The second option

alternative dispute resolution

IMSSA
Mediation Notes

by Thabo Ndabeni, National Director, IMSSA

Christopher W Moore says: "Conflict seems to be present in all human relationships and in all societies. From the beginning of recorded history, we have evidence of disputes among children, spouses, parents and children, neighbours, ethnic and radical groups, fellow workers, superiors and subordinates, organisations, communities, citizens and their government, and nations. Because of the pervasive presence of conflict and because of the physical, emotional, and resource costs that often result from disputes, people have always sought to find ways of resolving their differences. The solutions they seek are those that allow them to satisfy their interests and minimise their costs."

As people develop, the very mechanisms employed to deal with conflict change to match the level of development. At a certain point in the past, the physical domination of one group by another was probably an acceptable way of managing conflict. The dominated accepted their state of subjugation for as long as they feared their 'masters'. As soon as a bold leader emerges, or the pain of domination becomes unbearable, the dominated group mobilises against the oppressor. Victory in the ensuing battle is very costly because lives are lost, property is damaged, and the winning group has to invest a tremendous amount of resources to protect their gains. Christopher Moore says the overriding desire of those in conflict is to find a solution that "satisfies their interests and minimises their costs".

Over the years, the world has accepted the inevitability of conflict, but has also attempted to develop rules on how people in conflict should conduct themselves. Some of the conventions relate to the treatment of prisoners, civilians, children, women and what types of weaponry are acceptable. The establishment of the United Nations was another attempt, after the ravages of the second World War, to get the communities of the world to have a forum where disputes amongst nations could be resolved.

Formal processes

Parliament in South Africa passes laws that regulate relations amongst individuals. These laws provide a common basis for what is acceptable behaviour and what is not. Laws lay down the rights and obligations of citizens. The legislature attempts to provide a basis for relations among its citizens. However, in certain circumstances, the laws themselves can impede the promotion of good relations. The formal application of the law sometimes further aggravates a

situation, rather than resolving it. Thus, people have always sought alternative ways of dealing with conflicts.

Alternative dispute resolution

The formal judicial process has a number of flaws in relation to the parties in dispute. Firstly, the parties do not have control over their matter after they have reported their dispute at the police station. The police do the investigation, then refer the matter to the Attorney General, who determines whether there is a basis for prosecution. Finally, the matter is set down for hearing at the courts. In civil matters, parties in dispute have to formulate their dispute such that it complies with the definition of the law; in other words, they have to show that there is 'a cause of action'. If they cannot do this, the courts do not have the jurisdiction to hear the case. This does not, however, mean that the dispute goes away.

The disputants play a minimal role in the processing of their matter They cannot even choose who should prosecute or adjudicate on the matter. The biggest disadvantage is that the matter is reframed in legal jargon. If the participants do not have an understanding of the law, they sit in awe, wondering what the magistrate, prosecutor and their legal representatives are talking about. The proceedings are adversarial and the outcome is always in favour of one party or the other.

There are disputes that need the formal judicial system for resolution, particularly those that concern human rights and other fundamental principles. In other matters, alternative dispute resolutions may be an option.

Alternative dispute resolution offers parties a fair amount of control over their matter. Mediation, for example, allows the parties to choose who should mediate, an acceptable venue and the date when the matter will be heard. Mediation is a voluntary process unless a law (such as the LRA) prescribes it. The aggrieved person is given an opportunity to talk directly to the person with whom they are in conflict. The biggest plus is that the parties can jointly work out an agreement that addresses their interests to the greatest possible extent. Mediated agreements are likely to last if they address the concerns of all parties. The only weakness with these agreements is that decisions are not enforceable. The effect of the agreement, therefore, is directly proportional to the commitment of the signatories to the agreement.

Options

There are a range of options available to individuals who are in conflict. Avoiding conflict is one of the options that parties in conflict tend to resort to quite often.

A person can avoid the conflict by not raising the issue with the other party. This does not mean that there is no conflict. Either the person feels that it is inappropriate to raise the issue, or that s/he may have erred in his assumptions about the other party.

Another option is to raise the issue informally, with the hope of solving the problem. When informal deliberations fail to produce results, direct formal negotiations become the next option This approach will cause the parties to negotiate around the distressing issues and probably find a solution. Should a solution become elusive, because the issues are intractable or the parties are overcome by emotions, or they feel they will not make any headway because of lack of trust, an alternative approach is available. Mediation is the intervention by a third independent, impartial and mutually acceptable person with no decision-making powers who will assist the contending parties to voluntarily arrive at a solution acceptable to all.

Should parties fail to resolve the dispute through mediation, another avenue is

arbitration. Similar to mediation, arbitration involves a third party who is invited by the parties to assist in resolving the disputes. However, the difference between mediation and arbitration is that, in arbitration, the arbitrator makes a final and binding decision for the parties, whilst, in mediation the parties make the decision assisted by the mediator. The parties will jointly work out the terms of reference for the arbitrator and commit themselves to abide by that decision.

The aggrieved party still has the option of pursuing his/her matter through litigation in a court of law.

Equity and fairness generally influence the decision of the arbitrator. The values of natural justice also play an important part in arbitration procedures. In mediation, even though the mediator does not have decision-making authority he or she guides the parties in their deliberations, challenges the assumptions they make and tests the acceptability of the proposed solutions by their principals (if mandated by others) through asking good and appropriate questions. In mediation, parties are assisted towards arriving at a solution that addresses the interests and minimises the costs for the two sides.

The last option is the extra-legal approach. Moore says this does not rely on a socially-mandated – or often socially acceptable – process. It uses coercion to force an opponent into compliance or submission. There are two types of extra-legal approaches – non-violent action and violence.

Dispute resolution prescribed by law

Section 23 of the Constitution of South Africa confers rights to employers and employer organisations on the one hand, and employees and trade unions on the other, to engage in their normal activities without interference. The environment within which these rights are exercised is determined by the LRA. Section 1 of the LRA of 1995 states that the Act strives to "promote the effective resolution of labour disputes". Chapter VII of the Act lays out the dispute resolution processes that have to be followed in the instance of a disagreement between an employer and an employee.

The suggested process of conciliation, mediation and arbitration must happen within the broad framework of the provisions of the Act. What this means is that even though the Act encourages mutually agreed upon solutions to industrial problems by the primary agents, it clearly defines what constitutes a fair labour practice.

Conciliators, mediators and arbitrators facilitate the resolution of industrial disputes with the LRA as their point of reference. The decision of the arbitrators is final and binding. It can only be challenged through taking it on review, not appeal.

Bias

There is a perception that, at times, mediators, conciliators or arbitrators may be biassed. The mediation process provides a remedy for parties who, for one reason or another, doubt the impartiality of the mediator. Mediation is a voluntary process. Parties are free to walk away should they not be happy with the way it is conducted. Alternatively, parties have the right to choose another mediator.

In the case of conciliation, parties can formally complain to the Director of the CCMA, who will then take remedial action.

The LRA protects parties from abuse by those appointed to facilitate the resolution of their disputes. CCMA Commissioners have taken an oath to treat and handle parties impartially. Independent agencies like IMSSA have professional codes of ethics that bind their panellists to treat parties fairly.