

Quarterly Newsletter

October 2009

October's Newsletter is packed with articles focussing on burning issues – Why is Mediation Not Taking Root in South Africa: Prof Alan Rycroft considers why mediation has taken root in some limited areas, and not others; Adv Hendrik Kotze looks at utilising the Rule 37 process to inculcate mediation as a formal option, with the Brownlee v Brownlee judgement providing a strong platform from which to stride forward; and Adv Jacques Joubert and attorney Yolanda Jacobs consider the debate of whether mandatory mediation in South Africa is a sustainable and appropriate system. We are indebted to our contributors' knowledge and expertise in considering these issues.

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Enjoy the read.

Regards

Gina Barbieri
Deputy Head, Africa Centre for Dispute Settlement

Why is mediation not taking root in South Africa?

Prof Alan Rycroft

Internationally mediation burst into consciousness in the mid-1970s and has since that time been a chosen process for resolving disputes, whether they be environmental, commercial, divorce, employment or political. In this article I want to reflect on the track record of mediation in different areas of law to try to understand why in South Africa it has taken root in some limited areas but not in others.

(a) The success stories

The pre-eminent example of the institutionalization of mediation (or conciliation) is the CCMA where the State pays for free conciliation and arbitration of most employment disputes. It provides a panel of full-time and part-time trained conciliators and arbitrators. Unlike private mediation and arbitration where the process is voluntary, at the CCMA the employer is obliged to attend, if not the conciliation, at least the arbitration.

Although popular opinion varies on the reputation of the CCMA, its success over the 13 years of its existence has been remarkable. During the 2008/2009 financial year 101 759 conciliations (including pre-conciliations, con/arbs and conciliations) were heard, an average of 402 every working day. About 62% of disputes were settled at conciliation. Despite a view that the standard of arbitral awards is sometimes questionable, of the 2 084 out of 23 433 awards which were taken on review only 150 were deemed to be successfully reviewed. There is a 73% initial compliance rate. By any standards these statistics speak of an efficient and effective dispute resolution system.

The other area where mediation can be said to be a success is in tax law. In 2003 new regulations commenced prescribing the circumstances under which tax disputes may be settled. The taxpayer is given the option of referring a matter to ADR or referring the matter to the tax court or special board.

ADR could be the way the dispute is resolved in whole or in part, but if ADR fails to resolve the matter, the taxpayer can still go to the tax court or special board. ADR is not intended to be a 'court case', but an opportunity to agree differences of fact and interpretation of law.

The annual reports of the South African Revenue Service indicate that about 79% of the disputed matters were resolved through a mediation process and the remaining were resolved in the tax court or tribunal.

While the numbers of matters referred to ADR were not large, it is intriguing to understand the success of the process. From personal enquiries I was told that SARS attributed the success rate to the standing of the third-party mediators, usually retired judges with tax expertise.

I was advised that these mediators were paid a competitive rate for their time and that tax payers were not required to contribute to the costs of the ADR process.

(b) The stories of failure

The success of mediation in employment and tax disputes is not reflected elsewhere. The primary site of failure in appropriate dispute resolution is our civil court system itself. First, our rules of procedure do not facilitate negotiations taking place sufficiently early. Most matters that settle do so 'on the steps of the court' or only during the course of the trial. By contrast, in the USA the deposition process makes clients and their lawyers confront weaknesses in their cases well before the matter gets to court. In the UK, a relatively new system of active pre-trial case management by the court compels parties to prepare well before trial. Active engagement by judges in the UK in the pre-trial process also facilitates settlement. By contrast under our Uniform Rule 37, pre-trial conferences happen only on the eve of the trial when it is too late to avoid much of the litigation costs and without sufficient preparation to engage meaningfully in an attempt to settle.

Add to these structural difficulties the reality of a two to three year waiting list for a matter to go to trial in the High Court, plus the possibility of having to pay the winner's legal costs, a litigant has to be both determined and wealthy to pursue a dispute in the court structures. The same success enjoyed in labour disputes by the CCMA cannot be claimed by the labour courts. In a survey of the 20 decisions handed down by the Labour Appeal Court in 2008, I found that the average time taken from the dismissal of the employee to the LAC's judgment was six and a half years, with the average time taken between the decision of the Labour Court and the Labour Appeal Court being 3 years. In 2008 three matters decided by the LAC had taken over 10 years to resolve. In an area of law where speedy dispute resolution is an underlying imperative, these delays are intolerable. Certainly good lawyers will caution clients against approaching the labour court in case it draws them into a system that goes on to the LAC and possibly the SCA or CC.

Turning to other areas of law, Divorce mediation and collaborative family law have simply failed to transform from what remains a highly adversarial practice.

In a recent divorce matter the judge described the way in which the divorce had been pursued as "adversarial proceedings in which positions were taken up that gave every appearance of callousness and cruelty".¹ He went on to say that "this was a case in which, if the parties did not need mediation, the legal representatives certainly could have profited by it".² The practice of collaborative family law – now widespread in the USA and UK – where divorcing parties enter into an agreement with their lawyers, who have been trained in mediation and collaborative law, not to litigate but to commit to reaching an agreement which attempts to meet their interests, needs and priorities, has barely surfaced in South Africa.

There can scarcely be a more urgent area of social reform than land redistribution. From the early 1990's a series of statutes were passed which suggested mediation as a possible way of resolving land disputes.

¹ *Brownlee v Brownlee* (SGHC Case no. 2008/25274, judgment given 25 August, 2009) para 57.

² Para 54.

Legislation, being a declaration of intent, clearly articulates the need and preference for ADR in land claims. Attempts were made from 1994 to establish a mediation panel; the collapse of Imssa in 2000 resulted in the folding of the National Land Reform Mediation and Arbitration Panel. From 2002 an attempt was made by the Department of Land Affairs to re-conceive dispute resolution but it was not until 2009 that the organization Tokiso won the tenure to mediate land disputes. This year only 10 to 12 cases have been referred to Tokiso by the Commission on Restitution of Land Rights from some 300-400 disputes before the Commission. From my queries it was suggested that, despite funding, there appears to be a lack of capacity in the Commission to refer cases to mediation, perhaps even an inertia because the Commission fails to see itself as a party to the dispute.

The very limited success in the use of ADR processes in land disputes is attributable, in my view, to four fundamental flaws which are also found in other legislation which is permissive of mediation.

The first flaw is that reference to mediation is usually in the discretion of a public official. In s 13 of the Restitution of Land Rights Act 22 of 1994 it is the Chief Land Claims Commissioner who has the discretion to refer the matter to mediation. In s 22 of the Development Facilitation Act 67 of 1995, while a party can apply for mediation, it is the tribunal which has the discretion to allow it. In s 18(3) of the Land Reform (Labour Tenants) Act 3 of 1996 it is the Director-General who alone can decide to appoint a mediator. In s 7 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 it is the municipality which alone decides on mediation. An unwillingness to take this initiative is reflected in two cases, where judges ordered municipalities to consider mediation.³

This problem arises also, for example in s 13 of the Rental Housing Act 50 of 1999 where mediation is only triggered if the tribunal is of the view that mediation will help. Similarly in s 21(2) (b) of PEPUDA it is the Equality Court which has the discretion to refer a dispute to mediation. Contrast this to the CCMA where there the right to conciliation and arbitration is not dependent on official discretion. This was a deliberate step taken by the drafters of the Act because the repealed Labour Relations Act required parties to apply for a conciliation board, permission being in the discretion of the Minister of Labour which was seldom granted.

The second flaw in legislation which refers to mediation is that it is often so confusingly drafted. Take for example the new Consumer Protection Act 68 of 2008. An aggrieved consumer can refer the complaint to 'an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud'.

Let us stop to ask how the average consumer will find out who the ombud is and whether she has jurisdiction.

Or the dispute can be referred to 'a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes'.

³ *Cashbuild (South Africa) (Pty) Ltd v Scott and Others* 2007 (1) SA 332 (T); *Lingwood and another v Occupiers of R/E ERF 9 Highlands* 2008 (3) BCLR 325 (W).

How are we to locate this body? Similarly the mediation section in s 17 of NEMA – the National Environmental Management Act 107 of 1998 – is convoluted and also full of official discretion. Contrast that with the crisp and unambiguous referral of employment disputes to the CCMA.

The third flaw is where no provision is made to pay the mediator. It is all very well for legislation to make provision for mediation but quite another if there is no budget. Environmental mediation appears to have foundered on this rock.

The fourth flaw is to assume that there is a panel of trained mediators available at short notice to mediate a dispute in a specialised area of law. There is a need for the institutionalisation and training of panels.

What needs to be in place for ADR to work?

So, in summary, it is my view that there has been little transformation in South African dispute resolution. It has been suggested that South African lawyers are not sufficiently trained in the skills of negotiation or even aware of the mediatory process available to them. Because there is little appreciation of the principles, ethics and strategy in negotiation, lawyers are often less than effective in the process of last-minute settlement negotiations to ensure the best outcome for their client.

How can we turn things around? I would suggest the following is essential:

1. ADR and negotiation skills must be taught in law schools so that all lawyers have an awareness of the potential and possibilities of ADR.
2. Courts must make it easier to settle by pre-trial procedures and should penalize parties through refusing costs orders if they refuse to mediate before coming to court.
3. National legislation must facilitate the easy access of ordinary citizens to ADR processes.
4. This access should not be solely in the discretion of a public official.
5. The ADR body should be easily identified.
6. There must be on-going training of panels of mediators and arbitrators.
7. There must be education of the public so that they know about their rights to access ADR processes.
8. The cost of ADR must not be a disincentive. If possible, it should be free.

With these elements in place, it is my view that ADR will be given the space and support to flourish.

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Rule 37 and Mediation

Adv Hendrik Kotze

Since 1994 High Court Rule 37(6)(d) has required of parties to report to the Court whether any issue has been referred by the parties for mediation, arbitration or decision by a third party.

This requirement places a duty on the parties to consider the appropriateness of mediation and or arbitration to their particular dispute. Unfortunately this requirement (along with the rest of Rule 37 requirements) has for the most been ignored, with the parties merely reporting that such procedures were not appropriate.

Steps have recently been taken by the Courts to reinforce the requirements of Rule 37:

- A 2007 Practice Directive in South Gauteng High Court stipulates the following:
“The practice which has developed over the years where the provisions of the rule are ignored must come to the end. Failure to comply with the rule will in future lead to the matter not being allocated for trial....”
- The 2009 Consolidated Practice Notes in the Western Cape High Court stipulate as follows:
“A document which purports to be a pre-trial minute but which does not achieve the objects of Rule 37 (eg if it is a mere recordal or paraphrasing of the agenda items for discussions at a Rule 37 conference), shall not be accepted as a proper pre-trial minute.

These directives were given further substance by the ruling in *Brownlee v Brownlee* (unreported judgement on 25 August 2009 by Brassey AJ in the South Gauteng High Court), and specifically with regard to the issue of Rule 37(6)(d). In this matter (a disputed divorce) the attorneys had both indicated during Rule 37 proceedings that there was no matter that would benefit from referral to mediation.

Brassey AJ found that there were several issues that would have benefited from being submitted to mediation, and that the saving in time and legal costs may well have been significant. He further found that the parties’ legal representatives (and specifically the attorneys) had a positive duty to advise the parties of these benefits, which in the instant case they had failed to do:

“On the facts before me it is impossible to know whether the parties knew about the benefits of mediation, but I can see no reason why they would have turned their backs on the process, especially if they had been counselled on the matter by the attorneys. What is clear, however, is that the attorneys did not provide this counsel; in fact, in the course of the pre-trial conference they positively rejected the use of the process. For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients.”

Consequently, the Court capped the fees that the attorneys could recover from their own clients to that which would be allowed on taxation on a party and party basis.

This judgement now aligns South Africa law with principles that have long been accepted in English law (see *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576).

The following principles must now be accepted as part of our law:

1. Parties have an obligation to consider the appropriateness of mediation in a dispute. This obligation is imposed by Rule 37(6)(d). That this is of general application is clear from the *Brownley* judgment which states: “If mediation is appropriate in commercial cases, how much more apposite is it in family disputes”.
2. Parties should refer matters to mediation where there is a reasonable prospect that mediation could contribute to settlement of disputes or some of the issues in dispute.
3. Attorneys have a duty to advise their clients of the benefits of mediation, and to counsel them about submitting their disputes to mediation.
4. Any party or legal representative who neglects this duty stands to be punished by an adverse costs order.

In view of this, what should the approach of lawyers be to the use of mediation? The requirements of Rule 37(6)(d) now require serious consideration by all lawyers. The underlying principle as stated in the *Brownlee* judgement is that where there is a reasonable prospect that mediation may contribute to a settlement of the dispute or some of the issues in dispute, it should be considered.

The following can be provided as guidelines:

- In English law most cases are considered to be suitable for mediation. Cases that may be unsuitable are those where -
 - where a party wants the court to resolve a point of law and it is considered that a binding precedent would be useful;
 - where injunctive or other relief is essential to protect the position of a party; and
 - where there are allegations of fraud or other commercially disreputable conduct.
- It is common cause that a very substantial number of personal injury claims settle (sometimes literally) on the steps of the Court. This must indicate that disputes of this nature are susceptible to settlement, and that the early intervention of a trained mediator can reasonably be expected to contribute to an early settlement of such disputes. If this is correct, then -
 - attorneys handling personal injury claims should be advising their clients to refer disputes for mediation (and also doing so in the context of Rule 37(6)(d)); and
 - parties and attorneys who refuse to attend mediation proceedings should run the risk of adverse costs orders.



- Where one party requests mediation, this must indicate a reasonable possibility that settlement will be possible, or at least to participate in a settlement process. The reluctant party refuses to participate at its own peril.

One of the gravest obstacles facing lawyers and their clients is the lengthy waiting times for trial dates. This waiting period differs from jurisdiction to jurisdiction but probably averages anything between 2 and 2.5 years from date of enrolment.

Mediation may now well also offer assistance in this regard:

- If one party refers the matter for mediation, the other party can hardly refuse to participate (given the principles set out above). The outcome of mediation could well be early settlement, as apposed to waiting for the trial date.
- Where mediation was requested and refused, a party should be able to request the Court to convene a Court chaired Rule 37 meeting (in terms of Rule 37(8)). The appropriateness of mediation can then be discussed at this meeting before a judge. The judge can be requested to make directives in this regard. Such directives (e.g. to attend mediation) need the consent of the parties. However, any party refusing to agree to such a directive, stands to be punished in terms of Rule 37(9) by an adverse costs order.
- The allocation of trial dates is a matter that lies in the prerogative of the various Judges President. A draft practice directive being circulated in the Kwa-Zulu Natal High Court stipulates that preference will be given to matters where the parties have engaged in mediation, or where mediation has been requested, but refused by the other party. Other jurisdictions may well follow this route.

Brassey AJ also states in *Browlee v Brownlee*:

“..... in England the all but obligatory recourse to mediation has profoundly improved the process of dispute resolution. Parties resolve their problems so much more cheaply as a result and the burden on the court rolls has been considerably lightened. Informed estimates put the success rate of mediation at between eighty and ninety percent.”

There is every reason to believe that South African civil litigation practice is now firmly set on the same road.

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The Debate – a case for mandatory mediation in South Africa

Adv Jacques Joubert and Yolanda Jacobs

In Canada, the USA, Australia and New Zealand, it seems the mandatory mediation (before litigation) model is gaining the upper hand while in the United Kingdom, the voluntary model has prevailed. Broadly speaking, the voluntary model employs adverse cost orders at the end of the trial to encourage parties to mediate before the trial, while the mandatory model compels parties to mediate before the trial. We, as authors, favour the adoption of a flexible mandatory mediation model in South Africa.

Misconceptions about mediation

First, we must debunk some of the common misconceptions about mediation. It is wrong to say that:

- Mediation works only in the fields of labour and family law;
- Mediation requires no knowledge or experience of the law;
- Mediation is the same as negotiations between the parties;
- Mediation is simply about compromise or finding middle ground;
- Mediation requires no special mediation training and skills; and
- Mediation may harm a party's prospects later at a trial.

Mediation is a sophisticated process

While the growing popularity of mediation has at its base the escalation of legal costs, it is also a sophisticated process that allows parties, involved in any dispute, to find outcomes that are generally not available in litigation. Parties may choose evaluative or facilitative mediators, the former experts in the particular field of their dispute, and willing to express their opinions, while the latter will use facilitation skills during the mediation.

During private sessions with the parties, a skilled mediator finds out more about the nature and origin of the dispute and explores different potential outcomes of the dispute. It is in these outcomes that the true value of mediation emerges, offering more than a simple compromise to the parties.

The process is private, confidential and without prejudice and thus not harmful to a party's prospects later at a trial. Mediation is not binding, but any agreement reached by the parties at the end of the mediation is binding. Even if the mediation fails, it normally helps to narrow down the issues in dispute, saving time and money during the litigation.

Accredited mediators and managers of dispute settlement

In Cape Town, the Africa Centre for Dispute Settlement (ACDS) of the Business School of the University of Stellenbosch has trained and accredited 70 commercial mediators in collaboration with the ADR Group in the UK. Equillore, an industry leader in enabling dispute settlement, with offices in Cape Town, Durban and Johannesburg, draws its mediators from the ACDS panel of commercial mediators. Tokiso Commercial Dispute Settlement, active mainly in Johannesburg, also has a panel of commercial mediators, trained and accredited in collaboration with CEDR UK. Finally the Arbitration Foundation of South Africa (AFSA) with branches in several major centres in South Africa also provides mediation services with accredited commercial mediators drawn from the legal and accounting profession.

The above organizations should be able to rise to the challenge and roll out court based mediation programs if mediation became mandatory in our legal system.

Canadian study of mandatory mediation

In January 1999, a Rule was introduced into the Ontario Court Rules that made mediation mandatory, except if the Court granted leave to the parties to be excused. The findings of the report are summarized as follows:

- Mandatory mediation under this Rule resulted in significant reductions in the time taken to dispose of cases;
- Mandatory mediation resulted in decreased costs to the litigants;
- Mandatory mediation resulted in a high proportion of cases (roughly 40% overall) being completely settled (and a large further group partially settled) earlier in the litigation process;
- In general, litigants and lawyers have expressed considerable satisfaction with the mediation process under the Rule;
- Although there were some variations from one type of case to another, these positive findings applied generally to all case types.

Court based mediation in South Africa – Rule 37

Rule 37(8) of the Uniform Rules of Court of the High Court, relies on a voluntary model to bring parties to the mediation table. It states that a judge at a pre-trial conference may direct the parties to mediate, *if they consent*. This consent provision is an obstacle to court based mediation. As it stands, court based mediation is not likely to get off the ground in South Africa.

It is recommended that the Rules Board rewrite Rule 37 as a matter of urgency to introduce a flexible *mandatory* mediation model at our High Courts, one that will allow the various Judges President to regulate what types of cases should be referred for mediation in their Divisions and how the mediations should be managed, by issuing Practice Notes.

As in Canada, the Judges President should also be responsible for the accreditation of mediation service providers. No one is in a better position to regulate court based mediation in their Divisions than the respective Judges President.

Who pays for the court based mediation?

The Department of Justice should make funding available to the Divisions of the High Court to enable the Judges President to engage the services of the accredited mediation service providers.

These service providers should implement court based mediation in their Divisions and pay mediators for their services. Until such funding for court based mediation is available, we see no reason why parties who are funded by the public purse should as a rule not be liable for the costs of the mediation. It will after all be taxpayers' money well spent, especially in view of the Canadian study referred to earlier.

If one sees the costs of mediation in the context of the difference between the costs of settling a litigated dispute ahead of the trial and the costs of settling the dispute on the steps of the court, the argument that parties who are funded by the public purse, should participate and pay for the mediation, until the Department of Justice makes funds available, becomes compelling.

Equillore recently made a proposal to appoint accredited and experienced mediators to assist the Road Accident Fund to settle claims well ahead of trial. This proposal would have cost the Road Accident Fund R2150 per claim for 4 hours of mediation. It had the potential to save the Road Accident Fund millions in legal fees. It was rejected by the Road Accident Fund.

An interim solution: judicial intervention

Until the present Uniform Rules of Court are changed, judicial intervention may be helpful to encourage unwilling parties to join the mediation table. The judge at the Rule 37(8) pre-trial conference may request to know from the parties why mediation is not appropriate. If one or both of them refuse to participate in mediation, the judge may record the reasons in the court file. This note may assist the trial judge to make an appropriate cost order at the end of the trial. The threat that a party may be deprived of his costs, even if successful, may in itself be enough to persuade most parties to mediate.

This interim solution will however not work if the decision makers do not have to foot the bill of costs themselves. The only cost order that will then make a difference will be the feared *de boniis propriis* cost order against the decision maker, an order courts are reluctant to make.

The main drawback of this solution is that it is not always easy for a trial judge to adjudicate at the end of the trial whether the refusal to mediate had been unreasonable or not.

Another interim solution: judicial activism

Few will deny that the court roles in most Divisions of the High Courts are bursting at the seams because of Road Accident Fund cases settling on the steps of the court. It is no less than shocking that high value resources (judges) often sit in tea rooms waiting to hear whether their allocated Road Accident cases have been settled or not. Many in the legal profession blame the current leadership of the Road Accident Fund for the congested court roles.

They cite the following reasons:

- The Road Accident Fund's policy to admit liability, only on the first day of the trial, even if it never intended to dispute liability.
- Its failure to make settlement offers timorously, the most powerful of tools, to keep extravagant claims and legal costs in check.
- Its refusal to separate merits from quantum, ahead of the first day of the trial.

The growing polarization between the Road Accident Fund and the legal profession is however not helpful. The time has come for these "adversaries" to realize that they need to work together and not against each other. They owe it to the general public and road users to join each other at the mediation table to stop the madness of congested roles and escalating, unsustainable legal costs.

No one will deny that congested court roles escalate costs and imperil the constitutional right of South Africans to have their disputes disposed of by a court within a reasonable time. After all, justice delayed is justice denied. Yet in some Divisions, plaintiffs have to wait more than 2 years for their cases to be heard after the close of pleadings. The suffering of seriously injured, especially indigent plaintiffs, who have to wait years for compensation from the Road Accident Fund, make a compelling case for judicial activism to address the problem of our congested court roles. (Interim payments by RAF to alleviate this suffering are a rarity.)

Although the practice and procedure of the High Court is regulated by the Supreme Court Act and the Uniform Rules of Court the High Court derives inherent jurisdiction, not only from the common law, but also from section 173 of the Constitution of the Republic of South Africa, which provides as follows:

"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

It is suggested that judges and lawyers consider invoking the inherent power of the High Court during the Rule 37 pre-trial conference, as provided by the Constitution, and order unwilling parties to the mediation table, despite the consent requirement in Rule 37(8).

Mandatory mediation not a contradiction in terms

Some who have a vested interest in the economy of battle station litigation will probably object that mandatory mediation is a contradiction in terms – that one can lead a horse to water but cannot make it drink. They underestimate the sophistication of mediation.

International experience shows that litigants are more willing to talk to each other than they or their lawyers care to admit and are relieved when they do not have to show “weakness” by having to invite their adversaries to the mediation table.

In conclusion

It is recommended that the Judges President of the different Divisions of the High Court in South Africa encourage the judges of their Divisions to take judicial notice that the congested court roles have reached crisis proportions and employ Rule 37 in such a way to ensure that unwilling parties, especially those funded by the public purse, have no choice but to join the mediation table.

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