

The dark side of arbitration and Conciliation in Zimbabwe

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Abstract

Disputes and conflicts are the most prominent characteristics of human existence since time immemorial. It is this inevitability of disputes that calls for measures to be put in place so as to effectively and efficiently resolve them in order to manage the employment relationship. Arbitration and conciliation are two ways that are most used in organization to solve these conflicts. Their use has brought both positive and negative results in different organization. The paper however sought to look at the challenges of the arbitration and conciliation process from the Zimbabwean perspective. Different sources were used to present the critical analysis of these challenges

Keywords: arbitration, conciliation, labour, management and government

1. Introduction

History is sated with records of conflicts at various levels of human relations whether at inter-personal, inter-group, intra-group and intra-national or international arenas, conflicts have been found recurring in social relations. It then follows that conflict is also an inevitable characteristic and perspective in employment relations. This is motivated and precipitated by the dichotomy in interests and goals between parties in an employment relationship, that is, labour and capital. This study was prompted by the inevitability of these class disputes, which was further polarised by the advent of Industrialisation, and the need for the state to design dispute resolution mechanisms in place that are effective and efficient to enable an environment that breeds productivity and enable business.

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2. Background of the study

The Zimbabwean Courts have been characterised by back logs in labour cases taking more than 5 years to resolve and finalise and as a result an alternative to the court system has been established in order to counter the challenges associated with the court litigation route. The Zimbabwean legal structure is critical and of paramount importance as it provides the provisions within which the Conciliation and Arbitration derives its legal standing. It is of paramount importance to note at this stage that conciliation and arbitration are employed as alternative dispute resolution mechanisms to the traditionally used cumbersome litigation process. The litigation process is usually long and cumbersome and the parties have little or no influence to the process in terms of speed. Muza (2009) highlighted that the undependability of the courts traceable to numerous shortcomings dogging them is the reason why arbitration and conciliation should be opted for. Even Mazanhi (2010) substantiated the above position where he noted that the Zimbabwean labour Court has been profound of delays in attending to cases due to the long queues of cases waiting to be heard. It is against this background that arbitration and conciliation has been the most preferred mechanisms for dispute resolution. However despite it being a preferred mechanism, there are some challenges enshrined in it. It is against this background that the writers sought to highlight some of the challenges.

3. Challenges of Arbitration and conciliation

3.1 Costs

In case of a no settlement at conciliation, the Conciliator initiates a certificate of no settlement and forwards the case for arbitration. If one party chooses a private Arbitrator, there are costs involved. The costs of arbitration according to the Labour Act Section 98 (7) are such that the Labour Officer or Designated agent for the employment council which is registered to represent the enterprise or industry from which the parties are from, will determine the share of Arbitration costs to be borne by each party (Gwisai, 2007). The trend is that many parties choose Arbitrators by Labour Officers withstanding the back log that is building up in this regard.

Unfortunately, this has created the avenue for employers to plead incapacity to pay the costs of arbitration and opting arbitration by Labour Officers with the hidden agenda of subjecting the dispute resolution to delays which are inevitable with this route (Duve, 2011).

The government have through the Arbitration Act (Chapter 7:15), gazetted Arbitral fees with US\$300 as a minimum which normally involves one person against the company. As alluded above the Conciliator will determine the share of arbitral costs. However Mariwo (2008) observed that in cases which involves 'unfair dismissal', the arbitral costs are usually excessive to the appellant who is actually out of employment and seeking reinstatement through this mechanism. He added that the majority end up giving up on the process or opting for the Government Arbitrator where cases takes more than 36 months to be settled. Maitireyi and Dube (2013) noted that the pricing of arbitral costs unfairly favors employers who have a better financial footing than employees. This may create an unenviable situation where unscrupulous employers abuse their financial advantage by frequently and deliberately declaring disputes in order to squeeze employees financially.

It is important to highlight that there has been a practice nowadays in Zimbabwe which has been designed in order to reduce arbitral costs and enhance accessibility and consequently effectiveness of the alternate dispute resolution mechanism. The practice according to Madhuku (2010) has developed in Harare as part of what is described as 'social responsibility'. As part of social responsibility, an independent arbitrator is asked to do at least two cases for free, without charging the parties any fees. This has been designed in response to the increasing number of parties who plead incapacity to meet the costs and thereby resulting in backlog of cases awaiting arbitration by government Labour Officers. However in the absence of a legal basis to push and sustain such a position or gesture, some Arbitrators refuse to take 'social responsibility' cases.

This explains why the issue of social responsibility cases has been peculiar to the CapitalCity alone because there is no legal structure to push it to other regions of the country. However if entrenched in Labour Legislative structures, this will go a long way in enhancing the effectiveness of the dispute resolution mechanism. Lawyers, as an example, are required to do legal aid work as part of their pay back to society.

The pro deo (for God) and in forma pauperis (for the poor) services are well known in the legal profession across the world (Gwisai, 2007). It has to be one condition of appointment of an arbitrator that he/she will be required to accept reasonable 'social responsibility' work.

3.2 Speed/Time Limits

Despite the fact that compared to the court litigation system, conciliation and arbitration as a mechanism for dispute resolution is relatively faster, it should however be noted that the major drawback of our Labour Act (Chapter 28:01) is that it is silent interms of time lines within which the process of conciliation and arbitration could be concluded. The Zimbabwean Law does not impose a maximum time limit for a Conciliator or Arbitrator to make an award. This gap in law accounts for some of the delays in resolving labour disputes (Gwisai, 2008). Although the process of conciliation usually is completed in one sitting and resolution or recommendations are passed, the arbitration process usually takes time to settle the disputes. This could be attributed to the absence of set time lines in our legal framework in order to force arbitrators to resolve disputes with speed. In other countries, like South Africa, their legal structure provides that the award should be awarded within 21-30 days from the day of the hearing (South African Labour Relation Act of 1995).

In Lesotho, an Arbitrator is required to issue an award with brief reasons, within 30 days of the conclusion of the arbitration proceedings and that period can only be extended by the Director of the Directorate on good cause shown (Lesotho Labour Relations Act of 1990). In Botswana, Section 9 (9) of the Trades Disputes Act of 2003 provides that upon conclusion of an arbitration hearing, the arbitrator shall make an award and shall, within 30 days of the hearing, give reasons for the award. Gwisai (2008) noted that cases can take more than 12 months before an Arbitrator can give an award thereby delaying justice. Mariwo (2008) bemoaned the delays encountered in resolving disputes through arbitration in the private security sector. This is one example of several cases pending before the Labour Arbitrators. Government Arbitrators usually takes longer than Independent Arbitrators because of the volume of cases coming against the number of Government Labour Officers. As commonly said, the quote 'justice delayed is justice denied' is all but the earnest truth and in the Zimbabwean case.

The much desired efficiency and expeditious resolution of disputes is rendered void, unrealistic and unachievable through this administrative malaise (Matsikidze, 2013).

The new Labour Amendment No 5 of 2015 did not address the issue of time limits despite the push mainly from the Labour Representative bodies to incorporate the issue of time limits in order to enhance the effectiveness of the dispute resolution mechanism.

One of probable reasons why the Legislative arm of the State ignored such proposal could be attributed to the nature of Conciliation and Arbitration as dispute resolution mechanism. Conciliation and Arbitration, unlike the court litigation system is an interactive, negotiation and non adversarial process where disputants, with the help of a Principal Officers, are expected to craft and construct a mutually beneficial solution to their dispute. This is evidenced by the increase in 'advisory' awards being handed down by Arbitrators. The handing out of advisory awards has been precipitated by the realisation that only the parties to the dispute understands better the nature and source of their dispute, hence an advisory award gives them another chance to find an internally crafted solution first before turning to the arbitrator for an award which may have far reaching consequences to company survival and protection of jobs in the long run. Many companies have closed or applied for liquidation after Arbitral or Court rulings emanating from a labour dispute.

3.3 Expertise/Competency of Conciliators and Arbitrators.

Expertise and competencies of those who preside over the process of conciliation and arbitration has been placed under serious scrutiny. Literature and research has uncovered that there exist a gap interms of the expertise and competencies thereby impacting negatively on the service delivery (Trudeau, 2002). The principal actors presiding over the process should be unquestionably competent, experienced, disinterested and neutral parties (Bishop and Reed, 1998). Decision of Arbitrators should not end at being merely reasonable; they should satisfy the requirement of fairness. It should be highlighted that again the Zimbabwean legislative structure pre -2012 did not set minimum qualification and experience for one to be able to sit as a Conciliator and Arbitrator.

Madhuku (2010) conducted a study on behalf of the International Labour Organisation where he highlighted that Labour legislation, regulating conciliation and arbitration in Zimbabwe prescribed no minimum qualifications for principal actors. Some Scholars have attributed the failure of the dispute resolution mechanism to the incompetence of those who preside over the cases. Mazanhi (2010) even noted that some designated agents drawn from some employment councils do not have proper qualifications and expertise to effectively and efficiently resolve cases brought before them. Statutory Instrument (SI) 173 of 2012 was promulgated in order to address this anomaly.

It stipulated that an Arbitrator or a Designated Agent should have a minimum of a University Degree with at least 2 years experience in Human Resources or Industrial Relations field, a diploma in People Management. This provision was welcomed by all stakeholders as they saw that it would go a long way in enhancing the effectiveness of Conciliation and Arbitration as dispute resolution mechanism.

Trudeau (2002) highlighted that competency of those who preside over cases also gives confidence in disputants and may also speed up the time within which the resolution to the dispute can be made. The perception of the parties has a bearing on whether they would accept the arbitral award or not. A decision which is perceived to be unjust and unfair is likely to be appealed against, thereby prolonging the dispute. Madhuku (2010) highlighted that if there is one area of agreement among all social partners in Zimbabwe is the competency level for most Conciliators and Arbitrators is very low because there is no specific training offered to them before they begin their duties. The Independent Arbitrators tend to give outrageous and populist awards. A survey done by Muchadeyi (2013) revealed that some awards given are outrageous in their insensitivity to the informality and social justice or equity implication of conciliation and arbitration as dispute resolution mechanisms. He added that according to SI 217 of 2013 frame L.R 7 requires the arbitrator to retain a copy of the award while the other copies are served on the parties. There is no record that is being sent to the Ministry of Labour to enable the Ministry as the regulator to review and scrutinize the quality of awards being handed out. It is only at the Labour Court where the Ministry will get some scope as to the nature of awards given. However in South Africa, it is a statutory provision that every arbitration award be filed with the Registrar of the Courts (Madhuku, 2010).

Some Arbitrators have been criticized for awarding unrealistic rulings especially on the issue of remuneration. The Employer representative body EMCOZ has on numerous occasions castigated Arbitrators who come up with populist awards which go against business. Arbitrators have been criticized for being bookish and failing to take into cognisance the current environment within which business is operating in. EMCOZ is advocating for a mutually negotiated dispute settlement between the parties without the involvement of arbitrators. However the Workers' through their representative body, Zimbabwe Congress of Trade Union (ZCTU), argued that the Employers' position is influenced by their ignorance of the legal framework which governs employee relations (The Worker, August 2014).

It should be highlighted that minimum academic qualification were drawn as prerequisite in order to ensure correct interpretation of legal statutes (Madhuku, 2012). However there are other soft skills which are beyond academic papers which enables one to be a conciliator or an arbitrator. These sought of skills are lacking in the Labour Officers of today. Lack of faith and confidence with the competency and integrity levels of conciliators will negatively impact on the effectiveness of the alternate dispute resolution mechanism. This explains why employers appeal or contest most arbitral awards to the next level, which is the Labour Court because they have a negative perception and believe that the conciliation and arbitration system was not a conclusive process of dispute resolution. Gwisai (2007) pointed out that parties have successfully challenged arbitral awards in a higher court and exposing the weakness and shortcomings of arbitrators. This fact on its own is a serious indictment against the quality and credibility of arbitration rulings.

3.4 Finality of awards

A critical area one needs to consider when assessing the challenges of conciliation and arbitration as dispute resolution mechanisms is the issue surrounding the finality of awards handed out to settle the dispute. Unlike voluntary Arbitration which prescribes final awards which are impossible to set aside, Compulsory Arbitration awards are susceptible to appeals (Madhuku, 2010). The Law provides an appeal on the question of law. It has been observed that they are more appeals emanating from compulsory arbitral awards than warranted. As a result, many disputes are taking too long to resolve because the provision for an appeal to the Labour Court.

The conciliation and arbitration needs to develop jurisprudence similar to that of ordinary courts with the view to ensuring more finality of arbitral awards in compulsory arbitration (Matsikidze, 2013). Until and unless the arbitration stage is provided a legal standing to offer final awards, the alternative dispute resolution mechanisms will remain a utopia. The option of appeal defeats the very purpose why the conciliation and arbitration were adopted for. They were adopted in order to counter the court litigation system and enhance effectiveness in terms of speed and accessibility of dispute resolution mechanism. As a consequence, the absence of that legal standing to give final awards removes the efficiency which the mechanism was designed to create.

A High Court ruling is not final since either part can contest to the Supreme Court whose decision or ruling will be final. It is against this back drop that Labour is pushing for the finality of arbitral awards to avoid the complexities of the court system which usually take ages to settle.

3.5 Enforcement of awards

Closely related to the issue of finality of arbitral awards is the issue of enforcement of arbitral awards. In order to enhance counter the current challenges of arbitration as a dispute resolution mechanism, the awards should not only be final, but they should also be enforceable. For the Labour Court, Section 92 B of the Labour Act Chapter 28:01 is explicit in terms of its enforceability. However regarding arbitration awards, the position is governed by Section 98 (14) which says that "any party to whom an arbitral award related may submit for registration the copy of it furnished to him in terms of Sub section (13) to the court of any magistrate which would have jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the high court" (Labour Act Chapter 28:01). In practice the registration process is laborious and confusing. It is also important to note that many workers are not even aware of this requirement and the time lapse between obtaining an award and seeking registration for enforcement may make it impracticable to get an effective remedy (Gwisai, 2007).

One can also argue that the further requirement of registration also undermines the alternate dispute resolution mechanism in diverting the dispute to ordinary courts as the registering court also reserves the right to question the validity of the order and as a result open the issues again. Madhuku (2010) observed that some of the courts refuse to register awards not 'sounding in money', such as an order of reinstatement only. A closer look at the South African law, one can deduce that it provides and make Arbitral judgments executed in the same way as orders of the high court (South African Labour Relation Act of 1995 Section 163). The same applies to Malawi Labour Relations Act of 1996 says "Any decision or order of Industrial Relations Court shall have the same force and effect as any other decision or order of a competent court shall be enforceable accordingly.

In continuation of the above (Matsikidze, 2013) carried out the audit and discovered that breaching of conciliation agreements was a common affair. He added that there is no provision stipulating the effect of the conciliation agreement should one of the parties breaches it. As a result the other part is left with an award which cannot be converted into an arbitration award. Conciliation as a mechanism for dispute resolution has been criticised on its dependency on goodwill and utmost good faith and that there conciliator cannot give a binding decision (Matsikidze, 2013). The longer the case takes before finality impact negatively on how the aggrieved party has on the process as a whole thereby affecting the effectiveness of the dispute resolution in place. The fact that Conciliation is not enforceable in the Zimbabwean context places the mechanism at a disadvantage (Matsikidze, 2013). To borrow from the South African set up, there is need to set up an independent system to govern conciliation and arbitration in Zimbabwe. Madhuku (2010) noted that there should be an independent panel of Conciliators and they should not be restricted to Labour Officers who are Ministry Appointees.

It should be highlighted that under statutory instrument 15 of 2006, section 8 (7) Principal Officers at Conciliation had no legal standing to prescribe a binding resolution to a dispute. Their main role was limited to facilitating dialogue between disputants and give recommendations. The National Employment Code of Conduct Regulations, 2005, gazetted on 27 January 2006 confirmed the position that Labour Officers at Conciliation stage could only attempt to conciliate - and failing that, refers matters to arbitration. However the amended No 5 of 2015 repealed the above position.

New subsection (5), (5a) and (5b) of section 93 of the Labour Act changed the process of Conciliation stipulating different approaches to conciliating disputes of interest and disputes of right. These amendments allow the Conciliator to give a legally binding 'draft' award. The draft award is then sent to the Labour Court for confirmation and if thought appropriate by the Labour Court, the court order will be given to enforce the award made by the conciliator. This amendment is two-faced in terms of its contribution to the effectiveness of conciliation and arbitration. This will plug the loophole which has been used by employers in contesting or appealing disputes of rights despite glaring proof that they was a breach of contract or right. On the dark side, in its current form this amendment will likely clog the dispute resolution mechanism in the sense that all disputes of rights are going to be dealt with by Labour Officers at conciliation level.

3.6 The involvement of legal practitioners

The presence of lawyers in our dispute resolution mechanism can negatively impact on the process. The law and practice in Zimbabwe is that the disputants may choose to be represented by their legal practitioners from Conciliation itself. Section 4 of the labour regulations states that "a party to a matter before a labour officer may be presented by a fellow employee, an official of a registered trade union, employers' organization or a legal practitioner." (Labour Act Chapter 28:01) Sometimes employers never bother to attend in person and send their lawyers instead. In most cases Conciliators do not insist on the presence of the party in person, and as a result either party can choose not to attend in person.

Madhuku (2010) noted that this has impacted on the effectiveness of the dispute resolution mechanism. He recommended that our legislative structure should get insights from the practice in other Southern African countries. The common position is to distinguish between Conciliation and Arbitration. In South Africa and Botswana for an example, representation by legal practitioners is not permitted in conciliation proceedings but may be allowed in arbitration. The prohibition of legal practitioners at preliminary stages like Conciliation is done in order to give the disputants a chance to dialogue and find a mutually agreeable settlement before bringing in legal practitioners. According to the University of Botswana Law Journal (2012), Section 10 of Trades Disputes Act in Botswana also mirrors the South African legal framework.

It is well established that legal practitioners may be dilatory and many have a penchant for diverting attention from real issues (Duve, 2010). This as a result, impact negatively on the effectiveness of the system as a dispute resolution mechanism.

3.7 Lack of transparency

The fact that arbitration hearings are generally held in private rather than in an open courtroom, and decisions are usually not publicly accessible, is considered a benefit by some people in some situations. The absence of guidelines in our legal framework on conciliation has also impacted negatively on transparency of the system. Transparency is a critical element in shaping perception and confidence of disputants. Perception is also critical in ensuring that those who approach the system will accept a resolution or award which comes out of the system.

To this end a certain degree of transparency is needed in order to shape perception and even attitude of those who seek recourse. Awards should also be prone to evaluations and scrutiny by an established independent labour board as is the case in Malawi and Lesotho.

4. Conclusion

It can be concluded that all is not rosy in the process of arbitration and conciliation. There are challenges that are enshrined in the process that can hinder the effectiveness of the two methods in Zimbabwe. Organisations and employees therefore should understand these challenges before they venture in the process.

5. References

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