does not specify it, he or she would be acting *ultra vires*.

79. Van Zyl *et al* CCMA Rules (2005) 36.

80. Read S 184 of the Constitution. & S 13 (3) (b) of the SAHRC Act which empowers the SAHRC to bring proceedings in a competent tribunal on behalf of a person. CCMA is a tribunal.

2.2. Constitutional mandate of the SAHRC

The SAHRC is an institution located in chapter 9 of the Constitution hence it is popularly referred to as the chapter 9 institution. It is established by section 181 (1) (b) of the Constitution to *strengthen constitutional democracy⁸¹ in the Republic*. It is an independent institution subject only to the Constitution and the law, and is accountable to the National Assembly⁸².

The functions of the SAHRC are set out in section 184 (1) of the Constitution as follows:

- (a) promote respect for human rights and a culture of human rights;*
- (b) promote the protection, development and attainment of human rights; and*
- (c) monitor and assess the observance of human rights in the Republic.*

In section 184 (2) of the Constitution, the SAHRC has the following powers:

- (a) to investigate and report on the observance of human rights;*
- (b) to take steps to secure appropriate redress where human rights⁸³ have been violated;*
- (c) to carry out research; and*
- (d) to educate.*

The SAHRC Act is the enabling national legislation which further regulates the powers and functions of the SAHRC. These powers and functions are contained in section 13 of the SAHRC Act in detailed. However, section 13 (3) provides that *“the Commission [SAHRC] is competent-*

- (a) to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum; and*

81. My emphasis. The SAHRC strengthens democracy by protecting the Bill of Rights (S 184 of the Constitution) Bring proceedings in a competent tribunal or court (S 13 (3) (b) of the SAHRC Act. With a view to secure appropriate redress as required by S 184 (2) (b) of the Constitution.

82. S 181 (2) & (5).

83. Human rights are defined in section 1 of the SAHRC Act as “human rights contained in chapter 2 of the Constitution.

(b) to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons”.

In terms of section 15 (6) read with (7) of the SAHRC Act, the SAHRC must determine the procedures for conducting investigation and make those procedure known to the public. These procedures were referred to as the Complaints Handling Procedures (“CHP”) and publicised on 27 January 2012 in the Government gazette No. 34963. The purpose of these procedures as contained in clause 1 of the CHP is to specify, *inter alia*, the procedures to be followed when lodging, accepting, assessing, investigating and rejecting complaints. Clause 3 of the CHP grants the SAHRC jurisdiction to conduct any allegations of human rights violation. It can conduct investigation on its own initiative or after a complaint has been lodged by any person.

The SAHRC may not deal or investigate a complaint which⁸⁴:

- (a) occurred before 27 April 1994;*
- (b) is based on hearsay or rumour;*
- (c) is couched in language that is abusive, insulting, rude or disparaging;*
- (d) is the subject of a dispute before a court of law, forum or tribunal with internal dispute resolution mechanism or in which there is a judgment or finding by the court of law, forum or tribunal;*
- (e) is an anonymous complaint;*
- (f) is frivolous, misconceived, unwarranted, incomprehensible and manifestly incompatible with human rights or does not comply with the provisions of the SAHRC Act; or*
- (g) is lodged after the expiry of a period of 3 years from the date the complaint was lodged with the SAHRC subject to article 11.*

In clause 12 (8) and (9) certain complaints may be referred by the SAHRC to other institutions that can effectively deal with those complaints. To this end, The CHP makes a distinction between indirect and direct referrals⁸⁵ of complaints. An indirect referral is when the SAHRC notify and refer a Complainant to approach an institution that can best deal with a complaint. A direct referral is when the SAHRC directly refers a complaint to the appropriate institution and on a monthly basis seeks progress reports on the status of the referred complaint.

In terms of section 13 (2) (b) of the SAHRC Act, the SAHRC has the power to bring to the attention of a relevant legislature (or Parliament) concerns in respect of a proposed legislation which may be contrary to human rights or international law. This means that if the CCMA promulgates Rules which do not promote the protection of human rights as required by section 184 (1) (b) of the Constitution, then those Rules

84. See clause 4 of the CHP.

85. Clause 12 (8) and (9) of CHP.

are likely to be declared invalid in terms of section 2 of the Constitution. To this end, CCMA as an organ of state may in terms of Rule 25 be hindering the SAHRC from performing its constitutional mandate to defend the Bill of Rights. The High Court⁸⁶ reprimanded an organ of state for failing to implement the recommendations of the SAHRC. In paragraphs 16-17, the court held that the conduct of the Minister fell short of its constitutional obligation to assist the SAHRC in the exercise of its constitutional mandate.

86. In *Minister of Police v Human Rights & others* 2013 ZAGPJHC 180

CHAPTER 3: IMPACT OF RULE 25 ON THE MARGINALISED: NON-UNION EMPLOYEES

3.1. General

The Labour Law in South Africa is largely premise on unionisation and promotes collective bargaining.⁸⁷ Collective bargaining, a concept which dominates South Africa's LRA, is initiated and driven by organised labour in a form of trade unions and employers' organization.⁸⁸ The LRA recognises three agents in the collective bargaining process and these are- trade unions, employers' organisation and workplace forums.⁸⁹ The focus of this mini-dissertation is on trade union.

The right to join and participate in trade union activities⁹⁰ come with perceived benefits enjoyed by trade unions. In *NUMSA v Bader (Pty) Ltd [2003] 2 BLLR 103 (CC)*, the court remarked that the right to collective bargaining between the employers' organizations and trade unions is key to industrial relations environment.⁹¹ The benefits of belonging to a union include benefits such as holding meetings with employees outside working hours,⁹² access to employers' premises,⁹³ stop order facilities,⁹⁴ access to information,⁹⁵ and representing employees in conciliation and arbitration proceedings before CCMA without any limitation.⁹⁶ It should be stated in passing, though, that with regard to non-unionised employees, which are vulnerable within the context of unionised workplace employees, Government only plays an interventionist role from time to time as the need arise by introducing amendments to current Labour Laws in order to protect individual employees against possible abuse from employers.⁹⁷ Section 198 (A) of the LRA was introduced to protect employees of temporary employment service. These are employees who are usually employed for a period of 3 months.⁹⁸ Section 198 (B) protects employees who are employed on fixed term contract. Section 198 (C) protects part time employees. A Part time employee in terms of Section 198 (C) (1) is defined as an *employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full time employee.*

87. S 23 of the Constitution. See also the preamble of the LRA & S 1 (d) (i) (ii).

88. See chapter III of the LRA.

89. Grogan (2014) 370.

90. S 23 (2) of the Constitution.

91. Page 111 para 13.

92. S 12 (2) of the LRA.

93. S 12 (1) of the LRA.

94. S 25 (1) of the LRA.

95. S 16 (2) of the LRA.

96. Rule 25 of the CCMA Rules.

97. This could be seen by the introduction of S 198 (A), S 198 (B) and S 198 (C) of LRA.

98. S 198 (A) (1) of the LRA.

The question that arises from the above is whether the LRA promotes unionisation and collective bargaining at the expense of non-unionisation? The case of *Casual Workers' Advice Office and others v CCMA and others case no. J645/16* unreported does somehow demonstrate this issue. The Casual Workers' Advice Office (CWAO) challenged Rule 25 on the basis that it prejudiced non-trade union employees on the ground that Rule 25 does not allow non-trade union employees to be represented by community advice centres. They further amplified their argument by stating that 70% of employees in South Africa do not belong to trade unions. They rely on statistics released by Statistics South Africa to support their submission. The affidavits⁹⁹ filed in this matter reveal that non-union employees find it difficult to present their cases effectively during the CCMA proceeding. They are also not able to understand laws which are often referred to on issues discussed during the proceedings. Section 39 of the Constitution provides that when interpreting the Bill of Rights, foreign law and international law must be considered. In Canada there is Labour Law which regulates unionised workplaces and Employment Law which regulates non-unionised workplaces.¹⁰⁰ Trade union members are entitled to be represented by their trade unions while non-union members are entitled to be represented by anyone including Legal Practitioners [and the Canadian Commission].¹⁰¹

Despite the amendments to the LRA which seek to protect vulnerable workers such as non-unionised members,¹⁰² Rule 25 still remains a hindrance for non-union employees who seek the SAHRC to represent them in the CCMA. By the end of March 2014, members of the public lodged 527 labour relations complaints to the SAHRC.¹⁰³ This is an indication that public members who do not belong to trade unions require the SAHRC to protect their rights by bringing proceedings at CCMA on their behalf as required by section 13 (3) (b) of the SAHRC Act. This is an obligation the Constitution imposes on the SAHRC in terms of section 184. Section 2 of the Constitution requires any law to be declared invalid on the basis that is not consistent with the Constitution.

As stated above, by virtue of Rule 25 non-union employees are left without representation. They cannot be represented by office bearers or officials of unions because they do not belong to registered unions by virtue of section 200 (2) of the LRA¹⁰⁴. Section 200 (2) provides that *"a registered trade union or registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings"*. Further, non-union

99. <http://www.cwao.org.za/downloads/news/Affidavits%20of%20Labour%20Court%20challenge%20to%20CCMA%20Rule%2025.pdf>. Accessed 07 June 2017.

100. Employment and Labour Law in Canada: http://www.sherrardkuzz.com/pdf/Sherrard-Employment_and_Labour.pdf.

101. *Id*

102. For example S 198 (A), S 198 (B) and S 198 (C).

103. SAHRC Trend Analysis Report p 15: www.sahrc.org.za.

104. See Mark Meyerowitz *which Trade Unions are allowed to represent employees at the CCMA?*: <http://www.labourguide.co.za/most-recent/1815-which-trade-unions-are-allowed-to-represent-employees-at-the-ccma> [Accessed on 08 June 2017].

employees cannot be represented by practicing Legal Practitioners because most of them cannot afford the fees. The SAHRC provides legal services free of charge and could act on behalf of the non-union employees. It is so unfortunate that when they approach the SAHRC for assistance, they are told to either go to CCMA or relevant Bargaining Council by the SAHRC¹⁰⁵. This is an abdication of duty on the part of the SAHRC as it is required to protect the Bill of Rights and bring proceedings on behalf of these people to the CCMA.

The Affidavits¹⁰⁶ filed in the *Casual Workers' Advice Office and Others v CCMA* and others stated above, reveal that non-union employees find it very difficult to present their case in the CCMA. They are also not able to understand the law referred to on issues discussed during the proceedings at CCMA.

John Grogan¹⁰⁷, states that *“representation, even by lay persons, serves two main purposes- it gives accused employees moral support and ensures that the scales are not unfairly tipped or seen to be unfairly tipped against the employees. The presence of a representative also ensures that justice is seen to be done”*. The presence of the SAHRC on behalf of the non-union employees will ensure that their right to fair practice is vindicated and justice will be seen to be done.

3.2. SAHRC – the voice of the marginalised

I have categorised non-union employees as marginalised for two reasons. The first is because they are not skilled and experience to understand the law when it is quoted in the CCMA proceedings, and the second is because they neither can afford legal practitioners' fees nor be represented by any person of their choice¹⁰⁸.

In the Mail and Guardian newspaper article¹⁰⁹, the Deputy Minister of Justice was quoted as having accused the SAHRC of failing to fulfil its mandate of protecting the human rights of the poor. He was further quoted as having said that *“the original idea was that the commission would give service to marginalised people to help them exercise their rights. Only a small percentage of their budget is being utilised for helping the poor.”*

In its Trend Analysis report¹¹⁰, the SAHRC states that Complainants who approach it with cases relating to labour and discrimination in the workplace are referred to the

105. SAHRC Trend Analysis Report p13: www.sahrc.org.za.

106. <http://www.cwao.org.za/downloads/news/Affidavits%20of%20Labour%20Court%20challenge%20to%20CCMA%20Rule%2025.pdf> [Accessed on 07 June 2017].

107. John Grogan “Dismissal, Discrimination and Unfair Labour Practices (2014) 342.

108. <http://www.cwao.org.za/downloads/news/Affidavits%20of%20Labour%20Court%20challenge%20to%20CCMA%20Rule%2025.pdf> [Accessed on 07 June 2017].

109. Mail & Guardian (24 April 2007): <https://mg.co.za/article/2007-04-24-sahrc-accused-of-deserting-the-poor> [Accessed on 08 June 2017].

110. SAHRC Trend Analysis Report p13: www.sahrc.org.za.

CCMA or relevant Bargaining Council for assistance. In other words, the SAHRC is of the view that it is not mandated to deal with such cases.

The SAHRC working together with the Danish Institute of Human Rights, released a report entitled “Human Rights and Business Country Guide South Africa March 2015”¹¹¹. At page 22 of this report, it is recorded that the SAHRC investigated 13% of the discrimination and hate speech cases emanating from the workplace. This report records something completely different from the SAHRC Trend Analysis Report.

In the Deputy Minister’ submission, the original intention for establishing the SAHRC was to ensure that the human rights of the poor and marginalised people contained in the Bill of Rights are protected. This is further corroborated by section 184 (2) (b) of the Constitution read with section 13 (3) (b) of the SAHRC Act. The essence of these two provisions is that where human rights have been found violated, the SAHRC must institute proceedings either in court or tribunal [like the CCMA] to secure appropriate remedy.

111. <https://www.sahrc.org.za/home/21/files/Guide%20Final%20final.pdf%20March%202019.pdf> [Accessed on 08 June 2017]. The SAHRC also released a media statement relating to this report- <http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/314-sahrc-launches-human-rights-and-business-country-guide-to-sensitise-business-to-key-human-rights-shortcomings-in-sa> [Accessed 08 June 2017].

CHAPTER 4: COMPARATIVE DISCUSSION

4.1. General

South Africa does not exist in isolation from other international countries. That is why South Africa has a foreign international policy framework which requires that she always communicates with other countries to strengthen her democracy. While South Africa was in the process of transition from the apartheid era to a democratic state, the former President Nelson Mandela said:

*South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world with the community of nations....*¹¹²

This statement by the former President asserts two important goals. The first goal is that South Africa must regard human rights as her core concern not only domestically but also internationally. The second goal is that she must be part of the international community¹¹³ and engage with those who are committed to promoting human rights culture.

Section 39 of the Constitution requires that when the Bill of Rights is interpreted, international law and foreign law must be considered. In order to strengthen democracy, South Africa must constantly consider her discourse on human rights in comparison with other countries.

Like South African, the Labour Relations Law in Canada and United Kingdom were transformed to improve their efficiency and encourage the social justice element. In South Africa, the Labour Relations Law was a compromise reached by labour, business and Government and employees were granted the rights to freedom of association and join trade unions.¹¹⁴ In Canada, the Supreme Court of Canada in *Health Services and Support- Facilities Subsector Bargaining Association v British Columbia 2007 SCC 27* remarked that the labour law in Canada was as a result of a compromise adopted to promote a peaceful labour relation and also grant employees the right to organise collectively. In the United Kingdom, the introduction of the *fairness at work* white paper¹¹⁵ was Government's programme to transform the labour law with a view to grant employees the right to collective bargaining and the right to

112.112 *National Commissioner of South African Police Service v South African Human Rights Litigation Centre & another* 2014 ZACC 30 para 1.

113. South Africa is currently a member of the International Labour Organization- See S 1 (b) of the LRA.

114. Du Toit *et al Labour Relations Law a comprehensive guide* 2006. See also S 18 & S 23 (1) of the Constitution.

115. <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file24436>.

“accompaniment”¹¹⁶. South African labour law has transcended from an adversarial dispute resolution system which was characterised by legalistic processes, legal technicalities and delays largely caused by legal practitioners.¹¹⁷ In the *Netherburn Engineering cc/ta Netherburn Ceramics v Mudau 2009 4 BLLR 299 (LCA)*, at paragraphs 44-46 the court attributed the cause of the delays in resolving labour disputes speedily and cheaply to legal practitioners.¹¹⁸ In Canada, there was an outcry against the delay caused in resolving labour disputes which was attributed to busy schedule of Legal Practitioners. In *Dayco (Canada) limited v National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) 1993 2 S.C.R 230*¹¹⁹ the court remarked that labour disputes were emotive in nature and consequently there was a need to resolve these disputes quickly, which was not happening at the time. The *fairness at work* white papers in the United Kingdom was also aimed at reducing hostility in the dispute resolution, improving speedy resolution and encouraging collective bargaining¹²⁰.

The SAHRC as a state institution¹²¹ mandated to ensure that South Africa comply with international and regional instruments,¹²² must be part of international structures that seek to enhance human right protection and human rights discourse. In terms of section 13 (2) (b) of the SAHRC Act, if the SAHRC is of the opinion that any proposed legislation might be contrary to the Bill of Rights or international instruments, the SAHRC must bring that to the attention of parliament. Since CCMA Rules are a subordinate legislation, it follows that if the Rules are not consistent with the Constitution, parliament must be notified of this inconsistency.

It is therefore on the above basis that a comparative discussion is undertaken to ascertain how other human rights institution exercise their protection mandate of human rights. The discussion focuses on the Canadian Commission and the UK Commission. The SAHRC, Canadian and UK Commissions are established by different legislations in their countries. They exercise their human rights protection mandate differently in their respective countries. However, on the international circle, uniform normative principles through which human rights institutions’ effectiveness and efficiency could be assessed were adopted. In 1991, a workshop on the Promotion and Protection of Human Rights was held in Paris. The workshop was attended by the United Nation, different countries and other stakeholders. In that workshop, principles¹²³ were developed to guide the work and structure of the National

116. The white paper ultimately led to the introduction of the Employment Rights Act of 1999 and Employment Act of 2008.

117. Du Toit et al *Labour Relations Law a comprehensive guide* (1996) 3.

118. See also (1995) 16 ILJ 319 Explanatory Memorandum on the Labour Relations Bill.

119. Para 93.

120. Right to be represented by Trade union officials and co-worker was introduced in the *Employment Relations Act of 1999* and Legal Practitioners were excluded.

121. S 181 (1) of the Constitution.

122. S 13 (1) (b) (vi) of the SAHRC Act.

123. Which are the following:

Human Rights Institutions (“NHRIs”). These principles came to be known as “Paris Principles” because of the location and country in which they were developed. Recommendations were made to the United Nation to adopt these principles. Consequently, in 1993, the United Nation’s General Assembly adopted these principles which are now referred to as the Paris Principles¹²⁴. To be able to assess the efficiency of the NHRI, the Paris Principles are used as criteria.

The SAHRC, Canadian Commission and UK Commission are recognised as NHRI under the Paris Principles. They were assessed base on the Paris Principles and granted an “A” status.¹²⁵ An “A” status under the Paris Principles means that the NHRI could appear before the United Nation’s Committees and make submissions on human rights issues¹²⁶. The NHRIs are expected to act as guardians, experts and teachers of human rights especially for the vulnerable groups. In South Africa, the SAHRC should always act in the best interest of the vulnerable groups whose rights are alleged to have been violated¹²⁷.

It is therefore important that this mini-dissertation makes a comparative analysis of the SAHRC [as the NHRI] with that of other NHRIs in other countries. This mini-dissertation compares the SAHRC with the Canadian Commission and UK Commission.

4.2. Comparison between Canadian Commission and SAHRC

The Canadian Commission was established by section 26 (1) of the Canadian Human Rights Act (“CHRA”)¹²⁸. The SAHRC was established by section 181 (1) (b) of the Constitution. The powers and functions of the Canadian Commission are defined in section 27 of the CHRA. The powers and functions of the SAHRC are defined in the Constitution and further regulated by the SAHRC Act.

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- (a) The NHRI shall have a broad mandate which shall be defined in the Constitution and legislation of the particular country.
 - (b) The NHRI shall be competent to make recommendations, opinions or proposals to the Government or Parliament with a view to strengthen human rights promotion and protection.
 - (c) The NHRI shall be competent to contribute to any report relating to human rights matters that the Country must submit to the United Nation’s bodies and Committees.
 - (d) The NHRI shall be competent to conduct research and develop educational programmes on human rights.
 - (e) The NHRI shall cooperate with other NHRIs of other Countries to share ideas in order to strengthen human rights culture.

124. “Implementing Human Rights”, by Morten Kjaerum- <http://www.nhri.net/pdf/NHRI-Implementing%20human%20rights.pdf>. <http://www.un.org/documents/ga/res/48/a48r134.htm> [Accessed on 08 March 2017].

125. <http://www.ohchr.org/Documents/Countries/NHRI/ChartStatusNHRIs.pdf>. [Accessed on 02/11/2017]

126. SAHRC’s submission on *Legal Practice Bill* para 5.

127. *Id*, para 2.

128. <http://laws-lois.justice.gc.ca/PDF/H-6.pdf> [Accessed on 10 March 2017].

In terms of section 27 (2) of the CHRA, the Canadian Commission may develop guidelines¹²⁹ which set out the extent of the applicability of the CHRA. In terms of section 15 (6) of the SAHRC Act, the SAHRC may determine the procedures (which are referred to as CHP above) on how to conduct its investigation. In terms of the guidelines, the Canadian Commission is empowered to deal with discrimination complaints related to federally regulated employers¹³⁰. In terms of clause 3 (a) of the CHP, the SAHRC must investigate any alleged violation of a fundamental rights (which are defined in clause of the procedures as rights contained in section 9 to 35 of the Constitution). Section 9 protects affirmative action in the workplace and prohibits discrimination.¹³¹

The CHRA makes it illegal for federally regulated employers to discriminate against people or employees on the basis of race, colour, religion, age, sex, sexual orientation et cetera. These types of complaints can be lodged with the Canadian Commission and be investigated as set out in the guidelines. In *Canada (Human Rights Commission) v Air Canada*, the nub of the dispute was that the Air Canada discriminated against female flight attendants on the basis that they were paid less for work of equal value than male pilots and mechanical personnel. One of the issues the court had to determine was whether the Canadian Commission could proceed with its investigation of the matter. The court held that the Canadian Commission could proceed with its investigation. The South African Constitution read with the EEA makes it unlawful to discriminate anyone in the workplace yet the SAHRC asserts that it is not mandated to deal with cases relating to discrimination in the workplace.¹³² This is despite of its constitutional obligation to protect the rights entrenched in the Bill of Rights including the right not to be discriminated against. Once its investigation is concluded and there is merit on the complaint, the Canadian Commission may refer the complaint to the Canadian Human Rights Tribunal (Tribunal) for hearing (Page 8 of the guidelines). The SAHRC asserts in its Trend Analysis Report¹³³ that it is not mandated to deal with these cases and it refers them to the CCMA without conducting its investigation.

Additionally, the Canadian Commission must also ensure that employers comply with the [Canadian] Employment Equity Act¹³⁴. In South Africa, this function is allocated to a Government Department of Labour. The Canadian Commission can appear before the Tribunal and represent parties in cases of public interests (page 13 of the guidelines) without any hindrance. Rule 25 stands on the way of the SAHRC which is

129. http://www.chrc-ccdp.gc.ca/sites/default/files/chra_guide_lcdp-eng.pdf [Accessed on 10 March 2017].

130. Federally regulated employers are described at page 18 of the guidelines and are amongst others- federal departments, agencies and Crown corporations, chartered banks, airlines, television and radio stations, interprovincial transportation companies like buses and airline that travel between provinces.

131. Read also S 5 of the EEA.

132. SAHRC Trends Analysis Report p 13: www.sahrc.org.za.

133. *Id.*

134. <http://www.chrc-ccdp.gc.ca/eng/content/about-us> [Accessed on 16 March 2017].

mandated to bring proceedings in a competent tribunal (CCMA) to secure appropriate redress in case of a violation of a right in the Constitution.¹³⁵

In Canada, there is Labour Law which regulates unionised workplaces in which the majority union enters into a collective agreement with the employer. The purpose of the collective agreement is to set out the rights of unionised employees and how their disputes would be resolved. The union becomes the only competent body to represent unionised employees and no other. There is also Employment Law which regulates non-unionised workplaces¹³⁶. In terms of the Employment Law non-unionised employees may be represented by anyone including Legal Practitioners¹³⁷ and [Canadian Commission by virtue of the word “anyone”]. In South Africa, individual labour law and collective labour law are infused in one piece of legislation (LRA).¹³⁸ The SAHRC, in terms of Rule 25, cannot represent non-unionised employees at the CCMA.

4.3. Comparison between UK Commission and the SAHRC

Like the SAHRC, the UK Commission is responsible, *inter alia*, to protect each individual’s human rights and to monitor the effectiveness of equality and human rights legislations¹³⁹. The UK Commission was established by section 1 of the Equality Act 2006. As stated above, the SAHRC was established by the section 181 (1) (b) of the Constitution.

In the United Kingdom, there is an Advisory, Conciliation and Arbitration Service (ACAS) which is an independent institution that provides advice and conciliation services relating to employment disputes between employers and employees.¹⁴⁰ The ACAS could be likened to the CCMA in South Africa. Anyone [Including Legal Practitioners and the UK Commission) may represent parties in the ACAS.¹⁴¹ In South Africa the SAHRC may be prevented by Rule 25 from representing parties in the CCMA.

In United Kingdom, before a formal employment dispute is lodged with the Employment Tribunal, which may be likened to Labour Court in South Africa, a claim must be referred to ACAS for conciliation. Similarly, before a dispute is lodged with the Labour Court, the dispute must first be referred to the CCMA.

135. S 13 (3) (b) of the SAHRC Act.

136. Micheal Sherrard *Employment and Labour Law in Canada*: http://www.sherrardkuzz.com/pdf/Sherrard-Employment_and_Labour.pdf. Accessed on 14 March 2017.

137. “The future of Labour Arbitration” pages 5-9- http://www.cba.org/cba/cle/PDF/adm10_pink_paper.pdf [Accessed 10 March 2017]

138. Du Toit *et al Labour Relations Law a comprehensive guide* (2006) p 334.

139. S 3, S 8 and S 9 of the *Equality Act 2006*- www.legislation.gov.uk/ukpga/2006/3. Accessed on 07 June 2017.

140. See www.acas.org.uk. Accessed 07 June 2017.

141. See <http://www.acas.org.uk/media/pdf/o/g/Conciliation-Explained-Acas.pdf>. Accessed 07 June 2017.

Both South Africa and United Kingdom are member states of the International Labour Organization.¹⁴² Furthermore, they both subscribe to the Paris Principles and both have “A” status.¹⁴³

4.4. Analysis of the comparative discussion

The UK Commission, Canadian Commission and SAHRC subscribe to the Paris Principles and have been granted “A” status as champion of the protection of human rights in their respective countries. While the UK Commission may represent parties in a labour dispute before ACAS, the SAHRC may not because of the provisions of Rule 25. In terms of the Employment Law in Canada, the Canadian Commission may represent non-unionised employees. In Canada, there are two legislations¹⁴⁴ which regulate unionised employees and non-unionised employees respectively. In South Africa, individual labour law and collective bargaining are infused in the LRA. Consequently, the SAHRC may not be permitted to represent non-unionised employees by virtue of Rule 25.

This raises a question whether Rule 25 may be declared invalid on the basis that it does not permit the SAHRC from representing parties in a dispute before the CCMA? This question is answered in the next chapter.

142. See <http://www.ilo.org/public/english/standards/relm/country.htm>. Accessed on 05 November 2017.

143. See <http://www.ohchr.org/Documents/Countries/NHRI/ChartStatusNHRIs.pdf>. 05 November 2017.

144. Labour Law and Employment Law.

5.1. Analysis

This dissertation is mainly concerned with Rule 25 to the extent that it limits representation by the SAHRC as the competent institution entitled to represent parties in a dispute before CCMA. The SAHRC is entitled to represent parties for two main reasons. Firstly, it is constitutional mandated by virtue of section 184 to protect human rights which are entrenched in the Bill of Rights including the right to fair labour practice. Secondly, by virtue of section 184 (2) (b) of the Constitution read with section 13 (3) (b) of the SAHRC Act, it is obliged to institute proceedings in a competent tribunal in order to secure appropriate redress for any right violated. CCMA is a tribunal¹⁴⁵ and the SAHRC is entitled to institute proceedings and seek appropriate redress.

As an organ of state, CCMA has a constitutional obligation to assist (and not to interfere or hinder) the SAHRC to effectively execute its mandate¹⁴⁶ of instituting proceedings at CCMA to protect labour relations rights. CCMA cannot in its Rule 25 interfere with the mandate of the SAHRC because it is only required in terms of section 181 (3) and (4) to desist from doing so.

Unlike the SAHRC which is hindered by Rule 25, the Canadian Commission and UK Commission effectively execute their mandate including representing labour relations rights in employment tribunals similar to CCMA.

Rule 25 in its current form, hinders the SAHRC from exercising and fulfilling its constitutional mandate for the following reasons:

- (i) The Rule does not expressly specify the SAHRC as a competent institution that can represent parties in disputes before CCMA. Disputes in the CCMA proceedings implicate either the right to fair labour practice or the right not to be discriminated against. These rights are contained in the Bill of Rights and the SAHRC is mandated to protect these rights. When either of these rights is alleged to have been violated, it is the obligation of the SAHRC to take steps to secure redress as required by section 184 (2) (b) of the Constitution. In order to secure redress, the SAHRC must institute proceedings at the CCMA on behalf of affected employee as required by section 13 (3) (b) of the SAHRC Act. Because Rule 25 excludes the SAHRC from representing parties in a dispute before CCMA, the Rule interferes with the constitutional mandate of the SAHRC.

145. Sidumo fn 44 *supra* para 86. .

146. See *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016] ZACC para 50.

- (ii) The Labour Court order in the CWAO's case cited above authorises the Commissioner to exercise discretion to allow any person to represent a party on good cause shown. The essence of this order on the SAHRC is that before the SAHRC may be permitted to represent a party, it will have to show good cause. For this reason, the SAHRC's mandate to represent parties is at the mercy of the Commissioner's discretion. The SAHRC's mandate cannot be subjected to the discretion of the Commissioner. To do so will be contrary section 181 (4) of the Constitution read with section 4 (3) of the SAHRC Act. The SAHRC's obligation to represent affected non-union employees whose rights are violated is automatic in the same way as a Trade Union or Employer's organisation. Like the Canadian Commission and UK Commission, the SAHRC can investigate a complaint and bring proceedings to CCMA in order to secure appropriate redress without the Commissioner exercising discretion.
- (iii) The exclusion of the SAHRC in Rule 25 to represent non-union employees, whose rights are violated, perpetuates vulnerability on the part of those employees. As the chapter 9 institution created by the Constitution, the SAHRC is the voice of the non-union employees, poor and marginalised whose right to fair labour practice are threatened or violated. Chapter 9 institutions were created to be the voice of the poor (*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC at paragraphs 50-52).

As stated in its Trend analysis report, the SAHRC indicated that it refers discrimination and labour relations cases to CCMA and relevant Bargaining Council. The SAHRC stated that these types of cases are incorrectly referred to it (*See footnote 9, page 12, paragraph 1 of the SAHRC Trend analysis report*). The SAHRC is of the view that the appropriate institutions to deal with these cases are CCMA and relevant Bargaining Council. It is correct that these institutions have jurisdictions over these cases. However, it is incorrect for the SAHRC to simply refer these cases to CCMA and relevant Bargaining Council without conducting an investigation of possible human rights violation. Section 3 (a) of the SAHRC Act requires the SAHRC to investigate any alleged human rights violation and after completing its investigation take appropriate steps to secure appropriate redress. The SAHRC Act or its CHP cannot in anyway limit the constitutional functions and powers of the SAHRC (*See EFF judgment supra especially paragraph 58*).

The SAHRC derives its mandate from the Constitution. The Constitution imposes an obligation on the SAHRC to protect all human rights contained in the Bill of Rights. Labour relations and discrimination cases fall within the Bill of Rights. By end of March 2014, the SAHRC received 527 cases relating to labour relations and the SAHRC

never investigated and assisted the Complainants. It passively referred those cases to the CCMA. The SAHRC was supposed to play an active role of investigating those cases and institute proceedings on behalf of the Complainants at the CCMA in order to secure appropriate redress as required by section 184 (2) of the Constitution read with section 13 (3) (b) of the SAHRC Act.

Section 2 of the Constitution provides that *the obligations imposed by it must be fulfilled*. The mandate of the SAHRC is an obligation which the SAHRC must fulfil. By referring those 527 cases to CCMA without investigating and assisting the Complainants to secure appropriate redress at the CCMA, the SAHRC has failed in its obligation in that regard. As the Deputy Minister of Justice stated, the original intention of the SAHRC was to provide services to the poor and marginalised so that they can enjoy their human rights which are contained in the Bill of Rights.

The SAHRC has therefore abdicated its constitutional mandate by its failure to investigate, institute proceedings at CCMA with a view to secure appropriate redress on behalf of those 527 Complainants.

5.2. Findings

In terms of Rule 25, the SAHRC does not enjoy the same status accorded to the Trade Unions or Employers' organisations to represent parties in disputes before CCMA. There is therefore a need to redefine Rule 25 in order to accord the SAHRC the same status enjoyed by Trade Unions and Employers' organisation. The SAHRC is mandated and has an obligation to institute proceedings at CCMA and secure redress on behalf of employees whose fundamental right to fair labour are threatened or violated. This obligation cannot be limited by section 36 or Rule 25. It is an obligation imposed by the supreme law of South Africa and must be fulfilled.

This dissertation finds that Rule 25 encroaches on the constitutional mandate of the SAHRC in that it excludes the SAHRC as a competent institution to represent parties in the proceedings of the CCMA. The SAHRC is supposed to be the voice of the non-union employees and the defender of the right to fair labour practice in the CCMA.

By referring labour relations cases to CCMA without investigating any possible human rights violation and instituting proceedings at the CCMA where there is a violation, the SAHRC has abdicated its obligation imposed by the Constitution. The SAHRC must not be selective on what types of cases it will investigate. As long as the case implicates any of the rights contained in the Bill of Rights, the SAHRC is bound to investigate and secure appropriate redress on behalf of Complainants.

5.3. Recommendations

When the Legal Practice Bill omitted to specify the SAHRC as a competent institution to represent public members in the court of law, the SAHRC made submissions to Parliament. In its submissions, the SAHRC indicated that it is constitutionally mandated to protect human rights by instituting proceedings in the court of law and secure an appropriate remedy on behalf of public members to vindicate their rights¹⁴⁷.

This dissertation recommends that the SAHRC must make submissions to the CCMA with a view to ensure that the SAHRC is specifically mentioned as a competent institution to represent parties in the CCMA. Further, the SAHRC must be accorded the same status granted to Trade Unions and Employers' organisation whose right to represent parties is not subjected to the discretion of the Commissioner.

CCMA can make any Rules in terms of section 115 (2A) of the LRA. The purpose of these Rules must ensure the effectiveness of the CCMA proceedings. Like the Malaysian and Australian bars, CCMA may make Rules which must be adhered to by the relevant person who represent parties in the disputes.

5.4. Conclusion

Rule 25 regulates representation in the proceedings of the CCMA. It expressly specifies who can represent a party in a dispute at the conciliation and arbitration proceedings. If the party is the employer, only the director or employee can represent the employer. If the party is a close corporation, only the member of that close corporation. In a case of the party who is a member of a union, only an official or office bearer or member of that union. In a case of the party who is a member of employer's organisation, only an official, office bearer, director or employee of that organisation. Legal practitioners can only represent a party in arbitration other than arbitration for misconduct or incapacity. Non-union employees are left with a representation.

The SAHRC is constitutionally mandated to protect human rights entrenched in the Bill of Rights. Section 23 of the Constitution relates to labour rights which are adjudicated by CCMA by virtue of the LRA. Cases of discrimination in a workplace in terms of section 9 (2) of the Constitution are also adjudicated by the CCMA by virtue of the EEA. These rights are contained in the Bill of Rights and the SAHRC is competent and entitled to protect these rights. Section 184 (2) (b) of the Constitution read with section 13 (3) (b) of the SAHRC requires the SAHRC to institute proceedings in a tribunal in order to secure appropriate redress on behalf of a party in a dispute whose section 23 or section 9 (2) rights are threatened or violated. CCMA is a tribunal as per Sidumo's case *supra*. Consequently, the SAHRC can bring proceedings at the CCMA on behalf of a party in a dispute relating to labour rights or discrimination in a workplace. The

147. See fn 8 above.

mandate of the SAHRC is an obligation in terms of section 2 of the Constitution that must be fulfilled. CCMA, as an organ of state, is obliged by section 181 (4) of the Constitution read with section 4 (3) of the SAHRC Act not to interfere or hinder the SAHRC in executing its mandate including instituting proceedings at CCMA on behalf of a party and represent that party in order to secure appropriate redress.

In its trend analysis, the SAHRC indicated that it does not deal with the labour relations rights and discrimination in a workplace cases. However, in its report compiled in collaboration with the Danish Institute of Human Rights, the SAHRC indicated that it investigated 13% of discrimination and hate speech cases arising from the workplace. It is unclear why the SAHRC in trend analysis report is of the view that it cannot investigate labour relations and discrimination cases in a workplace. These cases implicates human rights entrenched in the Bill of Rights. And it is these rights that the SAHRC must investigate and institute proceedings in the CCMA in order to secure appropriate redress. The SAHRC is supposed to be the voice of public members especially non-union employees whose rights are violated by employers. The SAHRC Act and CHP are subordinate legislation to the Constitution which established the SAHRC and mandated it to protect human rights. These subordinate legislations are inconsistent and invalid if they “water-down” or nullify the constitutional mandate of the SAHRC (*the authority for this is the EEF and DA Constitutional Court Judgment supra*). To this end, I submit that the SAHRC abdicates its constitutional mandate if it continues to refer these cases to CCMA without conducting investigation and assisting a party whose rights are threatened or violated.

I also submit that Rule 25 encroaches on the constitutional mandate of the SAHRC to the extent that it hinders it from representing parties to disputes before CCMA. The Rule does not mention the SAHRC as a competent agent or institution to represent parties in dispute before the CCMA. In *Mavundla v Vulpine Investments 9 2000 BLLR 1334* the Labour Court held that even if parties in the dispute agree on legal presentation to be permitted, the Commissioner may not depart from the express provision which excludes it. In essence, if the provisions of Rule 25 do not specify the SAHRC as a competent agent to represent parties in the proceedings of the CCMA, the Commissioner may not exercise his or her discretion to permit it. If he or she permits it despite the express provision which does not specify it, he or she would be acting *ultra vires*.

It is my submission that the Rule must accord the same status to the SAHRC as accorded to trade unions and employers’ organisations in respect of representation of parties. This is so because the Constitution imposes an obligation on the SAHRC to take steps in order secure appropriate redress to rights violated. To be able to secure this redress, the SAHRC must make referral of cases relating to labour relations to the CCMA as mandated by section 13 (3) (b) of the SAHRC Act.

If the CCMA prevents the SAHRC from exercising its constitutional mandate it would be acting contrary to the Rule of Law. Section 2 of the Constitution provides that any conduct that is inconsistent with the Constitution must be declared invalid.

In light of the above, it is submitted that the provisions of Rule 25 are inconsistent with the constitutional mandate of the SAHRC. For this reason, Rule 25 must be amended to cater for the SAHRC as a competent institution to represent parties in the labour dispute before CCMA.

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