Alternative Dispute Resolution (ADR) in the Workplace – The South African Experience**

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Abstract

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.

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

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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 study considers whether the compulsory conciliation and arbitration processes – as offered by, for instance, the CCMA – are effective in creating a less adversarial labour relationship, and whether there are more appropriate methods to reconcile employer requirements and worker aspirations. This also presents important lessons for dispute resolution in other countries, especially in an African context, where most countries are searching for inexpensive dispute resolution options.

**Background**

The system of dispute resolution in South Africa has evolved from the shortcomings and problems experienced with the old system of labour relations and dispute resolution before the advent of democracy in 1994 (Grogan 1999:1). This system was characterised by high costs, prolonged legal action and low settlement rates. There was a pressing need for procedures and institutions to effectively deal with disputes in a cheap and expeditious manner (Mischke 1997:19).

In particular, the official structures only managed to achieve a 30% settlement rate against the 70% settlement rate of the erstwhile Independent Mediation Services of South Africa (IMSSA) (Du Toit et al 1999:25). IMSSA was one of the first organisations in South Africa to use ADR mechanisms such as conciliation and arbitration (Pretorius 1992:103). Trained persons drawn from its panel conducted these processes (Anstey 1991:252).

Even before the introduction of the Labour Relations Act (66/95) (hereafter referred to as LRA), the use of ADR had increased significantly. Pretorius (1992:104) concluded that the increase in active trade unions within the
COSATU (Congress of South African Trade Unions) and NACTU (National Council of Trade Unions) federations had led to an increase in the use of private dispute resolution mechanisms due to the fact that the statutory system had no credibility among the big, sophisticated trade unions and employers. It should be borne in mind that private ADR mechanisms require the consent of both parties for initiation. This could also be an indication that the role players in the labour relations system joined forces in an attempt not so much to change the system, but to overcome the shortcomings of the system existing at the time. The lack of credibility and the ineffectiveness of the dispute resolution system before 1995, when the LRA established the CCMA, caused structural strain, which compelled the system to change in order to maintain stability and move back to a state of equilibrium in a changed environment.

**Alternative Dispute Resolution**

The concept of alternative dispute resolution (ADR) includes all dispute resolution mechanisms other than the formal process of adjudication in a court of law (Pretorius 1991:264). According to Zack (1997:95), ADR offers a means of bringing workplace justice to more people, at lower cost and with greater speed than conventional government channels. It also 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. Wittenberg et al (1997:155) mentioned that more and more disputants, courts, public agencies and legislatures in the USA are embracing the use of ADR in employment disputes. Slate (1998:1) indicated that the American Arbitration Association is dedicated to the promotion of specifically the mediation process for dispute settlement. Mediation is seen as a fast, cheap and effective way to resolve disputes. The settlement rate achieved through mediation was as high as 85% in the USA.

Negotiation should also be included in any discussion as a dispute resolution process. However, it is specifically excluded from this discussion because the focus of this paper is on individual unfair dismissal cases, whereas
negotiation in the broader sense has more to do with the collective labour relationship. Collective bargaining between trade unions and employers is accepted as the primary method of dispute resolution in collective labour law.

Another form of ADR is described by Le Roux (2002:29) as ‘opting out of the CCMA’ through collective agreements. This option, however, is also mentioned in the context of collective labour relations and is of little relevance to small employers and individual employees.

**Problem Statement**

If the definition of ADR includes all processes outside of the Labour Court, then nearly the whole system of labour dispute resolution in South Africa can be viewed as ‘alternative’. The processes previously referred to as ‘alternative’ have now been institutionalised within the framework of the CCMA. The main aim of ADR, which according to Zack (1997:69) is bringing workplace justice to more people, at lower cost and with greater speed, has been encapsulated in the objectives of the CCMA. The problem is, however, that in practice the arbitration process has assumed a very legalistic and technical character, the process to finalise a dispute has become very time consuming and with the increasing role of labour lawyers, it has also become an expensive system. The low settlement rate at the CCMA is also an indication that something might have gone wrong with the implementation of an ADR strategy in the labour relations system and that there is a need to have a new look at alternatives. Although the ADR concepts are applied in the system of dispute resolution, it seems as if the benefits of such an ADR approach are not being reaped.

The paper therefore considers whether the compulsory conciliation and arbitration processes as offered by bodies such as the CCMA are effective in creating a less adversarial labour relationship, and whether there are more appropriate methods to reconcile employer requirements and worker aspirations. This also presents important lessons for dispute resolution in other countries, especially in an African context, where most countries are searching for speedy and inexpensive dispute resolution options.
Statutory ADR – A Contradiction in Terms

The Independent Mediation Service of South Africa (IMSSA), as one of the role players in the old system of dispute resolution, raised a number of concerns when the negotiations around the development of a new dispute resolution system took place (Robertson 1995:67). In hindsight, it seems as if most of the problems foreseen by IMSSA have become a reality.

IMSSA raised concerns about the fact that the new system of dispute resolution was the result of a tough negotiation process between the social partners involved in the National Economic Development and Labour Council (NEDLAC). This inevitably resulted in trade-offs between various interests resulting in legislation that reflects a compromise, at the expense of overall coherency. IMSSA suggested a participative dispute system design process facilitated by experts in this field. IMSSA was also concerned about the very prescriptive nature of the proposed Act, where processes were defined and the boundaries of processes were fixed. They foresaw serious capacity and cost constraints and they also predicted that particular processes and forums might not work smoothly in the South African context (they referred specifically to the proposed workplace forums). According to Robertson (1995:68), they were also concerned that a relatively sophisticated and complex dispute resolution system will be incorporated in the new LRA. It would have been more desirable for such a system to evolve over time via a negotiation process than to be imposed by legislation. Cost to government was seen as a further problem because the CCMA system’s budget far exceeded the budget that was available to the old dispute resolution system under conciliation boards and the industrial court.

Alongside the concerns of IMSSA that the system would be too prescriptive and fixed, Wittenberg et al (1997:155-159) contended that parties to a dispute need to be flexible in considering approaches for resolving their disputes. At the moment, however, the employer and employee parties in the South African labour relations system are still concentrating on the fixed system of rules as created by the LRA. The focus is mostly on the dispute resolution processes as provided by the CCMA and it is only the bigger and more sophisticated employers and unions that might make use of possible alternatives. The Arbitration Foundation
of Southern Africa (AFSA) includes in their services provision for disputes which cannot be neatly dealt with in terms of existing sets of rules and also makes provision for the need to mend broken labour relationships after disputes (Arbitration Foundation of South Africa, no date:5). The CCMA does not have a good track record of reinstating individual employees after dismissal. ADR offered by private dispute resolution institutions comes at a cost, which most individual employees and small employers cannot afford.

The CCMA and ADR

The CCMA was established as a statutory dispute resolution body, which could deal with disputes brought by individuals at no cost and without the necessity of legal expertise or assistance. The process of conciliation, which is not new to labour relations, was however made compulsory as first step before going to an adjudicative process such as arbitration or labour court, and also before allowing parties to exercise power tactics such as strikes or lockouts.

ADR refers to a broader spectrum of processes, other than litigation, that can be used to resolve disputes (Zack, 1997:1). Although the LRA implies that there are more alternatives than only conciliation, the dispute resolution processes that form the basis of dispute resolution in the CCMA, are mostly conciliation and arbitration.

The inherent nature of ADR is to provide dispute resolution to the labour community at no cost and without the involvement of legal representation. Although a system was created in South Africa where anybody could pursue a labour dispute at no cost and without the necessity of legal representation, the question should, however, be asked whether the system is really achieving the objective of expeditiousness. The tendency has also developed that most disputes at the arbitration stage require the intervention of lawyers, which raises the question whether the objective of affordability has been achieved (Healy 2002:4) and whether the essence of ADR can be found in CCMA processes.

The fact that even the lowest level or uneducated employees can now approach the CCMA at no cost does not mean that the processes involved are
simple. The conciliation process has been refined to a highly technical process where legal practitioners and labour lawyers have become involved on behalf of employer as well as employee parties. The involvement of legal representatives inevitably brought about formalised and technical arguments and procedures. This was, however, not the intention of the new Act. The idea was to have only the disputing parties involved in the conciliation process, thereby keeping proceedings informal by virtue of their lack of legal training.

The internal procedures to deal with conflict have become very technical, with clear rules (contrary to the intention of the LRA) as to how different types of conflict and disputes should be dealt with. Such inflexible rules also appear to be contrary to the principles of ADR, which in its very nature is flexible to address the needs of the parties. There is also the danger that if other methods of resolving disputes were to be explored, these might not be recognised by the formalised system (for instance, if taken on review to the Labour Court).

**Theoretical explanation why Compulsory ADR – as offered by the CCMA – does not work**

The theoretical background of this study uses the systems approach to labour relations to identify the internal and external dispute resolution mechanisms, institutions and processes. How the conflict is managed internally in the organisation has an influence on the external process and ultimately the outcome of the dispute. The current dispute resolution system in South Africa is based on the management of conflict on a case-by-case basis. This is confirmed by the fact that the CCMA is currently swamped by excessive referrals of individual unfair dismissal cases. Lynch (2001:207) proposed a new approach to conflict management where managing conflict should move beyond the case-by-case settlement of individual disputes.

Traditionally organisations introduced dispute resolution methods as stand-alone processes in three distinct phases based on the driving principles of power, rights and interests. Lynch (2001:207) goes on to describe yet another phase, namely the ‘integrated conflict management’ phase where the focus is on
conflict competence. Figure 1 contains a summary of these four approaches, and as will be pointed out, each of these phases has implications for the type of management style and the type of relationship in the organisation.

In the *power* phase, the first phase, a senior person with authority, such as a manager in the company, deals with conflict. This refers to an authoritarian way of dealing with disputes, which is characteristic of a market-orientated capitalist system where all the power to make decisions is lodged in the hands of the employer.

**Figure 1: Four Phases in the Approach to Conflict Resolution**

<table>
<thead>
<tr>
<th>Phase</th>
<th>Management Style</th>
<th>Type of Relationship</th>
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<tbody>
<tr>
<td><strong>Phase 1</strong></td>
<td>Authoritarian management style</td>
<td>Adversarial relationship, latent conflict</td>
</tr>
<tr>
<td><strong>Power</strong></td>
<td>Managerial prerogative, task oriented</td>
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<tr>
<td></td>
<td>Relies on legislation, procedures, codes, contracts</td>
<td>Uncertainty, distrust, incapacity, use of outsiders, hostile environment</td>
</tr>
<tr>
<td><strong>Phase 2</strong></td>
<td>Substantive and procedural fairness</td>
<td></td>
</tr>
<tr>
<td><strong>Rights</strong></td>
<td>Alternative dispute resolution, mediation, arbitration</td>
<td>Distrust of processes, legalistic, overuse of arbitration</td>
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<tr>
<td></td>
<td>People-oriented management style</td>
<td></td>
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<tr>
<td><strong>Phase 3</strong></td>
<td>Managing conflict</td>
<td></td>
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<tr>
<td><strong>Interests</strong></td>
<td>Conflict prevention</td>
<td>Employee relations, culture of conflict competence</td>
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Source: Adapted from Lynch 2001:207-208.
Many South African organisations still have this task-orientated management style, which is based on managerial prerogative, and which has probably been strengthened by the ideology of Apartheid. This approach is commonly found in a labour relationship that is highly adversarial and unpredictable (Nupen & Cheadle 2001:116).

The second phase that normally develops, is the rights phase, where dispute resolution and management of conflict rely mainly on legislation, rules, policies and contracts. This is to some extent characteristic of the current dispute resolution system that South African employers and employees find themselves in, where grievance procedures, disciplinary codes, rules and guidelines and substantive and procedural fairness determine the nature of the relationship.

Nupen and Cheadle (2001:117) agreed that the dispute resolution system established by the LRA, created a hugely increased respect for procedure. The fact that the CCMA is dealing with more or less 120 000 cases per annum is a victory for procedure. However, it exposes a pathology of conflict in the South African society and specifically in the labour relationship. Management styles are forced to focus on people, but in a negative sense of making sure that the rules and procedures are followed, and if not, penalties have to be enforced. The workplace relationship is characterised by distrust and uncertainty, and training that focuses on the mechanistic aspects of substantive and procedural fairness. The high caseload places the system of dispute resolution under strain, the system becomes gradually more and more ineffective and people are looking to alternative methods of resolving their disputes. This usually happens in private institutions for whose services the parties need to pay.

However, many big companies in industrialised countries have moved on to the third phase that provides interest-based processes such as mediation, facilitation and arbitration. In this phase the focus is on ADR in the true sense of the word. The original intention of the dispute resolution system in South Africa was probably to progress in this direction, with the incorporation of ADR in the CCMA. However, the low settlement rate during the conciliation phase at the CCMA could be an indication to the contrary and it seems as if there are problems with the implementation of a system of ADR, however good the intentions of the legislator might have been.
Many South African organisations find themselves in between the rights and interest phases. They have come to rely so much on the fact that they have followed the proper internal procedures that they see no point in attempting conciliation. This could be the reason why employers do not attend conciliations, and if they do, they have no mandate to settle. This could therefore be the reason for the low settlement rate.

Lynch (2001:208) proposed a fourth phase where people are offered a choice of all the available inter-connected options and functions to assist organisations to create a cultural transformation to ‘conflict competency’. This fourth phase is referred to as the *integrated conflict management approach*. This phase involves a comprehensive approach to conflict, requiring the organisation to change the company philosophy and in many cases the terminology of organisational life. Nupen and Cheadle (2001:121) drew attention to the fact that the common law had developed in a very negative way. It did not state what employees ‘should’ do to prevent disputes, but rather what will happen if they do not do it – for instance, breach of contract. The traditional approach to rules is also based on the criminal law model and terms are used such as ‘breach’ of ‘rules’ that constitutes grounds for ‘sanctions’ such as ‘discipline’ and ‘dismissal’.

The disciplinary hearing is also characterised by criminal law phrases such as ‘charges’ against the employee and the employer ‘defending’ himself or herself. The enquiry establishes ‘guilt’, and ‘aggravating’ and ‘mitigating’ circumstances should be taken into account.

This fourth phase introduces a new approach where more emphasis is placed on a more people-centred management approach and a healthy work environment where the causes and not the symptoms of conflict are treated. The aim is to create a culture of conflict competency. The integrated conflict management system requires organisations to go beyond ADR to a systems approach to conflict management (Lynch 2001:211).

In order to move towards such an integrated conflict management approach, it is necessary to understand how conflict transforms with the progression of time. This is discussed in the next section.
The Transformation of Conflict in the Workplace

Conflict is inherent in any organisation. If not managed properly, such conflict will become more manifest by tending to escalate from so-called tolerable conflict, to a more formal grievance, and finally to a dispute. Figure 2 gives an indication of how conflict escalates. The only mechanisms to deal with conflict within the organisation are currently the disciplinary and grievance procedures. If these mechanisms do not exist – or if they fail – the conflict escalates, becomes a dispute and needs to be resolved through compulsory conciliation and arbitration processes.

Figure 2: The Transformation of Conflict

Source: Adapted from Mischke 1997:10-13.
A distinction should be made between the concepts **conflict** and **dispute**. There is also an important difference between measures that can be used internal to the organisation and measures outside of the organisation. While conflict is still confined within the organisation, it is merely referred to as ‘conflict’, and processes to manage conflict are used. However, conflict that has remained unresolved, has escalated and has become formalised to a level where it needs to be referred outside of the organisation for resolution, is referred to as a ‘dispute’.

If conflict in an organisation has escalated to a point where it has to be referred outside of the organisation to a dispute resolution body, it is an indication that there is an inability in the organisation to resolve the conflict internally.

In line with the contention that conflict escalates and becomes more formalised over time if it is not managed properly within the organisation, Lynch (2001: 212) proposed a system in which managers are expected to prevent, manage, contain and resolve all conflict at the earliest time and lowest level possible. It could be viewed as the implementation of alternative conflict resolution internal to the organisation and not waiting for the dispute to be formulated and referred to bodies such as the CCMA.

In the current system of dispute resolution, emphasis is placed on the grievance and disciplinary procedures as instruments to managing conflict. In terms of the **integrated conflict management approach** of Lynch (2001: 108) and as outlined above, the picture should look different. The emphasis in the organisation should be on ‘conflict’ and not ‘disputes’ and on offering assistance and not decision making.

This approach is outlined in Figure 3. If the conflict escalates, it should be contained, meaning it should be resolved at the lowest possible level by offering the widest possible range of interventions and mostly enabling people to help themselves. Conflict is thus contained, managed and resolved in a manner that prevents it from escalating to the level of a ‘dispute’ that needs to be referred to an outside agency for resolution. This is brought about by people-oriented management providing support structures through sincere and visible championship by management, management training for all in leadership positions and comprehensive education and awareness programmes.
If the conflict is resolved, it strengthens the conflict competent culture and trust in the organisation. If there is no internal resolution of the conflict, a dispute is declared and both parties should work together to dispose of the dispute through the available (statutory or private) dispute resolution mechanisms.

The rationale for implementing the integrated conflict management approach is that a positive work environment that produces great results attracts and retains high performing employees. Tensions and misunderstandings are common and normal, but once resolved, understanding and cooperation grow, along with trust and good relationships. If conflict remains unresolved, it leads
to stress, hostility, mistrust, wasted resources and ultimately to legal consequences. Unresolved tension and misunderstandings also have a negative affect on performance, culture, teamwork, employment relationships and quality of products and services (Simon 2004:5).

Simon (2004:5) also states that for a company to reduce the cost of unresolved conflict it must become ‘dispute wise’. This means that there should be an understanding that resolving conflict early is not a cost but a saving – not a luxury but an essential part of running a business. However, workplace conflicts are often ignored or attempts are made to resolve them in an ineffective manner. The conflict is continuously pushed into the latent phase of conflict, as explained in Figure 2, if the employer is constantly compromising, or using a heavy-handed approach. A heavy-handed approach, such as the ‘...my way or the highway...’ approach, is characteristic of the first phase of dispute resolution as proposed by Lynch (2001:207). On the surface it then might appear that the conflict has been resolved, but the feelings still fester and the dispute goes underground only to erupt later and often more vigorously. Given a company’s reluctance to acknowledge the conflict and manage it through more effective means, the employee may turn to the only option available, namely litigation. The company’s reluctance to deal with conflict in the most appropriate manner forces the conflict into the legal system where it becomes a costly dispute.

In the study on which this article is based (Bendeman 2004), it was established that employers often found themselves in a situation where they were forced to prepare themselves to deal with conflict in this highly formalised and costly manner. They had to go to great lengths and incur great costs to deal with conflict in the workplace by involving labour lawyers in the internal processes, forcing the internal disciplinary and grievance enquiries to be conducted in a quasi-judicial manner similar to an arbitration hearing. This explains the very visible presence of labour consultants and labour lawyers in the dispute resolution process. It is unfortunate that the dispute resolution system created by the LRA, and as executed by the CCMA, has evolved into this highly adversarial, legalised and costly process.

The question that now arises, is whether the current system helps or hinders the development of such integrated conflict management systems within
organisations, and if conflict does escalate into a dispute, how the current system of dispute settlement and ADR can be improved. The perceptions of the people most closely involved with disputes, namely the commissioners of the CCMA, are thus explored in the next section.

Perceptions of CCMA Commissioners Regarding ADR

The views of CCMA commissioners can assist in exploring ‘alternative’ alternative dispute resolution methods under the LRA. This will help to determine if changes need to be effected by legislation (from the outside) or if the system will change from the inside and adapt to the needs and perceptions of the parties involved in dispute resolution. The perceptions of the commissioners regarding the nature and definition of ADR in the current system of dispute resolution thus need to be determined. This might provide some insight into the possibility of predicting future changes to the system arising because of the current problems experienced by commissioners.

This section contains only a very brief summary of the views of the commissioners, and more detail is provided in the original study on which this paper is based (Bendeman 2004).

The responses of the commissioners are categorised into five groups, namely:

• The nature and definition of ADR,
• The alternatives just before dismissal,
• Assistance with the technicalities of current dispute and grievance procedures,
• Alternatives to the grievance and disciplinary phase, and
• Private dispute resolution options as the only real ADR.

The nature and definition of ADR

Some of the commissioners emphasised that the definition of ADR has not changed in the current system, and it is in essence any conciliatory process
outside of the judicial system. ADR is also more than conciliation, mediation and arbitration. It includes processes such as facilitation and third party intervention in problem solving. Most were of the view that the prerequisites are that it should be voluntary and the third party must be seen as impartial and credible.

Other commissioners, however, were of the opinion that CCMA arbitration is a misnomer for state adjudication without a right to appeal. Arbitration is in essence a voluntary process, ‘... but at the CCMA the employers are forced into arbitration and they will do anything in their power to get out of it. The incidence of review for private arbitration is less than 1% but for CCMA arbitrations it is more than 30%...’ One commissioner was not supportive of the term ‘alternative’ dispute resolution and preferred the term ‘appropriate’ dispute resolution. There was also a perception that unions and bigger employers are uncertain themselves as to what ADR is and if true ADR will be recognised by the courts.

**Alternatives just before dismissal**

Some of the commissioners suggested the establishment of a ‘... review committee...’ or a ‘... review panel...’ in the organisation, consisting of management and trade union representatives. This committee evaluates a case, even after appeal, and the dismissal would only be effected if the committee agrees. If the credibility of this committee is acknowledged by the workers and the union informs the employee that they will not represent him or her at the CCMA – because they are satisfied that justice had been done – then the chances of this employee referring the case to the CCMA are less. ‘... Such a committee can actually bring management and the union closer together...’. This alternative applies mostly to bigger organisations where there is an established relationship between the employers and the union. One suggestion was that big companies and sectors such as the mining industry could develop their own system of ‘peer review’ or ‘sector ombudsman’ that fulfils the same role as these internal committees.

**Assistance with the technicalities of the internal procedures**

A pre-dismissal arbitration process was viewed as a possible alternative to assist with the technicalities of the internal procedures. This process has become
available with the recent changes to the LRA and entails that a CCMA commissioner does the arbitration as part of the internal processes of the organisation. This, however, has not taken off so far, because ‘... big companies invest a lot of money in training and developing their personnel to do the internal processes 100% correctly and are not prepared to spend an additional R 3 000,00 per day on a CCMA arbitrator to come and do something that they can do themselves...’.

**Replacing the grievance and disciplinary procedures**

A suggestion was made for a process called ‘conflict resolution facilitation’: ‘... People are scared to deal with conflict and need a facilitator to assist them...’.

This process requires management to arrange a meeting between the parties, on neutral ground, with a ‘conflict resolution facilitator’ who should be a highly skilled person to assist parties to work through the issues and emotions underlying the conflict. ‘... At the CCMA there is no time to deal with emotions and if this could be handled internally the chances are firstly that conflict will not escalate to become disputes, and if it does, there will be a better chance of settling in conciliation. If not, the issues will be much clearer at arbitration, making the commissioner’s work much easier...’. One of the commissioners suggested that the professional boards for psychologists and social workers should be approached to train their students in the field of workplace conflict facilitation and to allow them to do their practical courses at the CCMA or in companies.

**Private dispute resolution – the only real ADR**

An opinion was raised that the only true ADR is found in private dispute resolution. ‘... Employers think it is too expensive but after four or five appearances at the CCMA they begin to think differently...’. According to one commissioner, ‘alternative’ only means going the non-CCMA route, namely private dispute resolution. If the parties are sophisticated enough, such as professional and high-level workers as well as unionised sectors of the economy, disputes should be dealt with through private dispute resolution. If the parties are unsophisticated and highly adversarial, such as in the majority of individual unfair dismissal cases involving small to medium sized employers, then it might have to be compulsory.
Alternatives to external processes at CCMA

One of the commissioners mentioned the newly introduced con-arb process for probationers as alternative to the conciliation process. Con-arb is simply a process in terms of which a third person attempts to get settlement through conciliation, but if not successful, proceeds immediately with arbitration. Most of the commissioners in this study had been very positive about this process as a cure for non-attendance, low settlement rate and tedious time delays. However, it was pointed out that the con-arb process is not very popular in private dispute resolution. The reason for this could be that the process of conciliation only comes to fruition in a voluntary system. A compulsory system eventually forces out the conciliation phase as a means of resolving disputes.

Other possibilities were also raised by some commissioners, and these are explored below.

Conclusion on views of commissioners

The findings in this section have an important impact on the theory of conflict escalation and conflict management as discussed in Figure 2. It is also an indication of how the dispute resolution system changes and adapts to the strain experienced in the changing labour relations environment. It became clear that the internal mechanisms for dealing with conflict is problematic and there are various attempts to deal with this problem such as involving consultants and lawyers, making use of the proposed peer review or review committees or using the pre-dismissal arbitration. The external mechanisms are also problematic and the commissioners in this study indicated that there is not only a need for more use of the con-arb process due to the fact that employers do not attend the conciliation hearings, but also a need for a new look at other alternatives.

The latter issue, alternative ways of dealing with workplace conflict, is now dealt with.
Alternative Ways of Dealing with Workplace Conflict

This section deals specifically with possible changes required by the dispute resolution system and ways in which the system adapts – or should adapt – to the environment. Taking account of the views of the commissioners and of the available literature in this regard, the process of conflict management and dispute resolution should be changed as indicated in the shaded areas of Figure 4.

Figure 4: ADR and Proposed Changes to the Conflict Management and Dispute Resolution System

Figure 4 is a representation of conflict management and dispute resolution, and elaborates on the understanding of the escalation of conflict as indicated in Figure 2.

The point needs to be emphasised again that the internal mechanisms for the management of conflict have become very technical and problematic. It has become so to the extent that the legislator had to intervene and provide an option where a CCMA commissioner could come to the assistance of the employers to enable them to properly deal with internal processes (in the form of the pre-dismissal arbitration). This is also the area of dispute resolution where the consultants have become involved in the dispute resolution system and could be playing an increasingly important role in the future, due to the need for their services in the organisation. This is confirmation of the fact that the South African system of dispute resolution is in the ‘rights phase’ of dispute resolution in terms of the model proposed by Lynch (2001:207), and as discussed above. The rights phase is characterised by emphasis on, for instance, the grievance and disciplinary procedures, and arbitration.

Figure 4 incorporates one of the most important ADR options that was mentioned previously as part of an integrated conflict management approach, which is good human resource practices (see shaded area ADR1). One of the commissioners suggested that ADR can be applied even before the employer takes the decision to go the disciplinary route. This suggests that the conflict resolution alternatives to the grievance and disciplinary procedure are confined to a very narrow line between conflict manifestation and the grievance phase. The focus in this approach is on good human resource and labour relations practices such as motivation, performance appraisal and skills development.

Another possibility is that the current, rights-based approach to internal conflict resolution should be replaced with a conflict facilitation process, as indicated in the shaded area marked ‘ADR2’ in Figure 4. Lynch (2001:208) described dispute resolution based on processes such as facilitation and mediation as an ‘interest phase’ in dispute resolution and suggested that an ‘integrated conflict management phase’ needs to be reached, which focuses on a choice of methods and which is not predetermined by legislation. This is in line with the suggestion of one commissioner that one should not refer to ‘alternative’ dispute
resolution but to ‘appropriate’ dispute resolution. This can only be reached in a
culture of ‘conflict competency’ that focuses on how people treat each other and
manage disputes in a constructive manner, as discussed above. According to the
commissioners in this study, the current system of dispute resolution creates the
opposite, namely animosity in the labour relationship.

Another ADR initiative mentioned by the commissioners, namely the
pre-dismissal initiative, is also indicated in Figure 4 (shaded area ADR3). These
‘before-dismissal ADR’ options include ‘peer review’, ‘review committees’,
‘review panels’ and the ombudsman system. If these processes are analysed,
two conclusions can be drawn. On the one hand it could be seen as a move
towards co-operation and building trust in organisations where employers and
trade unions have better relationships and can work together, seeing that these
alternatives will only bear fruit if the employees regard them as credible.
However, on the other hand it could simply be a way of making doubly sure
that proper legal procedures are followed. If the case does go to arbitration,
employers would be completely sure that they had been following the very
technical prerequisites of the legislation. In the latter case, this alternative
might simply be regarded as an attempt to deal with the shortcomings of
the system, rather than moving towards an integrated conflict management
approach.

More confirmation for the assertion that South Africa is in the rights
phase, as identified by Lynch (2001:208), was received from commissioners who
indicated that the internal mechanisms and processes are characterised by
power play in that employers prefer to go to arbitration because they need to
reaffirm their power. The use of the grievance procedure is seen as a challenge to
management’s power, which needs to be corrected in the subsequent processes.
In such an environment, these pre-dismissal procedures are unlikely to bear
much fruit.

As already stated, the external mechanisms have been under strain because
of the high referral rate, the high rate of non-attendance and the low settlement
rate. It seems as if the conciliation phase as implemented by the CCMA has
become obsolete. There seems to be much support among the commissioners
that con-arb (see shaded area ADR4) should replace the conciliation-then-
arbitration system. However, the fact that the con-arb process is not popular in private processes could be an indication that con-arb is not necessarily a better process but is simply a short-term solution to address the problems that commissioners and parties currently experience.

Private dispute resolution (see ADR5 in Figure 4) is an alternative to the statutory dispute resolution system, but its utilisation is probably limited to bigger and more sophisticated role players.

Not only is it clear from the responses that the internal procedures have become very technical, but it has also been emphasised that there is a need for alternative methods of conflict handling and dispute resolution. There is, however, uncertainty over whether these alternatives will be recognised by the formalised system (for instance the Labour Court in reviews).

**Conclusion**

It has become common practice amongst many South African ADR practitioners to prefer the term ‘appropriate dispute resolution’ as opposed to the term ‘alternative dispute resolution’. This would include not only the application of new or different methods to resolve disputes, but also the selection – or the design – of a process which is best suited to the particular dispute and to the needs and capacity of the parties to the dispute. However, this option is mostly available only to the bigger and more sophisticated employers. The design of an appropriate dispute resolution system relies firstly on the maturity of the role players in the company. This maturity refers to an acceptance of the fact that conflict is inherent in the labour relationship and that it should be dealt with in the most appropriate manner as soon as it has manifested. An appropriate dispute resolution system secondly relies on a basic knowledge of industrial relations concepts and principles as well as technical knowledge of the judicial system and the legal requirements to deal with disputes.

However, the realities of the South African labour market – as the case could be in many African countries – are that a large percentage of employees
has no, or very little schooling and that the largest proportion of employers are in small to medium-sized businesses with little skills or training in labour relations and labour law. The mechanisms in the workplace to deal with conflict are primarily the grievance and disciplinary procedures. These procedures are not effectively used and many small and medium-sized employers do not have these procedures in place. The result is that more disputes land up at the CCMA and when they do, one of the parties is usually penalised for not following the proper procedures for internal conflict resolution.

The fact that the majority of South African employees and employers are ‘unsophisticated’ with regard to their rights and duties in terms of labour legislation (Landman 2001:76) is in contrast with the very sophisticated system of rules and procedures that forms the basis of the dispute resolution system. The majority of the role players who have to operate within the system do not have the ability to effectively deal with the system and they are the parties who are feeling the consequences of the unfair dismissal regime and the shortcomings of the CCMA.

Cognisance should be taken of the capacity and the needs of the parties in the labour relationship when designing a national dispute resolution system. The benefits of ADR processes can only be reaped if it focuses on the appropriateness of the system relative to the needs and capacities of the parties.

Overall, therefore, the conclusion is that once conflict has escalated to become a dispute, and needs to be referred to an outside agency (either with or without the involvement of some review committee or similar process), there is not much that can be done structurally to address the shortcomings of the dispute resolution system. Obviously this does not exclude the possibility of ensuring more effective processes, proper funding, and so forth, but these are not considered as structural changes.

This means internal conflict resolution processes should receive significantly more attention from the parties involved, but also from government and bodies such as the CCMA. Some pointers for improving such systems have been provided in this paper.
Sources


Alternative Dispute Resolution in the Workplace


