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Conciliation as a means for dispute settlement in labour disputes — the South African experience

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Labour dispute settlement in South Africa

Conciliation as a means for dispute settlement in labour disputes — the South African experience

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South African labour relations have tended to provide a backdrop for other struggles such as racial supremacy or hegemony as well as, ultimately, political liberation of the African masses. But the classic struggle between labour and capital first manifested itself in the gold mining industry in the early 1900s. This culminated in a miners' strike in 1922 that took on the form of an armed insurrection and necessitated the government calling out the armed forces to restore order.

The risk of capital flight that usually follows this type of incident (and South African gold mines were particularly susceptible because the depth of the gold deposits required large capital injection) forced the government to embark on a process of regulation that it had hither to avoided. This was because it was no longer possible to leave it up to the parties to resolve their disputes. In fact, the relationship between labour and capital up to 1922 had been characterised by a series of damaging wildcat strikes that the government now realised needed to be regulated.

Industrial Conciliation Act process

The outcome of this process was the *Industrial Conciliation Act* (1924) which, while not directly recognising the right to strike, required the parties to any labour dispute to submit the dispute to a conciliation process as a condition for any strike. Precisely what was meant by the term 'conciliation' is not exactly clear since it has never been statutorily defined. But what was clear is that the government set up a number of conciliation boards (CBs) that were compelled to attempt to resolve any labour dispute. It was only if the dispute remaining unresolved after such attempt that the Chair of the CB would issue a certificate, after which the parties could engage in a strike or lockout.

At the end of the day this could be seen as an attempt by the government to compel the parties to try to resolve any dispute before resorting to a strike. It must be assumed that the term 'conciliation' was meant to resemble the mediation process and hence the Chair of the CB would attempt to induce settlement through the deployment of (probably at that stage) rudimentary mediation techniques. Conciliation/mediation was appropriate in this context because workers enjoyed very few rights and so there was no role for any form of adjudication.

Over the years workers managed to secure additional rights and any dispute

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over these rights would be resolved through adjudication in the ordinary courts. This meant that there were no special adjudicative processes or forums to deal with labour rights disputes. But this changed rather dramatically in 1979 when the apartheid government was pressured into recognising black trade unions (up until this stage only whites were legally permitted to form and join trade unions) and the need to vest them with a greater range of rights.

This was achieved by introducing a right not to be subjected to an unfair labour practice (ULP). The sudden introduction of this general and all-embracing type of right resulted in a literal flurry of cases and a special Industrial Court was set up to adjudicate disputes of this nature. This court soon fell into disrepute as a labour dispute resolution mechanism because despite being initially intended to operate as a speedy, simple, cheap, efficient an non-technical forum, it was soon bogged down in the morass of delays and technicalities that characterise the ordinary litigation process. The main reason for this was that it was staffed by lawyers who had not been exposed to any training in ADR techniques.

The CBs were also not functioning effectively. Settlement rates were below 20% and there was usually a considerable delay (around 4-6 months) in setting them up. Only once the CB process had been finalised, could parties to a rights dispute proceed to adjudication in the Industrial Court since a certificate of non-settlement from the Chair of the CB (that is, the conciliator) was a precondition to founding jurisdiction in the Industrial Court. Parties faced further delays and costs during the adjudication process.

It is small wonder that parties became disillusioned with this process where the resolution of even the simplest of disputes could take up to two years. It is for this reason that parties increasingly turned to private means of dispute resolution and organisations such as the Independent Mediation Services of South Africa (IMSSA) began to play an important role in the labour dispute resolution process. This usually took the form of direct referral of any labour dispute to IMSSA. Thereafter most rights disputes would be resolved through arbitration whereas interest disputes would be mediated. This was achieved by calling on a panel of experts who had received training in these particular sphere as well as ADR in general and proved to be a lot more efficient and effective than the cumbersome state machinery.

Labour Relations Act system

After the advent of constitutional democracy in South Africa the government completely overhauled labour legislation. One of the major issues was the creation of a new statutory labour dispute resolution process and, as a result of the consultation and debate that preceded the enactment of the 'new' *Labour Relations Act* in 1995, the government was aware of the weaknesses in the former statutory system (that is, the CB process followed by the Industrial Court in the case of rights disputes) as compared to the smooth function of private dispute resolution organisations and processes — such as IMSSA.

One of the core debates in this issue was whether or not the two-stage approach of conciliation followed by adjudication (in the case of rights disputes) should be retained. Supporters of this proposition pointed to the desirability of parties locked in a labour dispute being compelled to attempt to settle that dispute through compromise before moving on to the adversarial process of adjudication. They further argued that the law settlement rate achieved by CBs would be addressed through proper training of conciliators. It was further argued that if a significant numbers of disputes could be resolved at this first stage of conciliation, this would not only get these disputes out of the system at an early stage but would also have a positive impact on the ongoing relationship between the parties — particularly where a trade union is involved.

Detractors from this two-stage system pointed to the inappropriateness of attempting to resolve rights disputes through

conciliation and, for this reason, were largely sceptical about raising settlement rates. As a result, the first-stage conciliation process was simply viewed as the addition of an unnecessary level or stage in the dispute resolution process and hence was a waste of time and effort. Instead, the argument was that parties to rights disputes should be permitted to proceed to adjudication as a first and final step.

Ultimately the government decided to retain the two-stage approach: conciliation is a compulsory first-step process for any adjudication process in the case of a rights dispute. A number of steps were put in place to improve the process of the Industrial Court system that had proved so ineffective. The Industrial Court was abolished and replaced by the Commission for Conciliation Mediation and Arbitration (CCMA). This is a one-stop dispute resolution shop designed to deal with all aspects of dispute resolution. Conciliators were properly trained and the CCMA was statutorily compelled to set up a conciliation within 30 days of submission of a dispute by either party. The formal litigation of the Industrial Court was replaced by an informal arbitration. This would take place only if the conciliators issued a certificate to the effect that conciliation had taken placed but settlement had not been reached.

How is the system performing?

It is difficult to gauge the effectiveness of this system because it cannot be properly compared with any alternative. User surveys have indicated, predictably, that parties are extremely satisfied with the conciliation process where settlement was reached and tend to be dissatisfied when this is not the case. It is in this latter context that conciliation is described as 'a waste of time' and 'an unnecessary step'. One of the problems in this regard is that parties will often approach the conciliation with a 'rights-based' mindset because, after all, the dispute is about results. And the most frequently adopted technique of conciliators has been challenging the strength of the respective parties.

However there was still a considerable amount of pressure on the government (particularly from large retailers who dismissed significant numbers of employees for offences such as dishonesty) to modify the two-stage approach. The argument was that the disputes were often complex (that is, complicated evidence needed to be produced in order to show that the employee had committed the transgression). In addition they also tended to be inherently rights-based in the sense that essentially the entire dispute turned on whether the employee was guilty. If this was the case, dismissal was justified if the employer made out their case, or reinstatement automatically occurred if the employer could not make out a case or the employee could provide an adequate defence. There was little room for compromise in this scenario and hence the conciliation stage was often regarded as an exercise in securing a certificate of non-settlement from the conciliator.

This tends not only to undermine the process of conciliation but impacts negatively on the entire dispute resolution process. One of the ways of addressing this was the introduction of the so-called 'con-arb' which, with the consent of the parties, enables a conciliator to assume the role of an arbitrator once he or she has assessed that settlement will not be attained during conciliation. The process will be informally adjudicated and the conciliator-turned-arbitrator will then tender a binding award.

Although this process is fraught with all kinds of concerns and difficulties (which could form the topic of another article) it has enjoyed a measured success rate. The most obvious point of difference is that the settlement rate in con-arbs has increased significantly because the parties are exposed to an effective form of reality testing since, during the conciliation they are compelled to deal with the very person who is ultimately going to adjudicate the matter. Thus any suggestion that a part might have a weak case is bound to be taken more seriously than speculation about what an unnamed arbitrator might decide at some later stage.

However, as with most aspects of dispute resolution, the question still remains as to the appropriateness of this type of process. Although it must always be borne in mind that the consent of both parties is required. ●

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