Abstract:
Disputes are an inevitable event in all facets of life and in the same vein it permeates society, from family quarrels to multinational corporate clashes. The dynamics of today society which revolve around competition, misunderstandings, wrongful termination of contracts, product liability and hostility among communities have contributed greatly to the endemic nature of dispute in our society. The Alternative Dispute Resolution (ADR) method of adjudication in South Africa has been very useful as a means of resolving dispute at a reasonable cost to parties involved in dispute. Besides the cost, the method does not require the ultimate decision to be made formally by a judge or jury. The main objective is to keep disputes out of the normal court system in an effort to cut down the cost of resolving the dispute among the parties. In view of the above issues, the principal aim of this paper is to show how South Africa has successfully used ADR to settle dispute and how this method can be used by other countries like Ghana, Nigeria, Ethiopia, Malawi and other African countries where the method of ADR has not been fully utilized.

1. Introduction
Alternative dispute resolution (ADR) refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts; Mnookin (1998:1). The practice and technique of ADR comprises negotiation, mediation, conciliation, arbitration, and a variety of “hybrid” processes by which a neutral person facilitates the resolution of legal disputes without formal adjudication. Today, the following are among those most commonly used APR in employment disputes in South Africa.
— Conciliation process: this is a process in which the conciliator who is a neutral person serves as a communicator between the parties, to encourage movement towards resolution but without offering suggestions, personal ideas or being judgemental.

— Mediation: this differs from conciliation in that the mediator is someone experienced in the field who offers alternative suggestions to enable the disputants to open up and stimulate discussion and movement towards resolution.

— Fact-finding: this is a non-binding process whereby the neutral party hears the parties presentations and submits findings of fact and non-binding recommendations to the disputants in the hope that their adoption will resolve the dispute.

— Arbitration: this is a system whereby the parties make presentations to a mutually agreed neutral party and commit themselves to abide by that person’s decision, recognizing it as final and binding. An arbitrator may be called upon to resolve disputes over a range of issues that affect both employer and employee in a work environment.

— Con-Arb: this is a process where when there is a deadlock in resolving a dispute through conciliation, arbitration process sets in immediately on the same day with the same commissioner who wanted to resolve the dispute through conciliation. However, both parties must apply for this process before it can be used.

Historically, the practice of ADR has a long history in the area of collective bargaining and labour-management relations, Mareschal (2002:1256). In the USA, mediation became part of the institutional framework of labour relations when national unions came to the forefront in the late nineteenth century. According to Mareschal (2002:1256), the U.S. federal government first recognized mediation as a method of handling labour disputes with the passage of the Erdman Act of 1898.
There is also a general dictum among the Americans that the practice of ADR by Native Americans and Aboriginal peoples of Canada predate the use of ADR in labour-management relations.

Eaton, A.E. and Keefe J.H. (1999:56) are of the view that ADR has spread to a variety of contexts in respect of contract negotiations and non-contractual disputes. Bingham and Chachere (1999:25) argue that in employment context, ADR has expanded to non-union settings and to public sector employment (both union and non-union). Baker (1999:8) argues that in the public policy context ADR is being used in environmental disputes and regulatory negotiations. Bercovitch and Houston (2000:120) buttressed the fact in their studies that ADR is also being used to resolve international conflicts and criminal justice cases.

Wall and Dewhurst (1991:63) in their studies on “Mediator Gender: Communication Differences in Resolved and Unresolved Mediations” are of the opinion that ADR is now expanding fast into almost all conflict contexts including divorce and child custody, educational setting, sexual harassment cases and small claims court. In the United States of America (USA), the use of ADR is quite extensive. Indeed, among non-union workplace more than 90% of firms with more than 100 employees employ some form of ADR to resolve employment disputes, (Colvin, 2003:375; Ewing, 1989:20; General Account Office, 1995:95; Feville, P. and Delaney, 1992:187). While a majority of Claims involve contractual violations or violations of non-binding employment policies, the use of these procedures, particularly employment arbitration, to resolve statutory claims is growing in USA. For example, employment arbitrators recently reported that approximately 38% of their cases involved claims according to Wheeler et. al. (2004:60). The USA Court in the case of Gilmer V Interstate/Johnson Lane (500 US 20, 1991) emphasized the practice among non-union employers to, as a precondition of employment, require their employees to waive their right to pursue claims through the courts and agree to resolve disputes through arbitration. The facts of the above case are as follows: Gilmer was a 62-year-old employee of a securities company. Under the Securities Regulation Agreement, a person seeking work in the securities industry, as a broker or sales person, or in any other capacity, is required to sign a registration form setting the fiduciary and other responsibilities of work in that industry. Any challenge
of an employer’s action thereafter is to be resolved by arbitration rather than litigation. When he was fired, Gilmer sought to institute litigation under the Age Discrimination in Employment Act claiming he was fired to be replaced by a younger person. The company sought to forestall his legal action on the grounds that he had signed the agreement to arbitrate all disputes arising out of his securities industry employment. The Supreme Court agreed, holding that by agreeing to arbitrate, Gilmer had waived his access to litigation, even over and alleged violation of statutes.

This mandated use of ADR to resolve issues of public policy and employment law draws the public attention to the importance of ADR in dispute resolution. However, this mandate has been criticised by individuals and institutions in USA who felt that the mandatory nature of the arbitration process is undemocratic.

In the United Kingdom (UK) the use of ADR is increasing in all sectors of the economy. In a research analysis on the perceptions of alternative dispute resolution as constraints upon its use in the UK construction industry conducted by Penny Brooker and Anthony Lavers (1997:519), the research revealed that among the 229 respondents interviewed, 70% of them agreed that they would prefer to use ADR to resolve their dispute instead of the present litigation process. Three percent of the respondents said that they would not use ADR and 27% said they do not know much about ADR. The authors of this research argue that the thirty percent cannot be treated as hostile to ADR, since the main reason for their response is that they lack knowledge of ADR.

Since 70% of the respondents prefer to use ADR, it can be argued that majority of the respondents are quite willing to use ADR instead of the litigation process in British Courts.

Unfortunately, in Africa not much has been done to develop and use the already existing infrastructure to promote and expand the use of ADR. In war-torn African nations, for example, the present crisis in Sudan, Somalia, the tribal conflict between the Tutsi and the Hutus in Rwanda, the conflict of law in respect of the sharia law and the Nigerian Constitution and the Ogoni oil crisis in Nigeria could best be resolved by ADR rather than the formal judicial system in which members of the public have little or no confidence.
In South Africa, the use of ADR has been fully embraced and this has minimized the institutionalized conflicts, inequality and discrimination that existed during the apartheid era. The current peace and economic development in South Africa can be attributed to the various ADR programmes that were established by the current Government. These programmes have increased access to justice for social groups that are not adequately or fairly served by the judicial system. These programmes are instruments for the application of equity, rather than the rule of law. The programmes complement and support judicial reforms and how these operate in South Africa and possible lessons other African countries can learn from this will be examined in this paper.

2. The South African Government and the use of ADR

The South Africa experience of the ADR systems shows that it can be used as a substitute for a poorly functioning formal dispute resolution system which can also be adopted as part of a widespread reform process. Prior to and during the transition in government, many NGOs, financed by numerous donors, undertook ADR efforts for a variety of purposes throughout South Africa. One of the earliest and most effective NGOs was the Independent Mediation Service of South Africa (IMSSA), which started in the early 1980’s to focus on resolving labour-management disputes.

After the establishment of IMSSA, the African Centre for the Constructive Resolution of Disputes (ACCORD), the Vuleka Trust, the Community Law Centre, the Wilgespruit Fellowship Centre, the Community Dispute Resolution Trust (CDRT), the institute for Multi-party Democracy (MPD), and the Community Peace foundation (CPF), among others, implemented a variety of training, mediation, and community reconciliation programmes to help manage and control community tension, resolve neighbourhood disputes, train community leaders in negotiation and conflict management techniques and establish neighbourhood justice centres.

After the transition of power from the apartheid government to democratic government, the new South African Government saw the above ADR programmes as models for new governmental dispute management. The Commission for Conciliation, Meditation, and Arbitration (CCMA) was established to resolve labour dispute in a workplace environment. The CCMA was patterned after the success of IMSSA and its operational activities were influenced by a similar ADR system in
Australia where it has been a huge success in resolving labour dispute. In South Africa, the CCMA has been very useful in resolving labour disputes and much attention will be given to the role of the CCMA in dispute resolution in the remaining part of this paper. It is necessary for other African countries to learn on how to minimize labour dispute through the process of CCMA as it has been used in South Africa.

Before discussing the role, structure and the process of CCMA in resolving disputes in South Africa, it is also necessary to mention briefly other ADR programmes that are currently implemented in resolving disputes in South Africa. Similar institutions like CCMA that are currently established include: (a) the local community courts established by Department of Justice (b) the family mediation boards which is to help in resolving local family disputes, (c) the National Land Reform Mediation Panel to help resolve disputed land claim; and several other national and state agencies which are considering their own dispute resolution mechanisms that totally exclude the normal litigation process.

3. The Structure, Functions and the Process of the CCMA in Dispute Resolution

The commission for Conciliation Mediation and Arbitration (CCMA) was established in 1995 mainly to replace the previous system of statutory conciliatory bodies that proved ineffectual, costly and complicated. The CCMA seeks to remedy these shortcomings by providing for conciliation and arbitration in a number of issues, thus freeing the all-important resources of the Labour Court to deal with and resolve the more serious and involved issues such as strikes action, unfair dismissal, retrenchments and discriminatory practices in workplace environment.

Some individuals are of the opinion that the pressures previously placed in the formal judicial system have now simply been shifted onto the CCMA, which already has a backlog of outstanding issues. Coupled with staffing and time constraints, the pressure and backlog result in important issues such as unfair dismissals and misconduct issues sometimes taking months to be resolved. Moreover, because employees in most cases need only assert unfair dismissal, and employers are
required by the South African Labour Relations Act 55 of 1995 as amended 2002 to provide the proof needed to establish whether the dismissal was fair, the CCMA is laid open to the possibility of rash and frivolous charges of unfair dismissal being brought before it, according to Robert Venter (2003:522). Venter argues that this in turn, slows the process, and perhaps even leads to a dilution of the seriousness of other allegations that warrant greater attention.

It should also be noted that the CCMA is an independent juristic person with jurisdiction in all the provinces of South Africa. The Commission is expected to maintain an office in each province and as many local offices as it considers necessary.

In terms of the structure, CCMA is governed by a governing body nominated by National Economic Development and Labour Council (NEDLAC) and appointed by the Minister of Labour.
The above Figure I illustrates the structure and composition of CCMA.

The governing body consists of the Director of the CCMA, appointed by the Commission and 10 members appointed by the Minister of Labour. The Director manages and directs the activities of the CCMA and supervise the Commission staff. The ten members nominated by NEDLAC consist of an independent chairperson and nine other members. Organised labour, organised business and the State propose the nine members in equal proportion.
It is the responsibility of the governing body to appoint adequately qualified persons as commissioners on either a full-time or a part-time basis for a fixed term. When making these appointments the governing body must have due regard to the need to constitute a Commission that is independent, competent, representative in respect of race and gender. The governing body determines the remuneration and other terms and conditions of appointment of the commissioners and prepares a code of conduct for the commissioners.

In respect of the functions of the CCMA, it plays a central role in the statutory dispute-resolution process. All disputes not handled by private procedures or accredited bargaining councils or agencies must be referred to it for conciliation or mediation before they can be referred to arbitration or adjudication. It is a state-funded but independent body, with jurisdictions throughout South Africa. The CCMA may also accredit private agencies to perform any or all of its functions. Its main functionaries are commissioners and senior commissioners. The multi-faceted functions of the CCMA are set out in section 115 of the Labour Relations Act 66 of 1995 as amended 2002 (LRA):

1. The CCMA must –
   a) Attempt to resolve, through conciliation, any dispute referred to it in terms of the above Act;
   b) If a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if –
      i. This Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or
      ii. All the parties to the dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the CCMA;
   c) Assist in the establishment of workplace forums in the manner contemplated in chapter V of the LRA.
   d) Compile and publish information and statistics about its activities.

2. The CCMA may –
   a) If asked, advise a party to a dispute about the procedure to follow in terms of this Act;
b) If asked, assist a party to a dispute to obtain legal advice, assistance or representation;
c) Offer to resolve a dispute that has not been referred to the CCMA through conciliation;
d) Conduct, oversee or scrutinise any election or ballot of a registered trade union or registered employers’ organisation if asked to do so by that trade union or employers organisation;
e) Publish guidelines in relation to any matter dealt with in this Act; and
f) Conduct and publish research into matters relevant to its functions.

In respect of a dispute which is of a mutual interest between a trade union and employees, on one hand, and an employer on the other hand, one of the parties has the right to refer it to CCMA. As soon as the dispute is referred to CCMA, a commissioner must be appointed to attempt to resolve the dispute within 30 days through ‘conciliation’, which may include mediation, fact-finding, and advice. At this stage, commissioners have no prescriptive powers, other than to subpoena persons for questioning, to inspect documents and enter premises. Prior to commencing with conciliation, however, the Commission is required to establish that it has Jurisdiction by determining, inter alia, whether the dispute had been referred within the prescribed time limit, and whether the dispute arose after the commencement of the LRA. While provision is made for the offence of contempt of the CCMA, Commissioners cannot themselves convict and punish persons for it, but must proceed by way of application to the Labour Court.

If a dispute cannot be settled by conciliation, the CCMA must appoint a commissioner to arbitrate. The arbitrator maybe the same as the one who conducted the conciliation process, unless one of the parties objects. The parties may choose their arbitrator from a list, and request a senior commissioner in complex cases. The application for arbitration must be made within 90 days of the date of which the certificate was issued. Non-compliance with this time limit can, however, be condoned on good cause shown by the party requesting condonation. Arbitration proceedings are meant to be relatively informal and employee parties are entitled to be represented, if they so wish, by legal practitioners or union officials, while employers can appear in person or be represented by a lawyer or employers’ association official.
However, consent of all parties and the leave of the Commissioner are required for a party to be represented by a legal practitioner (i.e. a person admitted to practice as an advocate or attorney in the Republic of South Africa) in the case of disputes arising from dismissals for misconduct or incapacity. In a situation where one party does not wish to permit the other to be represented by a legal practitioner, commissioners still have the power to permit such representation, provided they take into account the following issues: the nature of the questions of law raised by the dispute; its complexity; the public interest; and the comparative ability of the opposing parties to deal with the arbitration.

It should be noted that these considerations are subjective and commissioners must, in the absence of agreement between the parties, apply their minds to them before granting or denying right of audience to a legal practitioner. The South African Labour Court has held that the central question to be considered by commissioners is whether it would be unreasonable to permit a party to continue without legal representation. The issue of legal representation at CCMA will be discussed later in this paper.

During the arbitration process, the commissioner arbitration is expected to conduct arbitration in a manner which the arbitration considers ‘appropriate’ in order to determine the dispute fairly and quickly and to deal with the substantial merits of the dispute with the minimum of legal formalities (section 138 (1) of LRA). Unless the parties agree otherwise, arbitration amounts to a complete rehearing of the matter (see the case of *Gibb v Nedcor Ltd* 1997). The parties are, subject to the discretion of the Commissioner, entitled to give evidence, call witnesses, question the witnesses of other party and address concluding arguments to the commissioner. However, the phrase ‘subject to the discretion of the commissioner’ does not mean that he or she can disregard the rules of natural justice. If this is done, the award will be subject to review, which means that it can be set aside and, if the court so decides, the matter can be send back to the CCMA to be heard by another commissioner.
An arbitration award must be issued the commissioner within 14 days of the conclusion of hearing. An award can be made only in the following terms-

An arbitration award must be issued by the commissioner within 14 days of the conclusion of hearing. An award can be made only in the following terms-

a) Compensation – where the employer is required to pay certain amount of the employee or employees.

b) Re-employment – where the employer is required to take the employer back to work on any position the employer feel is good for employee, it could be a position lower than the previous position of the employee before the dispute occurred.

c) Re-instatement – where the employer is required to give the employee his former position and not a position lower than the former position of the employee before the dispute occurred.

4. **The Issue of Legal Representation at CCMA**

According to Debbie Collier (2005:1), the issue of legal representation at CCMA is a vexed one. The LRA as amended 2002 and the CCMA rules that there is no absolute right to legal representation at any stage of the proceeding arising from incapacity and misconduct dismissal. In terms of the CCMA Rule 25(1)(a) it states clearly that legal representation is not allowed at conciliation stages, while in terms of CCMA Rule 25(1)(c), legal representation is generally allowed at arbitration stage except in the case of incapacity and misconduct dismissals.

The bone of contention with regard to Rule 25(1)(c) is that legal representation is generally allowed at all cases in arbitration except in the case of incapacity and misconduct whereas in the Labour Court, Labour Appeal Court, High Court, the Supreme Court of Appeal and Constitutional Court legal representation is allowed in the case of incapacity and misconduct. Those who argued against the above rule based their argument on inconsistency in its application. They argued that all the courts should speak with one voice on whether to allow legal representation in the case of incapacity and misconduct. Among those who support the view that this inconsistency must be rectified is the Law Society of South Africa (LSSA).
The Law Society of South Africa has challenged the constitutionality of the CCMA Rule on the following grounds:

(i) rule 25(1)(c) is ultra vires; and

(ii) the exclusion of the right to legal representation in rule 25(1)(c) constitutes unfair discrimination against members of the legal profession.

The LSSA asserts that the CCMA’s refusal to allow parties the right to be legally represented at misconduct and incapacity arbitrations, while allowing representation by trade unions, employer organisations and in-home legal advisers, amounts to unfair discrimination against members of the legal profession. Those who support the view that the rule is fine and it should be left as it is, argued that legal representation in the case of misconduct and incapacity if allowed would make the process very legalistic and expensive and that a high degree of legal representation would both undermine endeavours to resolve these disputes expeditiously and tilt the balance unfairly in favour of employers. An empirical investigation conducted by Okharedia A.A. (2007) on whether legal representation should be allowed at arbitration, or that the status quo should be left as it is, yielded the following results.

**Table 1.1. Respondents’ Opinion on Legal Representation at Arbitration**

<table>
<thead>
<tr>
<th>Respondents’ view</th>
<th>No. of Respondents</th>
<th>(Percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal representation should be allowed at arbitration (except incapacity / misconduct dismissal)</td>
<td>32</td>
<td>27.1</td>
</tr>
<tr>
<td>Legal representation should be allowed at all arbitration</td>
<td>76</td>
<td>63</td>
</tr>
<tr>
<td>Legal representation should not be allowed at any arbitration</td>
<td>11</td>
<td>9.1</td>
</tr>
<tr>
<td>Others, I don’t care whether they are represented or not</td>
<td>1</td>
<td>0.8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>120</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>
The above table 1.1 shows that out of 120 respondents interviewed on whether legal representation should be allowed at arbitration, 76 of the respondents (63%) are of the view that legal representation should be allowed at all arbitration processes. Thirty two of the respondents (27.1%) are of the opinion that legal representation should be allowed at arbitration except in the case of incapacity and misconduct. Eleven of the respondents (9.1%) are of the opinion that legal representation should not be allowed at any arbitration. Only one (1) of the respondents (0.9%) said he does not care whether or not a legal representation is allowed at arbitration.

The inference which we can draw from this empirical investigation is that majority of the respondents are of the view that legal representation should be allowed in all arbitration cases. In our view and also based on our experience (as a part-time commissioner at) the CCMA, it is highly recommended that legal representation should be allowed in all arbitration processes mainly because the process of arbitration itself requires a full trial process of adjudication in which judgement must be given in respect of who is right and who is wrong followed by punishment or reward that must be given to one of the parties in the dispute. For a thorough investigation of all the allegations made in the process, legal experts should be given the opportunity to use their expertise knowledge to examine all the issues raised during their hearing. This will give more information to the adjudicator so as to be able to make a fair and well-informed judgement. For this reason, we fully support the opinion of the majority of the respondents who fully support the idea that legal representation should be allowed at all arbitration cases.

On the question of what methodology we used in selecting the above respondents, we used the accidental sampling technique. At CCMA building in Pretoria, we interviewed the respondents with the help of a well-structured questionnaire for them to fill as they come into the building to attend to their respective cases for the day. The respondents include both males and females who have been using the services of the CCMA for some time.

In recent times, the number of CCMA cases has been on the increase every month. For the month of February 2010, a total number of 13118 cases were held at the CCMA. In respect of the above cases, 82% of the cases are Unfair Dismissal Disputes, while 7% of the cases are dealing with unfair labour practices and the
other 10% involve cases on matters of mutual interest, Collective Bargaining, Severance pay and other smaller cases.

Table 1.2: Types Of Cases Referred By Region
### Cases Referred by Region: February 2010

<table>
<thead>
<tr>
<th>Region</th>
<th>Number of Cases Referred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern Cape</td>
<td>881</td>
</tr>
<tr>
<td>Free State</td>
<td>726</td>
</tr>
<tr>
<td>Gauteng - Johannesburg</td>
<td>3420</td>
</tr>
<tr>
<td>Gauteng - Pretoria</td>
<td>1388</td>
</tr>
<tr>
<td>Head Office</td>
<td>130</td>
</tr>
<tr>
<td>KwaZulu Natal</td>
<td>2165</td>
</tr>
<tr>
<td>Limpopo Province</td>
<td>719</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>895</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>247</td>
</tr>
<tr>
<td>North West</td>
<td>698</td>
</tr>
<tr>
<td>Western Cape</td>
<td>1849</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>13118</strong></td>
</tr>
</tbody>
</table>

### Highest Referring Issues in Dispute: February 2010

<table>
<thead>
<tr>
<th>Issue Full Description</th>
<th>Number of Referrals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfair Dismissal Disputes</td>
<td>82%</td>
</tr>
<tr>
<td>Unfair Labour Practice</td>
<td>7%</td>
</tr>
<tr>
<td>Matters of Mutual Interest</td>
<td>3%</td>
</tr>
<tr>
<td>Collective Bargaining</td>
<td>2%</td>
</tr>
<tr>
<td>Other</td>
<td>3%</td>
</tr>
<tr>
<td>Severance Pay</td>
<td>2%</td>
</tr>
</tbody>
</table>

### Referrals by Workplace Sector: February 2010 (7 Highest referrals)

<table>
<thead>
<tr>
<th>Workplace Sector</th>
<th>Number of Referrals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retail</td>
<td>15%</td>
</tr>
<tr>
<td>Safety/Security (private)</td>
<td>11%</td>
</tr>
<tr>
<td>Domestic</td>
<td>9%</td>
</tr>
<tr>
<td>Business/Professional services</td>
<td>13%</td>
</tr>
<tr>
<td>Building/Construction</td>
<td>10%</td>
</tr>
</tbody>
</table>
Of particular interest in this statistic is the large number of unfair dismissal disputes which is 82% of all the cases received in the month of February 2010. Followed by this, is the disputes on unfair labour practice which is 7% of all the cases. In view of the large number of Unfair Dismissal Disputes an attempt will be made to analyse...
three that revolve around misconduct and incapacity. The rationale for discussing
the 3 cases is to illustrate how thorough and meticulous the CCMA is in dealing with
Unfair Dismissal Disputes.

Table 1.3 CCMA Case Statistics By Province 2006-2010

<table>
<thead>
<tr>
<th>Region</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern Cape</td>
<td>1000</td>
<td>1233</td>
<td>1468</td>
<td>1979</td>
<td>1069</td>
<td>6749</td>
</tr>
<tr>
<td>Free State</td>
<td>2001</td>
<td>2117</td>
<td>2204</td>
<td>2523</td>
<td>1284</td>
<td>10129</td>
</tr>
<tr>
<td>Gauteng</td>
<td>9517</td>
<td>12282</td>
<td>15578</td>
<td>16842</td>
<td>9538</td>
<td>63757</td>
</tr>
<tr>
<td>KwaZulu-Natal</td>
<td>6961</td>
<td>6879</td>
<td>7676</td>
<td>8964</td>
<td>5117</td>
<td>35597</td>
</tr>
<tr>
<td>Limpopo</td>
<td>1324</td>
<td>1959</td>
<td>1962</td>
<td>2281</td>
<td>1312</td>
<td>8838</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>3630</td>
<td>3045</td>
<td>3194</td>
<td>3742</td>
<td>1849</td>
<td>15460</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>931</td>
<td>1102</td>
<td>1039</td>
<td>1061</td>
<td>486</td>
<td>4619</td>
</tr>
<tr>
<td>North West</td>
<td>1594</td>
<td>1700</td>
<td>1947</td>
<td>2563</td>
<td>1322</td>
<td>9126</td>
</tr>
<tr>
<td>Western Cape</td>
<td>5444</td>
<td>6387</td>
<td>7262</td>
<td>9098</td>
<td>5536</td>
<td>33727</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td><strong>188002</strong></td>
</tr>
</tbody>
</table>

Source: CCMA Statistics Information Handbook 2010

The above table 1.3 illustrates the number of cases settled by province in the
respective years. For a period of five years, 188,000 labour cases were settled at
the CCMA in the nine provinces. This is quite a large number and one wonders the
prosperity to settle those cases if the cases were to be referred to our Magistrate and
High Courts which also deals with criminal and civil cases. As a matter of fact, the
establishment of CCMA has helped to minimise cost since both employers and
employees do not pay any fees to refer a matter to CCMA. The statistics further
show that on the average the number of cases referred to CCMA yearly is on the
increase. The accessibility to CCMA has helped to improve the traditional hostile
relationship between employers and employees in work environment. It is for this
reason that we strongly recommend other African countries to establish similar
institutions like CCMA which deals only on labour issues.
4.2 CCMA Dispute Resolution in respect of Unfair Dismissal

4.2.1 The Case of Misconduct:

In the case between Komane v Fedsure Life, it illustrates how an employee was dismissed for stealing a packet of powdered milk from an office kitchen from which supplies had regularly been pilfered. The CCMA commissioner rejected her explanation that she had been asked to remove it and deliver it to a person on another floor, and proceeded to deal with the employee’s argument that dismissal was too harsh a sanction given her unblemished service record of eight years. Nothing that the Code of Good Conduct: Dismissal stated that it was not generally appropriate to dismiss an employee for misconduct unless it was so serious as to render the continuation of employment relationship “intolerable”, and unless the dishonesty was “gross”, the commissioner held that when it came to theft, the distinction between “gross” and ordinary dishonesty was artificial and unhelpful. The central test was whether the dismissal was for a fair reason. Since fairness entailed a value judgement, it could not be reduced to a set of rigid principles. To contend that a dismissal could only be justified when the misconduct rendered the continuation of the working relationship intolerable would be to circumscribe the concept of a “fair reason”. Theft according to the commissioner was gross misconduct unless the value of the goods involved was utterly paltry. Dismissal for theft was accordingly invariably for a fair reason, and it was not normally necessary for an employer that had dismissed an employee for this offence to prove that the relationship had become intolerable, which was in any event incapable of precise measurement. Nor could an employee plead that an employer’s failure to take steps to avoid pilfering was a mitigating factor, provided that a consistent deterrence policy had been followed. Furthermore, an adjudicator should be slow to interfere with the disciplinary standards set by an employer unless they were unreasonable. The Commissioner argues that where an employer has persistently taken a tough line against proven theft by dismissing the culprit, it was unnecessary to inquire further into whether the employment relationship had broken down. On the contrary, once the employer had proved the commission of the offence and that a proper hearing had been held, it was for the employee to show that it was not a fair reason. In theft cases, the question whether the prospect of the continuation of the employment relationship was intolerable should not be given the prominence it had received in
the past. In such cases, an employer was entitled to dismiss in order to deter other employees for stealing.

The arbitrator (CCMA Commissioner) finally held that the dismissal of the employee was both substantively and procedurally fair. The employer was discharged and the employee was found guilty of attempted theft. The employee misconduct has effectively destroyed the relationship of trust and the dismissal was justified.

Another interesting case of misconduct was that of *Motswenyane v Rockface Promotion*. In this case an employee who was the salesperson of the company was dismissed by the employer after it was discovered that R1 381 of her cash float was unaccounted for. She pleaded that she had left the money at home because she was afraid of being robbed, that she had returned the money the day after, and that she had been unaware that she would be dismissed without prior warning if a shortage was discovered in her float. She argued further that the employer had acted procedurally unfairly by not allowing her to be represented by a union official at the disciplinary inquiry, which she conceded had otherwise been conducted fairly. The commissioner after considering all the facts and evidence before him from both the employee and the employer, found there was insufficient evidence to indicate that the refusal by the employer to allow representation by a union official was itself unfair. As to the merits, it held that the consequences of a float shortage were adequately spelled out to sales persons, that the rule had been applied consistently, and that dismissal for such an offence was operationally justified. Furthermore, the Code of Good Conduct: Dismissal did not require an employer to spell out every rule in meticulous detail; it was enough that the employee should reasonably have been aware of it and of the consequences of non-compliance. The dismissal was accordingly found to have been fair.

The case of *Colyer v Dräger SA (Pty) Ltd* also indicates the role of the CCMA in dispute resolution. This is a case that evolved around three important issues, namely:

- The Dismissal of the Employee Party on the Ground of Incapacity due to Poor Work Performance
- The Question of Representation
- Contempt of the Commission (CCMA)
In this case, the employee was employed as an accountant/financial manager for six weeks until her dismissal for alleged incompetence (incapacity). She had represented to the recruitment agency which had introduced her to the employer that she was conversant with the relevant computer system, which was a weighty factor in her appointment. Soon after the commencement of employment, the managing director began to receive complaints about the employee’s performance, in particular an apparent lack of computer skills. After about two weeks a series of meetings was held, but the employee had insisted she was coping. Complaints continued, and the employer expressed concern about the employee’s performance, as well as her persistent late-coming. Her first monthly financial report was filled with errors, which were discussed with the employee. At this point, the employee alleged that she was the victim of a conspiracy by another senior employee.

Before the managing director travelled overseas, he canvassed the possibilities of the employee accepting either an alternative position at a reduced salary, a prolonged probation period or a severance package. He asked her to do nothing until her returned. On his return, he discovered that the employee had already commenced legal actions against the company.

The employee was accompanied to the conciliation proceedings by a candidate attorney of the firm of attorneys to which she had resorted. When it was pointed out that legal practitioners were not permitted to attend such proceedings, he had insisted on the right to remain and at least take note. After the conciliation failed, the Commissioner decided to proceed directly to arbitration, and the candidate attorney again presented himself. Up to this stage he had not disclosed that he was a candidate attorney. The Commissioner permitted him to represent the employee, and noted that his handling of the witnesses was rude and incompetent. It was later discovered during an adjournment, however, that the article clerk was not a fully qualified attorney, as the Commissioner had believed. In view of this, the Commissioner demanded an explanation why the candidate attorney had not disclosed his status during the earlier proceedings and the response from the candidate attorney was very rude.

In viewing of the evidence from both parties by the commissioner, the commissioner found that the employer had clearly defined its standards at the commencement of
the employee’s employment. The employee had been asked by the managing director to stop work while he was overseas, but she had ignored this request and instead visited her attorneys. The employer had treated the employee with tact and patience and had complied with the requirements of procedural fairness at the final meeting which had been held with the employee before the managing director’s departure. The arbitrator (CCMA Commissioner) finally ruled that the employee’s dismissal was accordingly both substantively and procedurally fair since a formal disciplinary code did not apply to an executive employee.

In respect of the conduct of the candidate attorney, the Commissioner found that his conduct had been unacceptable and contemptuous. Apart from the fact that he had by his incompetent handling of the case left a fatal void in his client’s case, the candidate attorney had not disclosed a material fact which it was incumbent upon him to do so since the Act permitted representation only by legal practitioners who were admitted to practice. The Commissioner therefore requested the Labour Court to rule on the candidate attorney’s conduct in the proceedings and to determine if the attitude of his rudeness amounted to contempt of the CCMA.

5. Concluding Remarks
The discussions in this paper have shown that ADR is a catch-all term which embraces conciliation, mediation and arbitration process of dispute resolution. The most appropriate type or form of ADR for a particular case depends upon the needs of the parties to the dispute. In South Africa, conciliation and arbitration attract the most attention. In mediation and conciliation the parties retain control over the outcome, agreeing only if they so wish and on terms they consider to be in their self interest. Today, alternative dispute resolution has now emerged as a mechanism to avoid the normal court litigation process. In South Africa, the statistics from CCMA show that a total number of 13,118 cases were referred to CCMA in the month of February 2010. This shows that for a year the total number of cases referred to CCMA would be 157,416. With this large number of cases, the CCMA has helped to reduce the number of cases that would have been referred to the Magistrate and High Courts. The establishment of CCMA has helped greatly in the dispensation of justice timeously since justice delayed is justice denied. The rationale for advocating ADR in recent time can be attributed to the following factors.
— Substantial savings of money and time
— Avoidance of the trauma and the emotion of litigation
— Avoiding interference with business operations and productivity
— It is aimed at preserving business relationship which might be annihilated by a trial but which might survive the suggested process
— Relieving crowded court dockets, particularly for criminal or other matters which must be handed in court
— Reducing public expenditures for courthouse facility expansion

Other African countries like Nigeria, Ghana, Malawi, Namibia, Sudan and Democratic Republic of Congo that still rely on Magistrate and High Courts to resolve all labour disputes need to focus on ADR and establish similar institutions like the South African CCMA to resolve all their labour disputes. This will help to reduce the current backlog of criminal and civil cases as is currently experienced in the Magistrate and High Courts of other African countries.

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