

Impact and Issues of Alternative Dispute Resolution in South Africa with Emphasis on Workplace Dispute

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Abstract

Informal dispute resolution is increasingly becoming relevant in the dispensation of justice. This is because of its different beneficial approaches to the parties involved especially the poor and the indigents in the society who are unable to afford the huge legal fees involved in formal justice system. With regard to dispute between well-resourced employer and poor vulnerable employee, one will agree that if formal justice is asked to adjudicate, clearly, there will not be fair playing field because the employer will deploy its huge resources to hire the best legal representative while the employee will not be able to do the same. This is why in South Africa aggrieved employees can approach the appropriate institution of justice set up for purposes of resolving labour dispute and institute an action against erring employers even without the assistance of legal practitioners. This article looks at the issue of informal dispute resolution; its applicability other related issues and more importantly the issue whether there is any need for a legal representation in alternative dispute resolution.

Keywords: *Informal Dispute, Justice, Legal Representation, Employers/Employees.*

1. Introduction

Disputes and conflicts are inevitable whether in the workplace or the society (Reuben, 2005). However, the manner at which they are resolved could either heightened the tension or subdue it (Bendix, 2010). Dispute can be resolved in many ways, but a lot of caution and responsibility needs to be taken in a bid to resolve disputes (McEwen, 1998). While the formal dispute resolution by judicial mechanisms such as the formal courts are recognised and are valid means to resolve disputes, the informal dispute resolution with less legalistic arts in forms of proceedings and procedure is best suited to resolve most disputes (Roberts and Palmer, 2005). A lot of literature on dispute resolutions have confirmed this assertion and supported disputes resolved through dialogues other than the strict legal mechanisms (Lodder and Zeleznikow, 2010). Resolving dispute through informal approach has become more beneficial especially where the parties are not at par in terms of wherewithal to bring an action to the formal court (Cameron et al. 1990). This inequality of resources is peculiar to aggrieved or wronged indigent poor in the workplace. In most cases, they do not have the means to hire legal practitioner to assist them take their complaint or grievance against the employers to court (Cummings et al. 2006). Some have struggled and attempted to hire a lawyer, however in most cases they have to compromise their rights because of the superior financial power of the employer used to defend the action (Felstine et al. 1981). This is the reason why the establishment of the Commission for Conciliation, Mediation, and Arbitration (CCMA) is overwhelmingly welcomed in South Africa especially by the vulnerable workers. Majority of indigent workers are approaching the CCMA on a daily basis, urging the commission to adjudicate on disputes on unfair labour practices (du Toit and Huysamen, 2013). The CCMA is a powerful mechanism available to assist aggrieved workers get adequate and appropriate redress against the employer (Zikhali, 2000). The processes and procedures are very flexible, user friendly and deliver justice in an informal way to the aggrieved party (Nyenti, 2012).

2. Literature Review

Alternative Dispute Resolution is likened to an informal justice system. One of its significance is that it "strengthens access to justice for poor and disadvantaged people." It is also different from the formal justice system. Articulating the key difference between formal and informal justice systems Wojkowska (2006) points out that "the *formal justice system*

involves civil and criminal justice and includes formal state-based justice institutions and procedures, such as police, prosecution, courts and custodial measures. The term *informal justice systems* are used when referring to dispute resolution mechanisms falling outside the scope of the formal justice system."

Undoubtedly access to justice is a vital part of judicial system and the government of South Africa is proactively promoting this mechanism in order to make ample access to justice to all regardless of class status (Wilson, 2001). Access to justice strengthens democratic dispensation, is very essential for human development, it is a means to reducing poverty and conflict prevention, it also restores dignity and strengthens the rule of law (Selim and Murithi, 2011). While there is ample legislation promoting alternative justice, the system remains largely neglected and people still use the status quo by instituting actions in orthodox formal courts (Roberts and Palmer, 2005). However, the poor and disadvantaged have drawbacks because they are, in most cases, unable to afford the services at the formal courts hence denying them the right to access justice (Langen and Barendrecht, 2009). Against this backdrop, Wojkowska (2006) asserts that "there is no denying that support to enhance the rule of law and improve the functioning of the formal justice institutions is crucial, however given the slow pace of reform, it is increasingly recognized that technical top-down fixes alone will not suffice to improve access to justice in many countries."

According to Wojkowska (2006) "informal justice systems are often more accessible to poor and disadvantaged people and may have the potential to provide quick, cheap and culturally relevant remedies. Informal justice systems are prevalent throughout the world, especially in developing countries. They are the cornerstone of dispute resolution and access to justice for the majority of populations, especially the poor and disadvantaged in many countries, where informal justice systems usually resolve between 80 and 90 percent of disputes."

3. Alternative Dispute Resolution (ADR) in South African Legal System

South Africa is embracing the path of ADR because it has been shown clearly from the happenings at the formal courts that they are failing the people in many respects such as inordinate delays, unbearable costs of legal fees and so on (Feehily, 2008). A way out is to continue to explore the possibility of all alternatives that will provide and dispense justice to all (Resnik and Curtis, 2011). The Non-governmental organizations (NGOs) are very proactive in the quest for and aggressiveness for the use of alternative dispute resolution in South Africa (Comaroff and Comaroff, 2007). According to Okharedia, (2011) "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." NGOs have been very prominent in the areas of labour disputes resolution using the alternative informal justice system. They are promoting this informal justice system because it has been noted to offer "a variety of flexible mechanisms best to match the dispute, as opposed to a rigid adversarial trial process, informality and not bound by strict procedural rules, time and cost effectiveness, focus on interests and restructuring of relationships" (Temba, 2014:117).

One of the outcomes of the NGOs efforts is the establishment of the CCMA to resolve labour dispute in a workplace environment (Musukubili, 2013). The establishment of the CCMA was as a result of lessons learnt and emulated from other jurisdictions that have put in place similar mechanisms to dispense justice in an informal way. Since inception of the CCMA, it has been seen to be playing a very useful role in resolving labour disputes which hitherto would have led to protracted industrial actions and strikes (Steenkamp and Bosch, 2012).

With regard to the intrinsic role of alternative dispute resolution in resolving disputes, Temba (2014:117) eloquently assert that "the concept of alternative dispute resolution (ADR) includes all dispute resolution mechanisms other than the formal process of adjudication in a court of law. ADR therefore, denotes a phenomenon other than a judicial determination, in which an impartial third party assists disputants in resolving issues between them. It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies 'mediation', a process by which a third party aids the disputants to reach a mutually agreed solution. Alternative Dispute Resolution helps to clear the backlog of cases at statutory dispute resolution institutions and is thus assisting government agencies to meet their societal responsibilities more effectively."

Apart from CCMA dispensing alternative justice, there are other specific and specialised ADR systems set up by the government and the Department of Justice for the purposes of resolving disputes informally ranging from land to family issues, community strives and conflicts (Mwenda, 2009). There are other several national and state agencies which are also providing alternative disputes resolution without venturing to the use of normal litigation process.

The rationale for establishment of the CCMA is to enable it concentrate on dealing with issues that can be solved through Conciliation Mediation and Arbitration, thereby allowing the labour courts to deal with and resolve more serious

and involved issues such as strikes action, unfair dismissal, retrenchments and discriminatory practices in workplace environment (Bendeman, 2006). Reinforcing the significance of ADR, Bendeman (2006) indicates that “alternative dispute resolution (ADR), for instance conciliation and arbitration, is often regarded as a better option than the more conventional mechanisms for the settlement of labour disputes, because of the lower cost and greater speed involved. Because it normally requires the consent, and thus the commitment, of the parties involved, it has the potential of presenting a more successful and sustainable solution to labour disputes.”

With regard to the mandatory nature of ADR as part of the justice mix in South Africa, Bendeman asserts that (2006) “in South Africa, ADR has not only been formalised, but has also been made compulsory as part of the transformation of the South African labour relations system after 1994. The Commission for Conciliation, Mediation and Arbitration (CCMA) is one institution that was created with high expectations and is specifically tasked with ADR-type processes.

However, the dispute resolution system of the CCMA is currently under strain due to a very legalistic approach, long delays, and declining settlement rates.” The view expressed by Bendeman (2006) “the dispute resolution system of the CCMA is currently under strain due to a very legalistic approach, long delays, and declining settlement rates” is well founded because of the seeming backlogs, technicalities, and dealing with important issues such as unfair dismissals and misconduct issues sometimes taking months to be resolved hence eroding the very reason why CCMA was established.

At the CCMA, instances of frivolous suits being instituted by employees abound (Madhuku, 2002). This is possible because of the flexible nature of the procedure to institute an action (Van Schaack, 2004). Take for an instance, under the South African Labour Relations Act 55 of 1995, the employee only needs to establish whether the dismissal was unfair hence opening the floodgates for aggrieved employees to bring rash and frivolous charges of unfair dismissal before the CCMA, according to Venter (2003) this in turn, “slows the process, and perhaps even leads to a dilution of the seriousness of other allegations that warrant greater attention.”

4. Legal Representation at CCMA Arbitration Proceedings: To be or not to be

The issue of whether litigants should be represented at the CCMA has been very controversial and the controversy is not likely to stop anytime soon (Selala, 2013). The pronouncement of the adjudicating institution is that there is no absolute right to legal representation at any stage of proceedings arising from incapacity and misconduct or dismissal (Kumwenda, 2012). Against the backdrop of this, Rule 25(1)(a) of the CCMA clearly provides that legal representation is not allowed at conciliation stages (Van Eck, 2012). However, at the arbitration stage, legal representation is generally allowed as provided for in terms of Rule 25(1)(c) of the CCMA (Collier, 2003). In terms of Rule 25(1) (c) 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 (Bezuidenhout, 2009). There have been heated debates on the issue of legal representation amongst legal scholars and practitioners. The pundits however believe that there should be consensus on whether legal representation should be allowed. The most potent argument therefore is that in so far as the issue involves adjudication by a presiding officer, it is reasonable to allow litigants to be represented by counsel of their choices (Erichson, 2000). The benefit of this is that, since alternative dispute is informal justice, legal technicality will be discarded and issues will be dealt with in order to resolve the dispute in an amicable way (Riskin, 1997).

More importantly, in the legal fraternity, there have been various legal challenges to the issue of whether there should be legal representation or not. The Law Society of South Africa has been in the vanguard of this confrontation (Oswin, 2007). They have argued that the exclusion of the right to legal representation in rule 25(1)(c) constitutes unfair discrimination against members of the legal profession and as such should be declared null and void (Mubangizi, 2004). Another important issue raised by the society which goes to the foundation of constitutionality of access to justice and the right to legal representation is the refusal to allow parties the right to be legally represented at misconduct and incapacity arbitrations, while allowing representation trade unions, employer organisations and in-home legal advisers, amounts to unfair discrimination against members of the legal profession (Van der Westhuizen, 2008). Arguments advanced by the proponents for excluding legal representation is that by nullifying the rules that disallow representation, it will open the floodgate for all sorts of representations and as such defeat the very essence of mediation and conciliation. This will turn what is supposed to be handled informally into robust legal tangles where each legal practitioner will want to pride his or her skills and trade thereby in the process truncate speedy and less costly dispute resolution.

5. Conclusion

Undoubtedly, informal dispute resolution has proven very reliable, accessible to all and dispensing justice timeously. This is working very well in South Africa particularly in employment disputes. The establishment of the CCMA has helped to reduce the number of cases that would have been referred to the formal courts. The issues surrounding legal representation should not be invoked to undermine the good work being done by the CCMA. Consequently, the rules as they are should be allowed to apply. The poor and the vulnerable should be assisted rather than confused with less important issue of legal representation at the CCMA. The conciliation and mediation roles being played by the CCMA meet the requirement and standard inherent in the concept of rule of law.

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