

# Enforcement of Workers' Rights:

**Negative experiences of low-wage, precarious workers with the CCMA,  
Department of Employment and Labour, and the Sheriff of the Court**

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## List of abbreviations

AVWO - African Vulnerable Workers Organisation  
CWAO – Casual Workers Advice Office  
CCMA - Commission for Conciliation, Mediation and Arbitration  
DoEL - Department of Employment and Labour  
EPWP - Expanded Public Works Programme  
IZWI - Izwi Domestic Workers Alliance  
LRA - Labour Relations Act  
NEDLAC - National Economic Development and Labour Council  
MIWUSA - Migrant Workers Union of South Africa  
NMWA - National Minimum Wage Act  
OWC - One Wage Campaign  
OCC – Open CCMA Campaign  
RLT - Rural Legal Trust  
SADSAWU - South African Domestic Service and Allied Workers Union  
TERS - Temporary Employer-Employee Relief Scheme  
UDWOSA - United Domestic Workers of South Africa  
UIF – Unemployment Insurance Fund

# I. Executive Summary

This is a report of a research investigation into negative experiences of low wage workers who approached the Department of Employment and Labour (DoEL), the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Sheriff of the Court for the enforcement of their workers' rights.

The project arose out of the work of the One Wage Campaign which campaigned for the inclusion of domestic and farm workers in the National Minimum Wage. Workers repeatedly expressed frustration that even when policies were enacted to protect their rights, those rights were difficult to enforce.

The research question was:

***What problems do low wage, precarious workers experience when they attempt to access the enforcement services of the DoEL, CCMA and Sheriff of the Court?***

Given the context of the Covid-19 pandemic, research methods shifted to primarily telephonic interviews, as well as some face-to-face interviews and online survey responses.

Key complaints from workers included:

- Poor treatment of workers by officials and representatives of all three institutions
- Lengthy waiting times at the CCMA
- Structural disadvantages for workers in CCMA procedures, including the lack of representation.
- Lack of service delivery and feedback at the DoEL
- Failure of the Sheriff of the Court execute its enforcement functions

Based on the detailed stories and views collected, the report concludes with overarching discussion on:

- The time that it takes for the institutions to make and enforce decisions
- Complicated, expensive and demanding legal processes involved in resolving cases
- Disrespectful, abusive treatment of workers connected with all three institutions
- The lack of standardised compensation guidelines for rights violations
- Power relationships, and the subtle or explicit abuses of power by employers and officials

Recommendations are as follows:

## **1. Reduce the time it takes for institutions to make and enforce decisions.**

- Procedures should be reformed so that well-resourced employers are not able to cause delays.
- Resources should be made available and rules and procedures adapted so that workers do not bear the costs of institutional limitations.

## **2. Eliminate discrimination and abuse.**

- Disrespectful and abusive behaviour of the officials of the institutions must be brought to a stop immediately, and all workers must be treated with respect and recognition.
- Discriminatory attitudes among officials, as well as institutionalised sexism, must be exposed and confronted.
- Recourse for workers and actions against abusive officials must be made easier and more effective.

## **3. Reduce complicated, expensive, and demanding legal processes.**

- The rules of representation must be changed so workers can be represented by institutions of their choice, even if these are not registered trade unions.
- Access to workers' rights and the enforcement of such rights must not be made dependent on the good faith and cooperation of employers.
- The cost of enforcement must not be paid by workers.
- Processes must be simplified and designed to facilitate the participation of workers in ways accessible to them.

## **4. Improve compensation standards for mistreated workers.**

- Workers should be compensated in line with living wages.
- There should be clear guidelines and standards for compensation.

## **5. Redress power relations through systemic change and movement building.**

In addition, the report also includes recommendations of how this research can be taken forward: such as making this research accessible to stakeholders, discussion by selected worker organisations on how to support mobilisations via this research; and further focussed research into the enforcement role of the DoEL.

## II. Introduction

This report shares the aims, background, implementation process and findings of a research investigation into the negative experiences of low-income workers who approach the Department of Employment and Labour (DoEL), the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Sheriff of the Court for enforcement of their rights as workers. The research was commissioned by the Solidarity Centre, a non-profit dedicated to promoting workers' rights, to Dahlak Exchange, a founding partner of Izwi Domestic Workers Alliance. It was carried out by a group of researchers active in the One Wage Campaign (OWC), which is a coalition of worker groups, NGOs and some trade unions supporting the struggles of domestic workers, farm workers and Expanded Public Works Programme (EPWP) workers to be included in the National Minimum Wage as prescribed by the National Minimum Wage Act (NMWA). The campaign has three main demands:

- All workers, including domestic, farm and EPWP workers, must be given the right to the full minimum wage without phase-in periods.
- Employer exemptions should be eliminated, as they create a legal loophole that can be used to exploit workers.
- R21/hr is not a living wage, and ultimately should be increased. The first step is to establish the equality of all workers.

During the course of this campaign, the workers raised the importance of compliance. In the experience of workers there are high levels of non-compliance, which has the potential to undermine the intentions of the NMWA and that of the objectives of the OWC. The DoEL and CCMA have central roles to play in addressing non-compliance, but attempts by workers to enforce the NMWA are often frustrated by the unwillingness or incapacity of the DoEL and CCMA to carry out their legally mandated functions with regards to enforcement.

OWC works in a manner that puts the agency of the workers at the centre and this research was framed with the same approach in mind. Priority is given to the views and experiences of the workers.

### A. Aims, Rationale, and Objectives

The immediate aim of this project is to create a record of the problems that workers experience when they attempt to access the enforcement services of the DoEL, CCMA and Sheriff of the Court. The broad aim is that this record can be used to support worker mobilisation, media interventions and litigation, which exert pressure on these institutions and move them to improve their functioning to the benefit of low-income workers. In line with this broad aim, the report also aims to offer some analysis of the experiences documented. The rationale for this was as follows:

- In order to improve the wages and employment conditions of low waged, precarious workers, the DoEL, CCMA and Sheriff of the Court must deliver to a high standard on its mandated functions.

- Worker mobilisation and pressure through a variety of tactics are likely to improve the functioning of the DoEL, CCMA and Sheriff of the Court.
- The creation of awareness and sharing of experiences of different groups of workers affected by the problems in the DoEL, CCMA and Sheriff of the Court is necessary to facilitate worker mobilisation and pressure.
- Documenting the experiences of different groups of workers with the DoEL, CCMA and Sheriff of the Court and sharing the knowledge so gained with workers, their allies, the public and the authorities are crucial to the creation of the needed levels of awareness.
- Such documentation can also build evidence for media interventions and litigation that would assist with building pressure for solutions to the problems with the DoEL, CCMA and Sheriff of the Court.

In order to achieve these aims, therefore, the project has to meet the following objectives:

- Collect data on the negative experiences of low-income workers with these institutions
- Analyse these data to identify the causes of negative experiences.

Next steps in the project could include:

- Present the data and analysis in accessible form to relevant stakeholders
- Assist stakeholders in the use of the research findings.

## B. Research Questions

The main research question is:

*What problems do low wage, precarious workers experience when they attempt to access the enforcement services of the DoEL, CCMA and Sheriff of the Court?*

Secondary questions include:

1. What services do the DoEL, CCMA and Sheriff of the Court offer low wage, precarious workers?
2. How do workers attempt to access these services?
3. What problems do workers experience when they make these attempts?
4. How did workers attempt to solve these problems?
5. What are the causes of these problems?
6. What are the consequences of these problems?
7. What is the profile of affected workers in terms of geographic location, economic sector, race, immigration status, gender and organisational affiliation?

8. What is the meaning and implications of these experiences of low wage, precarious workers for labour law, DoL policies, the CCMA, the Sheriff of the Court and worker organising?



### III. Context

Before engaging with the research methodology, results, analysis and recommendations, it is important to create an awareness the backdrop against which this research has been conducted.

#### A. Low wage, precarious, women workers

It is widely accepted that South Africa's economy depends on low wages and discriminates against black people and women. This is a feature of society that was carried over from colonialism and Apartheid into the present dispensation. Farm and domestic workers are part of those groups who were historically trapped in a poverty wage regime and who still are. EPWP workers are part of the new layers of low wage, precarious workers that were produced by the neoliberal policies of post-Apartheid governments. These layers also include labour broker workers, outsourced and contract workers. The low wage regime of Apartheid has not only survived but has consolidated and grown.

It is less widely accepted and understood that these layers of low wage, precarious workers are excluded from the key institutions of labour relations and worker rights. Domestic workers are particularly difficult to unionise, as they work for individual employers and cannot gather or mobilise at shared workplaces, and they often face threat of dismissal for claiming labour rights or joining a union. The trade unions are based on an almost exclusive membership of permanent workers who are better paid than the majority of low wage, precarious workers. Exclusion from the trade unions means the latter groups have no representation and limited access to the bargaining councils, no representation at the CCMA, limited access to and no representation at the Labour Courts and no representation or access to the National Economic Development and Labour Council (NEDLAC). This creates a labour market with at least two tiers. About 3.5 million workers have some rights, access to recourse and statutorily protected channels through which to defend and improve those rights. These workers are by no means an elite, but they are markedly better off than the 6.5 million in the tier below them. The latter groups are effectively rightless because they are excluded from the institutions charged with ensuring access to and enforcement of their rights.

The enforcement, administrative and social welfare functions of the DoEL, CCMA and Sheriff of the Court are therefore of critical importance to low wage, precarious workers. Unfortunately, there is evidence that these institutions are failing large numbers of workers in painful ways when it comes to these functions. This is evident from the experiences of workers in the OWC and its members and allies. A thesis published in 2016 noted that all of the key functions of these institutions, such as labour inspections, compensation for injuries on duty and the Unemployment Insurance Fund, were failing workers. (Madalani, 2016)

It is no coincidence that women make up the majority of domestic, farm, EPWP and other low-income workers. South Africa's labour market is characterised by institutionalised sexism, which means women are forced into unpaid, low paid and precarious work. Through its focus on the interest of low wage, precarious workers, this project also seeks to resist this institutionalised sexism and make a contribution to the struggles of women.

## B. Roles of the DoEL and the CCMA

The 2019 NMWA gave the CCMA a central role in implementation and enforcement alongside and in addition to the DoEL. This is part of a trend over recent years seeing legislators and policy makers shifting enforcement of worker rights from the DoEL to the CCMA. Under- or non-payment of wages is one example. The enforcement of the rights of labour broker, contract and part-time workers given by Section 198 of the Labour Relations Act [7] since 2015 is another major example.

This trend is largely in recognition of the fact that the DoEL is seriously under-resourced and lacks the political leadership to carry out its mandated functions satisfactorily. It also reflects a widely shared perception that the CCMA is a well-functioning institution. The logic is to move responsibility for enforcing worker rights from a dysfunctional DoEL to a well-functioning CCMA.

This logic has deeply problematic consequences for the enforcement of worker rights. The CCMA is an institution for dispute resolution, which means its proceedings start with conciliation and mediation and then move to arbitration hearings that are modelled on court hearings. Firstly, clear violations of labour rights should be addressed through enforcement, not mediation. A worker should be able to claim her rights under the law, not be forced to negotiate for them with her employer. Secondly, the process and outcome are crucially impacted by on the attitudes and resources of employers. Recalcitrant employers who are well resourced can delay and nullify enforcement in many ways, including by simply delaying it and using the time to dismiss worker activists. This has been borne out by the experience of labour broker workers trying to enforce their Section 198 rights. This matter needs to be researched separately, but there is enough evidence to support the view that the functionality of the DoEL's enforcement role needs to be restored urgently.

## C. CCMA Closures and budget cuts

With the underperformance of the DoEL, the CCMA has been the primary avenue to labour justice for workers, especially those who are not part of unions, and working in industries without bargaining councils.

In late 2020, it was announced that the budget of the CCMA would be reduced by R617 million over three years. This is in the context of 1.68 million jobs lost in South Africa in 2020, and a dramatic increase in case loads after National Minimum Wage enforcement was moved from the DoEL to the CCMA in 2019. In early 2021, the CCMA had 17% fewer commissioners than in 2013, while handling 30% more cases. The CCMA estimates that its mediation and arbitration processes preserved 10,000 – 30,000 jobs per year from 2012-2020. Now, as case referrals are on a sharp rise, the funding needed to manage referrals has been sharply reduced.<sup>1</sup>

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<sup>1</sup> Smit, S. Dec 2020.

According to CCMA representatives in the media, the budget cuts will result in longer wait times for cases, and lower settlements for workers as Commissioners are pushed to resolve cases quickly.<sup>2</sup>

On top of this, Covid-19 precautions have led to the closure of CCMA offices to walk-in referrals. Workers and employers are expected to apply through digital platforms, and CCMA offices have opened partnerships with nearby internet cafes to assist workers. In April 2021, data from the first month of closures showed 5141 referrals, 75% less than the monthly average.

Responding to these issues, a group of nearly 50 workers' rights organisations have formed the Open CCMA Campaign to advocate for the re-opening of the CCMA offices, and other measures to improve outcomes for workers and end what they see as the CCMA's long-time "anti-worker bias".<sup>3</sup>

Though most of the cases detailed in this research were experienced before the recent wave of changes, the frustrations of workers interviewed are entirely consistent with those expressed by the Campaign. The impact of the recent budget cuts will sharpen a trajectory that, activists argue, began years ago to limit workers' access to justice at the CCMA.

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<sup>2</sup> Damons, M. April, 2021.

<sup>3</sup> Interview, Mokgola

## IV. Research Process

The COVID-19 pandemic and the related lockdowns had a decisive impact on the project. Both the focus and the process had to be changed in response. The researchers had to take several measures to protect the integrity of the process and to make it more useful to its intended stakeholders. In this subsection we recount some of the key measures that were taken and their outcomes.

### A. Methods & Timeframe

In the initial planning the main research methods were interviews, focus groups and reading case documents, all to be provided by affected workers. The plan was to meet these workers through referrals by the member organisations of the OWC and by waiting in the waiting rooms of the DoEL. COVID-19 made face-to-face interviews impossible until late in 2020. The plan of approaching waiting workers was also made impossible by the closure or restrictions of the offices of the target institutions.



In response, we shifted the main research method to telephonic interviews, which do not deliver the same levels of interaction and quality of data as face-to-face interviews. It nevertheless proved an adequate substitute especially as it was supplemented by face-to-face interviews when this became possible in the fourth quarter of 2020, with COVID-19 safety protocols in place. It was noticeable that workers were not willing to share their case documents electronically if the only contact they had with the research team was through telephone conversations. In sharp contrast, workers willingly shared electronic copies of their case documents if they interacted face-to-face with the research team.

Another method that was used to compensate for the restrictions on face-to-face interviews was a Google Forms Survey. This was put up on 6 November 2020 and shared on various social media pages used by affected workers. The uptake was low and only 7 workers completed the survey on their own. The reasons for this could be the length of the survey, lack of data on the part of the workers, survey fatigue and challenges of literacy and language. We thus increased the number of telephonic interviews and uploaded the results to Google forms for analysis.

A total of 68 respondents informed the research data:

- Seven workers filled out the survey independently via Google Forms.
- 38 telephonic interviews were conducted with workers
- 18 face-to-face interviews took place: 13 domestic workers at the Community Safety Centre in Payneville, Springs, and five farmworkers in Badirile, Randfontein.

- Five key informant interviews were conducted with worker support organisations, including representatives of Izwi Domestic Workers Alliance, the South African Domestic Service and Allied Workers Union, the United Domestic Workers of South Africa, the Migrant Workers Union of South Africa, and the Open CCMA Campaign. Requests for an interview with a CCMA representative were declined.

The research took place over the period of from October 2020 – May 2021.

## B. Challenges and Limitations

The research was planned towards the end of 2019 with an intended starting date of early 2020. The World Health Organisation (WHO) declared COVID-19 a global pandemic on 11 March 2020. As part of its response to the pandemic, the South African government instituted a lockdown from 27 March 2020. It temporarily brought the research to a halt, but its impact went beyond that.

It became apparent that the pandemic and lockdown were having severe impacts on low-income workers. Worker groups inside the OWC drew attention to massive job and income losses for domestic and EPWP workers and life-threatening risks of exposure to coronavirus infections for farm workers. On top of this, the institutions charged with enforcing worker rights were closed down or moved online in the way they functioned, which meant the same thing for low-income workers without internet access.

This necessitated changes to the content and methods of the research. It was thought that it would be more useful for the struggles of workers if, instead of a narrow focus on the enforcement role of the DoEL, the research looked at the enforcement of workers' rights as a whole. The CCMA and Sheriff of the Court were included as a focus of study, given the role of these institutions in resolving labour disputes and recovering the monies owed to workers by employers. The geographic scope of the research was confined to Gauteng province to accommodate the broader scope.

In light of these changes, we are confident that the research succeeded in shedding light on the important issues it investigated. We were able to connect with workers sufficiently to understand their negative experiences with these enforcement institutions and we were able to point to the primary reasons behind these experiences. A key consideration is that this was always a qualitative investigation interested in telling the stories of subjective experiences. The limitations imposed by the pandemic and the ensuing lockdown did not prevent us from gaining this knowledge.

## V. Results

### A. The Department of Employment and Labour

#### 1) *Decline of DoEL services*

The researchers found it difficult to identify domestic workers who had substantive experience with DoEL services to participate in the research. According to worker representatives interviewed, the institution's reputation for poor performance, and the migration of regulatory enforcement duties over to the CCMA, have resulted in few workers even attempting to access their rights through the DoEL directly. There has been a general sense of 'giving up' on the DoEL – an acceptance that it will not carry out its enforcement functions. Mandla Masuku (MIWUSA) referred to the DoEL as a "dead donkey". Amy Tekie (Izwi) explained that "taking cases to the DoEL felt like dropping these cases in a hole in the ground". Maggie Mthombeni (Izwi) shared her experience of the DoEL where security guards refused to let workers into the offices of the department without the "correct" documents.

27.3% of respondents who visited the DoEL were reported 'very bad' treatment. 81.8% visited the DoEL two or more times, some up to ten times. Yet 63.6% did not receive the services they were seeking. Pinky Mashiane, a former domestic worker and the president of United Domestic Workers of South Africa (UDWOSA), explained:

*"I have a lot of experience of DoEL officials harassing domestic workers. I accompanied a worker named Georgina in May 2019. It was a case where the DoEL official would tell her to come in to the office on a certain day. She got there, only to be told by the official that nothing had been done about her case and she must come again on the Friday. This is a woman who must travel from Laudium!*

*"When it happened again, I went with. Janine Nkosi started to shout at Georgina, 'Why are you here?! You must come back Friday!' This is when I stepped in and told her this was not acceptable. She then started shouting at me and it became a confrontation between the two of us. When I said that I was from the union, she told Georgina that unions are just eating the money of the workers."*

*"The reason DoEL officials behave like this is that as government workers they think they are higher than domestic workers. They also fear unions and poison workers against unions. You know why? Because they are employers themselves who abuse their domestic workers."<sup>4</sup>*

*"I wrote to the manager about this official and took the case on. I expected a meeting but all I got was an email saying they are looking into the matter."*

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<sup>4</sup> Mashiane also shared similar experiences at the Labour Court.

Sarah Kabini, a domestic worker from the Pretoria area, shared how she ended up sleeping outside the Pretoria offices of the DoEL for three days:

*On 20 March (2020) my employers paid me R800. They said that they could no longer afford to employ me for the full week, but for two days only. They told me that I must apply for the other R1000 from the UIF.*

*I filled in the form and applied for UIF in April and then waited for the money. I waited until August and went to the labour department, but they were closed. Meanwhile my employers said they can't pay me my money anymore and I must work for only 1 day. They were going to call me when I must come in.*

*I went to the labour department again. They told me the system for COVID-19 applications was closed. I said to them that I had already applied in April! After this they called and said I must wait. Then it stayed like that.*

*In September I went again. They gave me a form. I was working 2 days now. I asked my children to fill in the form because I never had education. I worked the Monday and Tuesday and went to the office. The UIF said I can apply again, although my employer said don't apply. I took the form back to the office. They said they were closed.*

*The next time I went they said your employer must apply, not you. They gave me an email. The next day they called and said the email is not working. I went back to labour and there they gave me another paper. They said I must SMS the paper. When I took the paper to my employer, they said the paper is corruption.*

*I did not get the money. My employer said they don't have enough money to pay me. That is why in October, I slept outside the labour department for three days. Despite this, I did not get the (TERS) money.*

*I got no UIF money, although we pay every month. They said it is because I have a 2 day a week job. I feel very bad. We have nothing, but we must pay for everything. Water, electricity, rent – we have to pay.*

*I feel like I lost the Covid money. I don't know if I am going to get it.*

Other problems were identified by respondents as follows:

- “No feedback.”
- “They don't care about domestic workers. I think all of them are domestic worker employers - those who are undermining domestic workers.”
- “Always promising but not helping.”

The positive feedback from respondents was as follows:

- Very good and helpful
- They help but they take time

- Friendly and fast to be attended, promised to phoned but nothing till now

Edgar Mokgola, spokesperson for the OpenCCMA Campaign and organiser at Casual Workers Advice Office, reported many complaints that when workers report violations to the DoEL, the labour inspectors call the employers prior to inspecting, eliminating the efficacy of an inspection and sometimes resulting in the dismissal of those workers who made the report. In addition, responding to Covid-19 many labour centres have closed, and workers who come to register a complaint are told by the security guard to fill out some information and leave it in a submission box. They are not given a reference number of any means of following up. This was also experienced by one Izwi member.

In summary, lack of service, disrespectful treatment, absent or slow feedback and failures to resolve problems are the key issues that account for the negative experience of respondents with the DoEL.

## 2) Covid-19 Social Protections

About half of respondents approached the DoEL between March and August 2020, during the peak of the Covid-19 lockdowns. The most common reason respondents had for approaching the Department was underpayment of wages (64%), including the failure of employers to pay workers for overtime, weekend and holiday work, or to comply with the National Minimum Wage. 36% of respondents were pursuing pay-outs from the Unemployment Insurance Fund (UIF) and 36% were pursuing claims to the Temporary Employer-Employee Relief Scheme (TERS), a special relief measure instituted to provide wage payments for workers on unpaid leave during lockdown. Other reasons workers had for reaching out to the DoEL were unfair dismissals and execution of dispute settlements. In these cases, workers were referred to the CCMA as the institution with jurisdiction on these matters.

Kenny, a storage worker, shared his experience:

*“I was working before lockdown and earning R16/hour. On 11 May, I went on leave and got paid R3500. Before I went back lockdown started. I exchanged bad words with the boss, Johan. We were fighting. The boss promised me TERS money but I got nothing. He told me to start on the 1<sup>st</sup> of September, but I didn’t manage to go. I did not have transport money and no money for something to eat as well. Our working hours were from 6:30am to 14:30pm. Sometimes we worked very long hours till we knock off around 6pm, but we were not paid for overtime. We had no contracts.”*

A farm worker who chose to remain anonymous shared the following:

*“The treatment is very bad at work. I am the breadwinner in a home of thirteen people and even help others sometimes. We did not get our TERS money. There is no overtime payment and we work some weekends for which we have never been paid. I want to remain anonymous because I fear losing my job.”*



The abovementioned failure of DoEL to hold domestic and other employers accountable for UIF registration had far-reaching and devastating impact at the onset of the Covid-19 pandemic. A survey conducted by Izwi in April 2020 showed that 26% (150) of the 577 domestic worker respondents were on unpaid leave, and another 26% were on leave but not sure whether they would be paid. Anecdotally, domestic worker organisations can attest to huge numbers of workers who had been on unpaid leave during the months in question.

Statistics on percentage of domestic workers not registered for UIF are unreliable and vary dramatically, from ~30% to 80%.<sup>5</sup> Domestic worker unions and associations note that the majority of their members are not registered for UIF. As a result, reported Izwi representatives, most of the hundreds of thousands of domestic workers put on unpaid leave were not able to access any TERS relief, and retrenched workers were not able to claim unemployment insurance. Even for those workers who were UIF registered, many employers did not bother to make TERS claims on their behalf, or were stymied by administrative issues with the claims process. Claims for migrant workers were also more difficult and took substantially longer to be paid out (with some never paid at all).

From the first days of lockdown, civil society organisations began pushing for the following amendments to the TERS scheme:

1. Employees must be able to claim directly, rather than having to relying on employers,
2. TERS claims should be mandatory, not optional, for employers who have put workers on unpaid leave, and
3. Workers whose employers did not register them for UIF should be eligible for TERS.

The first two demands were granted in April 2020, but the problem of unregistered workers was still not addressed. The challenge faced by unregistered workers was particularly relevant for domestic workers and farmworkers, two groups of “ultra-low” paid workers who often work in informal conditions, without UIF registration or even written contracts. Eventually civil society advocacy efforts successfully convinced the Dept of Employment & Labour (DoEL) to extend the TERS payments to unregistered workers on 26 May 2020. The victory, however, was hollow. In subsequent weeks no publicity or information on the application process for unregistered workers was made available and workers continued to struggle.

Two members of the One Wage Campaign, Izwi Domestic Workers Alliance and Support Centre for Land Change (SCLC), represented by Kropman Attorneys, began a series of legal communications with the DoEL, threatening court action if their commitment to unregistered workers was not operationalised. Despite the DoEL’s assurances that the TERS application process would be adjusted to accommodate unregistered workers, no change was forthcoming. Finally, in October 2020 after 5 months of legal correspondence and unkept promises, the Department opened the process was for unregistered workers to make TERS claims online.

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<sup>5</sup> CITE

However, several problems with the application process and online system made it very difficult for workers to submit claims. Izwi attempted to submit claims on behalf of workers: for 20 out of 21 workers, they could not get pass the initial process of registering on the UFiling website, and ultimately not a single claim could be submitted.

The overall performance of the Department's Covid-19 response would require a separate and extensive study. However, the experiences of domestic and farmworker organisations in this study reflect a clear, consistent, and prolonged neglect of particularly vulnerable, non-unionised workers. Myrtle Witbooi (SADSAWU) summed up the situation as follows:

*The DoEL does not enforce registration for UIF. We once had an action where we went with the labour inspectors of the department to 500 households that employed domestic workers; only 22 of these households had registered their workers for UIF. Nothing came of this. The department did nothing to follow up and enforce.*

*This is a severe problem. Because these workers are not registered, the employers act as if they exist outside the system of workers' rights. So these workers get nothing. Not the minimum wage, not compensation for injury on duty, not any fairness when they are dismissed. Because of the DoEL, these workers end up with no rights at all.*

This point is critically important. It is not only a matter of individual workers who do not receive services. The failure of the DoEL to enforce regulatory compliance has perpetuated the widespread notion of domestic work as informal and unregulated, reinforcing historical servitude and enabling a range of exploitative practices across the sector.

## B. The Commission for Conciliation Mediation and Arbitration

This section presents the findings on workers' experiences with CCMA during the COVID-19 lockdown in South Africa.

### 1) *Extended wait times*

Workers who decided to refer cases at the CCMA had one experience in common: waiting. The lockdown probably prolonged the usual waiting times due to office closures and a backlog in hearings. In the survey submitted to workers, respondents' answer to the question regarding the outcome of their case with the CCMA was most often, "still waiting." Queeneth Simelane of African Vulnerable Workers Organisation (AVWO) mentioned that her calls to the CCMA (and the Department of Labour) were not answered during the lockdown. Another negative impact of the lockdown was that she was not allowed to represent workers due to the gathering restrictions at the CCMA. In general, she said her experience was that "workers do not receive case dates".

Queeneth referred an unfair dismissal case for Nora, who was told by her employer in March to "go look for another job, we have no money to pay you". Her job as a domestic worker for 6 days a week was bringing in ZAR 1500 a week. Nora told her employers that it is not possible to find

another job during lockdown. Nora had no case date yet on the day of the interview. In Anna's case, described below, it turned out there was a date scheduled that she wasn't aware of.

*Anna experienced something similar to Nora. Her employer also told her he had no more money to pay her. She referred a CCMA case but never received a case date. However, on the 8th of September she was phoned by the commissioner who asked her where she was because they were waiting for her. Her case was dismissed and she applied for a rescission of the ruling. On the application form she wrote: "I think the commissioner may consider granting my application because my employer decided to pay his attorney who delayed my case, instead of paying me".*

Employers and workers are affected differently by the time duration of dispute processes at the CCMA. For workers, waiting time is filled with uncertainty, and is often a time without income and without work. Suzan in Badirile, for example, was not paid during lockdown for her job in a packing hall on a vegetable farm. Together with several colleagues she went to the DoEL, who referred them to the CCMA. There, a case was opened in August "for not getting paid". At the time of the interview Suzan had not yet received a date for a hearing. She also refused to go back to work, since the employer had not paid her wages during lockdown.

The worker representatives also raised the issue of waiting time at the CCMA as a common problem for workers. Maggie Mthombeni of Izwi said that there is discrimination in this regard against migrant workers from outside South Africa. "Workers with South African IDs wait for ten working days, but those with foreign passports and asylum documents wait for a month. We had cases where they had to wait for several months". Mandla Masuku of MIWUSA agreed with this and added that "it is individuals who discriminate. The rules do not discriminate".

## *2) Poor treatment and service*

Survey respondents reported mixed experiences with the CCMA. 15% reported "bad" or "very bad" treatment, while 85% had a neutral or positive experience. 90% said that the commissioner treated them well, and some respondents had positive comments about the CCMA generally. Again, the point of this study is not to provide an objective assessment of the CCMA's performance, but to highlight critical areas where poor performance and inexcusable behaviour is limiting workers access to justice.

Such areas in this study include:

### *a) Rude and disrespectful treatment of workers, including xenophobic biases*

Izwi made the following formal complaints to the Johannesburg CCMA in January 2020:

- *Domestic workers with walk-in referrals at CCMA Johannesburg are being told that instead of going to the general referral centre, they must go upstairs to a separate office to submit complaints. A worker named Norma came to us because the CCMA representative who*

*served her at this special office said that she cannot submit a referral because she does not have a permit to be in SA. Then she started shouting about how Zimbabwean workers come to SA and leave eight children behind in Zim, and that they just open cases against employers because they are after money. Eventually she opened the case for Norma. However, she separately called Norma's employer and told the employer that Norma does not have any rights because of her work status, and she advised the employer to take Norma to the police. (This was confirmed when Izwi's case manager spoke to the employer. The employer now believes she has no obligation to respond to the CCMA hearing because she was told by the CCMA representative that Norma has no rights.)*

- *Another worker named Aletta, who is South African, was sent to the same office upstairs to report a complaint and was treated very badly. The CCMA worker was rude to her for being a domestic worker and refused to fill out any forms or open her case. She told Aletta that domestic workers are coming to her to report cases and they are all just lying. Finally Aletta left without ever having her complaint registered.*

Maggie Mthombeni of Izwi added that “commissioners do not allow workers to tell their stories. They interrupt workers and ask for a summary. This makes the worker feel very bad. Especially when the employer gets a chance to tell their whole story.” Sindiswe Moyo noted that “[Commissioners] will say things like ‘this is a lot of money in Zimbabwe’ or ‘you Zimbabweans want to challenge everything’.”

While there was a clear element of xenophobia in the bad treatment of workers at the CCMA, worker representatives had different views when asked about sexism. Myrtle Witbooi of SADSAWU felt that women workers and especially domestic workers were discriminated against, while Maggie Mthombeni felt it was not the case and that women commissioners were more likely to treat workers badly than male commissioners were. It is noticeable that organisations with mainly women members, such as Izwi and SADSAWU, report more cases of bad treatment than MIWUSA, comprising mainly male members.

In the instances of Norma and Aletta above, the Johannesburg CCMA representatives responded to Izwi's complaint by asking that the workers come in person to make the report. When one worker did so, the person she was told to contact was not available. In this instance, and likely others, the burden of holding CCMA officials accountable for their bad behaviour was placed on the shoulders of the mistreated worker. The CCMA authorities could surely follow up on an emailed complaint, but instead they expected the worker to use her own time and funds to make repeated trips to the CCMA to report the case, and therefore no action was ultimately taken.

- b) *Commissioners who either do not know the proper regulations and procedures, or choose not to implement them*

Mthombeni also noted that in the last year there has been an increase in commissioners who do not know how certain CCMA processes work, or what are the relevant labour laws. In one case, she corrected a commissioner on the required notice period for domestic workers. He dismissed her, saying “I don't have time to Google it”. She has also found that commissioners are no longer

calculating outstanding leave days into amounts owed to dismissed workers, despite its inclusion in the Sectoral Determination 7 regulation on dismissal of domestic workers.

*c) CCMA refusing applications for late referrals*

Izwi noted that the CCMA is recently rejecting condonation applications for late referrals. 'Condonation' is when referrals are submitted after the time limit has expired (30 days for unfair dismissals) and the applicant requests that the referral be heard anyway. Condonation for late referrals is critical in workers accessing their rights, as:

- Very often, workers do not know their labour rights and options for enforcing such; by the time they learn of their options and access representation, the 30 days has often passed.
- Unions and associations often attempt to settle the matter with the employer before reverting to the CCMA; this may take several weeks, and if it is not successful, can result in a late CCMA referral.
- During the Covid-19 lockdown, many workers and worker representatives were not comfortable attending CCMA hearings given the high numbers of cases regularly occurring at the CCMA. They thus waited to submit referrals until the chance of transmission was lower.

From April 2020 to May 2021, about 70% of Izwi's condonation applications have been denied, whereas from October 2018-March 2020, they had never had a single such application denied. Most of those denied were late due to Covid-19 health risks, including over periods when the CCMA was not even open. When Mthombeni inquired about the appeals process, she was told that the decision is up to the specific commissioner reviewing the application, and can only be appealed if there is a new reason for the late submission. A few of Izwi's appeal requests were granted, but for the rest, the case had to be closed without justice for the worker.

*d) Commissioners who heavily pressure workers into resolving cases for less than they deserve.*

"Conciliation is used to intimidate workers into accepting whatever the employer is offering", reported Myrtle Witbooi of SADSAWU.

Worker representatives noted that it is common for commissioners to push workers to accept a low settlement, even when there is a clear and accepted rights violation. Workers are told that if they go to arbitration, they might end up with nothing, or will have to spend money on lawyers. Workers are intimidated into signing agreements that favour employers. This may be due to pressure to resolve disputes quickly to manage a burgeoning caseload, and/or to CCMA performance indicators that reward cases resolved at conciliation.

Izwi reported an instance where a worker, who had been sexually abused for years and then unfairly dismissed by her employer, refused a settlement of one month's pay. The commissioner was angry at her for refusing, and said "The CCMA is not an ATM. Do you think you can just get whatever money you ask for?" Moyo of MIWUSA raised the issue of how private conversations

are used during conciliation. “Commissioners speak to employers first. When they speak to workers afterwards, they push hard for workers to accept what employers are offering.”

Because CCMA was designed for mediation and not enforcement, there are not fixed minimum standards of what must be paid for rights violations. Employers who explicitly broke the labour law are getting away with marginal settlement payments because commissioners and employers are exercising undue power to force a quick resolution.

### 3) *Structural & procedural disadvantages*

Worker representatives all agreed that the structural advantages of employers was one of the key barriers to justice for workers at the CCMA. Maggie Mthombeni (Izwi) said that workers were scared of the CCMA process and Myrtle Witbooi (SADSAWU) said workers were intimidated. Key issues include:

- Lack of clarity on CCMA processes
- Intimidation by employers’ labour consultants
- Lack of access to online services

The following vignette is illustrative of workers’ experiences with the CCMA, based on an interview with her and review of 38 pages of official documents related to her case. She was not working at the time of the interview, which took place at the Community Safety Centre in Springs.

*Agnes starts her story by saying that on the 1st of May 2020, her days and hours of work were reduced from 7 days a week to 3 days a week in which she worked 5 hours a day. She had worked as a domestic worker for the employer for 8 years. Her wages dropped from ZAR 2000 a month to ZAR 1500 to ZAR 960 per month in June. That month, she referred a constructive dismissal case at the CCMA with the help of Queeneth. On the 5th of July, while she was cleaning a room, she found a letter in a bin that stated she ‘will dismiss herself’. On the day of the CCMA hearing, 13 July, the employer did not appear. The commissioner dismissed Agnes’ case and told her to refer an unfair labour practice case instead of a constructive dismissal case. She did so. Then she received a message from her employer that she has tested positive for COVID-19 and therefore Agnes should not come in to work for the two weeks she would be in quarantine. This confused Agnes because there were two other workers at the house who were still going to work. After two weeks the employer phoned and told Agnes to come to work for 2 days a week and that she would not be paid for the time she did not work. That meant that for the month of July, Agnes was paid 560 ZAR. Agnes was upset and did not go to work. Queeneth and Agnes went to the CCMA to find out if there was a date for the hearing of the unfair labour practice dispute case. They were unsuccessful.*

*From the case documents shared with us, in total 38 pages consisting of CCMA rulings and various submitted affidavits, it appears there was a CCMA hearing on 11 August that was attended by the employer and not by Agnes. Again, the case*

*was dismissed by the commissioner. In September there was an application from Agnes for a rescission of this ruling and the commissioner ruled on 21 September to proceed with arbitration. The commissioner's ruling was made without the opposing affidavit from the employer because the employer submitted this affidavit only on the 23rd of September. Then the CCMA ruled that it had no jurisdiction over the case because the opposing affidavit was filed outside of the 5 days available according to the rules of the CCMA. The employer then submitted another affidavit on the 15th of October to apply for both the rescission of the ruling that rescinded the case dismissal on 11 August, and for rescinding the jurisdictional ruling of 7 October. In the affidavit, the employer denies having dismissed Agnes. On the contrary, they state that Agnes absconded from work and is intentionally misleading the commissioner.*

*During this process Agnes claims she was visited and intimidated twice by the employer or their representatives. On 13 September, Agnes was visited by a man who told her to sign a document. She believes this man was from the CCMA and sent by her employer. She thought it was strange that she had to sign these papers brought by a man who she didn't know, but she signed because she was scared. She did not read the papers, but she did get a copy. On the 15th of October, her employer visited her and told her to sign some more papers. This time she insisted to read the papers first and then she refused to sign. After this, Queeneth phoned the employers who shouted at her.*

This detailed description of Agnes' experience reveals several insights about the way workers experience and negotiate CCMA procedures, and about how employers have many advantages over low-income workers during the process. First, the CCMA procedures take time. In the case of Agnes, after 5 months different commissioners had made rulings on procedural issues, and she did not know where it was heading or if the dispute would proceed with the CCMA.

Secondly, Agnes, with the help of Queeneth, provided the necessary documents involved in referring cases or applying for rescission of rulings through handwritten forms, visits to the CCMA's offices in Benoni and SMS text messages. The employer, on the other hand, communicated via email and typed affidavits in the format and language of legal practitioners. Employers who have the means to consult legal experts and who have sufficient resources to phone and email the CCMA have the advantage of obtaining information easier and quicker. Whereas Agnes went to the CCMA to dispute her sudden loss of income and bad treatment by her employer, the employer simply denies that there is a case at all. Considering that the CCMA does not send staff to applicants to sign forms, it also appears that the employer sent a representative, which is often a labour consultant in such cases, to Agnes to get her to sign a settlement agreement after Agnes applied for rescission of the ruling that dismissed her case on 11 August. In South Africa, the use of labour consultants by employers is a well-known practice that effectively obstructs workers from accessing institutions like the CCMA.

In the case of Mpho from Badirile, the employer's use of a labour consultant facilitated her suspension from the land reform farm where she was working. During a strike on the farm, Mpho

had a confrontation with one of the managers who accused her of assaulting her, but Mpho believes she was victimized as she openly challenged this manager. She attended a disciplinary hearing on the farm in October 2019. They told her there was someone “from Labour”; it was someone from LabourWise. On their website<sup>6</sup>, LabourWise offers advisory services on labour- and employment-related matters. Resources available to clients (who pay monthly subscription fees) include referrals to a national network of labour consultants and arranging for representation at the CCMA.

Workers often struggle to make a distinction between these labour consultants and people from the DoEL or the CCMA as they are all presented as professionals dealing with the issue at hand. Of course, in the case of consultants, they are paid to serve the interests of the employers. Therefore, they pose another barrier for workers to access their rights. Mpho never received a result from her disciplinary hearing as the managers left the farm soon after the strike.

*Thandeka, in Springs, referred a dismissal case to the CCMA because her employer accused her of stealing on 20 September 2019. In the documentation of Thandeka’s case there are hand-written papers documenting her experience. On 5 October 2019 Thandeka had visited the employer with Queeneth. They could not resolve the dispute. The conciliation hearing took place in October. The employer did not attend and sent a representative. The matter was not resolved and referred to arbitration, which took place on 16 January 2020.*

*During this process, another commissioner told Thandeka to accept the employer’s offer of ZAR 2000 and “not waste her time”. There is documentation indicating that Thandeka chose at this point to withdraw from the case and instead refer an unfair labour practice dispute. There is also an application for condonation of late referral form and affidavit dated 10 July 2020, but it is unclear why they are part of the documentation or process. Since the lockdown Thandeka and Queeneth have not heard anything about this case.*

Another farm worker in Badirile, Nokuthula, was dismissed after a disciplinary hearing on the farm where she worked and lived since 2003. When she wanted to object to the outcome of the disciplinary hearing, the managers told her she must go to the CCMA. Meanwhile, the employer told her to leave her home on the farm as well. Moses Sekobane, a paralegal who provides support to farmworkers through Rural Legal Trust, explained that they were going to refer the unfair dismissal case in Johannesburg instead of Randburg, which is much closer. The reason to opt for higher travel expenses and time spent on a visit to the CCMA was “at the Randfontein CCMA they do not always do hearings”. This means that the cost of limited service delivery by the CCMA in remote areas is burdened on the most marginalized workers in the country.

Farm workers who were interviewed explained that they chose not to use the CCMA because they are scared to lose their jobs. Especially farm workers in rural areas have a deep mistrust in institutions because, in their experience, they work in favour of their employers, who have

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<sup>6</sup> labourwise.co.za



personal connections with people inside those institutions. These powerful networks include political parties, local councillors and the police. Mandla Masuku (MIWUSA) noted that “the penalties on employers who transgress and the awards in favour of workers are way too low. The employers are not scared to break the labour laws. In fact, it makes business sense for them to do so.”

The workings of institutions such as the CCMA in relatively small rural communities are embedded in the wider politics and power relations of the locality. Farm workers’ problems are compounded by the reality that labour issues are tied up with tenure and housing issues.

#### *4) Rule 25: The right to representation*

All of these challenges make representation and support for workers paramount in ensuring some level of access to labour justice. Yet under the rules of the CCMA, only registered trade unions (and in selected cases, attorneys) have the right to represent workers at the CCMA. The vast majority of low-waged workers do not belong to registered trade unions. None of the worker organisations interviewed for this project are registered trade unions for example. Commissioners have the discretionary power to allow such organisations to represent workers, but often do not even know the CCMA practice rule that allows it. When a representative accompanies a worker to a CCMA hearing, s/he may be asked to sit outside during the hearing, or be allowed to join the meeting but not allowed to contribute. According to Mthombeni of Izwi, in some cases, the commissioner asks the employer to decide whether the worker should be allowed to have this “discretionary” representation in the hearing, even though it is directly in the interest of the employer that the worker be without representation.

Worker representatives pointed out that this meant workers often went without representation, which worsens the structural disadvantages they already face.

At the time of research, there are no associations & unions supporting domestic workers which are registered as trade unions with the DoEL, in some cases because of blockages in the registration process. This means that of the nearly 1 million domestic workers in SA, not one is guaranteed the right to representation at the CCMA. For an industry with a long and public history of worker exploitation, this is shocking and unacceptable.

Issues of bad treatment, discrimination and representation are often decisive in how workers experience the CCMA. Clear and accessible recourse against bad treatment and discrimination is called for, while representation needs to be a right for all workers, regardless of union membership, and not subject to the discretion of commissioners.

#### *5) The Open CCMA Campaign*

The Open CCMA Campaign considers each of the issues discussed above to be part of a growing “anti-worker bias” at the CCMA. Many of the barriers to justice for domestic and farm workers are impacted by other workers as well. Mokgola of CWAO explained that this bias is reflected in the following experiences of workers, which directly reflect those noted above:

- Sections 142-149 of the Labour Relations Act give commissioners the power to assist the workers or employers by providing information and advice, and by requisitioning related documentation and witnesses, but the Commissioners do not use these powers and workers are left without support in the process.
- Case managers at CCMA treat workers poorly and shout at them. When a worker who has been misused by an employer is then abused by the CCMA administration, s/he loses confidence and stamina needed to successfully advocate for their rights.
- Commissioners convince them to take bad settlements.
- Referrals are processed more quickly when submitted by employers than by workers.
- Part-time commissioners work for employer companies during their spare time, so they are biased against workers.
- The closure of walk-in centres and shift to a digital referral process accommodates employers, but not workers, who are much less likely to have access to or familiarity with online forms.

Mokgola notes that these issues are not new, but the recent budget cuts and structural changes, combined with the Covid-19 pandemic restrictions, have escalated the trend and scaled up the negative impacts on workers.

OpenCCMA Campaign demands are as follows:

- 1) The immediate full reopening of the CCMA, including walk-in facilities and part-time commissioners hearing cases, with all the necessary Covid-19 health protocols.
- 2) An increase in the budget of the CCMA to meet its growing caseload.
- 3) The immediate appointment of more full-time commissioners, even if this means cutting the R4 million annual salary of the CCMA director.
- 4) A complete ban on part-time commissioners acting for employers during the period of transition to more full-time commissioners.
- 5) The creation of a mechanism allowing workers and communities to report corrupt commissioners, anti-worker commissioners and hold to account disrespectful staff.
- 6) Scrapping Rule 25 and giving all workers the right to representation at the CCMA, regardless of whether they are members of registered trade unions or not.
- 7) The immediate closure of NEDLAC – 56% of whose R40 million annual budget goes to salaries, where the average salary is R800 901 and where the working class is routinely sold out by ‘organised labour’ and self-styled, unaccountable ‘community representatives’.
- 8) The immediate closure of Productivity SA – whose budget is over R80 million per year and whose sole purpose is to find ways to intensify the daily exploitation of workers.

- 9) The redirecting to the CCMA of the existing DEL funding to Productivity SA and NEDLAC.
- 10) The resignation from the CCMA governing body of the three labour federations. Bheki Ntshalintshali, a paid employee of Cosatu, to pay back the R206 157 he received for attending governing body meetings in 2019 and Narius Moloto, a paid employee of Nactu, to pay back the R174 312 he received. Geoffrey Esitang of Fedusa was also paid, R52 293.
- 11) A restructured DoEL that includes an increased budget, increased inspectorate that can assume enforcement functions currently and inappropriately entrusted to the CCMA, dismissal of staff responsible for corruption in the UIF and Compensation Fund, and a weeding out of staff who are nothing more than outriders for employer interests, including directors and chief directors.<sup>7</sup>

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<sup>7</sup> See Annex 3.

## C. The Sheriff of the Court

Very few respondents had approached the Sheriff of the Court. Given the common experience of non-compliance with arbitration awards, the reasons for the low uptake of the services of the Sheriff would be interesting to explore. Unfortunately it fell outside the scope of this study.

The respondents that did approach the Sheriff of the Court reported that their reason was the failure of employers to comply with arbitration awards in favour of workers. Bad treatment and the failure to enforce monetary arbitration awards were the two most common experiences of workers who approached the Sheriff of the Court.

Johanna Mahlangu approached the Sheriff for the enforcement of an arbitration award of R16000 in her favour that was not being honoured by the then CEO of the Department of Agriculture. Pinky Mashiane, the president of UDWOSA, supported Mahlangu through this process and explained:

*“We went to the Labour Court [to have the award certified as a court order]<sup>8</sup>. She [Mahlangu] had no money for transport and I had to pay for her transport out of my own pocket. The officials there harassed us.*

*Johanna had been in a motor car accident while on duty, and had been badly injured. As a result of the accident and the injury, she developed a stutter and could not speak freely.*

*When the official asked Johanna what she was doing there, she struggled to answer because of the stutter. He became impatient. He shouted at her. I challenged him and he called the security to escort us out.*

*I explained to the security. She stuttered because she was injured at work. Her employer shouted at her and fired her because of the stutter. Now this official did the same. The security said we must ignore the official because he is rude to everyone.*

*We took the case forward to the Sheriff. That was years ago, but Johanna never yet got her money.”*

In summary, fewer workers than expected reached out to the Sheriff of the Court for the execution of certified arbitration awards. Those that did sometimes suffered bad treatment and failed to secure the enforcement that they wanted.

Worker representatives emphasised that the time it took and the rarity of success were the main problems with the Sheriff of the Court. Mandla Masuku (MIWUSA) reported that they were not able to claim monies owed to workers through the Sheriff. Furthermore, only registered unions are able to act on behalf of a worker at the Sheriff of the Court, limiting how much assistance supporting organisations can provide in resolving the issue on behalf of workers.

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<sup>8</sup> This is the step where an arbitration award is certified as an order of the court laying the basis for the Sheriff of the Court to execute the order.

Izwi Domestic Workers Alliance currently has 15 open cases, some dating back to 2018, of workers whose CCMA awards were never paid by employers. The Sheriff is responsible to enforce payment. In some instances, workers have had to go back and forth between the CCMA and the Sheriff repeatedly to sort out paperwork. Each of those trips can take a full day of the worker's time. Other cases are simply not being attended to by the Sheriff. In most cases, workers eventually decide that the sacrifice of leave days and transport costs is not worthwhile, as no real action is being taken, and they drop the cases.

The CCMA has a fund set aside to pay the Sheriff of the Court for enforcement of CCMA awards. However, according to sources that fund is not often used. Maggie Mthombeni from Izwi was told by a CCMA Commissioner "That Fund is not for domestic worker cases". This means that workers are paying sizeable fees to the Sheriff (one Izwi member paid R1200, in addition to transport costs) to have their awards enforced, in a time when they have been unfairly treated and are usually out of work.

The cycle of worker exploitation is perpetuated by the failures of DoEL to enforce its own regulations, and of the Sheriff to enforce the CCMA mandated awards. When employers are not ultimately held accountable for abuse, there is no impetus to change their behaviour.

## VI. Discussion and Recommendations

1. One of the key points that stands out across the three institutions is **how workers experience the time that it takes for the institutions to make and enforce decisions**. It is one of the top frustrations identified by respondents.

An important cause of the reported delays is the ability of employers to use the procedural points to delay addressing substantive issues. The underlying idea is that both employers and workers are entitled to fair procedures. In the experience of the workers, the procedures are written in favour of employers with resources to delay the making and enforcement of decisions to the point where the possibility of a fair outcome for the worker is taken away.

Limited capacity and resources relative to the amount of work needed is another cause of delays. This has been prevalent in the DoEL for many years. Budget cuts and increased caseloads have made this a reality for the CCMA as well. It is not a given that it should be the workers paying the price for the limitations of these institutions, but this is what happens in the context of the current rules and practices of the institutions. Workers pay the price in the form of delayed cases, abusive behaviour by commissioners and personnel who are stressed by heavy workloads, repeated visits for case referrals and hearings and, in some cases, the denial of any kind of recourse when workers drop out of proceedings that have become too fraught.

The implication here is that the achievement of fair outcome can be improved manifold if ways are found for the institutions to meaningfully cut down the time it takes them to make and enforce decisions. Recommendations include:

- Reforming procedures so that well-resourced employers are not able to cause delays.
  - Making available extra resources, and reviewing the rules and practices so that workers do not bear the costs of institutional limitations.
2. **Disrespectful, abusive treatment** was another common problem reported by respondents in connection with all three institutions. This was a cause for much distress and it is not simply a procedural issue because it causes many workers to abandon the pursuit of enforcement of their rights.

One of the respondents stated her belief that the cause of this is the feeling of superiority among government workers towards domestic workers. This could be seen as indicative of the causes of this problem 'from above'. It is also necessary to look at the problem 'from below' and ask what causes workers to be vulnerable or even put up with such behaviour. In this regard it should be noted that the workers in question are almost always acting as individuals and are either not part of or represented by organisations or are new to organisations.

It must not and cannot be ignored that the correspondents who reported this problem were black women. This points to the continuing power of racialised sexism to humiliate, exploit and exclude this group. The evidence suggests that racist sexism is so deeply embedded in the state that it continues to operate even if senior state officials are themselves black women.

More than one respondent recounted considerable but ultimately futile efforts to bring to account one abusive official. In fact, the research did not find one experience of an official that was successfully brought to account.

From this, the following recommendations arise:

- Disrespectful and abusive behaviour of the officials of the institutions must be brought to a stop immediately, and all workers must be treated with respect and recognition.
  - Discriminatory attitudes among officials, as well as institutionalised sexism, must be exposed and confronted.
  - Recourse for workers and actions against abusive officials must be made easier and more effective.
3. **Complicated, expensive and demanding legal processes** were also identified as contributing to a negative experience across all three institutions. This had several aspects to it.

The first was that processes aimed at enforcing workers' rights depend on a certain level of good faith and cooperation from the employers. An example of this is workplace inspections by the labour inspectors of the DoEL. Employers are notified when these would take place, which would give them the chance to arrange for the workplace to give the appearance of compliance to labour laws. Another example is the frequency with which CCMA commissioners unnecessarily ask the employer for their approval to implement Rule 25 and allow a worker to have a non-union representative. UIF and TERS pay-outs were also major examples, with many workers claiming that employers deduct UIF payments from the wages without ever registering them, and/or pocketed TERS payments that were meant for workers. The CCMA's conciliation and arbitration proceedings are also based on assumptions that employers will show good faith and cooperate in most cases. This assumption does not hold in the experience of low-income workers and is a major obstacle to the enforcement of their rights.

The requirement that workers (often after dismissal) must carry the cost of repeated visits to the offices of the institutions, including transport costs and leave days, and also pay for the Sheriff of the Court means that the enforcement of worker rights is unaffordable for many low wage workers and a serious strain for all of them. This is another factor that skews the processes in favour of employers and can be abused effectively by recalcitrant employers.

Processes at the institutions and especially at the CCMA have become heavily infused and even determined by technical legal arguments that are often delivered in writing. Workers are expected to deliver formulations to the same standard as legal practitioners. Cases are delayed or even dismissed because of mistakes made on forms. Employers are driving and exploiting these processes, often banking on the fact that workers can neither afford to wait for pay-outs, nor afford legal counsel.

The following recommendations arise from the above:

- The rules of representation must be changed so workers can be represented by institutions of their choice, even if these are not registered trade unions.
  - Access to workers' rights and the enforcement of such rights must not be made dependent on the good faith and cooperation of employers.
  - The cost of enforcement must not be carried by workers, including Sheriff fees, transport costs, loss of income and legal fees.
  - Processes must be simplified and designed to facilitate the participation of workers in ways accessible to them. Legal practitioners must be confined to advisory roles and not actively represent one side in a dispute.
4. **The lack of compensation guidelines for rights violations** is also important. There is no getting away from the fact that the amounts awarded are too small and workers are left in poverty even when they win cases. There is also a lack of standards when it comes to compensation, which makes the processes of pursuing it a gamble for workers.

The recommendations that follow from this are:

- Workers should be compensated in line with living wages.
  - There should be clear guidelines and standards for compensation.
5. **Power relationships, and the subtle or explicit abuse of power**, are at the foundation of the technical and organisational factors driving the negative experiences of low wage workers. Employers and state officials hold power over low wage workers, and the workers face real challenges in negotiating and resisting that power. During the time of the research, COVID-19 triggered power shifts in favour of state officials and employers as the general neoliberal orientation of the state was strengthened, making it much more difficult and painful for workers to attempt to enforce their rights. Recommendations include:
- The above point raises the need for **systemic change**. Capitalism and neoliberalism that rest on the low wage labour of women and black people are at the base of the negative experiences of low wage workers with the institutions.
  - Such an agenda of systemic changes to existing power relationships needs a broad **movement building** approach. This is not only compatible with working towards the immediate changes proposed but would benefit from it.



**Recommendations for next steps for the research** are as follows:

1. Steps should be taken to make the research accessible to various stakeholders.
2. Selected worker organisations should discuss how to use the research to support mobilisations.
3. A focused research into the enforcement role of the DoEL is needed.

# Annex 1: Acknowledgements, References and Interviews

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## Annex 2: Summary of Survey Results

(Attached)

## Annex 3: Open CCMA Press Statement

(Attached)