A CRITICAL ANALYSIS OF MEDIATION AS AN ALTERNATIVE METHOD OF DISPUTE RESOLUTION.

By

LIONEL GREENBERG

48127187

submitted in partial fulfilment of the requirements for the LLB degree

BACHELOR OF LAWS

In the

SCHOOL OF LAW

at the

UNIVERSITY OF SOUTH AFRICA

RRLLB81 PORTFOLIO - 3

PROFESSOR T DEANE

UNIQUE NUMBER: 681766

5 JUNE 2020

ACADEMIC INTEGRITY DECLARATION

1. I understand what academic dishonesty entails and am aware of Unisa's policies in this regard.

2. I declare that this assignment is my own, original work. Where I have used someone else's work I have indicated this by using the prescribed style of referencing. Every contribution to, and quotation in, this assignment from the work or works of other people has been referenced according to this style.

3. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

4. I did not make use of another student's work and submitted it as my own.

NAME: LIONEL GREENBERG

SIGNATURE: 

STUDENT NUMBER: 49127187

DATE: 3 June 2020

SUMMARY

Civil litigation is the primary method of dispute resolution that parties to a dispute use in the civil justice system in South Africa. Alternative dispute resolution (ADR) encompasses several processes and techniques that can offer greater flexibility for resolving and managing conflicts. Depending on the nature of the dispute, parties may elect which resolution that would preferable to bring resolution to a particular dispute or an alternative to engaging in costly full-scale lengthy court process.

The dispute in question could also allow for a combination of methods to be utilised where ADR can reduce legal costs by resolving a dispute amenable without having to resort to formal court litigation. Where a dispute is capable of being resolved using ADR it would in many instances be advantages to all parties. South Africans have become progressively more litigious and has impacted on court rolls becoming increasing more clogged up with cases therefore cases are not being resolved within a reasonable time.

In this paper the research will critically analyse mediation as an alternative method of dispute resolution. Alternative dispute resolution (ADR) refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts.[1] ADR encompasses negation, mediation, and arbitration. By combining these process and having a mini trial, or mediation/arbitration or summary trial this variety is termed a "hybrid" process. The “hybrid” process can also utilise a number ADR techniques to bring finality to matter with the added benefit if lowing legal costs.

In the case of mediation this process can described as unfacilitated negotiation. One needs to go further and consider in what circumstances mediation would succeed and be more suitable and whether it would be to the benefit to parties to the dispute or would be it merely compromise and deny parties the opportunity to fully ventilate

---

1 Mnookin R ‘*Alternative Dispute Resolution’* (March 1998). Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series. https://www.researchgate.net/publication/30504345_Alternative_Dispute_Resolution (Date of use: 30 May 2020)

their dispute. In the South African context one also examines how traditional law would be applied in the context of the spirit of Constitution of South Africa and application of ubuntu.

KEY WORDS

ADR, arbitration, conciliation, negotiation, ubuntu.

ACRONYMS

ADR - Alternative dispute resolution

CC - Constitutional Court

CCMA - Commission for Conciliation, Mediation and Arbitration

SALRC - South African Law Reform Commission

TABLE OF CONTENTS

ACADEMIC INTEGRITY DECLARATION 2

SUMMARY 3

1. INTRODUCTION 6

1.1. PROBLEM STATEMENT 6

1.2. HYPOTHESIS 7

1.3. RESEARCH METHODOLOGY 8

2. MEDIATION AND OTHERS FORMS OF ADR. 8

2.1. BACKGROUND OF THE STUDY. 8

3. MEDIATION. 10

4. PURPOSE OF MEDIATION. 13

5. UBUNTU AN AFRICAN TRADITIONAL CULTURE. 17

6. ALTERNATIVE DISPUTE RESOLUTION 19

6.1 ARBITRATION. 19

6.2. CONCILIATION. 20

7. ADR ADVANTAGES. 21

8. SUMMATION OF ALTERNATIVE DISPUTE RESOLUTION. 21

CONCLUSION 22

LIST OF RESOURCES / BIBLIOGRAPHY 24

1. INTRODUCTION

1.1. PROBLEM STATEMENT.

In this paper the research will to critically analyse mediation as an alternative method of dispute resolution. This study examines whether the efficacy of mediation can be used as an effective mechanism for all types dispute resolution else the research considers what other alternatives are available that parties to a dispute may consider to find suitable resolution. Traditionally it could be said that litigants would utilise a court of law to bring finality to their dispute utilising litigation, since this method has been tried and tested formal process given that the court process has been around for time immemorial.

Parties embroiled in disputes are able consider in what circumstances mediation would a preferable option compared to advance dispute resolution (ADR). One needs to consider the nature of the dispute and whether the outcome would be to the benefit of parties to resolve their dispute using the mediation[2] process. Of importance is would the mediation process compromise and deny parties of the legal rights and would they be given the opportunity to fully ventilate their dispute using mediation?

In South African we recognize and must respect cultural diversity and one should recognise that traditional law blended ubuntu[3] is seen as a form of mediation or ADR. Does the notion of ubuntu resemble mediation or ADR and should it be viewed in the spirit of Constitution of South Africa since both Western-styled mediation and African-styled mediation are practised in South Africa.[4] Also there are some instances where mediation would not be

---

2 'Mediation' means the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute.

3 Boniface A. "African-style mediation and western-style divorce and family Mediation: reflect-ions for the South African context". 2012 PELJ Potchefstroom p391. http://dx.doi.org/10.4314/pelj.v15i5.10.

4 Boniface A. "African-style mediation and western-style divorce and family Mediation: reflect-ions for the South African context". 2012 PELJ Potchefstroom p338.

suitable. For example to highlight a few these would be in matters relating to child abuse, neglect, family violence, property and alcohol abuse.[5]

1.2. HYPOTHESIS.

Alternative dispute resolution[6] (ADR) encompasses several processes in finding resolution to a dispute. ADR offers greater flexibility and allows for a hybrid approach in choosing which resolution process could be best suited to resolve a particular class of dispute. Where numerous ADR techniques and resolutions methods are used together this can be termed as a hybrid process. The use of negotiation, conciliation, mediation, and arbitration can be combined in order to bring about finality to a dispute. By using this hybrid approach it can also reduce the financial burden by having a dispute resolved amenable, rather than to engage in costly and protracted formal court litigation. Given the nature of the dispute one could consider whether mediation would be preferable as the chosen method to resolve a dispute or if the dispute is capable of being resolved through ADR and whether this will be advantages to all parties.

In recent years there has been a growing support for courts to support ADR given the notion that court rolls are becoming more clogged up with parties being more adversarial and resorting to having a matter adjudicated by a court of law.

Moreover, ADR refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. One asks

---

5 Uniform Rule 41A of the High Court in South Africa is entitled ‘Mediation as a Dispute Resolution Mechanism’, which aims to regulate the procedure for referral to mediation of cases in the various High Courts with the use of Form 27, published in the Government Gazette on 7 February 2020 came into operation on 9th March 2020. The amendment also provides that if mediation has not been considered, the court itself is obligated to manage cases effectively and recommend mediation as a dispute resolution if it deems it appropriate.

6 'Alternative dispute resolution' means a process, in which an independent and impartial person assists parties to attempt to resolve the dispute between them, either before or after commencement of litigation.

whether mediation is preferable method to resolve a dispute or if ADR which encompasses arbitration, and conciliation would be preferable. When all these available processes are consider they are termed a 'hybrid process' and the dispute resolution practitioner would be required to play multiple roles. These hybrid alternatives to are used in the adjudication process are advocated on a variety of grounds.[7]

1.3. RESEARCH METHODOLOGY.

The research methodology that has been undertaken has been constrained to a desk study. This research is reliant on materials available from various primary sources, inclusive of case law and national legislation from SA. Secondary sources comprise journal articles, academic books, reports, policy papers and newspaper articles have been considered to critically analyse mediation as an alternative method of dispute resolution.

2. MEDIATION AND OTHERS FORMS OF ADR.

2.1. BACKGROUND OF THE STUDY.

2.1.1. Parties to a dispute could follow the adversarial civil litigation process when dispute arises and utilise the civil justice system to a remedy to bring finality to litigants dispute. This could be said to be a traditional dispute-resolution process using our civil justice system. This process is known as trial requires a judge to preside over the matter would then decide who is right or wrong. A court process ends were someone wins and someone loses.

2.1.2. Going beyond the bounds of a court process there are many other options available that parties to a dispute can explore to find resolution. These

---

7 Mnookin R '*Alternative Dispute Resolution'* (March 1998). Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series. https://www.researchgate.net/publication/30504345_Alternative_Dispute_Resolution (Date of use: 30 May 2020)

alternative comprise mediation, negotiation, conciliation and arbitration and are referred to as alternative dispute resolution (ADR).

2.1.3. Mediation may be described as the continuation of a negotiation process between the disputants, with a third person, namely the mediator, assisting the disputants in, first, identifying and understanding their underlying concerns and needs and, based on these, in negotiating a settlement that is acceptable to both parties.[8]

2.1.4. We should commence with the ones rights that are enshrined in Constitution of the Republic of South Africa. Of great importance is the ability of our people to meaningfully assert and claim the rights in the Constitution and in the Bill of Rights. The constitutional guarantee of the right of access to courts and provides a vehicle for people to vindicate these rights.[9]

2.1.5. Section 34 of the Constitution[10] guarantees everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Further the resolution of the Access to Justice Conference held in July 2011, under the leadership of the Chief Justice. towards achieving delivery of accessible and quality justice for all, that steps be taken to introduce alternative dispute resolution mechanisms, preferably court-annexed mediation or the Commission for Conciliation, Mediation and Arbitration kind of alternative dispute resolution, into the court system.[11]

---

8 S Vettori S 'Mandatory mediation: An obstacle to access to justice' (2015) 15 African Human Rights Law Journal 355-377. http://dx.doi.org/10.17159/1996-2096/2015/v15n2a6

9 Chief Justice Ngcobo 'Enhancing access to justice: The search for better justice' *Access to Justice Conference* 6 July 2011 p 7 available at *https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf* (Accessed 5 May 2020).

10 Section 34 of the Constitution of the Republic of South Africa, 1996.

11 Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985). Chapter 2 section 70.

2.1.6. Dispute resolution procedures are less complex to comprehend, they are affordable, speedy and cost effective when used by the public contrasted against the adversarial system where the truth emerges in a costly court when opposing sides present their cases as aggressively promoting their viewpoint in a given circumstance and the presiding office a judge or magistrates pronounces his judgement based on legal principles and precedent.

Justice Ngcobo stated that –

'access to justice suffers… when the costs of litigation are prohibitive; when the procedures and processes are unduly complicated or burdensome; and when delays are too long for the average person'.[12]

2.1.7. This aspect of litigation has been highlighted by the court by Ngcobo J as it forms a basis to the analysis why parties to a dispute could and perhaps should consider other remedies that are available to them as canvassed below.

3. MEDIATION.

3.1 Mediation has been defined as a flexible process that is conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.[13]

---

12 Justice Ngcobo goes on to provide that 'in order to ensure access to justice in a civil justice system, the system should be just in the results it delivers; be fair in the way it treats litigants; offer appropriate procedures at a reasonable cost; deal with cases with reasonable speed; be understandable to those who use it; be responsive to the needs of those who use it; provide as much certainty as the nature of particular cases allows; and be effective that is, adequately resourced and organised'. Chief Justice Ngcobo 'Enhancing access to justice: The search for better justice' *Access to Justice Conference* 6 July 2011 p 19 available at *https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf* (Accessed 5 May 2020).

13 Definition published by the Centre for Effective Dispute Resolution (CEDR) 2008.

3.2 Mediation has been evolving for many years and is a concept that is playing an ever increasingly important role in our society. Mediation is seen as an alternative dispute resolution (ADR), i.e. an alternative to litigation.

3.3 In Africa there is a tradition of family or neighbourhood mediation. This mediation is facilitated by elders and takes place in "an attitude of togetherness" and "in the spirit of Ubuntu".[14] Mediation is compulsory in African culture, including when a family problem occurs.

3.4 Mediation has been defined as a dispute resolution process where negotiation between parties who are engaged in a dispute is resolved with the assistance of a neutral third party who is described as the mediator.[15]

3.5 Mediation provides a relaxed forum where an impartial person who is the mediator is either directed by a court or a person that the parties have chosen to facilitate communication to a dispute between to promote reconciliation, settlement, or understanding among the parties.

3.6 The are basic rules inter alia that the mediator may not impose his own judgment on the issues in preference to that of the disputants. While the definition does encapsulate the concept of mediation, it gives no indication of the procedure to be followed.[16]

3.7 The mediator has no advisory or determinative role concerning the issues in dispute or in determining the outcome however mediation has taken and in many instance attorneys and advocates can also mediate in matters.

---

[14] An English rendering of the word *Ubuntu* is "A human being is a human being through other human beings". Malan *Conflict Resolution* 88.

'Mediator' means a person selected by parties or by the clerk of the court or registrar of the court from the schedule referred to in rule 86(2) of the rules of the High Court South Africa, to mediate a dispute between the parties;

[16] Mowatt JG Alternative dispute resolution: some points to ponder. The Comparative and International Law Journal of Southern Africa, Vol. 25, No. 1 (MARCH 1992), at p 48.

3.8 In many instances a mediators roll would be to advise the parties on or to determine the process of mediation and would also set the terms of the mediation process. Mediation may also be undertaken voluntarily.

3.9 In some instances mediation could be invoked by an order of court or as a as a result of a provision in an a contractual agreement where the parties agreed that they would be subjected to should a dispute arise.

3.10 In the case of mediation settlement is sought between the parties, mediation is a non-binding negotiation, unlike in litigation there is an attainment of justice that is pronounced by the court.

3.11 Characteristics of Mediation:[17]

3.11.1 Promotes communication and cooperation;

3.11.2 Provides a basis for you to resolve disputes on your own;

3.11.3 Voluntary, informal and flexible;

3.11.4 Private and confidential, avoiding public disclosure of personal or business problems;

3.11.5 Can reduce hostility and preserve ongoing relationships;

3.11.6 Allows you to avoid the uncertainty, time, cost and stress of going to trial;

3.11.7 Allows you to make mutually acceptable agreements tailored to meet your needs;

3.11.8 Can result in a win-win solution.

---

[17] Methods for Resolving Conflicts and Disputes. Oklahoma Bar Association (accessed 25 May 2020). https://www.okbar.org/freelegalinfo/disputes/

4. PURPOSE OF MEDIATION.

4.1. There has been great progress spanning back many years where learned scholars has been enhancing the civil justice and the shortcoming of the adversarial system. The conventional litigation process for resolution remains controversial, costly and protracted and is characterised by a number of its shortcomings. In recent years, in 2011, Justice Ngcobo, stated publically the following about South Africa's civil justice system and civil litigation: 'Our civil justice system is still characterised by cumbersome, complex and time-consuming pre-[court] procedures, overloaded court rolls…,[and] delays in matters coming to trial… It is expensive, slow, complex, fragmented, and overly adversarial… While significant progress has been made in enhancing the accessibility of our courts, there are still persistent problems.'[18] Three decades later, the fundamental shortcomings identified in the Hoexter Commission, 1983 appear to be no different to the shortcomings currently recognised in the South African civil justice system.[19]

4.2. The main purposes of mediation is to promote access to justice, promote restorative justice, preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation, facilitate an expeditious and cost-effective resolution of a dispute between litigants or potential litigants, facilitate an expeditious and cost-effective resolution of a dispute between litigants or potential litigants

---

18 Chief Justice Ngcobo 'Enhancing access to justice: The search for better justice' Access to Justice Conference (6 July 2011) 15-16 available at https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf (Accessed 8 May 2020).

19 The Hoexter Commission of Inquiry into the Structure and Functioning of Courts, 1983 (hereafter, 'Hoexter Commission (1983))', a commission that in the past identified various problems within South Africa's judicial system and spurred the Department of Justice and Constitutional into acknowledging these discrepancies. Abader M.I An Investigation into the Application of Judicial Case Management in the South African Civil Court System to Enhance Quality and Access to Justice (unpublished LLM thesis, University of Johannesburg, 2003) 100.

and provide litigants or potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers[20].

4.3. Where litigation has already commenced and where there are multiple parties to the dispute, the terms of any settlement agreement are not binding on any party who has not participated in mediation process.

4.4. In instances when litigation has commenced any party may at any stage after litigation has commenced, but before trial may request the clerk or registrar of the court, in writing, to refer the dispute to mediation where the purposes of mediation and its' objective to facilitate settlement between the parties.

4.5. Over the years and to date, the following concerns about the South African civil justice system can be identified.[21] These concerns include overburdened court rolls, due to the rapidly increasing volume of litigation at courts.[22]

4.6. The significance of the above is the need for parties who are embroiled in a dispute may be able to explore other avenues to bring finality to their matters but one should not loose sight and also not to unnecessarily forgo your rights as canvassed below.

4.7. Reverting back to the mediation process of importance is that all discussions and disclosures, whether oral or written, made during mediation remain confidential and is inadmissible as evidence in any court, tribunal or other forum, unless the discussions and disclosures are recorded in a

---

20 Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985). Chapter 2 section 71.

21 Over the years South Africa's civil justice system has come under constant scrutiny and criticism from various interest groups in the country. South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution (1997) para 2.8.

22 Hurter E 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 Tydskrif vir die Suid-Afrikaanse Reg 240

settlement agreement signed by the parties, or are otherwise discoverable in terms of the rules of court, or in terms of any other law.

4.8. Potential benefits of mediation are said to include the reduction of the transaction costs of dispute resolution because the ADR processes may be vastly cheaper and faster than ordinary judicial proceedings, the creation of resolutions that are better suited to the parties' underlying interests and needs, and improved ex-post compliance with the terms of the resolution.

4.9. Mediation is essentially anti-legal for its main thrust is interest based and its objective is to achieve a settlement of a dispute by probing the underlying issues between the parties.[23]

4.10. Of great significance is confidentiality being kernel principle of the mediation process where an accredited mediator must comply with a code of ethics. We must be mindful that court hearings where trials are public are the most intrusive form of dispute resolution unlike mediation where the parties “dirty linen’ remains confidential.

4.11. Mediation may not be suitable in certain circumstances. For example where there is a risk of child abuse[24], children’s rights[25], alcohol, drug and in instances of mental health problems. However mediation may often be used in divorce[26] matters and has become increasingly important in Family law, to an extent that the Children’s Act makes mediation compulsory in certain instances.[27]

---

23 Mowatt JG "High price of cheap adjudication"p81-84.

24 S 110 Children’s Act, 38 of 2005.

25 Constitution of South Africa Act 108 of 1994. In particular section 28(2) provides that, “A child's best interests are of paramount importance in every matter concerning the child.” This provision naturally includes children who come into conflict with the law.

26 Mediation in Certain Divorce Matters Act 24 of 1987.

27 Boniface, AE "Resolving Disputes with Regards to Child Participation in Divorce Mediation" [2013] SPECJU 6.

4.12. Recently our courts have taken steps to reinforce the requirements of Rule 37. For instance, the South Gauteng High Court in a 2007 Practice Directive stipulate:

'The practice which has developed over the years where the provisions of the rule are ignored must come to an end. Failure to comply with the rule will in future lead to the matter not being allocated for trial'. [28] The question that must be posed given what the Rules Board has done to introduce a process of mediation into litigation with a view to promoting access to justice.

4.13. In the unreported matter of Mmamphsika,[29] mediation is not only considerably less costly than litigation, but it promotes reconciliation and often offers a speedy resolution of disputes.

4.14. The Rules Board for the courts of law has amended the rules regulating the conduct of proceedings of the Magistrates Courts of SA with a view to introducing ADR mechanisms by way of court-annexed mediation in the court system.[30]

4.15. In the court ruling in Brownlee v Brownlee "The court held that the failure by attorneys to send a matter to mediation at an early stage should be visited by the Court's displeasure" said Brand.[31] Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have

---

28 Rycroft A 'Why Mediation is not Taking Root in South Africa', in Africa Centre for Dispute Settlement 2009 Quarterly Newsletter 2-3, available at - http://www.usb.ac.za/disputesettlement/pdfs/October_- Newsletter_2009.pdf (Accessed 4 June 2020).

29 *Mmamphsika and Another v Mmamphiska and Another (1932/2017) [2018] ZAGPPHC 628.*

30 Mc Laren I "Mediation of Civil matters in the Magistrates and Regional Courts of South Africa". (Accessed 4 June 2020) http://www.mclarens.co.za/mediation-of-civil-matters/

31 John Brand, alternate dispute resolution specialist at commercial law firm Bowman Gilfillan. (Accessed 31 May 2020).https://www.bowmanslaw.com/insights/finance/sa-high-court-obliges-lawyers-to-recommend-mediation/

been trained in the process.[32] We now see that the court are promoting mediation given the benefit in divorce and family related matters.

5. UBUNTU AN AFRICAN TRADITIONAL CULTURE.

5.1.1. In the matter of S v Makwanyane[33], ubuntu has become an integral part of the constitutional values and principles that inform interpretation of the Bill of Rights and other aspects of our law in South Africa. In particular, a restorative justice theme has become evident in the jurisprudence that encompasses customary law, eviction, defamation, and criminal law matters. This contribution explores the scope and content of ubuntu, as pronounced on by the judiciary in various cases, and demonstrates that its fundamental elements of respect, communalism, conciliation and inclusiveness enhance the constitutional interpretation landscape. Ubuntu societies maintained conflict resolution and reconciliation mechanisms which also served as institutions for maintaining law and order within society.[34]

5.1.2. South Africa's modern history, a traditional African concept - ubuntu - was incorporated in the state's official law. South Africa's 1996 Constitution made no express mention of ubuntu but did recognise customary law "subject to the Constitution",[35] requiring courts to apply customary law "when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".[36]

---

32 *Brownlee v Brownlee* 2008/25274 SGHC. Also see *Egan v Motor Services* (Bath) [2007] EWCA Civ 1002.

33 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

34 Murithi T. Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu.The Journal of Pan African Studies, vol. 1, no.4, June 2006

35 Section 211(3) of the Constitution of the Republic of South Africa, 1996.

36 Ndulo, Muna (2011). "African Customary Law, Customs, and Women's Rights". (Accessed 31 May 2020). https://www.repository.law.indiana.edu/ijgls/vol18/iss1/5

5.1.3. Two major epochs are highlighted in the development of ubuntu, marked by the constitutional decisions in Makwanyane and PE Municipality[37] respectively. The former carved the central avenue of development for ubuntu, while the latter marked the start of the thematic development of the concept in the direction of restorative justice. The recognition of customary law and ubuntu is closely connected with the Constitution's "transformative" nature. It is often said that a distinctive feature of South Africa's Constitution is that it is inherently forward-looking; ie it aims to empower the state to transform South African society over time. Langa DP (as he then was), in Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors,[38] stated that a "spirit of transition and transformation characterises the constitutional enterprise as a whole".

5.1.4. Our courts have applied the legal concept of ubuntu uncritically, without reference to African sources to illustrate its meaning in different contexts, and without questioning its compatibility with the Bill of Rights.

5.1.5. We need to give credence to Ubuntu an its appropriate place as an emerging value in South African law. Ubuntu is often emphasise for the power as a transformative tool to engender a new distinctively African flavour to South Africa's maturing legal system and we can embrace and accept mediation to resolve disputes.

5.1.6. We can not forget the social contacts and bonds we establish and the objective how mediation process can be embraced given that depending on your culture the use of an elder in your community fulfilling the roll of a mediator. South Africa's modern history, a traditional African concept - ubuntu - was incorporated in the state's official law. South Africa's 1996

---

37 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

38 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit 2001* 1 SA 545 (CC).

Constitution made no express mention of ubuntu but did recognise customary law "subject to the Constitution", requiring courts to apply customary law "when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

6. ALTERNATIVE DISPUTE RESOLUTION.

6.1 ARBITRATION.

6.1.1. Another method for resolving disputes, is arbitration where the outcome is made my binding having considered the issues and a determination is made by a third party. Judicial officers may involve independent third parties to assist in the resolution of cases that are engaged in litigation.

6.1.2. There is widespread support of the use of ADR and it can take the form of being facilitative, advisory and determinative. When the facilitative processes is utilised this could include negotiation, facilitation, conferencing and mediation. Where a dispute resolution practitioner considers and appraises the dispute and provides advice arising from the facts of the dispute, the prevailing law and, in some instances the possible or desirable outcomes. Where a determinative process is utilised in dispute resolution the arbitration practitioner would then evaluate the ambit of the dispute and may consider the hearing of formal evidence from the parties concerned and then would make a determination which is not the case in mediation.

6.1.3. In some instances the arbitration practitioner would fulfil multiple rolls and his/her approach would be then viewed as hybrid process. The hybrid approached has evolved by combining multiple process and the parties can enjoy what could be termed as the best of both worlds when electing the arbitration approach. The outcome of the conciliation process however is generally not binding, unless a written agreement has been concluded between the parties it can not be enforced by the courts of law.

6.2. CONCILIATION.

6.2.1. Conciliation is a process where a commissioner meets with the parties in dispute, and explores ways to settle the dispute by way of agreement. At a conciliation hearing a party may appear in person else he can only be represented by a director or employee of that party or any member, office bearer or official of that party's registered trade union or registered employer's organisation. The meeting is conducted in an informal way.[39]

6.2.2. Mowatt, in describing these terms in relation to family matters, refers to conciliation as "an informal process whereby parties meet with a neutral third party to explore amicably the possibilities of a reasonable settlement".[40]

6.2.3. Conciliation-mediation and arbitration are also available to settle commercial disputes since this mechanism consists of having the parties wanting to amicably seek a solution to a dispute with the assistance of a conciliator/ mediator that is elected by the parties who acts as a neutral third party much as in the case of mediation. Though mediation and conciliation are separate and different processes and that each of these processes are derived from the same generic concept of mediation.[41]

6.2.4. Conciliation informal procedure embraces communication between the disputants to bring about speedy resolution found in labour and divorce related matters and brings about more favourable outcomes. This is as a

---

39 Conciliation – *CCMA South Africa* . (Accessed on: 6 May 2020) https://www.ccma.org.za/Advice/CCMA-Processes/Conciliation

40 "Family court and mediation" 290.

41 Faris J.A. (1995) An Analysis of The Theory and Principles of Alternative Dispute Resolution. http://uir.unisa.ac.za/bitstream/handle/10500/16772/thesis_faris_ja.pdf?sequence=1&isAllowed=y

result that the disputants are themselves able to reach an agreement acceptable to the parties.[42]

7. ADR ADVANTAGES.

7.1. Unless bound by a contract containing where there is a clause requiring parties to the contract to submit themselves to alternative dispute resolution, the parties that have engaged in commercial litigation are not required to submit themselves to alternative dispute resolution proceedings.

7.2. Clearly ADR has substantially greater advantages than litigation in terms of public expenditure and given the workload of the courts. It is often cheaper and faster than litigation, it helps to contain increasing legal costs and eases the burdens on the courts. As ADR is an interests-based process, the settlement outcome may not be solely a victory for one party and a defeat for the other as it is for litigation.[43]

8. SUMMATION OF ALTERNATIVE DISPUTE RESOLUTION.

In negotiation through bilateral interaction the disputants devise their own processual standards, where in the case of mediation the processual control vests in and is derived from the mediator while control of the content and outcome of the dispute rests with the disputants. In the case of arbitration, the arbitrator is bound by the contractually predetermined arbitration agreement. In no instances are externally imposed processual rules applied. The transformation of the dispute is internal to the process itself and the degree of intervention is commensurate to the competence vested in the neutral third party to transform the dispute. Once more the consensual

---

42 Mowatt JG. Alternative dispute resolution: some points to ponder. The Comparative and International Law Journal of Southern Africa, Vol. 25, No. 1 (MARCH 1992), pp. 44-58 https://www.jstor.org/stable/23248783

43

principles of ADR emerge, as they are in this instance fused with the theory of dispute transformation.[44]

CONCLUSION

The various modes of alternative dispute resolution systems as discussed above, hold many similarities as well as differences. These methods provide diverse techniques, which help a party to a dispute to amicably settle their dispute. The numerous modes of dispute resolution are becoming widely accepted and applied in numerous areas of where parties find themselves embroiled in dispute. We also find that mediation has become be internationally acceptable and palatable method to resolve disputes. We should take cognisance where ubuntu features in our hybrid of ADR in South Africa since it entrenched in African culture and relationship similarities it shares with western mediation.

Mediation in the South African context can be advantageous since disputes can be resolved more expeditiously given their flexibility and that mediation is less technical. The major problem with mediation is that agreements rarely made an order of court. Mediation lacks the dimension of enforcement as in the case of other ADR. Though ADR hybrids carry a far greater weight they come with a greater cost to parties engaged in a dispute. In arbitration and court trial proceedings resolution takes substantially longer given the availability of a presiding officer will be required to bring the dispute / litigation to finality.

Though mediation may not offer parties all the protection found available in arbitration or in the case of litigation where the court adjudicates a matter. We should also be mindful that no precedents are forthcoming when electing the mediation process so the parties to the dispute merely reach consensus. Mediation operates "in the shadow of the law"[45] and though it has evolved substantially over many years and the courts becoming increasing involved in bring finality to matters through

---

44 Faris J *An analysis of the theory and principles of alternative (*Drs of Law Thesis University of South Africa 1995) 12.

45 Boulle and Rycroft 'Mediation: Principles process and practice' (1997) Butterworths.

mediation it appears much development has to evolve that mediation can become robust where parties disputes need resolution. As the ADR hybrid evolves so mediation will find its rightful place in the resolution of disputes.

-oooOooo-

LIST OF RESOURCES / BIBLIOGRAPHY

Books:

Allen “The mediation process: navigating the quagmire” (2009)3 Conflict Management.

Fey *Alternative methods of dispute resolution* (2002).

Harris and Reilly (eds) *Democracy and deep-rooted conflict: options for negotiators* (1998) IDEA https://www.idea.int/publications/catalogue/democracy-and-deep-rooted-conflict-options-negotiators?lang=en

Moore *Mediation process: practical strategies for resolving conflict* (1996) 2ed

Pretorius (ed) *Dispute resolution* (1993) Juta

Palmer & Roberts *Dispute processes* (2012) Butterworths

Van Winsen Cilliers & Loots *Herbstein & Van Winsen The civil practice of the Supreme Court of South Africa* (2009) (Vol 1 and 2) Juta

Legislation:

Constitution of South Africa Act 108 of 1994. In particular s28(2)

The Constitution of the Republic of South Africa Act 108 of 1996 s211(3)

Mediation in Certain Divorce Matters Act 24 of 1987.

Children’s Act, 38 of 2005. s110

Mediation in Certain Divorce Matters Act 24 of 1987.

Rules Board or Courts of Law Act, 1985 (Act No. 107 of 1985).

Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991.

Case law:

Brownlee v Brownlee 2008/25274 ZAGPJHC
Egan v Motor Services (Bath) [2007] EWCA Civ 1002.
Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re *Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC).
Mabuza v Mbatha 2003 4 SA 218 (C).
Mmamphsika and Another v Mmamphiska and Another (1932/2017) [2018] ZAGPJHC 628.
Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC).
S v Makwanyane 1995 3 SA 391 (CC).

Electronic resources:

Boniface AE "African-style mediation and Western-style divorce and family mediation: reflections for the South African context" (2012)5 PELJ 378.

Clark *Lawyers and mediation* (2012) Springer. Available from: https://www.euppublishing.com/doi/pdfplus/10.3366/elr.2013.0164 (Date of use: 5 May 2020).

Dheka G. "A Comparative Analysis of Community Mediation as A Tool of Transformation in The Litigation Systems of South Africa and the United States of America. University of the Western Cape". Date of Publication November 2016.

https://etd.uwc.ac.za/bitstream/handle/11394/5514/Dheka_g_llm_law_2017.pdf?sequence=1&isAllowed=y (Date of use: 5 May 2020).

Albert, F. Alternative dispute resolution: A developing world perspective. JANUARY 2013 pp 1-164.
https://www.researchgate.net/publication/290059766_Alternative_dispute_resolution_A_developing_world_perspective (Date of use: 28 May 2020).

John Brand, alternate dispute resolution specialist at commercial law firm Bowman Gilfillan. https://www.bowmanslaw.com/insights/finance/sa-high-court-obliges-lawyers-to-recommend-mediation/ (Date of use: 5 May 2020).

Jordaan B *Court-Based Mediation Becoming A Reality In SA Civil Justice System.* Accessed 31 May 2020). https://www.google.com/search?q=CourtBased+Mediation+Becoming+A+Reality+In+SA+ Civil+Justice+System%E2%80%99&ie=utf-8&oe=utf-8&client=firefox-bab&gfe_rd=cr&ei=9st8V7_cB4ip8we_poa4CQ (Date of use: 5 May 2020).

Ngcobo CJ 'Enhancing access to justice: The search for better justice' *Access to Justice Conference* 6 July 2011 p 19. *https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf* (Date of use: 5 May 2020).

Mc Laren I "Mediation of Civil matters in the Magistrates and Regional Courts of South Africa". http://www.mclarens.co.za/mediation-of-civil-matters/ (Date of use: 5 May 2020).

Mowatt JG - Alternative dispute resolution: points to ponder. The Comparative and International Law Journal of Southern Africa, Vol. 25, No. 1 (MARCH 1992), pp. 44-58. https://www.jstor.org/stable/23248783. (Date of use: 5 May 2020)

Mnookin, R.H. "Alternative Dispute Resolution". The New Palgrave Dictionary of Economics and the Law, 1998. https://ssrn.com/abstract=117253 (Date of use: 5 May 2020).

Private dispute resolution – on the rise, and why not? https://www.werksmans.com/legal-updates-and-opinions/private-dispute-resolution-on-the-rise-and-why-not/ (Date of use: 7 May 2020).

SabinetLaw: Measures to reduce case backlogs outlined. Available from:

http://www.sabinetlaw.co.za/justice-and-constitution/articles/measures-reduce-case-backlogs-outlined/ (Date of use: 5 May 2020).

STA Law Firm “United Arab Emirates: Comparative Analysis of ADR Methods With Focus On Their Advantages And Disadvantages”.. Date of publication 5 February 2019.

https://www.mondaq.com/Litigation-Mediation-Arbitration/777618/Comparative-Analysis-Of-ADR-Methods-With-Focus-On-Their-Advantages-And-Disadvantages (Date of use:: 5 May 2020).

Conciliation – *CCMA South Africa*.
https://www.ccma.org.za/Advice/CCMA-Processes/Conciliation
(Date of use:: 5 May 2020).

Journal articles:

Boulle and Rycroft ‘Mediation: Principles process and practice’ (1997) Butterworths

Clark Lawyers and mediation (2012) Springer

Vettori S (2015) Mandatory mediation: An obstacle to access to justice. 15 African Human Rights Law Journal 355-377 (Date of use: 5 May 2020).
http://dx.doi.org/10.17159/1996-2096/2015/v15n2a6
http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962015000200007

Feehily, R. (2015). Commercial mediation: Commercial conflict panacea or an affront to due process and the justice ideal? The Comparative and International Law Journal of Southern Africa, 48(2), 317-358. Retrieved May 6, 2020, from www.jstor.org/stable/24585881(Date of use: 5 May 2020).

Wahab, A & Van Gramberg, B (2010) Court-annexed and judge-led mediation in civil cases: The Malaysian experience. Australian Dispute Resolution Journal, vol. 21, no. 4, pp. 251-8. http://vuir.vu.edu.au/24331/1/Alwi%20Abdul%20Wahab.pdf (Date of use: 5 May 2020).

Thesis

Faris, J. A. (1995) An analysis of the theory and principles of alternative dispute resolution, University of South Africa, Pretoria, http://hdl.handle.net/10500/16772

Miscellaneous sources:

Jani P. *Mediation as an Alternative Disputes Resolution System – An Analytical Study*

South African Law Commission Issue Paper 8 Project 94 Alternative Dispute Resolution (1997) 14. 10

South African Law Commission Issue Paper 8 Project 94 Alternative Dispute Resolution (1997) 17.

MARKING RUBRIC

Research Paper Rubric for RRLLB81		
Paper Focus: Introduction/Purpose/ Position Statement		/20
Analysis		/30
Evidence (Sources)		/15
Organisation and Citation		/20
Writing Quality & Adherence to Format Guidelines		/10
Integration of Knowledge (This criterion ties in with the Analysis measure above)		/5
	TOTAL	
Comments		