

# Reforming the South African Social Security Adjudication System: Innovative Experiences from South African Non-Social Security Jurisdictions

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## Abstract

There is currently no uniform social security dispute resolution system in South Africa due to the piecemeal fashion in which schemes were established or protection against individual risks regulated. The result is that each statute provides for its own dispute resolution institution(s) and processes. There are also various gaps and challenges in the current social security dispute resolution systems, some of these relating to the uncoordinated and fragmented nature of the system; inaccessibility of some social security institutions; inappropriateness of some current appeal institutions; the lack of a systematic approach in establishing appeal institutions; a limited scope of jurisdiction and powers of adjudication institutions; inconsistencies in review and/or appeal provisions in various laws; an unavailability of alternative dispute resolution procedures; and an absence of institutional independence of adjudication institutions or forums. The system is therefore in need of reform. In developing an appropriate system, much can be learned from innovative experiences in comparative South African non-social security jurisdictions on the establishment of effective and efficient dispute resolution frameworks. Dispute resolution systems in the labour relations, business competition regulation and consumer protection jurisdictions have been established to realise the constitutional rights of their users (especially the rights of access to justice, to a fair trial and to just administrative action). They thus provide a benchmark for the development of the South African social security dispute resolution system.

## Keywords

Access to justice; social security; adjudication; dispute resolution; review; reconsideration; appeal; hearing; jurisdiction; fairness.

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## 1 Introduction

The South African social security adjudication system is in dire need of reform. This is due to the various challenges bedevilling it. In reforming the adjudication system, much can be learned from innovative experiences in comparative jurisdictions on the establishment of effective and efficient dispute resolution frameworks. This article seeks to analyse the dispute resolution systems in some key comparative South African jurisdictions. Selected dispute resolution systems investigated are the labour relations system;<sup>1</sup> the business competition regulation jurisdiction;<sup>2</sup> and the consumer protection jurisdiction.<sup>3</sup> The institutions, mechanisms and procedures in these jurisdictions, established to resolve disputes that may arise, are reviewed to provide a possible benchmark for comparison with the current social security dispute resolution framework.

These institutions and their procedures have been established to realise the constitutional rights of their users (especially the rights of access to justice and to a fair trial). They therefore seek to comply with the constitutional requirements of the rights. They are thus examined to ascertain their effectiveness in providing access to justice for their users. Such mechanisms and procedures could provide guidelines for the development of the social security dispute resolution system.

## 2 Right of access to justice and related rights

The South African social security adjudication system seeks to realise mainly the constitutional rights of access to courts and to social security.<sup>4</sup> In addition, since some aspects of social security are administered by public administrative institutions, they are bound to comply with the right to just administrative action. This implies that the social security dispute

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<sup>1</sup> This consists of the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court and the Labour Appeal Court established by the *Labour Relations Act* 66 of 1995 (LRA).

<sup>2</sup> Involving the Competition Commission, the Competition Tribunal and the Competition Appeal Court established in terms of the *Competition Act* 89 of 1998.

<sup>3</sup> Made up of the National Credit Regulator and the National Consumer Tribunal established in terms of the *National Credit Act* 34 of 2005.

<sup>4</sup> Section 34 of the *Constitution of the Republic of South Africa*, 1996 states that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". S 27(1)(c) of the *Constitution* states that "everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance".

resolution system must fully give effect to these rights as required by the *Constitution*; as well as to other rights having a bearing on these two rights (such as the rights to equality and human dignity).

Section 34 of the *Constitution* seeks to ensure access to the institutions and mechanisms to resolve disputes. The right has three components.<sup>5</sup> In the first instance, it guarantees everyone who has a dispute the right to be able to bring that dispute to a court or tribunal to seek redress (the right to access to justice). This ensures protection against actions by the State and other persons which deny access to courts and other forums; and the elimination of obstacles in the way of access to courts. It requires that accessibility to the adjudication institutions must be ensured, meaning that everyone who has a dispute must be able to bring a dispute to a court or tribunal to seek redress.<sup>6</sup> Accessibility is promoted through aspects such as the geographic or physical location of an institution; the absence of procedural hurdles in the submission of disputes;<sup>7</sup> the hearing venues and modalities; the education of claimants on the available avenues for redress;<sup>8</sup> the language(s) utilised during proceedings; the friendliness of

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<sup>5</sup> Currie and De Waal *Bill of Rights Handbook* 704.

<sup>6</sup> See Currie and De Waal *Bill of Rights Handbook*; DOJ&CD *HIV/AIDS, Human Rights and Access to Justice* 11-12; Vawda 2005 *Obiter*; Foundation for Human Rights *Civil Society Priorities*; Anderson *Access to Justice and Legal Process* 19-20; Nyenti 2012 *Obiter*; *S v Makwanyane* 1995 3 SA 391 (CC); and *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC).

<sup>7</sup> Access to courts involves a process of enabling and empowering those not enjoying rights to claim those rights, which includes eliminating any procedural hurdles that prevent the free exercise of those rights (see Vawda 2005 *Obiter* 239-240). Therefore, even where a social security adjudication system is accessible in other aspects, it will still be ineffective if (potential) users are restricted from the system due to insurmountable procedural hurdles. Procedural rules give content to substantive rights, and must enable the effective realisation of the rights. It has been declared that "a substantive right on paper is of no use unless it is harnessed to an effective procedural remedy which allows the litigant to actually bring the case before the court in good time and without excessive cost. Legal gateways are important determinants of what kind of justice can be achieved. ... Legal procedures not only determine whether the poor can get access to legal remedies, and how quickly and effectively such remedies will be, they can also influence the way that a particular dispute is construed by the law, and the kinds of outcomes which are possible" (Anderson *Access to Justice and Legal Process* 15).

<sup>8</sup> For a person to be able to approach a court or tribunal to seek redress, he or she must have knowledge of his or her rights. Therefore, knowledge of rights is a prerequisite to access to justice. However, many South Africans have little knowledge of the law and human rights (see Mubangizi 2004 *JJS*). It has been held that the right to access to justice in terms of the *Constitution* includes the ability to achieve this, which implies (*inter alia*) that a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able

the prescribed documents and forms; the diversity of the dispute lodgement options; the reasonableness of the timeframes for lodging disputes; and the provision of financial and other support.

Secondly, the right further requires that courts, tribunals or forums that resolve disputes must be independent and impartial in the execution of their duties. For the adjudication institution to be effective it must be able to provide claimants with appropriate redress. For an adjudication institution to be able to do this, it must be able to decide disputes according to the facts and the law, including freedom from improper influence (both internal and external).<sup>9</sup> This means that to be effective, an adjudication institution must be independent and impartial.

In order to ensure access to justice, section 34 requires disputes to be decided in a fair public hearing.<sup>10</sup> In *De Beer v North-Central Local Council and South-Central Local Council* the court stated that the hearing itself must also be fair.<sup>11</sup> Section 34 also requires that an alternative tribunal or forum must also conduct proceedings in a fair public hearing.<sup>12</sup> However, the proceedings need not be identical to those of a court of law,<sup>13</sup> as the requirements of fairness in terms of section 34 are flexible and depend on different factors. In addition, it would neither be unfair nor unconstitutional for a tribunal or forum to adopt procedures different from those of a court.<sup>14</sup>

The resolution of disputes must also be undertaken in a fair manner. Embedded in the right to a fair trial is also the right to procedural equality. This means that adjudication institutions should ensure that claimants have reasonable opportunities to assert or defend their rights.<sup>15</sup>

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to obtain a remedy from a court; and must have some knowledge about what to do in order to achieve access (see Budlender "Access to Courts" 344).

<sup>9</sup> See ILO *Social Security and the Rule of Law* para 433.

<sup>10</sup> Currie and de Waal *Bill of Rights Handbook* 723.

<sup>11</sup> *De Beer v North-Central Local Council and South-Central Local Council* 2002 1 SA 429 (CC) para 14.

<sup>12</sup> Currie and de Waal *Bill of Rights Handbook* 723.

<sup>13</sup> See *Mbebe v Chairman, White Commission* 2000 7 BCLR 754 (Tk) para 776.

<sup>14</sup> See *Bongoza v Minister of Correctional Services* 2002 6 SA 330 (TkH) paras 22-25. Also see Brickhill and Friedman "Access to Courts" 59-97, 59-98.

<sup>15</sup> It implies, among other things, that reasonable notice of the time when the dispute is to be decided should be given to a person concerned (with the adjudication institution given the power to condone a failure to comply with any notice requirements); power to determine the appropriate procedures; personal appearance and appropriate representation (each party to a dispute should be able to participate in the adjudication of the dispute. Each party should also be guaranteed the right to

The *Constitution* guarantees the right of everyone to administrative action that is lawful, reasonable and procedurally fair.<sup>16</sup> In addition, everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.<sup>17</sup> The State is required to enact national legislation to give effect to the right to administrative justice and to provide for the review of administrative action by a court or other independent and impartial tribunal.<sup>18</sup> The *Promotion of Administrative Justice Act* was adopted in realisation of this.<sup>19</sup>

The provisions of section 33 regulate the conduct of public administration. They are thus relevant to the social security adjudication framework since dispute resolution is undertaken by public administrative institutions.<sup>20</sup> The right to just administrative action and the provisions of the *Promotion of Administrative Justice Act* also bind private institutions when they make decisions that adversely affect a person's rights.<sup>21</sup> Administrative justice ensures that public officials act within their powers under the various social security statutes and that the procedures they apply are fair and the outcomes of their decisions are reasonable.

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engage a lawyer or another qualified representative of their choice); equal access to evidence (each party should also have access to the relevant evidence, including documents, expert opinions, etc.); rapid resolution of disputes (disputes must be resolved as expeditiously as possible, especially social security disputes); inexpensive adjudication procedures (procedures should be free or costs should be kept at the absolute minimum so as to allow even the poor to be able to resolve disputes); and the guarantee of an effective remedy (the adjudication institution should be able to make a decision that has to be duly motivated or, in other words, explain the reasoning that led to the decision in the dispute, and be legally enforceable) (see ILO *Social Security and the Rule of Law* para 433; Budlender "Access to Courts"; Dugard 2008 *SAJHR*; *De Beer v North-Central Local Council and South-Central Local Council* 2002 1 SA 429 (CC); *Bangindawo v Head of the Nyanda Regional Authority* 1998 3 BCLR 314 (Tk) 331D; and *Beinash v Ernst and Young* 1999 2 SA 91 (CC).

<sup>16</sup> Section 33(1) of the *Constitution*.

<sup>17</sup> Section 33(2) of the *Constitution*.

<sup>18</sup> Section 33(3) of the *Constitution*.

<sup>19</sup> *Promotion of Administrative Justice Act* 3 of 2000.

<sup>20</sup> See *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC); and *Chirwa v Transnet Limited* 2008 4 SA 367 (CC) which laid down a "functions test" in determining whether an institution is performing a public function.

<sup>21</sup> De Villiers 2002 *SAJHR* 341.

### 3 Current South African social security dispute resolution system

There is currently no uniform social security dispute resolution institution in South Africa. This is due to the piecemeal manner in which social security schemes were established and/or how protection against individual risks is regulated. The piecemeal manner in which the schemes were established and/or protection against individual risks are regulated has resulted in each statute providing for its own dispute resolution institution(s) and processes. There is a wide array of laws providing for dispute resolution institutions and procedures. The result is that the current social security dispute resolution system is fragmented and uncoordinated. The adjudication system is composed of the Independent Tribunal for Social Assistance Appeals established by the *Social Assistance Act*;<sup>22</sup> the panel of a presiding officer assisted by two assessors (the so-called "Compensation Court") in terms of the *Compensation for Occupational Injuries and Diseases Act* (COIDA);<sup>23</sup> the Certification Committee of the Medical Bureau for Occupational Diseases and the Medical Reviewing Authority for Occupational Diseases under the *Occupational Diseases in Mines and Works Act* (ODMWA);<sup>24</sup> the Regional Appeals Committees and the National Appeals Committee of the Board of the Unemployment Insurance Fund (UIF) in terms of the *Unemployment Insurance Act* (UIA);<sup>25</sup> the Road Accident Fund Appeal Tribunal in terms of the *Road Accident Fund Act* (RAF Act);<sup>26</sup> the Office of the Pension Funds Adjudicator established by the *Pension Funds Act*;<sup>27</sup> and the Registrar and

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<sup>22</sup> *Social Assistance Act* 13 of 2004.

<sup>23</sup> *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 (COIDA). An objection against a decision of the Compensation Commissioner is considered and decided by a panel composed of a presiding officer with the assistance of two assessors also called the "Compensation Court" (see s 91(2) read with ss 2(1)(b) and 8(a) of COIDA.)

<sup>24</sup> *Occupational Diseases in Mines and Works Act* 78 of 1973 (ODMWA).

<sup>25</sup> *Unemployment Insurance Act* 63 of 2001.

<sup>26</sup> *Road Accident Fund Act* 56 of 1996. Disputes relating to assessments of motor vehicle accident injuries (disputes where the Road Accident Fund or its agent objects to a serious injury report by a medical practitioner; or where an injured person objects to the Road Accident Fund's or its agent's rejection of a serious injury assessment report by a medical practitioner) are resolved by an Appeal Tribunal appointed by the Registrar of the Health Professions Council of South Africa (HPCSA) (see Reg 3(4) in GN 769 in GG 31249 of 21 July 2008).

<sup>27</sup> *Pension Funds Act* 24 of 1956. The *Financial Sector Regulation Bill* [B34-2015] envisages the creation of an Ombud Regulatory Council and a Financial Services Tribunal to hear and decide appeals by persons aggrieved by a decision of a decision-maker in terms of a financial sector law (ss 173 and 214 of the *Financial Sector Regulation Bill* [B34-2015]). This means that when the law is enacted,

Appeal Board of the Council for Medical Schemes (CMS) regulated by the *Medical Schemes Act*.<sup>28</sup> Appeal mechanisms are also fragmented across the social security system, at times involving specially constituted appeal bodies and at times the Labour or High Court.

There are various other gaps and challenges that the current South African social security dispute resolution system faces. Some of these challenges relate to the inaccessibility of some social security institutions; the inappropriateness of some current appeal institutions; the lack of a systematic approach in establishing appeal institutions; the limited scope of jurisdiction and powers of adjudication institutions; inconsistencies in review and/or appeal provisions in various laws; the unavailability of alternative dispute resolution procedures; and the absence of the institutional independence of adjudication institutions or forums.

### **3.1 Inaccessibility of some social security institutions**

The accessibility of the various adjudication institutions/ forums is not always appropriately ensured. While some forums are geographically spread across the Republic, others are centrally located. As an example, the Certification Committee and the Medical Reviewing Authority in terms of the ODMWA (together with the Medical Bureau for Occupational Diseases) are located in Johannesburg, while the National Appeals Committee of the UIF Board is located in Pretoria.

The accessibility of the various adjudication forums is also facilitated through multiple application lodgement options<sup>29</sup> and reasonable timeframes for lodging disputes.<sup>30</sup> The relevant documentation for the lodging of applications and the consideration of disputes is in English and

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decisions of the Pension Funds Adjudicator will be heard by the Ombud and Tribunal.

<sup>28</sup> *Medical Schemes Act* 131 of 1998.

<sup>29</sup> An appeal to the Independent Tribunal for Social Assistance Appeals against a decision of the South African Social Security Agency (SASSA) may be delivered by hand, post, fax or electronic mail (see Reg 14(2)(b) in GN R746 in GG 34618 of 19 September 2011)). An appeal to a Regional Appeals Committee of the UIF Board can also be made by submitting a *Notice of Appeal Form* (Form UI 13) either by hand or by registered post to the Committee at the respective Labour Centres of the Department of Labour (Reg 8(1) in GN 400 in GG 23283 of 28 March 2002).

<sup>30</sup> Most statutes stipulate that an appeal must be lodged within 90 days after (notification of) the decision. In the case of COIDA, the appeal timeframe is 180 days (see Reg 8(2) in GN 400 in GG 23283 of 28 March 2002; s 50(1) of ODMWA; Reg 2(2) in GN R746 in GG 34618 of 19 September 2011; and Reg 3(4)(a) in GN 769 in GG 31249 of 21 July 2008).

the hearings (where applicable) are also conducted in English.<sup>31</sup> However, interpreters are provided where necessary.<sup>32</sup>

The speedy resolution of disputes is not guaranteed, as timeframes for finalisation have not been stated in many statutes.<sup>33</sup> In addition, no power is granted to the adjudication forums to reconsider their original decision (except as provided in terms of COIDA that a Presiding Officer may correct the error or defect).<sup>34</sup>

The adjudication forums adopt a variety of dispute resolution procedures. Where necessary, some of the adjudication forums can convene a hearing, in which case the personal attendance of the parties and other interested persons is possible. However, some forums resolve disputes by means of documentary evidence only.<sup>35</sup>

External dispute resolution avenues are only through litigation in the High Court (at times the Labour Court).<sup>36</sup> Due to its inherent review powers, all the decisions of public social security institutions are reviewable (on the basis of judicial review) by the High Court (except where expressly provided otherwise). Specific issues to be dealt with by the High Court on

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<sup>31</sup> See, for example, the Compensation Fund *Objection against a Decision Form* (Form WG 29); and the RAF *Objection Form*.

<sup>32</sup> As an example, the Compensation Fund appoints interpreters in some hearing locations of the "Compensation Court" for assistance where an objector is unable to understand the language of the hearing (see Compensation Fund *Annual Report 2009* 34).

<sup>33</sup> It is only the Independent Tribunal for Social Assistance Appeals which is required to finalise an appeal within 90 days of the date on which the appeal was received (see Reg 16(2) in GN R746 in GG 34618 of 19 September 2011).

<sup>34</sup> See Rule 18 of the *Rules for the Conduct of Hearings Before the Compensation Court in Section 91 Hearings of COIDA*.

<sup>35</sup> This is the case in the review of a Certification Committee disease certification decision by the Medical Reviewing Authority for Occupational Diseases in terms of s 50(1) of ODMWA; the consideration of the decision of the Regional Appeals Committees by the National Appeals Committee of the UIF Board (an appeal is made to the Committee by submitting the Notice of Appeal Form (UI 13) to the head office of the UIF (Reg 8(2) in GN 400 in GG 23283 of 28 March 2002)); the consideration of the (reconsidered) decisions of SASSA by the Independent Tribunal for Social Assistance Appeals (parties who disagree with the decision and reasons of SASSA and who wish to appeal the decision are required to lodge an appeal to the Independent Tribunal in the prescribed form (see Form 3 (Lodging of an Appeal) in GN R746 in GG 34618 of 19 September 2011)); and the resolution of appeals by the Road Accident Fund Appeals Tribunal (some appeals of the Tribunal can be decided without a hearing (see Reg 3(4) in GN 769 in GG 31249 of 21 July 2008)).

<sup>36</sup> Such as in s 66 of the UIA, which provides for objections to compliance orders to be referred to the Labour Court, and for a compliance order to be referred to the Labour Court to be made an order of the Court.

the basis of appeal are also outlined in some laws.<sup>37</sup> In addition, some laws provide for the resolution of disputes by the High Court in the first instance. For example, the RAF Act requires a person with a claim against the fund to bring a claim in any High Court within whose area of jurisdiction the occurrence which caused the injury or death took place.<sup>38</sup> It is doubtful whether the High Court is the appropriate venue for the resolution of such disputes due to its inaccessibility.<sup>39</sup>

### **3.2 *Inappropriateness of some current appeal institutions***

Some social security statutes provide for reviews by and appeals to the ordinary courts (especially the High Court). However, the ordinary courts are not always the appropriate forums to deal with social security appeals. The powers of these courts to deal with the matters are unsatisfactory, as the courts mostly have review powers with little appeal powers. They are also apparently not specialised enough to deal effectively with social security matters. Appeals to such courts may also pose difficulties for aggrieved persons, due *inter alia* to limited access to the courts especially for indigent persons (also due to costs in the absence of legal aid); undue delays that characterise court proceedings; and the technical and legalistic basis upon which cases are decided (with little regard to broader fairness considerations). This leads to the contention that: the current South African social security system has a large backlog in terms of the pool of beneficiaries. Yet, the adjudication system is not sufficiently specialised and localised, from the perspective of access to the system. Instead, the beneficiaries cannot financially afford the system of legal representation in the normal court context. Those who could afford to pay the costs still face a punitive snail paced legal bureaucratic process. Tedious as it is, the

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<sup>37</sup> In terms of s 92 of COIDA, the Compensation Commissioner can also state a case on a question of law to the High Court; ODMWA also empowers the Compensation Commissioner for Occupational Diseases to also state a case on a question of law to the High Court on appeal (s 58(1) of ODMWA).

<sup>38</sup> Section 15(2) of the RAF Act.

<sup>39</sup> Provincial or local divisions of the High Court are currently located in Port Elizabeth, Durban, Umtata/Mthatha, Pietermaritzburg, Grahamstown, Cape Town, Bhisho, Polokwane, Thohoyandou, Johannesburg, Pretoria, Mmabatho/Mafikeng, Kimberley and Bloemfontein (see *Renaming of High Courts Act 30 of 2008*). A person (especially an indigent person) may have limited or no access to the High Court due to the high cost of court proceedings and the absence of legal aid. In addition, the purely technical and legalistic basis of dealing with cases means a person who brings a case to the High Court requires legal representation, which an indigent person can hardly afford (see Committee of Inquiry *Transforming the Present* 124; *Cele v the South African Social Security Agency and 22 Related Cases* 2009 5 SA 105 (D); and *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuzza* 2001 4 SA 1184 (SCA)).

system leaves out the bulk of marginalised social security beneficiaries when they lodge a complaint.<sup>40</sup>

### **3.3 *Lack of a systematic approach in establishing appeal institutions***

There is also a lack of a systematic approach to the regulation of appeals in the South African social security system. While some laws specifically provide for the establishment and functioning of appeal institutions and mechanisms, other laws leave such issues to the discretion of the relevant Minister.<sup>41</sup> It is inappropriate to establish an appeal tribunal purely on the basis of Ministerial or Registrar direction/regulation, also due to the gravity and importance of the issues at stake, such as the establishment of the institution; the appointment of its members; its main objective(s); its jurisdiction, functions and powers; procedures for the disposal of complaints; giving parties an opportunity to comment and to be represented; time limits; record-keeping; making a determination and the enforceability of determinations; a review possibility; accountability; remuneration; and a limitation on liability etc.<sup>42</sup>

### **3.4 *Limited scope of jurisdiction and powers of adjudication institutions***

The scope of the jurisdiction and the powers of the social security adjudication institutions/forums are limited. They can exercise the powers and functions only as circumscribed in legislation. The scope of the jurisdiction and the powers of the High Court as the appeal institution are also sometimes limited, particularly in relation to the types of cases or issues that it can decide. The High Court is mostly empowered to review decisions taken by the institutions concerned.

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<sup>40</sup> Kanyane "Exploring and Developing a Culture of Good Governance" 104.

<sup>41</sup> An example of such a situation is the *Social Assistance Act*, which empowers the Minister (of Social Development) to either consider an appeal against a decision of SASSA him/herself; or appoint an independent tribunal to consider such an appeal. Where a tribunal is so appointed, all appeals against decisions of the Agency must from then on be considered by that tribunal (s 18(1A) of the *Social Assistance Act*). In addition, in the case of the RAF, upon receipt of the notification from a party to the dispute or 60 days after receiving submissions, medical reports and opinions relevant to the dispute period, the Registrar will refer the dispute for consideration by an Appeal Tribunal paid for by the RAF (Reg 3(8)(a) in GN 769 in GG 31249 of 21 July 2008).

<sup>42</sup> See Olivier, Fourie and Nyenti *Commentary* 6.

The possible remedies that can be provided by the social security institutions are also limited due to the circumscription of such remedies in the various statutes. This emanates from the circumscribed powers afforded to the social security institutions.

Some of the social security statutes stipulate that the decisions of the adjudication forums are binding on the administrative institutions; and the "Compensation Court" is considered to have the status of a magistrate's court (with its decisions enforced as such). However, most of the adjudication forums are not afforded the power and mechanisms to enforce their rulings.<sup>43</sup>

In addition, the effectiveness of some of the institutions is restricted due to the provision of multiple dispute resolution avenues in some statutes. An example is in the *Pension Funds Act* where a party could lodge a complaint within the jurisdiction of the Adjudicator in a civil court (a High Court).<sup>44</sup> This is problematic as it encourages "forum shopping"<sup>45</sup> and undermines the objective of the establishment of the Office of the Adjudicator – to dispose of complaints in a procedurally fair, economical and expeditious manner.

### **3.5 Inconsistencies in review and/or appeal provisions in various laws**

Most social security statutes fail to make an appropriate distinction between (internal) reviews and (external) appeal procedures. Social security adjudication standards require that the administrative organs/institutions that undertake the determination of applicants' rights to social security benefits should also undertake internal review procedures (first level adjudication procedures). As the Committee of Inquiry into a Comprehensive System of Social Security in South Africa stated, one of the guiding principles in devising an appropriate social security

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<sup>43</sup> The exception is the Pension Funds Adjudicator, whose determination is deemed to be a civil judgment of any court of law as if the matter in question had been heard by such a court, and is noted as such by the clerk or the registrar of the court. A writ or warrant of execution may also be issued by the clerk or the registrar of such a court and be executed by the sheriff six weeks after the date of the determination if an appeal has not been made to the High Court (s 30O of the *Pension Funds Act*).

<sup>44</sup> The Adjudicator cannot investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation (s 30H(2) of the *Pension Funds Act*).

<sup>45</sup> Forum shopping refers to the practice where a party selects a dispute resolution avenue with the best possible prospects.

adjudication system is the need to ensure that an institutional separation exists between administrative accountability, review and revision, and a wholly independent, substantive system of adjudication.<sup>46</sup> This implies that where an applicant for social security benefits is aggrieved by a decision of the administering institution, he/she should be able to request a revision of the initial decision. After the exhaustion of the internal review (first level) processes, applicants should have access to an external appeal mechanism or institution (second level procedures).

In some of the social security statutes there is a conflation of first- and second-level adjudication procedures and of the administrative and adjudicative roles. This is the case with ODMWA, which provides that if the Reviewing Authority for Occupational Diseases disagrees with a decision of the Certification Committee, the Chairperson of the Authority is required to request the Chairperson of the Certification Committee to submit the case for review to a joint meeting of the Certification Committee and the Reviewing Authority.<sup>47</sup> It is only in a review of a finding of the Certification Committee by a joint Reviewing Authority/Certification Committee meeting that the finding of the Certification Committee can be rescinded or replaced with the joint meeting's own finding.<sup>48</sup> The process has been hailed as a beneficial one because:

... this means that before a final decision is made the case has been discussed in at least three meetings by, in all, ten doctors. Every one of these has been able to state his opinion and debate difficult medical points with his colleagues so as to contribute toward a fair decision.<sup>49</sup>

However, it brings into question both the existence and the effectiveness of the Reviewing Authority as an independent body established to review the findings of the Certification Committee.

There is also a lack of consistency in the provisions relating to reviews and appeals in the various laws. Some laws make provision for appeals to appeal bodies established in terms of the relevant laws,<sup>50</sup> while other laws provide for appeals to other adjudication bodies such as the Health Professions Council of South Africa and the High Court.<sup>51</sup>

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<sup>46</sup> Committee of Inquiry *Transforming the Present* 124.

<sup>47</sup> Section 50(2) of ODMWA.

<sup>48</sup> Section 52(1) of ODMWA.

<sup>49</sup> Wiles 1987 *SAMJ* 417.

<sup>50</sup> See for example the case of the UIA and ODMWA.

<sup>51</sup> A dispute relating to the assessment of motor vehicle accident injuries under the *Road Accident Fund Act* 56 of 1996 is resolved by an Appeal Tribunal (Road Accident Fund Tribunal) appointed by the Registrar of the HPCSA. A person who is

### **3.6 Unavailability of alternative dispute resolution procedures**

Social security disputes are resolved mainly by resort to litigation (adversarial adjudication). Few social security statutes provide for external dispute resolution avenues other than litigation in the normal court system.<sup>52</sup> The absence of alternative dispute resolution avenues in South African social security statutes implies that persons not satisfied with the internal adjudication processes can have their right of access to social security enforced only by means of (adversarial) litigation in the ordinary courts of law. However, the various problems plaguing the current court structure indicate that the courts are not the most appropriate forum for the resolution of social security disputes. The need for litigation therefore has an adverse impact on the right to access to social security of beneficiaries/applicants, as it restricts access to adjudication. Therefore, alternative mechanisms for the resolution of disputes should be considered in the South African social security system. This is to ensure proper redress for social security litigants and to promote their right to access to social security.

### **3.7 Lack of institutional independence of adjudication institutions/forums**

A review of the current South African social security dispute resolution institutions/forums reveals that most of the adjudication forums or institutions can effectively be regarded as internal organs of the social

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dissatisfied with the decision of the Tribunal can appeal to the High Court for a review of the Tribunal's decision (see Reg 3(4) in GN 769 in GG 31249 of 21 July 2008). The RAF Act requires a person with a claim against the Fund to bring an action in any High Court within whose area of jurisdiction the occurrence which caused the injury or death took place (s 15(2) of the RAF Act). COIDA states that the Compensation Commissioner can state a case on a question of law to the High Court (s 92 of COIDA). In terms of ODMWA, the Compensation Commissioner for Occupational Diseases can also state a case on a question of law to the High Court on appeal (s 58(1) of ODMWA).

<sup>52</sup> The only exception can be found in COIDA (which provides for the organisation of pre-trial conferences); and the *Pension Funds Act* (which provides for alternative dispute resolution mechanisms, including conciliation and/or arbitration). Parties to a COIDA hearing are required to hold a pre-hearing conference, if directed to do so by the presiding officer. In a pre-hearing conference, the parties must attempt to reach consensus on any means by which the dispute(s) can be settled (Rule 13 of the *Rules for the Conduct of Hearings before the Compensation Court in Section 91 Hearings of COIDA*). The *Pension Funds Act* provides that prior to investigating a complaint and if it is expedient, the Pension Funds Adjudicator may require any complainant first to approach an organisation established for the purpose of resolving disputes in the pension funds industry or part thereof, and approved by the registrar (s 30E(1)(b) of the *Pension Funds Act*).

security institutions and as therefore not being independent of these institutions. The only exceptions are the Office of the Pension Funds Adjudicator and (in some respects) the Council for Medical Schemes Appeal Board. In the first place, the Ministers or Directors-General of the relevant Departments in charge of the relevant social security institution are in most instances responsible for the appointment of members of the adjudication forums.<sup>53</sup> The relevant Ministers or Directors-General also determine the length and (other) conditions of employment of members, including remuneration. Ministers or Directors-General can also discipline the members and terminate their appointment.<sup>54</sup>

In addition, most of the social security adjudications institutions/forums also do not have independent funding through direct appropriations from Parliament (the Office of the Pension Funds Adjudicator and the CMS being the exception).<sup>55</sup> They are mostly funded by the relevant departments as part of the Departments' annual budget allocations.<sup>56</sup> The financial dependence of the adjudication forums is also indicated by the fact that they are not independent accountable institutions in terms of the *Public Finance Management Act*.<sup>57</sup> Management, governance, oversight and supervision are also undertaken by the departmental or institutional heads; and the adjudication forums are also required to report to departmental or institutional heads (in the case of the Road Accident Fund Appeal Tribunal, to the Registrar of the HPCSA). Human resource and administrative support is provided either by the social security administration institutions or (in the case of the Road Accident Fund Appeal Tribunal), the HPCSA.<sup>58</sup>

### **3.8 The need for an appropriate framework**

The gaps and challenges in the current social security dispute resolution system indicate that it is unable to realise the right to access to justice and related rights of users of the system, contrary to the prescriptions of section 34 of the *Constitution*. There is thus a need for the establishment

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<sup>53</sup> See, for example, Reg 3(8)(a) in GN 769 in GG 31249 of 21 July 2008; s 2(1)(b) read with the definition of presiding officer in s 1 in COIDA; s 40(2)(b) of ODMWA; s 47 of the UIA; and Reg 4 in GN R746 in GG 34618 of 19 September 2011.

<sup>54</sup> See, for example, s 8(5) of COIDA; s 41 of ODMWA; s 47 of the UIA; and Reg 4 in GN R746 in GG 34618 of 19 September 2011.

<sup>55</sup> See s 30T(1) of the *Pension Funds Act* and s 13 of the *Medical Schemes Act*.

<sup>56</sup> See Reg 6 in GN 16 in GG 30646 of 11 January 2008; s 41(1) of ODMWA; s 51 of the UIA; and Reg 3(8)(a) in GN 769 in GG 31249 of 21 July 2008.

<sup>57</sup> *Public Finance Management Act* 1 of 1999 (PFMA).

<sup>58</sup> See ss 12, 14 and 50 of the *Medical Schemes Act*.

of an appropriate framework. The establishment of such a framework is further motivated by the gravity and importance of the issues at stake.

This calls for the introduction of special and earmarked adjudication institutions and procedures, in order to deal effectively with social security disputes. The Committee of Inquiry into a Comprehensive System of Social Security<sup>59</sup> in South Africa has thus recommended that:

... a uniform adjudication system be established to deal conclusively with all social security claims. It should, in the first instance, involve an independent internal review or appeal institution. It should, in the second place, involve a court (which could be a specialised court) which has the power to finally adjudicate all social security matters, and that this court has the power to determine cases on the basis of law and fairness. The jurisdiction of this court should cover all social security claims, whether under the new UIA, the RAFA, the COIDA and all the other benefits (including the Social Assistance Act) emanating from the social security system (including claims falling under the jurisdiction of the Pension Funds Adjudicator).

Institutions, mechanisms and procedures in the labour relations, business competition regulation and the consumer protection jurisdictions provide a possible benchmark in the development of an effective social security dispute resolution system. These institutions and their procedures have also been established to realise the rights to access to justice and to a fair trial of their respective users.

#### **4 Access to justice in comparative South African jurisdictions**

Adjudication institutions, mechanisms and procedures in the labour relations, business competition regulation and the consumer protection jurisdictions have been established to ensure access to justice.<sup>60</sup> In order to achieve this purpose, integrated and streamlined systems have been created, consisting of specialist multi-tiered institutions that are accessible

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<sup>59</sup> Committee of Inquiry *Transforming the Present* 124.

<sup>60</sup> As an example, the LRA states that one of its objectives is to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration, and through independent alternative dispute resolution services accredited for that purpose (s 1(d)(iv) of the LRA). It has been stated that in establishing a new dispute resolution system that places a premium on conciliation, mediation and arbitration (and less on litigation, amongst other things), the LRA sought to satisfy the need for expeditious, efficient and affordable procedures and easily accessible, specialist, but informal institutions in specified disputes in the labour terrain (see Van Niekerk *et al* *Law@Work* 399). The National Credit Regulator and National Consumer Tribunal have also been established "to make it easier and less expensive for consumers and credit providers to resolve their disputes" and are important mechanisms in the promotion of consumer rights in South Africa (see Woker Date Unknown <http://tinyurl.com/jfm3h9u>).

and guarantee complementary and seamless procedurally-fair dispute resolution processes.<sup>61</sup> The multi-tiered and complementary nature of these dispute resolution institutions, their status and procedures guarantee their effectiveness in resolving disputes. In the first instance, their nature enables them to undertake sequential and complementary reviews and appeals procedures, which are a primary consideration in the development of an adjudication system, as there is a need to ensure an institutional separation between administrative accountability, review and revision (on the one hand) and a wholly-independent, substantive system of appeals (on the other).<sup>62</sup> It also allows for the resolution of disputes at an appropriate level. It further ensures the independence of the appeal institution from the administration that reviewed the initial complaint, which is a necessary aspect of the concept of appeal.<sup>63</sup> Other factors promoting their effectiveness include their accessibility, the fairness of their procedures, the scope of their jurisdiction and powers, their expertise and their independence and impartiality.

#### **4.1 Accessibility of adjudication institutions**

Attempts to make the institutions accessible are not always appropriately made. Some of the institutions convene in as many places as is necessary; while others have a single centrally-located presence.<sup>64</sup>

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<sup>61</sup> In the case of the labour relations jurisdiction, the LRA established the CCMA and enabled other independent alternative dispute resolution services to resolve disputes. The Act also created the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act (see Preamble of the LRA). On its part, the *Competition Act* established the Competition Commission, the Competition Tribunal and the Competition Appeal Court as independent bodies for the achievement of the objectives of the Act, which include the resolution of disputes (see Introduction to the *Competition Act*).

<sup>62</sup> Olivier, Van Rensburg and Mpedi "Adjudication and Enforcement of Social Security" 526. Also see Committee of Inquiry *Transforming the Present* 124, where it is recommended that a uniform adjudication system be established to deal conclusively with all social security claims. Such a system should, in the first place, comprise an independent internal review or appeal institution. In the second place, according to the Committee, the system should comprise a court (which could be a specialised court) that has the power to finally adjudicate upon all social security matters.

<sup>63</sup> See the provisions of the *ILO Employment Promotion and Protection against Unemployment Convention* 168 of 1988 (art 27(1)) and *ILO Social Security (Minimum Standards) Convention* 102 of 1952 (art 70) and remarks by the ILO in this regard in *ILO Social Security and the Rule of Law* para 434.

<sup>64</sup> The CCMA has offices in all the provinces, with more than one office in some provinces. Labour Courts are currently situated in Cape Town, Durban, Johannesburg and Port Elizabeth. However, sessions of the Labour Court can be held in other locations if there are available judges (in which case the court sits as a circuit court) (s 152 of the LRA). However, the Competition Tribunal has a national office in Pretoria, which implies appeals and review applications must be forwarded to this single office. The National Credit Tribunal also has a single national location

Accessibility is facilitated, however, by appropriate dispute lodgement procedures and time limits.<sup>65</sup> Accessibility is further promoted by the wide scope of possible claimants as the institutions also allow non-individual claimants to bring disputes in some cases.<sup>66</sup>

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in Centurion, Pretoria. Persons who want to submit complaints to the Tribunal must forward these to this office.

<sup>65</sup> In terms of CCMA dispute lodgement procedures and time periods, any party to a dispute about a matter of mutual interest may refer the dispute in writing to the CCMA. The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute (ss 134(1) and (2) of the LRA). Where it is required for a dispute to be resolved through arbitration, the CCMA appoints a Commissioner to arbitrate that dispute, if a Commissioner has issued a certificate stating that the dispute remains unresolved; and if within 90 days after the date on which the certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. However, the CCMA may condone a party's non-observance of that timeframe and allow a request for arbitration filed by the party after the expiry of the 90-day period where good cause is shown (s 136(1) of the LRA). In addition, Labour Court dispute lodgement procedures and time periods promote access to the court. Generally, referral of a dispute to the Labour Court must be made within 90 days after the CCMA certifies that the dispute remains unresolved. However, the Labour Court may condone non-observance of that timeframe where good cause is shown (s 191(11) of the LRA and Rule 12(3) of the *Rules of the Labour Court*). An application to the Labour Court for the review of a CCMA arbitration award must be made within 6 weeks of the award (s 145(1) of the LRA). The Court may also condone the late filing of an application for review where good cause is shown for such late filing (s 145(1A) of the LRA). In terms of the *Competition Act*, the Competition Commissioner can initiate a complaint against an alleged prohibited practice. A person can also submit information concerning an alleged prohibited practice to the Competition Commission in any manner or form, or in the prescribed form. Complaints can be delivered by hand, by mail, or communicated by telephone, fax or email (s 49B(1) and (2) of the *Competition Act* and Rule 14 of the *Rules for the Conduct of Proceedings in the Competition Tribunal*). A complaint against a prohibited practice can be made up to three years after the practice was stopped (s 67(1) of the *Competition Act*). A person or entity that is registered with the National Credit Regulator or an applicant for registration may file a complaint with the National Consumer Tribunal within 20 business days after the National Credit Regulator makes the decision that is the subject of the application. However, the Tribunal may allow a party to file a complaint at a later time where good cause is shown for the delay (s 137(2) of the *National Credit Act*). A consumer or credit provider who has unsuccessfully attempted to resolve a dispute directly with another party, or through an alternative dispute resolution process, may also file an application at any time within 20 business days after the failure of the attempted alternative dispute resolution. The Tribunal may also allow such a party to file a complaint at a later time where good cause is shown for the delay (s 137(3) of the *National Credit Act*).

<sup>66</sup> The LRA states that persons who can bring a case to the CCMA include one or more employees; or one or more trade unions; or one or more trade unions and one or more employees who can bring a dispute against one or more employers; one or more employers' organisations; or one or more employers' organisations and one or more employers.

## 4.2 Scope of jurisdiction and powers of adjudication institutions

The scope of the jurisdiction and the powers of these institutions are also fairly wide. As an example, parties can lodge a dispute with the CCMA about *any matter* of mutual interest.<sup>67</sup> However, as creatures of statute, they can resolve only disputes falling within the purview of the statute. In this regard, the Competition Appeal Court has held that the Competition Tribunal is an administrative tribunal which can exercise jurisdiction only to the extent permitted by the *Competition Act*.<sup>68</sup> The Tribunal's jurisdiction is, therefore, confined to a consideration of the complaint as referred. The terms of the complaint to be decided by the Tribunal are also constrained by the terms of the complaint initiated by the Competition Commissioner or by some other person or entity. Accordingly, if the original ground for the complaint is that there was a prohibited agreement,<sup>69</sup> the Tribunal cannot determine it on the basis that there was a concerted practice or *vice versa*.<sup>70</sup> It has also been held that as a creation of the LRA, the CCMA can resolve only such disputes as fall within the purview of the LRA (ie disputes between employers and employees).<sup>71</sup> Some laws clarify this by the use of terms such as "any matter in this Act".<sup>72</sup>

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<sup>67</sup> Section 134(1) of the LRA (emphasis added).

<sup>68</sup> See *Omnia Fertilizer Ltd v The Competition Commission In Re: The Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd* (CAC) Case No 77/CAC/Jul08.

<sup>69</sup> Chapter 2 of the *Competition Act* deals with certain conduct which is prohibited because it is harmful to competition in the relevant market. Commercial activities which are prohibited under the *Competition Act* are concerned with conduct relating to a firm's interaction with its competitors (a horizontal relationship), interaction with its customers and suppliers (a vertical relationship), and unilateral conduct by a dominant firm (abuse of dominance).

<sup>70</sup> See *Netstar (Pty) Ltd v Competition Commission* (CAC) Cases No.99/CAC/MAY10; 98/CAC/MAY10 and 97/CAC/MAY10 para 26. In terms of s 1 of the *Competition Act*, "concerted practice" means co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.

<sup>71</sup> *Sapekoe Tea Estates (Pty) Ltd v Commissioner Maake* 2002 23 ILJ 1603 (LC). Also see Bosch "Jurisdictional Issues at the CCMA".

<sup>72</sup> See, for example, s 27 of the *Competition Act*, which states that the Competition Tribunal may adjudicate on any conduct prohibited in terms of ch 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act; adjudicate on any other matter that may, in terms of this Act, be considered by it, and make any order provided for in this Act; hear appeals from, or review any decision of, the Competition Commission that may, in terms of this Act, be referred to it; and make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.

In addition, the institutions have extensive powers, such as the power to subpoena persons.<sup>73</sup> This implies that the institutions are also able to provide a wide range of remedies, including (in some cases and in matters within their jurisdiction) making an order which any court of law may make, providing interim relief and making cost orders.<sup>74</sup>

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<sup>73</sup> As an example, a CCMA commissioner has the power to subpoena persons when attempting to resolve a dispute (s 142 of the LRA). The member of the National Consumer Tribunal presiding at a hearing has the power to direct or summon any person to appear at any specified time and place. He or she can question any person under oath; order any person to produce any book, document or item necessary for the purposes of the hearing; and perform any other action in relation to the Act (s 144 of the *National Credit Act*).

<sup>74</sup> CCMA commissioners can make any appropriate arbitration award in terms of the LRA, including, but not limited to, an award which gives effect to any collective agreement, which gives effect to the provisions and primary objects of the Act and which includes, or is in the form of a declaratory order (s 138(9) of the LRA). The Commissioner can make an order for the payment of costs according to the requirements of law and fairness (s 138(10) of the LRA). The CCMA can also make any settlement agreement in respect of any dispute that has been referred to it to be an arbitration award (if agreed to between the parties or on application by a party) (s 142A of the LRA). The National Consumer Tribunal can confirm a resolution or agreement as a consent order, which may include an award of damages to a complainant (with the consent of the complainant) (see s 138 of the *National Credit Act* and *Liphoko v Absa Bank* Case No NCT/253/2009/138(1) (P) (April 2010)). The Tribunal can make an appropriate order in relation to prohibited conduct or required conduct in terms of Act (including the power to grant interim relief; declaring conduct to be prohibited in terms of the Act; interdicting any prohibited conduct; imposing an administrative fine in terms of s 15 with or without the addition of any other order; confirming a consent agreement as an order of the Tribunal; condoning any non-compliance of its rules and procedures on good cause shown; confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of the Act; suspending or cancelling the registrant's registration; requiring repayment to the consumer of any excess amount charged (together with interest at the rate set out in the agreement); or any other appropriate order contemplated in the Act which is required to give effect to a right (see ss 149 and 150 of the *National Credit Act*; *Motitsoe v Randburg Finance* Case No NCT/253/2009/138 (1) (P) (April 2010); *National Credit Regulator v Chatspare Pty Ltd* Case No NCT/08/2008/140 (1) (P) (July 2008); and *Malan v Amalgamated Banks of South Africa (Absa)* Case No NCT/22/2008/149(1) (P) (30 October 2008). If the Tribunal does not make a finding against a respondent, the presiding member at a hearing can award costs to the respondent and against a complainant who referred the complaint. If the Tribunal makes a finding against a respondent, the member of the Tribunal presiding at a hearing can also award costs against the respondent and to a complainant who referred the complaint (s 147 of the *National Credit Act*).

Effectiveness is further promoted by providing some of the institutions that are not courts of law with powers to enforce their decisions.<sup>75</sup> The decisions of such institutions are deemed to be the judgment of a court and are therefore enforceable as such. As an example, an arbitration award issued by a Commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.<sup>76</sup> If a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.<sup>77</sup>

A decision, judgment or order of the Competition Tribunal may be served, executed and enforced as if it were an order of the High Court.<sup>78</sup> A decision, judgment or order of the National Consumer Tribunal is also served, executed and enforced as if it were an order of the High Court, and is binding on the National Credit Regulator; provincial credit regulators; a consumer court; an alternative dispute resolution agent or the ombud with jurisdiction; a debt counsellor; and a Magistrate's Court.<sup>79</sup>

### **4.3 Procedural fairness of adjudication institutions**

The procedures of the adjudication institutions promote the resolution of disputes quickly and fairly. In the case of the CCMA, it attempts to resolve any dispute referred to it in terms of the LRA through conciliation.<sup>80</sup> A Commissioner is appointed, who then attempts to resolve the dispute through conciliation within 30 days of the date the CCMA received the referral. However, the parties can agree to extend the 30-day period.<sup>81</sup>

Adjudication institutions allow the personal appearance of parties to a dispute and other interested parties in most cases. The CCMA is an example of this, as during arbitration hearings a party to the dispute may appear in person or be represented only by a legal practitioner; a Director or employee of the party; or any member, office bearer or official of that

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<sup>75</sup> A determination of the Pension Funds Adjudicator is deemed to be a civil judgment of any court of law. A writ or warrant of execution may be issued by the clerk or the registrar of such a court and be executed by the sheriff (s 300 of the *Pension Funds Act*).

<sup>76</sup> Section 143(1) of the LRA. An arbitration award may be enforced only if the Director has certified that the arbitration award is not an advisory award (s143(3) of the LRA).

<sup>77</sup> Section 143(4) of the LRA.

<sup>78</sup> Section 64(1) of the *Competition Act*.

<sup>79</sup> Section 152 (1) of the *National Credit Act*.

<sup>80</sup> Sections 115(1(a) and 133(1) of the LRA

<sup>81</sup> Section 135 of the LRA.

party's registered trade union or registered employers' organisation.<sup>82</sup> Parties to a hearing of the Competition Tribunal also have a right to personal appearance and to representation.<sup>83</sup>

Institutions are also empowered to determine adjudication procedures, which gives scope for the adoption of flexible procedures. Adjudication institutions determine the process in attempting to resolve a dispute. In CCMA conciliation hearings, the Commissioner determines the process to attempt to resolve the dispute, which includes mediating the dispute, conducting a fact-finding exercise and making a recommendation to the parties, which can be in the form of an advisory arbitration award. Legal representation is not allowed in conciliation proceedings, which means the procedure is simple.<sup>84</sup> In arbitration hearings the Commissioner conducts the hearing in a manner he or she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.<sup>85</sup>

The Competition Tribunal proceedings are conducted as expeditiously as possible, and in accordance with the principles of natural justice. Hearings may also be conducted informally or in an inquisitorial manner.<sup>86</sup> The Chairperson of the Tribunal may order that a matter be heard in chambers, if no oral evidence will be heard. He or she can also order that oral submissions be made at the hearing; or that they are made by telephone or video conference, if it is in the interests of justice and expediency to do so.<sup>87</sup>

The National Consumer Tribunal also conducts its hearings in an inquisitorial manner.<sup>88</sup> Tribunal proceedings are conducted as expeditiously and informally as possible, and in accordance with the principles of natural justice.<sup>89</sup> Hearings are relatively simple to follow, which means parties do not need legal representation. There are also very few costs involved. It has been remarked that:

The complaint can be expressed in a laymen's undefined narratory style ....  
And proof on a balance of probabilities is adequate. ... The approach of the  
NCT should be that, subject to statute, the NCT is guided only by the rules of

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<sup>82</sup> See Rule 25 of the *Rules of Conduct of Proceedings Before the CCMA*.

<sup>83</sup> Rule 44 of the *Rules for the Conduct of Proceedings in the Competition Tribunal*.

<sup>84</sup> See Rule 25(1) of the *Rules of Conduct of Proceedings Before the CCMA*.

<sup>85</sup> Section 138(1) of the LRA.

<sup>86</sup> Section 52(2)(a) and (b) of the *Competition Act*.

<sup>87</sup> Section 52(2A) of the *Competition Act*.

<sup>88</sup> Section 142(2) of the *National Credit Act*.

<sup>89</sup> Section 142(1) of the *National Credit Act*.

natural justice. In that context the object and test for using the inquisitorial power is not to pursue to a point against anyone who is not a consumer as if he were the enemy. The inquisitorial power exists to get to the bottom of facts that are material to reaching a correct finding on the properly raised complaint.<sup>90</sup>

Parties participate in the resolution of disputes in person or through a representative. Parties to a hearing of the Competition Tribunal can put questions to witnesses and inspect any books, documents or items presented at the hearing.<sup>91</sup> If permitted by the CCMA Commissioner, a party to the dispute can also give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments.<sup>92</sup> Parties to a hearing of the National Consumer Tribunal and any other person who has a material interest in the hearing may participate in the hearing in person or through a representative.<sup>93</sup> They may put questions to witnesses and inspect any books, documents or items presented at the hearing.

The participation of parties to the dispute is facilitated by the use of multiple languages in dispute resolution proceedings. The National Consumer Tribunal is an example of this, with its language policy stating that the Tribunal will endeavour to make use of any of the eleven official South African languages as well as the South African Sign Language and Braille where practicable, on request.<sup>94</sup>

The participation of parties to the dispute is further promoted through the provision of interpreters and translators by some institutions. Such is the case with the Competition Tribunal, where interpreters and translators are provided during hearings for persons who do not understand the language of the hearing.<sup>95</sup>

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<sup>90</sup> Fleming J in *National Credit Regulator v Chatspare Pty Ltd* Case No NCT/08/2008/140 (1) (P) (July 2008) paras 7-9.

<sup>91</sup> Section 53 of the *Competition Act*.

<sup>92</sup> Section 138(2) of the LRA.

<sup>93</sup> Section 143 of the *National Credit Act*.

<sup>94</sup> The Policy states that one of the principles underlying it is the promotion of good language management by the Tribunal to ensure efficient and effective public service administration and approachability and accessibility that meets the needs of the public and ensures equitable access to the services and information of the Tribunal. The factors to be taken into account in arriving at the choice of official language(s) the Tribunal will use in each context/situation are usage; practicality; expense; regional circumstances; and the balance of the needs and preference of the public it serves (see *National Consumer Tribunal Language Policy* in GN 293 in GG 38659 of 31 March 2015).

<sup>95</sup> Rule 49 of the *Rules for the Conduct of Proceedings in the Competition Tribunal*.

Legislation provides the adjudication institutions with alternative dispute resolution processes in furtherance of their objectives. A member of the Competition Tribunal assigned by the Chairperson is empowered to convene a pre-hearing conference. Such a pre-hearing conference is convened on a date and at a time determined by the member with the Competition Commission, each complainant who has filed a Complaint Referral, intervenors and the respondent.<sup>96</sup> A pre-hearing conference is used (*inter alia*) to give directions in respect of clarifying and simplifying issues in dispute; obtaining admissions of particular facts or documents; the production and discovery of documents whether formal or informal; the witnesses to be called by the Tribunal at the hearing, the questioning of witnesses and the language in which each witness will testify; the determination of the procedure to be followed at the hearing, and its expected duration; a date, time and schedule for the hearing; and any other matters that may aid in resolving the complaint.<sup>97</sup> A pre-hearing conference may be conducted in person or by telephone or both. It is not required that the pre-hearing conference must follow formal rules of procedure, and it is not open to the public.<sup>98</sup>

In order to promote the informal resolution of disputes between parties, the *National Credit Act* requires that in any dispute between a credit provider and a consumer that may be referred to the National Consumer Tribunal (excluding complaints that could be resolved informally or investigated) and before parties may apply directly to the Tribunal, they must attempt to resolve the matter directly between themselves.<sup>99</sup> If they are unable to resolve the matter, they must refer the matter to the ombud with jurisdiction for resolution in accordance with the *National Credit Act* or (if the credit provider concerned is a financial institution and a participant in a recognised scheme as defined in the *Financial Services Ombud Schemes Act*) in terms of the *Financial Services Ombud Schemes Act*.<sup>100</sup> In other cases, they are required to apply to either a consumer court for resolution in accordance with the *National Credit Act* and any provincial legislation establishing that consumer court. They can also apply to an alternative dispute resolution agent for resolution by conciliation, mediation or arbitration.<sup>101</sup>

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<sup>96</sup> Rule 21(1) of the *Rules for the Conduct of Proceedings in the Competition Tribunal*.

<sup>97</sup> Rule 22 of the *Rules for the Conduct of Proceedings in the Competition Tribunal*.

<sup>98</sup> Rule 21(4) of the *Rules for the Conduct of Proceedings in the Competition Tribunal*.

<sup>99</sup> Section 134(4)(a) of the *National Credit Act*.

<sup>100</sup> *Financial Services Ombud Schemes Act* 37 of 2004.

<sup>101</sup> Section 134(4)(b) of the *National Credit Act*.

In the case of the CCMA, in relation to individual unfair labour practices and unfair dismissals the LRA permits the implementation of a process known as "con-arb" (conciliation-arbitration). Con-arb is a speedier one-stop process of conciliation and arbitration which allows for conciliation and arbitration to take place as a continuous process on the same day, if required.<sup>102</sup>

#### **4.4 Independence and impartiality of adjudication institutions**

The independence and impartiality of the institutions or forums are ensured, as they were created either as independent institutions that are autonomous of the administrative and/or delivery institutions; or as courts of law.<sup>103</sup> The Competition Tribunal is able to effectively perform its obligations due to its status and nature and the independence of its members. The Tribunal is a juristic person and a Tribunal of record.<sup>104</sup> The President of the Republic appoints ten persons as members of the Tribunal. Tribunal members are appointed on the recommendation of the Minister of Trade and Industry, from among persons nominated by the Minister, either on the Minister's initiative or in response to a public call for nominations.<sup>105</sup>

In addition, a person cannot be a member of the Competition Tribunal if he or she is an office-bearer of a party, movement, organisation or body of a partisan political nature. A person is also disqualified from membership if he or she is an un-rehabilitated insolvent; is subject to an order of a competent court holding that person to be mentally unfit or disordered; or has been convicted of an offence committed after the *Constitution* of 1993 took effect and sentenced to imprisonment without the option of a fine.<sup>106</sup>

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<sup>102</sup> Section 191 of the LRA.

<sup>103</sup> The CCMA is independent of employees / trade unions and employers / employers' organisations; while the Competition Commission, Competition Tribunal are independent of business. The Competition Appeal Court has the status of a High Court.

<sup>104</sup> Section 26(1) of the *Competition Act*.

<sup>105</sup> Section 26(2) of the *Competition Act*. Two members (the Chairperson and one other member) are full-time executive members of the Tribunal, while eight (including the deputy chairperson) are part-time non-executive members. These members constitute the pool from which the chairperson appoints adjudicative panels comprising three members (see Competition Tribunal 2015 <http://www.comptrib.co.za/about/members/>).

<sup>106</sup> Section 28 of the *Competition Act*.

The conditions of appointment;<sup>107</sup> the discipline and termination of service of Competition Tribunal members;<sup>108</sup> as well as the operational arrangements of the Tribunal (such as funding;<sup>109</sup> human resource and administrative support;<sup>110</sup> management;<sup>111</sup> governance, oversight and supervision;<sup>112</sup> and accountability and reporting<sup>113</sup>) also foster its

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<sup>107</sup> The Chairperson and each other member of the Competition Tribunal are appointed for five years, although the President may re-appoint a member of the Competition Tribunal at the expiry of that member's term of office. However, no person may be appointed to the office of the Chairperson of the Tribunal for more than two consecutive terms (s 29 of the *Competition Act*). If a member is still considering a matter before the Tribunal on the expiry of his or her term, the member can continue to act as a member in respect of that matter only (s 33 of the *Competition Act*). The Minister of Trade and Industry determines the remuneration, allowances, and other benefits of the Chairperson, Deputy Chairperson and other members of the Competition Tribunal (in consultation with the Minister of Finance) (s 34(1) of the *Competition Act*). The Minister also determines other conditions of appointment of members of the Competition Tribunal. The Minister cannot reduce a member's salary, allowances or benefits during his or her term of office once these are determined.

<sup>108</sup> The Chairperson can resign from the Competition Tribunal; or resign as the Chairperson but remain as a member of the Tribunal if he or she gives one month's written notice to the Minister. Any other member of the Tribunal can resign by giving at least one month's written notice to the Minister (ss 29(3) and (4) of the *Competition Act*). The President can remove the Chairperson or another member of the Competition Tribunal from office (on the recommendation of the Minister) if that person becomes an office-bearer of a party, movement, organisation or body of a partisan political nature. The Chairperson or member can also be removed if the person becomes an un-rehabilitated insolvent; becomes subject to an order of a competent court holding him or her to be mentally unfit or disordered; or is convicted of an offence committed after the *Constitution of the Republic of South Africa* 200 of 1993 took effect, and is sentenced to imprisonment without the option of a fine (s 29(5)(a) of the *Competition Act*). The President can also remove the Chairperson or a member of the Competition Tribunal from office (on the recommendation of the Minister) for serious misconduct, permanent incapacity, or for engaging in an activity that may undermine the integrity of the Tribunal (s 29(5)(b) of the *Competition Act*).

<sup>109</sup> *The Competition Tribunal is financed from money appropriated by Parliament for the Tribunal; fees payable to the Tribunal in terms of the Act; income derived by the Tribunal from its investment and deposit of surplus money; and money received from any other source (s 40(1) read with s 42 of the Competition Act).*

<sup>110</sup> The Chairperson of the Tribunal appoints staff, or contracts with other persons, to assist the Competition Tribunal in carrying out its functions; and determines the remuneration, allowances, benefits, and other terms and conditions of appointment of a member of the staff (in consultation with the Minister and the Minister of Finance) (s 35 of the *Competition Act*).

<sup>111</sup> The Chairperson is responsible for managing the caseload of the Competition Tribunal, and assigns each matter referred to the Tribunal to a panel composed of any three members of the Tribunal (s 31(1) of the *Competition Act*).

<sup>112</sup> Governance, oversight and supervision are undertaken by the National Assembly as the Minister of Trade and Industry is required to table in the National Assembly the annual report of the Tribunal (and Commission) submitted to him or her (s 41(1) and (2) read with s 42 of the *Competition Act*).

independence and impartiality. These enable the Tribunal and its members to function without any undue interference and influence.

The institutional framework, status and composition of the National Consumer Tribunal indicate the desire for it to resolve consumer disputes independently, impartially and efficiently. The Tribunal has 11 members appointed by the President of the Republic on a full- or part-time basis.<sup>114</sup> A member of the Tribunal serves for a term of five years, although he or she may be reappointed at the expiry of his or her term of office.<sup>115</sup> However, a person cannot be appointed as Chairperson of the Tribunal for more than two consecutive terms.

A person cannot be a member of the Tribunal if he or she is an office-bearer of any party, movement, organisation or body of a partisan political nature.<sup>116</sup> This will also be the case if the person acquires a direct or indirect financial interest in a registrant with the National Credit Regulator personally or through a spouse, partner or associate. A person who acquires an interest in a business or enterprise, which may conflict or interfere with the proper performance of his or her duties, also cannot be appointed. Other situations which bar a person from becoming a member of the National Consumer Tribunal include if the person is an un-rehabilitated insolvent or becomes insolvent and the insolvency results in the sequestration of that person's estate; if the person is removed from an office of trust on account of misconduct in respect of fraud or the misappropriation of money; if the person is subject to an order of a competent court holding that person to be mentally unfit or disordered; if the person is convicted in the Republic or elsewhere of theft, fraud, forgery

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<sup>113</sup> The Competition Tribunal (together with the Competition Commission) is listed as a national public entity in Schedule 3A of the PFMA. The Chairperson of the Tribunal is the accounting authority of the Competition Tribunal for the purposes of the PFMA (s 40(7) read with s 42 of the *Competition Act*). Each year, the Chairperson submits to the Minister a statement of the Competition Tribunal's estimated income and expenditure, and requested appropriation from Parliament, in respect of the next financial year (s 40(3) read with s 42 of the *Competition Act*). Within six months after the end of each financial year, the Chairperson is required to prepare financial statements in accordance with established accounting practice, principles and procedures, comprising a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Competition Tribunal during the preceding financial year; and a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year. The Competition Tribunal's financial records are audited each year by the Auditor General (ss 40(9) and (10) read with s 42 of the *Competition Act*).

<sup>114</sup> Section 26(2) of the *National Credit Act*.

<sup>115</sup> Section 29(2) of the *National Credit Act*.

<sup>116</sup> Section 26(4) read with s 20(2) of the *National Credit Act*.

or uttering a forged document, perjury, an offence under the *Prevention and Combating of Corrupt Activities Act*,<sup>117</sup> or an offence under the *Financial Intelligence Centre Act*,<sup>118</sup> or an offence involving dishonesty; or is convicted of any other offence and sentenced to imprisonment without the option of a fine.

The conditions of employment of Tribunal members;<sup>119</sup> their discipline and the termination of their service;<sup>120</sup> and the operational arrangements of the Tribunal (including funding;<sup>121</sup> human resource and administrative support;<sup>122</sup> managerial framework;<sup>123</sup> governance, oversight and supervision;<sup>124</sup> and accountability and reporting<sup>125</sup>) also foster its independence and impartiality.

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<sup>117</sup> *Prevention and Combating of Corrupt Activities Act* 12 of 2004.

<sup>118</sup> *Financial Intelligence Centre Act* 38 of 2001.

<sup>119</sup> The *National Credit Act* states that during the term of office of a member of the Tribunal, the member's salary, allowances or benefits may not be reduced (s 34 of the *National Credit Act*).

<sup>120</sup> The Chairperson may resign from the Tribunal, or resign as Chairperson but remain as a member of the Tribunal if he or she gives the Minister one month's written notice (s 29(3) of the *National Credit Act*). A member of the Tribunal other than the Chairperson may resign by giving at least one month's written notice to the Minister (s 29(4) of the *National Credit Act*). The President removes the Chairperson or any other member of the Tribunal from office on the recommendation of the Minister if he or she is disqualified from being a member of the Tribunal (s 29(5)(a) read with s 20(2) of the *National Credit Act*). In addition, the President can also remove the Chairperson or a member of the Tribunal from office for serious misconduct; permanent incapacity, or engaging in any activity that may undermine the integrity of the Tribunal (s 29(5)(a) of the *National Credit Act*).

<sup>121</sup> The National Consumer Tribunal is financed from funds appropriated by Parliament, any fees payable in terms of the Act, income derived from their respective investment and deposit of surplus funds, and other funds accruing from any source (s 35 of the *National Credit Act*).

<sup>122</sup> The registry of the Tribunal (which is led by the Registrar) provides administrative support and secretarial functions to the Chairperson and CEO – see *National Consumer Tribunal Annual Report 2013-2014*.

<sup>123</sup> The head of the Tribunal is the Chairperson, who is responsible for managing the caseload of the Tribunal. The Deputy Chairperson performs the functions of Chairperson in his or her absence (s 31(1) of the *National Credit Act*).

<sup>124</sup> Governance, oversight and supervision of the National Consumer Tribunal are undertaken by Parliament. Every five years the Minister is required to conduct an audit review of the exercise of the functions and powers of the National Consumer Tribunal. The Minister also receives an annual report from the National Consumer Tribunal on its activities, as required by the PFMA. When the Minister conducts an audit review of the exercise of the functions and powers of the National Consumer Tribunal or receives an annual report on the Tribunal's activities, he or she forwards a copy of the report to the Premier of each province. He or she also tables it in Parliament as soon as practicable (s 36 of the *National Credit Act*).

The CCMA was established as an institution that is independent of the State, any political party, trade union, employer, employers' organisation, federation of trade unions or federation of employers' organisations.<sup>126</sup> The CCMA's independence and impartiality is promoted through the appointment and conditions of service of members;<sup>127</sup> its funding;<sup>128</sup>

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<sup>125</sup> The National Consumer Tribunal (and the National Credit Regulator) must each report to the Minister annually on its activities, as required by the PFMA (s 36 of the *National Credit Act*).

<sup>126</sup> Section 113 of the LRA.

<sup>127</sup> The CCMA is governed by a Governing Body (s 116(1) of the LRA). The Governing Body consists of a chairperson and nine other members, each nominated by NEDLAC and appointed by the Minister of Labour; and the Director of the CCMA (who has non-voting power). The chairperson, who is an independent person, is nominated by NEDLAC; three members of the Governing Body are nominated by NEDLAC to represent organised labour; three members of the Governing Body are nominated by NEDLAC to represent organised business; and three members of the Governing Body are nominated by NEDLAC to represent the State. The Members of the Governing Body are appointed for a period of three years (s 116(2) of the LRA). The Governing Body appoints the Director of the CCMA (s 118(1) of the LRA). The Director is required to perform the functions that are conferred on him/her by or in terms of the LRA or by any other law; to perform functions that are delegated to the Director by the Governing Body; to manage and direct the activities of the Commission; and to supervise the Commission's staff (s 118(2) of the LRA). The Governing Body determines the Director's remuneration, allowances and any other terms and conditions of appointment not contained in Schedule 3 of the LRA (s 118(3) of the LRA). A person appointed as the Director of the CCMA automatically holds the office of a Senior Commissioner. However, only the requirement that the Governing Body must prepare a code of conduct for the Commissioners and ensure that they comply with the code of conduct in performing their functions in s 117 applies to the Director (s 118(4) of the LRA). The Director, in consultation with the Governing Body, may delegate any of the functions of his or her office to a Commissioner, except the functions mentioned in ss 120 and 138(8) (s 118(6) of the LRA). The Governing Body appoints as Commissioners as many adequately qualified persons as it considers necessary to perform the functions of Commissioners by or in terms of the LRA or any other law (s 117(1) of the LRA). The Governing Body appoints each Commissioner on either a full-time or a part-time basis; and to be either a Commissioner or a Senior Commissioner. The Governing Body appoints each Commissioner for a fixed term determined by it at the time of appointment. The Governing Body may appoint a Commissioner, who is not a Senior Commissioner, for a probationary period. When making appointments, the Governing Body must have due regard to the need to constitute a Commission that is independent and competent and representative in respect of race and gender (s 117(2) of the LRA). The Governing Body determines the Commissioners' remuneration, allowances and any other terms and conditions of appointment not contained in the LRA (s 117(4) of the LRA). The Governing Body is required to prepare a code of conduct for Commissioners and ensure that they comply with the code of conduct in performing their functions (s 117(6) of the LRA). A Commissioner may resign by giving written notice to the governing body (s 117(5) of the LRA). The Governing Body may remove a Commissioner from office for serious misconduct; incapacity; or a material violation of the Commission's code of conduct (s 117(7) of the LRA). Also see *Maepe v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 2189 (LAC).

human resource and administrative support;<sup>129</sup> managerial framework;<sup>130</sup> governance, oversight and supervision;<sup>131</sup> and accountability and reporting.<sup>132</sup> These attributes enable the CCMA to effectively undertake its objectives; and to eliminate any undue influence in its activities so that it can function independently and impartially.

#### **4.5 Expertise of adjudication institutions**

The statutes establishing comparative South African social security institutions promote the effectiveness of the institutions by requiring that only suitably qualified persons are appointed as members. This is done by stipulating minimum academic qualifications and relevant professional and other experience. As examples, the Chairperson and other members of the Competition Tribunal are required to comprise sufficient persons with legal training and experience to satisfy the requirements of the Act.<sup>133</sup> They are also required to have suitable qualifications and experience in

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<sup>128</sup> The CCMA is funded through moneys that the Minister of Labour (with the agreement of the Minister of Finance) allocates from public funds; moneys that Parliament appropriates to it; fees payable to the CCMA; grants, donations and bequests made to it; and income earned on the surplus moneys deposited or invested (s 122 of the LRA).

<sup>129</sup> The CCMA is composed of a Governing Body, the Director and Commissioners (ss 117, 118 and 119 of the LRA). In addition, the Director appoints staff of the CCMA after consulting the Governing Body. The Governing Body determines the remuneration and allowances and any other terms and conditions of appointment of staff members (s 120 of the LRA).

<sup>130</sup> The CCMA is headed by the Director, who manages and directs its activities and supervises the staff (s 118(2) of the LRA).

<sup>131</sup> Governance, oversight and supervision of the CCMA are undertaken by a Governing Body as the supreme policy-making body responsible for the policy-making of the CCMA (s 116 of the LRA).

<sup>132</sup> The CCMA is listed in Schedule 3A of the PFMA as a national public entity. This implies the autonomous financial accountability of the CCMA. Financial accountability and reporting for the CCMA are undertaken by the Director. In each financial year, the CCMA is required to submit to the Minister a statement of the Commission's estimated income and expenditure, and requested appropriation from Parliament, for the following financial year (s 122(3) of the LRA). In addition, the CCMA is required to provide the Minister of Labour with a report concerning its activities and the financial position during the previous financial year. The Minister tables the annual report in Parliament within 14 days of receiving it from the CCMA. However, if Parliament is not in session at that time, the Minister tables the report within 14 days of the beginning of the next session of Parliament (Item 9(1) and (2) of Schedule 4 of the LRA).

<sup>133</sup> Section 28(1) of the *Competition Act*.

economics, law, commerce, industry or public affairs and to be committed to the purposes and principles of the *Competition Act*.<sup>134</sup>

The members of the National Consumer Tribunal are also required to comprise sufficient persons with legal training and experience to satisfy the requirements of the Act.<sup>135</sup> A member is required to have suitable qualifications and experience in economics, law, commerce, industry or consumer affairs, and to be committed to the purposes of the Act.<sup>136</sup>

A person who is appointed as Director of the CCMA must be a person who is skilled and experienced in labour relations and dispute resolution; and has not been convicted of any offence involving dishonesty.<sup>137</sup>

## 5 Conclusions

Adjudication institutions or forums in comparative South African non-social security jurisdictions present many lessons for the reform of the social security adjudication framework. The multi-tiered and complementary nature of these dispute resolution institutions, their status and procedures guarantee their effectiveness in resolving disputes. They are able to undertake sequential and complementary review and appeal procedures, which allows for the resolution of disputes at an appropriate level and ensures the independence of the appeal institution from the administration that reviewed the initial complaint.

Attempts to make the institutions accessible are not always appropriately made. Some of the institutions convene in as many places as are necessary, while others have a single centrally located presence. However, accessibility is facilitated by appropriate dispute lodgement procedures and time limits. The wide scope of possible claimants also ensures greater accessibility to the institutions.

The scope of the jurisdiction and of the powers of these institutions are also fairly wide, although limited to matters falling within the purview of the enabling statute. The wide scope of the jurisdiction and the powers enables the institutions to provide a wide range of remedies, such as

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<sup>134</sup> They must also be citizens of South Africa, ordinarily resident in the country (s 28(2) of the *Competition Act*).

<sup>135</sup> Section 28(1) of the *National Credit Act*.

<sup>136</sup> Section 28(2) of the *National Credit Act*. Current members come from diverse backgrounds including law, academia, business, government and non-governmental organisations (see Woker Date Unknown <http://tinyurl.com/jfm3h9u>).

<sup>137</sup> Section 118(1) of the LRA.

making an order which any court of law may make, providing interim relief and making cost orders. Some of the institutions that are not courts of law also have the powers to enforce their decisions.

The procedures of the adjudication institutions promote the resolution of disputes quickly and fairly. This is achieved by empowering them to determine adjudication procedures, which gives scope for the adoption of flexible procedures. Procedural fairness is further promoted through the participation of parties in the resolution of disputes in person or through a representative.

The independence and impartiality of the institutions or forums are ensured, as they were created either as independent institutions that are autonomous of the administrative or delivery institutions, or as courts of law. The independence and impartiality of the institutions are fostered through the conditions of appointment; the discipline and termination of the service of members, as well as their operational arrangements (such as funding; human resource and administrative support; management; governance, oversight and supervision; and accountability and reporting).

The effectiveness of comparative South African institutions is further promoted by requiring that only suitably qualified persons are appointed as members. This is done by the stipulation of minimum academic qualifications and relevant professional and other experience. This is in contrast with the position in some current social security dispute resolution forums that do not state such requirements.<sup>138</sup>

Dispute resolution institutions and procedures in the labour relations, competition and consumer protection spheres provide examples of systems established to resolve disputes in an efficient and effective manner. They can thus be considered as realising the rights to access to justice and to just administrative action for their users, thereby presenting useful guidelines for the reform of the current social security dispute resolution framework.

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<sup>138</sup> As examples, the Regulations to the Social Assistance Act stipulate minimum qualifications and experience requirements for the members of the Independent Tribunal for Social Assistance Appeals panel who are legal practitioners and medical practitioners. The Regulations to the Road Accident Fund Act also state minimum qualifications and experience requirements for the medical practitioners that make up the Appeal Tribunal. The *Pension Funds Act* also states minimum qualifications and experience requirements for a person to be appointed as an (Acting) Adjudicator (see Regs 6-8 in GN R746 in GG 34618 of 19 September 2011; Reg 3(8) in GN 769 in GG 31249 of 21 July 2008; and s 30C of the *Pension Funds Act*).

## 6 Recommendations

At present, various social security institutions are responsible for the administration of particular risks and for the resolution of disputes, since there is no single overall social security administrative institution.<sup>139</sup> Therefore, improving the system requires properly functioning internal review or revision frameworks within each institution. The establishment of well-structured and properly-aligned internal review frameworks will lessen the workload of the appeal institution(s) and will also enhance decision-making by the institution.<sup>140</sup>

The *Social Assistance Act* provides for a senior official to reconsider a decision by the South African Social Security Agency.<sup>141</sup> Provision must be made for officials designated to undertake reconsiderations to be appropriately qualified and to be trained if necessary. The Agency should be empowered to condone the late lodgement of applications for reconsideration; and reconsiderations should be conducted at the level of the SASSA District Office to promote accessibility (geographical and physical).

In relation to COIDA, the "Compensation Court" should undertake the review of the decisions of the Compensation Fund. The presiding officer and assessors should be sufficiently qualified to review such decisions. The scope of jurisdiction of the Compensation Court should be wide, as it should be able to review any decision of the Director-General/Compensation Commissioner. Its powers must also be extensive in order that it may be able to confirm, vary or set aside the original decision and replace it.

A framework for the review or reconsideration of ODMWA compensation claim decisions must be established, possibly by extending the scope of jurisdiction of the Reviewing Authority. The system for the review of disputes relating to the certification of an occupational disease must also

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<sup>139</sup> As announced in the State of the Nation Address 2007, the government is planning a National Social Security System in order to address South Africa's social security challenges (see Mbeki 2007 <http://www.gov.za/node/538254>; and National Treasury *Social Security and Retirement Reform*). The National Social Security System will streamline the administration of social security, since the administration of the different risks will be undertaken by a single institution. This implies that the review or reconsideration of decisions will also be carried out by a single institution.

<sup>140</sup> See Olivier, Govindjee and Nyenti *Project to Set Up Internal Remedy Units* 129.

<sup>141</sup> An example can be found in the *Social Assistance Act*, which empowers the SASSA to reconsider its decision (s 18(1) of the *Social Assistance Act*).

be reformed. The Reviewing Authority should be designated as the internal review or reconsideration forum. Multiple dispute lodgement mechanisms must be provided (such as by hand, post, fax or electronic mail). In addition, the Reviewing Authority should also have the power to condone applications which are submitted late, where good cause is shown. The Reviewing Authority should have the power to review any finding of the Certification Committee and the Compensation Commissioner on its own, and be able to confirm, vary or rescind the decisions. The certification of diseases and the review of decisions should be undertaken in as many locations as practically possible, and the certification procedure must also be expedited.

Under the *Unemployment Insurance Act*, the Regional Appeals Committees of the UIF Board are geographically or physically distributed around the Republic. Therefore they offer a more accessible option (than the National Appeals Committee) for persons unhappy with decisions of the Fund to review the decision. In addition, members of the Regional Appeals Committees could be considered to be more senior in rank than the original decision-makers at the Unemployment Insurance Fund. Suitably qualified or trained persons should thus be appointed to undertake the review or reconsideration of Unemployment Insurance Fund decisions.

No proper mechanism for the internal Road Accident Fund review or reconsideration of its decision has been established in the *Road Accident Fund Act*. This means that there should be either the creation of an internal framework for the Road Accident Fund to review or reconsider its decisions, or the designation of the Appeal Tribunal appointed by the Registrar of the HPCSA as the internal review forum for the Fund. Such proposals were made by the Road Accident Fund Commission in 2002, which stated that the Road Accident Fund should establish its own internal review mechanism or body capable of monitoring decisions on benefits and initiating immediate reconsideration of such decisions where there is an indication or notification by a claimant of a dispute.<sup>142</sup> Although the Commission also proposed a two-tiered (external) appeals system,<sup>143</sup> it is hereby recommended that only an internal review mechanism should be developed within the Road Accident Fund.

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<sup>142</sup> See RAF Commission *Report XLIV*.

<sup>143</sup> RAF Commission *Report 782*. The proposal consisted of a first stage appeal to a Benefits Review Panel and thereafter an appeal to a Benefits Appeal Tribunal.

One of the functions of the Council for Medical Schemes in terms of the *Medical Schemes Act* is to investigate complaints and settle disputes in relation to the affairs of medical schemes as provided for in the *Medical Schemes Act*. It should thus be the designated internal dispute resolution forum.

The *Pension Funds Act* requires pension funds to reconsider decisions when a member of the fund lodges an application for reconsideration. If a complainant is not satisfied with the reply of the fund or the employer, or if the fund or the employer fails to reply within 30 days of the receipt of the complaint, the complainant may lodge the complaint with the Office of the Pension Funds Adjudicator.<sup>144</sup>

In addition to the reform of internal review mechanisms, a uniform, external and independent social security appeal institution must also be created to hear appeals emanating from reviewed or reconsidered decisions on the basis of law and fairness. A Social Security Appeals Tribunal is proposed, which will serve as the new highest level of non-judicial appeal in social security matters. It will replace all existing appeal institutions, such as the Independent Tribunal for Social Assistance Appeals, the National Appeals Committee of the Unemployment Insurance Fund Board, the Road Accident Fund Appeal Tribunal and the Office of the Pension Funds Adjudicator. A further right to review by the High Court should be provided.

This reformed framework would ensure the multi-tiered and complementary resolution of disputes, with sequential review and appeal procedures, which would allow for the resolution of disputes at an appropriate level. It would also ensure the independence of the appeal institution from the administration that reviewed the initial complaint.

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<sup>144</sup> Section 30A of the *Pension Funds Act*.

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## List of Abbreviations

CCMA	Commission for Conciliation, Mediation and Arbitration
CMS	Council for Medical Schemes
COIDA	Compensation for Occupational Injuries and Diseases Act
DOJ&CD	Department of Justice and Constitutional Development
HPCSA	Health Professions Council of South Africa
ILO	International Labour Organisation
JJS	Journal for Juridical Science
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
ODMWA	Occupational Diseases in Mines and Works Act
PFMA	Public Finance Management Act
RAF	Road Accident Fund
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAMJ	South African Medical Journal
SASSA	South African Social Security Agency
UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund