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# Arbitration requires transparency and openness

By Aadil Patel

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Our Constitution guarantees workers' right to strike - a right further entrenched in the Labour Relations Act (LRA), which also permits employers the right to lock workers out of the workplace pending resolution of such disputes.




But lengthy - and often violent or destructive - strikes have called into question the value of strike action as the prime method of resolving disputes about wages or other matters of mutual interest between employers and employees (sometimes referred to as 'interest disputes').

There have been recent calls for interest disputes to be resolved through arbitration, when appropriate. While the use of arbitration as a dispute resolution mechanism in collective bargaining is not new, it is certainly not wide-spread in South Africa. It is compulsory in respect of interest disputes involving essential services, for instance, where workers employed in essential services are prohibited form embarking on strike action under the LRA.

Where employers and trade unions reach deadlock during collective bargaining, the parties do not resort to strikes or lock-outs, but refer the dispute to arbitration. An arbitrator then determines the salary increase to be awarded or other changes to terms and conditions of employment to be effected. Interest arbitration thus offers an alternative mechanism to break deadlock between parties engaged in collective bargaining.

This, together with the mayhem that has occasioned some recent strikes, has prompted a growing list of parties to call for greater use of interest arbitration. But is interest arbitration the panacea to all our industrial action difficulties?

## Not always the best way

While any alternative that could assist us in minimising the negative effects of strikes or lock-outs should be applauded, interest arbitration is not always the best way to resolve a dispute quickly. During arbitration, a third party determines the solution that should be applied to the dispute between the parties. This may result in an arbitrator-imposed solution that fails to meet the needs of either of the parties to the dispute..

Parties who are considering interest-arbitration should consider whether they can live with an award that favours the other side or where the proverbial baby is split in half by an arbitrator aiming to find an amicable resolution to the dispute. They should also consider the nature and scope of the power they permit the arbitrator in resolving the issue in dispute.

For instance, is the arbitrator at liberty to determine the size and scope of the wage increase, for example, without being forced to accept either parties' proposal on the increase? In this scenario, the arbitrator is given free rein to determine the actual increase to be awarded after taking into account the evidence and representations of both parties. The arbitrator is neither bound to agree to the employer's proposal (let's say for a 6% salary increase), nor to that of the trade union (who may have motivated for a 15% salary increase). The arbitrator thus have wide discretion to determine the size of the increase having regard to the facts placed before her by the parties.

In contrast, when using pendulum or baseball arbitration (so-called following its successful use to resolve a baseball strike in the USA), the arbitrator is bound to accept the proposal of either one of the parties. She does not have discretion to select an appropriate increase or outcome that may be somewhere between that of the parties, but is forced to select the one she determines to be the most appropriate when considering the evidence placed before her by the parties. The arbitration award thus reflects the position of one of the two parties, clearly signalling a winner and a loser to the process.

## Best and worst positions

While this process may appear to be radical on the face of it, there is method in getting the parties to motivate their most reasonable proposal. It places pressure on the parties to understand their best and worst positions and present the arbitrator with a proposal which they believe will be more reasonable than that of the other party.

Using the figures in our example above, the employer who wanted to implement a 6% salary increase may be forced to present its full mandate of an 8% salary increase to the arbitrator in the hope that this position will be viewed as being more reasonable than that of the trade union. By the same token, the trade union may have demanded a 15% salary increase for its members during negotiations, but would always have been willing to accept a 10% salary increase.

They will therefore face the same pressure as the employer to put their best compromise forward as their position to the arbitrator. The union may not be willing to stick with its 15% increase demand where there is a risk that the arbitrator may find that the employer's position is more reasonable. This process forces the parties to put their best positions forward or risk getting only what the other party offers.

## Negotiate in good faith

However, many employers and trade unions may not be ready for this type of deadlock-breaking mechanism. Parties seeking to use interest arbitration should ideally have mature bargaining processes and structures in place and be able to negotiate in good faith to extract the maximum benefit for both parties during the arbitration process.

Where either party merely uses collective bargaining and strikes or lock-outs as a means of settling scores or inflicting pain, using a different method to resolve the eventual dispute may not address the underlying issues. However, parties who are desirous to achieve the best outcomes to collective bargaining and who have found themselves at different ends of picket lines over the past years, should earnestly explore whether interest arbitration may not assist them in avoiding costly strikes and lock-outs. All reasonable alternatives should be explored in an attempt to minimise industrial action that can undermine job creation and labour stability in our country.

If parties opt for arbitration, it requires them to be open, transparent and mature as to what they can afford and the impact of a demand on the bottom line. The question to ask is if South Africa is prepared for this type of openness.

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