



INDEPENDENT MEDIATION
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The IMSSA Review

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The first six months of 1989 has proved to be as busy as predicted, and the demand for mediation and arbitration services has increased steadily during this period. Year on year, whereas there were some 120 mediations and 75 arbitrations during the first six months of 1988, there were 195 mediations and 117 arbitrations during the first six months of 1989.

This increase in demand may be attributed to a number of factors. In the first place, with the ever increasing unionisation of workers in South Africa a wider range of parties are resorting to third party intervention to resolve disputes. Secondly, labour and management who have had experience of mediation and arbitration, have continued to use third party neutrals to assist them in the process of dispute resolution. And thirdly, given the current political climate and the attitude of the major trade union federations to the recent amendments to the Labour Relations Act, it is apparent that parties are turning with greater frequency to independent third party neutrals to assist them resolve conflict. There are, for example, an increasing number of recognition agreements which require that conflicts of right be adjudicated through private arbitration under the auspices of IMSSA. Some German multinationals have, in accordance with the IG Metaal Code of Conduct for German investors in South Africa, agreed to refer disputes of right to private arbitration. IMSSA has for some time now been cited in the disputes procedures of many recognition agreements as the source of mediators.

Arbitration

A total of 117 arbitrations took place between January and June 1989, as follows:

| | | |
|--------------|---------------|------------|
| January - 21 | February - 12 | March - 28 |
| April - 18 | May - 16 | June - 22 |

The issues brought to arbitration most often were individual disputes of right. These included individual dismissals or a determination regarding appropriate disciplinary action. The reasons for the dismissals ranged from late-coming, to theft, to drinking on the job, to insubordination, and many other common workplace misdemeanours.

Arbitrations also occurred in collective disputes of right and collective disputes of interest. In respect of collective disputes of right, the most common matters before the arbitrators included the interpretation of substantive and procedural agreements and collective dismissals. In the case of collective disputes of interest, the most common cases were wages, substantive conditions of employment and bargaining unit disputes.

The awards made by arbitrators in respect of dismissal cases, both collective and individual, reflect a relative parity between dismissals upheld and reinstatements ordered. There were however a greater number of conditional reinstatements than there were absolute reinstatements. Conditional reinstatements usually involve reinstatement either partially retrospective or from the date of award, or reinstatement with some form of lesser penalty, be it a warning or an instruction to undergo counselling or some other form of corrective action.

The outcome of arbitrations over collective disputes of interest obviously varied from case to case, with no particular trend discernable, though each arbitration award is thoroughly motivated.

The majority of arbitration cases still take place in the Transvaal between parties who conduct their business and work in the Transvaal. However, there does seem to be an increase in the number of arbitrations taking place in other regions. The sectors which made the most use of IMSSA's arbitration service remain the retail, food, metal and mining sectors.

The average length of an arbitration over the last six months was two days. The average cost was R1 160 per day. The cost per arbitration event was therefore approximately R2 380. It is important to note, however, that most cases of individual dismissal last one day and would therefore cost the lesser amount. This cost includes the fee to the arbitrator, the IMSSA administration fee, and any briefing, travel and accommodation costs, as well as the writing of the award.

A considerable amount of time and energy has been put into securing permission from parties who have not previously given permission or who have actively withheld permission to publish selected awards in the Industrial Law Journal or the soon to be published IMSSA Digest. Most major employers and unions have granted permission, however it remains for IMSSA to secure the permission of all parties. Publication is vital to the development of the arbitration process as it is the only effective means of bringing an emerging arbitration jurisprudence to the attention of the companies and unions who use the process.

Mediation

There were approximately 195 mediations during the first six months of 1989, as follows:

| | | |
|--------------|---------------|------------|
| January - 24 | February - 35 | March - 22 |
| April - 28 | May - 43 | June - 43 |

It is expected that these figures will continue to rise in the short term particularly as mid year is the most popular wage bargaining period and therefore the period during which most disputes occur. Already 60 mediations have been confirmed for July.

The vast majority of mediations occur over wages and other substantive conditions of employment although during the period under review there were mediations over other matters including job grading, recognition, retrenchments, dismissals and hours of work. It is difficult to accurately assess the outcome of mediations unless the parties settle their dispute during the course of the mediation, as the outcome of the dispute is generally not communicated to either the mediator or the IMSSA offices at any later date. It does appear however that approximately 70% of all disputes referred to mediation are settled during the course of the mediation. Movement generated during mediation is often the catalyst to settlement where this occurs after mediation proceedings have terminated.

Mediation is generally resorted to as a step in the disputes procedure contained in the recognition agreement between the company and the union. There does appear however to be an increasing demand for mediators to mediate either at a Conciliation Board hearing or to act as chairman to the Conciliation Board. IMSSA has no objection to this practice and numerous such events have been arranged.

There appears to be a greater spread of mediations amongst the four regions than there are arbitrations. The majority of mediations do still occur in the Transvaal although a growing number of mediations have taken place in Natal, the Cape and in the Orange Free State.

The majority of mediations occur in the food industry. This industry is closely followed by the chemical, construction, transport and printing sectors. The retail sector does not feature as prominently in these statistics simply because most retailers negotiate nationally with one union and therefore there are fewer mediations. This is not to say that mediation is used to a lesser extent in the retail sectors, on the contrary, most retailers and retail unions have used IMSSA's services and the settlements reached in the retail sector tend to involve very many more workers and larger amounts of money than do most other sectors. The hotel and restaurant, as well as health and education sectors, appear to be making greater use of mediation than they have in the past. This is possibly as a result of the growth in unionization in these sectors in recent months.

The average mediation lasts one day and the cost to the parties is approximately R1 000. This charge includes the mediator's fee, the IMSSA administration fee and any travel and accommodation costs which might have been incurred by the mediator.

There is a growing interest in an approach to dispute resolution called med-arb and IMSSA has recently conducted two med-arbs. This process involves mediation to begin with, failing settlement the parties agree to give the mediator the powers of an arbitrator, either to determine a decision on the basis of the facts he has heard during the mediation process or on the basis of further formal submissions made by the parties. The power given to the third party to determine the dispute is a strong inducement to the parties to settle during the actual mediation phase.

Balloting

Twenty-five balloting exercises were conducted by IMSSA around the country over the last six months. Twenty-one ballots were conducted over the same six months during 1988. These ballots have been used for verification of union stop orders for the purposes of recognition, and for strike ballots. A number of mediators have been trained to conduct ballots in their regions and therefore it is not difficult or expensive to arrange a ballot at any point around the country.

Relationship by Objectives

A number of follow-up meetings were held pursuant to RBO exercises conducted during the course of 1988. These meetings proved most positive and it appeared that the exercises had had a favourable effect on the relationship between labour and management.

Two RBO exercises have been arranged for this year, and many enquiries by interested parties have been made. A select group of mediators are soon to be trained by Don Power of the Federal Mediation and Conciliation Service in the United States in relevant RBO skills.

Other activities

Besides the provision of arbitration, mediation, balloting and RBO services, IMSSA's staff and panellists have been involved in a number of activities aimed at upgrading their professional and administrative skills. IMSSA mediation and arbitration panellists took part in community mediation, mediation and arbitration seminars during April and May. International experts in both mediation and arbitration were invited to attend the seminars and to share with the panellists their experiences and views from a different perspective.

Tom Colosi, vice president of the American Arbitration Association and widely reputed to be one of the finest negotiation skills trainers in the United States, attended the National Mediation Seminar. He ran a negotiation skills course specifically designed for mediators, and offered important insights into third party intervention in the collective bargaining process. Another valuable session involved representatives of trade unions and companies who regularly use mediation giving their perspectives on key problems in collective bargaining, information disclosure, positional bargaining and the authority of the mediator in the process, and provided the opportunity for mediators and users to debate these issues vigorously and frankly.

Professor James Oldham from Georgetown University, Washington and an arbitrator attached to the American Arbitration Association and the Federal Mediation and Conciliation Service, attended the National Arbitration Seminar. He contributed to debates on topics such as terms of reference, appropriate sanctions and remedies in discipline and dismissal disputes, the influence of external law on the arbitration process, expedited arbitration, inquisitorial arbitration and interest arbitration.

Dr Kate O'Regan of the Labour Law Unit at the University of Cape Town presented a thoroughly researched review of IMSSA arbitration awards which will be published in the near future.

As a result of discussions held at these seminars, the IMSSA Director and his Assistant have been mandated to provide a more comprehensive flow of information and documentation on developments in the industrial relations field to panellists and to make more regular and greater contact with the panellists in the Western and Eastern Cape and Natal. An outreach programme has already been arranged for August involving both company and union users, and panellists in the Natal and Cape Regions. A logical development, over time, must be the establishment of IMSSA offices in the major centres in these regions.

The IMSSA staff has been substantially strengthened by the addition of an Assistant to the Director and a full-time Bookkeeper and also by the computerisation of its functions. All staff have attended a computer course and most work is now undertaken with the assistance of a comprehensive computer networking system. In addition, the IMSSA offices have been expanded to accommodate more mediation and arbitration events, as well as to accommodate an enlarged staff complement.

The structure and function of the IMSSA Board of Trustees is in the process of being reviewed and the views of the various constituencies involved in IMSSA have been taken into account in undertaking this task.

As a non-profit service organisation operating in the public interest, the financial security of IMSSA has traditionally depended on the success of its fundraising efforts, as it generates limited income through the provision of its services. A domestic and international fundraising drive was initiated during May, the results of which are not fully known to date. Although there have been favourable indications that finance will be forthcoming, grants made are usually short term and fundraising therefore remains an ongoing priority to ensure the long term viability of the organisation.

The next six months should prove to be as demanding as the last have been, however it is anticipated that this will not place unmanageable strain on the organisation as internal expansion and planning over the last year have made it possible for IMSSA to provide an efficient service under even the most demanding conditions.

IMSSA Staff

| | |
|-------------------|-----------------------|
| Charles Nupen | Director |
| Felicity Steadman | Assistant to Director |
| Elizabeth Storey | Secretary |
| Dren Nupen | Co-ordinator |
| Bontle Mpakanyane | Client Services |
| Zi Channing | Client Services |
| Anna Mariotti | Secretary |
| Eleanor Rorich | Bookkeeper |
| Soraya De la Rey | Receptionist |
| Seth Phamuli | Interpreter |

IMSSA Board of Trustees

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| Felicity Steadman | Assistant to the Director |

PANEL UPDATE

Arbitrators

Transvaal

Advocate Mark Antrobus
Mr Paul Benjamin
Mr John Brand
Advocate Martin Brassey
Advocate Jules Browde, SC
Mr Edwin Cameron
Advocate Nazeer Cassim
Mr Rod Harper
Dr David John
Mr Steven Kemp
Professor Peter le Roux
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Advocate Roland Sutherland
Advocate Karel Tip
Advocate Wim Trengove, SC
Mr Tim Trollip
Mr Eric Truebody
Mr Raymond Tucker
Advocate Nigel Willis

Natal

Mr Chris Albertyn
Mr Chris Brunton
Mr Andrew Burnett
Mr Michael Cowling
Mr Graham Giles
Mr Thabani Jali
Mr Chris James
The Hon. Mr Justice R N Leon, QC
Mr Richard Lyster
Mr Mandla Mnchunu
Mr Martin Oosthuizen
Advocate Maurice Pillemer
Mr Pat Stilwell
Mr Craig Tanner
Advocate Gardner van Niekerk

Mediators

Transvaal

Advocate Mark Antrobus
Advocate Graham Barlow
Mr Paul Benjamin
Mr John Brand
Mr Azhar Cachalia
Mr Brian Currin
Mr Graham Damant
Mr Nick de Villiers
Mr David Douglas
Ms Sara Gon
Mr Peter Harris
Mr Nicholas Haysom
Professor Peter le Roux
Mr Vusi Masinga
Ms Fiona McLachlan
Mr Thabo Molewa
Mr Deon Nel
Mr Charles Nupen
Mr Mark Orkin
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Advocate Roland Sutherland
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Dr Attie van der Merwe
Advocate Hans van der Riet
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Advocate Nigel Willis

Natal

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Mr Clive Couperthwaite
Mr Michael Cowling
Mr Jeffrey Fobb
Mr Phillip Glaser
Dr Rob McCann
Mr Mandla Mnchunu
Mr Inthiran Moodley
Mr John Radford
Mr Alan Rycroft
Mr Raymond Zondo

Western Cape

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Mr Lee Bozalek
Mr Roger Chennells
Professor Hugh Corder
Mr Steven Kahanovitz
Mr John MacRobert
Mr John Murphy
Mr Hermann Niewoudt
Mr Merwe Scholtz
Mr Clive Thompson

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Mr Basil Gibson
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Mr Wallace Mgqqi
Mr Bulelani Ngcuca
Mr Hermann Niewoudt
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Ms Mary Simons
Professor S M Blackie Swart
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