

## **South Africa: NGO Mediation and Arbitration of Labor Disputes Key Points**

**Description:** This case profiles the ADR work of an NGO, the Independent Mediation Services of South Africa (IMSSA), in the mediation and arbitration of labor disputes. The program works to resolve union-management disputes, primarily in the organized labor sector. Participation in the ADR processes is voluntary, and arbitration agreements are legally enforceable. Mediated agreements are not enforceable, but are reported to enjoy a high compliance rate. Panelists are well-trained, and they may collect fees for their work. IMSSA finances its ADR work through a mix of fee-for-service (about 20%) and donor funding. Its caseload has grown from 44 cases in 1984 to almost 1500 in 1996. Cases can be handled within a few days. There is no systematic follow-up or monitoring, although satisfaction appears to be high.

**Goals:** IMSSA's program began in the 1980s to address tensions and poor relations between management and labor. It was established to overcome the ineffectiveness (costly, time-consuming with low user satisfaction) of the government-run labor dispute resolution system. With the political transition in South Africa, IMSSA's ADR program has served as a model for the new governmental structure for addressing labor disputes—the Commission for Conciliation, Mediation, and Arbitration (CCMA).

**Design:** IMSSA's program uses Western ADR models, which fit well with the institutional and cultural norms within the industrial relations sector. IMSSA's organizational and institutional creativity has been instrumental in its continuing success, as these qualities have helped it to adapt its program to meet challenges to its financial resources and to its mandate posed by the recent political transition and accompanying changes.

**Operation:** Other factors important to IMSSA's success include: the large number and good training of the panelists; the high unmet demand for dispute resolution services in this sector; and the consequent support for the program from labor and management, its key constituents. Its relationship to legal structures has been clarified and strengthened with a 1995 law; IMSSA's clear independence from an ineffective and illegitimate legal system and government structure was critical to its success at the time of IMSSA's origins and until the transition to the new government, though it is now working closely with the new CCMA.

**Impact:** In terms of providing cheaper, quicker, more satisfactory resolution of labor disputes, IMSSA cites its ever-increasing caseload as evidence, although there is no systematic evaluation of its work. IMSSA's impact in the ADR field is established by the proliferation of ADR programs and particularly by the creation of CCMA. IMSSA can also take credit for developing leadership at the grassroots level. One of its former founders and director is now the head of the CCMA. IMSSA faces new challenges in the face of the new government ADR system, and plans to complement and supplement CCMA work, and branch out into more specialized services. Modifications of the funding sources to rely more on fee-for-service work is also planned.

### **Key Acronyms Used in Case Study**

CCMA	Commission for Conciliation, Mediation, and Arbitration
CCRS	Community Conflict Resolution Service (IMSSA project)
DOJ	Department of Justice
IDRS	Industrial Dispute Resolution Service (IMSSA project)
IMSSA	Independent Mediation Services of South Africa
PMU	Project Management Unit (IMSSA group managing USAID grant)
USAID/SA	USAID/ South Africa

# SOUTH AFRICA CASE STUDY

## I. DESCRIPTION<sup>1</sup>

### A. *Background on the NGO Sector*

Since the beginning of South Africa's political transition in the early 1990s, the country has become one of the world's most active arenas for experimentation with ADR systems. These efforts have arisen out of a foundation laid in the early 1980s with the establishment of Independent Mediation Services of South Africa (IMSSA), an NGO originally devoted to expanding the use of ADR in the resolution of labor disputes.<sup>2</sup> ADR mechanisms are now seen as an important component of both government and NGO efforts to rapidly expand the provision of services, including broadening access to justice, and to reduce the high levels of conflict and violence in the country, transforming the

current culture of confrontation into a culture of tolerance and conciliation.

This case focuses on IMSSA's ADR work in the labor sector, which began during the apartheid era in the 1980s in an environment in which South Africa's justice system was unable and unwilling to meet the needs of the population as a whole, and in which the mechanisms for meeting dispute resolution needs in the labor sector in particular were woefully inadequate. Meanwhile, USAID/SA and other donors in the country were interested in providing support to talented individuals and organizations that could promote and help to develop democratic attitudes and practices in preparation for an eventual political transition, and so supported IMSSA.

IMSSA began its work in 1984 under the leadership of Charles Nupen and a group of founders who had been trained in ADR in the U.S. and U.K., and who have maintained close links with ADR pioneers in both of those countries and with the "Western" models of ADR that they developed. Although IMSSA's main work has long been in the field of industrial relations, the organization actually works in four main sectors or project areas: 1) the Industrial Dispute Resolution Service (IDRS) handles labor issues; 2) the Community Conflict Resolution Service (CCRS) handles ad hoc negotiations of community disputes (especially taxi wars and disputes in schools) and houses the Project Management Unit (PMU), a team that manages a relatively new USAID/SA umbrella grant that provides support for community-level dispute resolution activities; 3) an elections and balloting project and; 4) a training department that provides training in conflict resolution on an as-requested basis to communities, industry groups, and occasionally to the government. IMSSA is, however, currently in the process of reorganizing;

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<sup>1</sup> Conducted by Carolyn Logan, Research Consultant to CMG's USAID/ADR Project, September 1997.

<sup>2</sup> Over the years, both before and after the start of the transition period, a number of other NGOs have begun to take up the development of ADR mechanisms in other sectors. Some of these include: the African Centre for the Constructive Resolution of Disputes (ACCORD) and Vuleka Trust, both of which initially provided ADR services directly to parties on an ad hoc basis, and which have since moved into specific sectors such as conflict resolution in educational institutions; Community Law Center (CLC) and Vuleka/Diakonia, which have trained paralegals to provide a variety of community-level problem-solving and facilitation services, including basic dispute resolution; the Institute for Multiparty Democracy (MPD) and Vuleka Trust, which have provided conflict resolution training to a broad cross-section of community members; and Community Dispute Resolution Trust (CDRT) and Community Peace Foundation (CPF), both of which have helped to develop community justice centers.

the above four units are being dissolved, and the organization will be restructured based on processes or functional group (arbitration, mediation, facilitation, training, etc.). Its work in the industrial relations sector has been going on the longest, and has been the most influential during the transition, and so will serve as the focus of this report.

With the political transition in South Africa, the context for provision of ADR services in the country has also changed dramatically, and it continues to do so. The most notable change has been the radical shift in the level of government interest in the use of ADR, and the consequent shifts in resources, responsibilities, and personnel. Until the new government was elected in 1994, interest in and provision of ADR services was almost entirely limited to the NGO sector. NGOs for the most part provided these services as an alternative to state systems, which were either inadequate and ineffective, or even entirely non-existent, and there were almost no linkages between the ADR systems and the formal legal system.

The new government, however, brought in new personnel and introduced new goals, both of which have led to rapidly mounting interest in developing ADR mechanisms within a variety of state systems, including the formal legal system. A number of top government officials came out of the NGO sector, and are thus familiar with ADR; most significantly, Dulla Omar, the new minister of justice, formerly worked for an NGO called Community Law Centre in Cape Town, and he has been instrumental in efforts to bring about wider provision of ADR services. Within the Department of Justice (DOJ) and the formal legal system, plans are under way to develop a community courts system which would provide justice at the community-level, largely through ADR-type services, and to develop a system of family mediation boards or of family courts that offer conciliation and mediation as a first option. The Department of Land Affairs has recently created a National Land Reform Mediation Panel

for the resolution of land disputes, and a number of other departments are considering following suit. The evidence of this government interest can be seen most significantly in the creation of the new Commission for Conciliation, Mediation, and Arbitration (CCMA), a statutory body designed to provide ADR services for the resolution of certain types of labor disputes, based largely on the model developed by IMSSA.

This transition has had profound impacts on the NGOs that have long been the key providers of ADR services. Many have lost personnel, often including their top leadership, to government departments. In addition to Dulla Omar, Charles Nupen, director and one of the original founders of IMSSA, left to head the newly created CCMA. IMSSA also lost a number of its panelists (mediators and arbitrators) to government positions, including Fikile Barn, who is now president of the Land Claims Court, and Wallace Mgoqi, who is now a land commissioner. Edwin Molahlehi, former director of CDRT, also left his organization for a government post. Also, since 1994, the funding priorities of many donors have shifted away from NGOs and toward direct support for the government's new initiatives (although in USAID/SA's case, the level of support available for NGOs has remained roughly constant).

### ***B. Program Goals***

One of IMSSA's initial goals was to facilitate the development of constructive channels of communication between management and organized labor in a sector that, like many others in South Africa, was characterized by tension and poor relations. Nupen hoped that an ADR approach could help to improve and preserve relationships, a vitally important issue in South Africa then and now. Another primary goal was to reduce the cost and time of resolving disputes in this sector, and increase the satisfaction of the parties involved with the outcomes achieved. In this sense, IMSSA aimed

to meet a very concrete need in the country. The state-run dispute resolution mechanisms available at the time-which remained in place until the Labor Relations Act (LRA) of 1995 created the CCMA and other new mechanisms-were highly ineffective, involving high costs and longtime delays, and often providing unsatisfactory resolution of disputes. The previous system for handling labor disputes consisted of conciliation boards, industrial councils, and industrial courts.<sup>3</sup>

Many of the ADR facilities that were developed by NGOs in South Africa in the 1980s and early 1990s were specifically developed in response to a perception that the legal system was illegitimate and unjust, and were thus intended to serve as independent alternatives to the formal legal process. This was not, however, the case with IMSSA, for which overcoming the ineffectiveness--rather than the illegitimacy---of the existing system was the primary motivation.

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<sup>3</sup>Conciliation boards and industrial councils were created within specific sectors as a first mechanism for resolving disputes in those sectors, but they were functioning only poorly at best. Conciliation boards had only been successfully settling some 20% of the disputes that were referred to them, and industrial councils were achieving just a 30% success rate. (Note these figures were estimates provided by various interviewees and were based on the status of these boards and councils in the early 1990s, just before the passage of the LRA. Some estimates of their success rates were even lower.) Both of these bodies were often seen merely as unwelcome hurdles on the way to litigation, and they may even have been contributing to conflict and creating additional disputes. A labor relations task force created in 1995 to evaluate these issues identified the key problems in this system as highly cumbersome and legalistic procedures loaded with technicalities, lack of resources, and poor remuneration and lack of training for adjudicators. The result was lengthy delays it could take 2-3 years just to get to the industrial courts, and they often had backlogs of up to five months, while the appeals process could also drag on for several years.

However, while IMSSA's services were initially seen as an alternative system, as the country moved towards political transition, the organization's interest in seeing its work serve as a catalyst for change in the government's system also grew. IMSSA has generally been very supportive of the government's recent reform efforts and the creation of the CCMA, which provides dispute resolution services using a similar model, despite the fact that this development has forced IMSSA to reevaluate its own role and develop its skills in some new areas.

### ***C. Project Design***

IMSSA's goal setting and project design appears to have followed a path similar to that of many other NGOs in South Africa, in the sense that its creation process was largely "expert-led" rather than participatory. Nupen and the other founders had been well trained in ADR development in the U.S. and the U.K., and they were well connected with ADR experts in those countries. Their introduction of ADR in South Africa appears to have been based largely on these models and on the founders' own understandings of the needs in South Africa. There is little evidence of a highly participatory process in the creation of IMSSA's CCRS. This appears to be typical of the NGOs working in the ADR sector in South Africa more generally.

At least until recently, USAID/SA has gone along with this "expert-led" approach, focusing on identifying and supporting good individuals and organizations. Given the fact that South Africa has long had a highly trained, and often underutilized, cadre of professionals, this has been a relatively effective approach in the country. As expectations of NGO impacts increase, however, this approach appears to be changing in at least some cases, such as with the umbrella grant administered by IMSSA's PMU.

Specific aspects of project design are discussed below:

**Categories of disputes handled** - IMSSA's industrial relations work has focused on resolving union-management disputes, usually over cases involving treatment of individual employees. Its work is limited primarily to the organized labor sector, and to the cases of individuals who have union representation; agricultural and domestic labor disputes are not normally handled.

**Methods** - IMSSA provides both mediation and arbitration services. Participation in both processes is entirely voluntary for both parties. All arbitration agreements are legally enforceable in South Africa under the country's Arbitration Act. Mediation agreements are not enforceable, although IMSSA believes that most do get implemented.

**Panelists** - IMSSA's work is organized by a core staff at its main office in Johannesburg and its three regional offices, but the mediations and arbitrations themselves are conducted by IMSSA "panelists." The panelists are a network that now includes more than 300 individuals from a wide variety of mostly professional backgrounds. Many, particularly those who have focused on labor/industrial relations, are lawyers, but there are also many with social science backgrounds ( , psychology, business administration, industrial relations, etc.).

Prospective panelists enter into a fairly rigorous training process that includes a number of **courses with increasing levels of specialization**, observations of actual mediations and arbitrations, and twinings with experienced mediators and arbitrators. Their progress is regularly reviewed, and trainers and the mediators and arbitrators that they work with must recommend them to IMSSA's board of directors before it will accredit them as panelists. The entire process takes a minimum of six months. IMSSA also has a professional code of conduct for its accredited panelists. Most panelists also have other jobs. IMSSA used to require that they only could provide mediation and arbitration services for IMSSA, but panelists

now can provide services both to IMSSA and to the CCMA. Lack of diversity among the panelists has been an issue in the past, but since the transition IMSSA has had an aggressive affirmative action plan, and it has succeeded in substantially increasing the representation of blacks and women among both panelists and permanent staff.

**Case management** - Most panelists specialize in particular sectors, particular types of disputes, and in either mediation or arbitration. The parties jointly select a panelist; if they cannot agree, they can request that IMSSA appoint one. IMSSA then makes necessary arrangements and supplies the venue if necessary at one of its four offices around the country.

**Financial resources** - IMSSA funds its services in two ways: through fee-for-service work (about 20%), and through donor funding. For labor arbitrations, for example, the arbitrator's fee typically runs about R2,300 per day (approximately \$450-600), though some cost more, and all of this goes to the panelist. IMSSA then collects an additional 10% for administration, as well as other minor fees. The costs are usually split evenly between the parties. The remaining 80% has historically come from donor support. Roughly 50% of this support is provided by the Royal Danish Government and the European Union, and the remainder is provided by USAID and several other donors.

**Caseload** - Since IMSSA began its work, the demand for its services has steadily increased; its caseload has grown from five arbitrations and 39 mediations in 1984, to 857 arbitrations and 627 mediations in 1996. IMSSA staff estimate that they have roughly an 80% success rate in reaching settlements in mediation. In addition, IMSSA conducts "relationship-building interventions," which have increased from 1 in 1986 to 81 in 1996; in 1993 it began facilitations of organizational change in the industrial sector, with a case load ranging from 9 to 43 cases per year in the last four years. At this point, the

types of services that WSSA provides are relatively well known, so parties usually come to WSSA on their own, and the organization does not need to do a great deal of case screening<sup>4</sup> about 80% of current users have used WSSA's services before.

**Time and cost for resolution** - WSSA could not provide any detailed statistical information on the time and cost required for settling cases, but some very general information is available. The length of time for settlement varies depending on the type of case, but staff indicated that simple cases such as unfair dismissals can usually be handled within a day, while larger scale or somewhat more complex cases may take 2-3 days for resolution. Due to the high number of panelists relative to the number of cases handled, there is no problem with backlogs. The conciliation boards and industrial councils have a much lower settlement rate, and parties experience much longer delays; no information is available, however, on the average costs of settling cases using these state-run mechanisms. Nonetheless, the advantages in terms of time and success in achieving settlement are substantial enough that they could justify paying for WSSA's services even if they proved to be more expensive than the state-run system.

**Evaluation and monitoring** - WSSA does keep good records on the "incoming side" of the cases that it handles, including the parties involved, the nature of the dispute and the industrial sector that it is in, the panelist who handles it, and the settlement reached, if any, as well as the costs incurred at WSSA. There is, however, no follow-up monitoring concerning the satisfaction of disputants who use IMSSA's services, or on the rate of successful implementation of mediated

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<sup>4</sup> Note that this applies to the IDRS services. The same does not necessarily apply to the community disputes brought to TMSSA that have been handled by CCRS.

settlements.

## II. ANALYSIS

### A. Impact

Although good comparative statistical data is not available with respect to many of WSSA's specific impacts, overall trends in the ADR sector in South Africa do suggest that the organization has had a far-reaching impact in several ways. First, there is little question that IMSSA has succeeded in providing an improved dispute resolution alternative for certain types of cases and certain classes of disputants in the labor/industrial relations sector. In particular, WSSA's services proved to be a vast improvement over those formerly provided by the state system with respect to both the time required to resolve disputes and the overall success rate in achieving settlement. Thus, while the conciliatory dispute resolution services provided by WSSA were not new in principle (the state's conciliation boards should have been providing similar services), in practice they did create a new and effective option for dispute resolution. They did not, however, do much to increase the access of poor or unrepresented workers to justice.

The evidence that IMSSA's services have increased the satisfaction of disputants with the resolution of their cases is also substantial. IMSSA has earned a high degree of respect within the donor and NGO communities and government, and the high and growing levels of use, as well as the large percentage of repeat users (estimated at 80%) suggest that they are satisfying disputants in unions and industrial management as well. Moreover, IMSSA's impacts now spread far beyond just those parties that have been assisted in resolving disputes, as its work has come to serve in effect as a pilot program or a laboratory for experimentation for new state-run dispute resolution systems. The organization's work has contributed substantially to the high credibility of ADR services in South

Africa in general, and to the widespread adoption of these methods by a variety of government departments and private-sector actors. Most noticeably, the creation of the CCMA, the first of several planned expansions of ADR services to a broad, national scope, directly reflects IMSSA's success and the satisfaction of labor, management, and government with this approach.

The role of IMSSA's work in the creation of the CCMA is apparent in its design and operation, which are heavily influenced by the IMSSA model. The CCMA's mandate is to do work similar to IMSSA's, although it will cover a somewhat broader range of disputes, serve a broader array of workers, protecting the rights of both unionized and non-unionized labor, and it will provide its services free of charge. Most importantly, a training program has been set up for the CCMA's commissioners (the third parties) that aims to provide a foundation similar to that of the IMSSA panelists; IMSSA actually trained the first group of commissioners. In its first year of operation, the CCMA has seen its caseload grow very rapidly to levels well above those predicted.

Finally, IMSSA's work has contributed to the development of leadership within both the ADR sector, and within society as a whole, as demonstrated by the leading role the organization is taking in the debates about and implementation of the rapidly expanding network of ADR services nationwide, and by the role that a number of IMSSA panelists and members of the organization's leadership have had in the new government. In addition, IMSSA and a number of other NGOs in the ADR sector have been active in providing conflict resolution training to a broad cross-section of community leaders throughout the country. These leadership impacts have been among the clearest and most widespread benefits of the various ADR programs implemented in South Africa, including IMSSA's.

### ***B. Factors Affecting Successful Program***

### ***Design and Operation***

Some of the key factors contributing to the failure of the government's labor dispute resolution system included highly cumbersome and legalistic procedures loaded with technicalities, lack of resources, and poor remuneration and lack of training for adjudicators. Some of the key factors explaining IMSSA's contrasting success are directly linked to aspects of the project design and implementation that allowed it to avoid some of these problems. The background conditions and design conditions that were particularly important to the success of IMSSA's IDRS program are described below.

***Sufficient human resources and effective training:*** Perhaps most importantly, IMSSA succeeded in creating a highly competent cadre of panelists to serve as third parties who could provide high quality dispute resolution services with an excellent reputation for fairness and impartiality. The combination of IMSSA's extensive training program and the diversity and skills of its panelists, supported by IMSSA's code of conduct for panelists, has allowed it to develop an excellent reputation that has been the key source of its success and its growing caseload over the years. In addition, the fact that IMSSA has been able to create a sizable cadre--now numbering more than 300--of panelists, has allowed it to consistently handle its caseload in a timely manner.

***Good fit with institutional and cultural norms:*** In contrast to the technical complexity of the government's dispute resolution processes, all of IMSSA's work was based on the well-developed Western models of mediation and arbitration. This does not appear to have been a problem in the relatively modernized and globalized industrial relations sector.<sup>5</sup>

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<sup>5</sup> In South Africa, it appears that a



**Political support:** The experience of IMSSA in particular, and of NGOs working in ADR in South Africa in general, has been that political support at "higher" levels may not be necessary to develop an effective program. In fact, in a system that was as politically illegitimate to much of the population as that of South Africa, political support (and in some cases even USAID/SA support) was seen as a thing to be avoided. The South African experience suggests that it may still be beneficial to support independent ADR and conflict resolution activities via the NGO sector in societies before and during transitions to a more open and democratic form of government.

Since the transition, the government has recognized that in addition to dealing with the overall level of conflict in society, it needs to enable its citizens and businesses to participate in the global economy, and that this requires stability and the ability to manage conflicts, rather than having them deteriorate into strikes or violence. The business community has also recognized this need, as have the unions at least to some extent. Thus, there is a coalition of support for legal and institutional reform in the

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participatory design process and a good fit of both the ADR mechanisms used and the overall program design with institutional and cultural norms becomes increasingly important as one moves from the modernized industrial/institutional sector down to community level work, and from urban to rural areas. The experiences of a number of NGOs provide particular examples of this. In its work with paralegals in rural areas of Kwazulu-Natal, CLC has found that it must consult extensively with local leaders, coming to agreement about which types of cases and issues will continue to be handled by traditional leaders, and which types of cases the paralegals can assist the community to resolve. Many types of family and community disputes remain under the jurisdiction of the local chiefs, while the paralegals limit their work to cases involving provision of government services and similar "external" issues.

country, and a consensus that the best models such as those developed by IMSSA must be examined and utilized.

There has been some resistance to ADR as a way to resolve conflict in some of the most modernized, and thus most "legalized" sectors of South African society-lawyers have been the most resistant group, and mid-size businesses have also taken more convincing (although larger businesses accustomed to working in the global environment have welcomed ADR), but the success of IMSSA and other organizations that have recently entered this market is increasingly convincing them of the value of ADR. But at the grassroots level, there is much less resistance to conciliatory approaches to conflict resolution and problem solving, since these tend to be much more consistent with traditional practices than adversarial litigation methods. Outreach and education has not been a focus, as IMSSA relies on word-of-mouth promotion based on the effective provision of services.

**Rough parity in the power of classes of disputants:** ADR work in the labor sector benefits from the fact that there is a legal framework in place that at least to a reasonable extent, especially since the passage of the LRA, protects workers' rights.<sup>6</sup> The earlier framework was not necessarily adequate, but was at least sufficient to give workers some status or power in a dispute.

**Clearly-defined relationship to the formal legal system:** IMSSA's IDRS program probably also benefited from its clearly defined and clearly independent relation to the formal legal system, which was failing so completely at the time its work began. The only link IMSSA's work had to

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<sup>6</sup> IMSSA has not found this to be the case in some other sectors, such as in landlord-tenant disputes, where tenants have so few legal rights, and the legal framework is so weak, that almost all of the power is in the hands of landlords, and disputes are therefore not very amenable to mediation.

the formal system at that time was via the enforceability of IMSSA's arbitrated settlements. Given the lack of credibility of the formal legal system, it was almost certainly best for IMSSA that it was clearly independent of this system. At the same time, this relationship has changed over time in positive ways and IMSSA's work served as a model and catalyst for change once the government decided to reform its own system. Thus, in many respects, IMSSA achieved the best of both worlds-it had independence from a failing system, but nevertheless was able to serve as the basis for changing that system. It is also worth noting that IMSSA's relationship to the government system will be substantially different since the creation of the CCMA. IMSSA's services are no longer so much an alternative to the government's as a supplement or complement to them. IMSSA expects both to sub-contract to CCMA to help it handle some of its caseload, and to specialize in complex or new, cutting-edge types of labor disputes that the CCMA cannot handle.

**Sufficient financial resources:** Until recently, raising sufficient financial resources has not been a serious problem either for IMSSA or for many of the other NGOs working in the ADR sector. The financial environment for NGOs has changed radically during the transition, and many have faced serious financial crises. IMSSA has fared better than most, due to its particularly good reputation with donors and its long history of raising some funds through fee-for-service work (possible in this sector). Historically, IMSSA has obtained 20% of its resources from fee for services, and 80% from donors.

Nevertheless, the pressure is also on IMSSA to increase its self-sufficiency, and the organization hopes to reverse its current funding ratio over the next few years to the point where it relies on donors for just 20% of its resources, earning 80% itself through other means. In this respect the organization's creativity and adaptability have served it well in developing a number of plans for generating more revenues,

some of which are already being implemented. For example, IMSSA may start requiring panelists to pay for the services and benefits that they receive, which are currently free. IMSSA has also already begun to more aggressively market its training services to government and other potential customers (winning, for example, the contract to provide training for the first group of CCMA commissioners), and its project management skills (winning supervision of USAID/SA's umbrella grant for community-level conflict resolution work).

In addition, as the CCMA begins to take on some of the caseload that IMSSA traditionally handled, the organization is looking to develop its skills in new areas to continue drawing paying clients from the labor and industrial sectors. These new areas include specializing in particularly complex labor disputes, developing expertise in some new areas of conflict arising in the labor sector such as HIV/AIDS issues, and increasingly working in the area of facilitation of organizational change to help businesses adapt to meet the needs of entering the global market and of the new political situation in the country. Unfortunately, despite these efforts, one effect of tightening financial constraints is that IMSSA may have to cut back or eliminate entirely the ad hoc work it does in resolving community disputes such as taxi wars, because it may not be able to subsidize these activities as it has in the past, and the parties are frequently unable to pay themselves.

**Effective evaluation procedures:** IMSSA, like many other NGOs, does keep relatively good records on the "input side" of their work, i.e., what parties are using their services and for what types of disputes. However, there does not appear to be a great deal of monitoring on the "output side," monitoring the level of satisfaction of users, gathering suggestions for improvement, and monitoring the implementation of mediation agreements. IMSSA's experience is representative of that of most organizations in that their main source of feedback is the level of

use of their system-as long as their case load is increasing, they can continue to assume that they are doing a good job. While this is not a bad indicator of success, it should not be the only one. USAID/SA is currently pushing all NGOs that it works with to implement much more extensive monitoring and evaluation systems- the PMU has elaborate plans for monitoring grantees' impacts under the umbrella grant, in part because USAID/SA is providing substantial funds specifically for this purpose-but these programs are only now being put into place. As South Africa continues to expand its use of ADR into new sectors and reviews current ADR activities as demonstration projects that can help identify effective models for future use, careful monitoring of impacts is becoming increasingly important.

### III. ASSESSMENT

#### A. Time and Cost Reduction

Before comparing the time and cost of reaching settlement between the two systems, it must first be reiterated that IMSSA has simply been much more successful in helping parties to reach settlements at *any* cost or length of time - a 70 to 80% success rate, compared to 15 to 30% for the state system. Thus, parties might want to use IMSSA's services even if they cost more or take longer, although it does not appear that this is the case.

Despite the lack of detailed statistical data on the time necessary to resolve disputes in either IMSSA's IDRS or the conciliation boards and industrial councils, it appears that IMSSA is resolving cases more quickly. IMSSA is able to handle all of the cases brought to it in a timely manner, without developing a backlog. Data is not available, however, on the proportion of the total industrial relations caseload being handled by IMSSA, and it may only be handling a relatively small proportion of all labor disputes (see below), so this must be taken into account in

measuring its success against government dispute resolution processes. The cost advantages of IMSSA's services are less clear. The higher rate of settlements and the relatively fast process compared to the industrial courts system would lead to substantial savings, but it is not clear how these savings compare to the fees that parties pay to use the IDRS's services. Nevertheless, the growing number of users of IMSSA's services suggests that these fees are not prohibitive, especially given the time savings and success rate. However, these fees do limit access to the system, as discussed below.

#### B. Access and Options

The nature of the option for dispute resolution provided by IMSSA is not necessarily new or unique in the industrial relations sector - the conciliation boards and industrial councils were also in part based on the use of ADR techniques. Thus, the IMSSA did not increase the options available *per se*, but IMSSA does provide this option much more effectively, so the organization has, in effect, increased options.

IMSSA has not, however, done much to expand access to justice-this was never really one of its key goals. In fact, IMSSA's services, while highly effective, may only be meeting the needs of a relatively small proportion of labor disputants. The fees that IMSSA charges, in combination with its habit of working primarily with unionized labor, exclude some sectors such as agricultural and domestic laborers almost entirely, and these sectors are also the ones that are likely to be most uncomfortable or unfamiliar with the mostly Western model of ADR used by IMSSA.

#### C. Satisfaction

Because of a lack of follow-up monitoring and evaluation, IMSSA cannot provide very much direct evidence concerning the levels of satisfaction with its services. Nevertheless, there are a number of indicators

that suggest that the level of satisfaction with IMSSA's services has been high - the continuously growing caseload and high esteem in which IMSSA is held by other NGOs; donors, and the government, and perhaps most significantly, the creation of the CCMA.

#### ***D. Preserving or Improving Relationships***

Improving communications and relations between labor unions and management was one of the key motivations for the creation of IMSSA and the IDRS. It is, however, difficult to measure this impact, and no monitoring or evaluation directly related to it has been done.

#### ***E. Community and Leadership Development***

One of the benefits not only of IMSSA's work, but of other NGOs working in this sector as well, has been the development of leadership within the country from the grassroots to the national level. Moreover, the leaders coming out of these programs are well versed in conciliatory approaches to problem solving and policy development, a particularly critical skill in helping South Africa manage the complex political demands of the post-transition era. This benefit can also be seen in programs working at the grassroots level. (One conflict resolution NGO, CDRT, for example, has found that a number of the mediators who have worked in its community justice centers have gone on, even after being laid off by CDRT due to its financial difficulties, to serve in other positions in local government.)

#### ***F. Laboratory for Experimentation: IMSSA and CCMA***

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<sup>7</sup> Although this does not mean that IMSSA is universally loved, as many NGOs that work on cooperative projects with IMSSA fear that they will be overpowered by it.

IMSSA's most important impact, and the most obvious example of its success, has been the fact that via the LRA of 1995, the government chose to disband the existing state structures for dispute resolution that had been so ineffective, and build a new system that has its roots, in part, in the model and approach developed by IMSSA. The emergence of the CCMA, while a success for IMSSA, provides new challenges as well.

As mentioned earlier, the CCMA's mandate under the LRA is similar to that of IMSSA, although the CCMA will cover a wider range of disputes and workers, incorporating especially protection of rights for domestic and agricultural workers who have previously had few rights and even fewer resources with which to protect them. Like IMSSA, the CCMA is primarily designed to handle the cases of individual workers, such as those that arise under collective bargaining agreements, but it does not adjudicate conflicts concerning the agreements and labor contracts themselves. The LRA does require that contracts and collective bargaining agreements now include specifications regarding the dispute resolution mechanisms that will be used by the parties.

IMSSA expects to be able to handle some of the cases under CCMA jurisdiction. IMSSA has been forced to reevaluate its role, and it is sharpening its skills to provide services in some new areas. Disputants will still have the option of using private dispute resolution services such as IMSSA's rather than the CCMA if they so choose, and such arrangements can be stipulated in labor contracts. The CCMA can accredit private providers, like IMSSA, and the CCMA will cover at least some of the costs for cases that are under its jurisdiction that are taken by the parties to a private provider. This represents a relatively unique mix of public and private dispute resolution services that could prove to be very mutually reinforcing. For example, IMSSA prepares itself to specialize and handle particularly complex cases, while

anticipating that the CCMA will handle the bulk of the routine cases.

The CCMA has seen its caseload grow phenomenally since it started its work in November 1996, rising from 834 cases in the first month, to 5871 in July 1997-nearly 34,000 cases were brought to the organization within its first 9 months. This caseload is much greater than expected, and not surprisingly, it has challenged the capacity and capabilities of the new organization. While this in part suggests that IMSSA had only been handling a relatively small proportion of labor disputes in the past, it must also be recognized that the passage of the LRA and the creation of the CCMA have expanded the total caseload, perhaps drastically. New rights have been created, and new sectors of workers offered the services of the organization. In addition, particularly because the CCMA's services are free, some analysts believe that many parties are choosing to use the CCMA first, and giving up too easily on trying to resolve their disputes themselves. They predict that as the functions and role of the CCMA and the types of cases that it should handle become better understood, the more spurious cases being brought before the commission will decline.

The CCMA faces some daunting challenges, and may continue to learn from IMSSA's experience. IMSSA's experience has demonstrated that the quality of its panelists has been the most fundamental factor in its success. CCMA has felt forced to speed up its training process and cut corners to increase the number of commissioners and handle the caseload. While timely resolution of disputes is important, it may be better to ensure that commissioners are well trained, even if it means delaying some cases for now. The CCMA also faces the challenge of reaching out to its new constituents, especially agricultural and domestic workers who have not previously been well represented in labor disputes. This may require a more extensive program of outreach than either IMSSA or the

CCMA have found necessary in the past, and it may also require some adaptation of the current model in order to meet the needs of these workers, who are less familiar with the ADR Western models.

The continued provision and expansion of ADR services in South Africa in the next few years presents a number of challenges both for individual NGOs and organizations such as IMSSA, for government bodies such as the CCMA, and for the government as a whole. Financial sustainability, defining missions, and monitoring impacts are clearly the most important challenges faced. IMSSA appears to have the human and institutional capacity that has been necessary to think creatively and develop ways to meet all of these challenges, having outlined a detailed plan for achieving financial sustainability, identified new, cutting-edge niches that it can fill to continue to generate demand for its services, and working with USAID to improve monitoring and evaluation of the work that it supports.

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