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South Africa

Court connected ADR in civil litigation: the key to access to justice in South Africa

Mohamed Paleker

[Litigation] is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful wealthy litigant and the under-resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the Courts and the Rules of Court, all too often, are ignored by the parties and not enforced by the Court.¹

In any constitutional democracy where the rule of law is supreme, access to justice is fundamental. A guarantee of access to justice in a constitution or in a bill of rights is not enough; it must be *tangible* to all citizens. If this is not the case, justice is simply an ideal and not a reality.

In South Africa, litigation is extremely adversarial. Like many other adversarial legal systems, our rules of procedure are complex. Disputes are settled after a protracted process of legal wrangling on minute points of law and procedure. Little wonder that most people instruct attorneys (solicitors) and advocates (barristers) to litigate a matter for them. But attorneys, advocates and, consequently, litigation do not come cheap.

When one considers the costs and the complex nature of adversarial litigation against the backdrop of the staggering levels of poverty and illiteracy in South Africa, then it is easy to appreciate why access to justice, although guaranteed by the Constitution,² is beyond the reach of millions of people.

Justice in the High Courts, the Supreme Court of Appeal and, paradoxically, the Constitutional Court, are generally for the well-heeled. The poor (and sometimes, even the middle class) struggle to meet the tariffs charged by practitioners when litigating in these courts. The Magistrates' Courts (that is, the lower courts) provide a cheaper alternative. However, on account of the limited jurisdiction of the Magistrates' Courts, litigants often find that they are unable to obtain relief in these courts. For the poor, access to justice even at Magistrates' Court level remains a luxury. The picture becomes more distasteful when one ponders the condition of our state-funded Legal Aid program which for a long time now has bordered on collapse, due to demand for legal assistance far exceeding available financial means.

Recently, to address the issue of the lack of access to justice, the organised professions (attorneys and advocates) commenced a campaign to encourage pro bono work, but how far this campaign will go remains to be seen. For its part, the government has embarked on a program of restructuring our courts by creating a number of specialist courts. While these specialist courts have had the effect of streamlining the justice system, for the poorest of the poor, the creation of specialist courts has meant nothing for they are still denied access to justice on account of their socio-economic disadvantage.

It is submitted that while measures like restructuring the courts, offering *pro bono* services and allocating more human and monetary resources to the Legal Aid program may offer some respite to address the access to justice crisis, a better solution would be to incorporate *effective* court connected ADR into our current civil litigation

system. ADR would, in economic terms, be more affordable and empowering to the litigant, lead to a considerable saving of court time and administration, and spare judicial expertise for more serious cases. There is no reason why ADR cannot achieve these goals, especially since it has done just that in the area of South African labour law.

Some might argue that we *have* incorporated court connected ADR into our civil litigation system via the *Short Process Court and Mediation in Certain Civil Cases Act 1991* (SPCA) and *High Court Rule 37*. However, for reasons discussed below, I consider these to be ramshackle attempts at introducing ADR. Consequently, when contemplating reform, one must not judge the efficacy of ADR by what these pieces of legislation have delivered.

Mediation in the Magistrates' Courts

As lower courts the Magistrates' Courts are the courts of first access to the public. In terms of the *Magistrates' Courts Act 1944* read with the *Magistrates' Courts Rules*,³ they may hear, inter alia, contractual, delictual (tort) and property disputes,⁴ and entertain different types of applications. Attached to the Magistrates' Courts are the Small Claims Court, the Family Court, the Maintenance Court and the Children's Court. While all of these courts operate at Magistrates' Courts level, they are considered specialist courts, each having their own empowering legislation.

SPCA and its accompanying Rules⁵ introduced mediation in (a) the ordinary Magistrates' Courts (that is, not the specialist courts), and (b) a new species of court created by the Act called the Short Process Court.

A fundamental problem with SPCA

and its accompanying Rules is that they do not expressly define mediation, the methodology of the mediation process, or the ethical and formal duties of the mediator. For the most part, the Act and the Rules contain technical provisions for referring a matter to mediation.

In some countries, it might not be necessary for legislation to contain the detail that I allude to above. However, in South Africa, it is submitted, it is important to have comprehensive legislation for it must be remembered that we have a strong adversarial system where ADR can be completely overshadowed by the formal adversarial litigation system. SPCA simply describes at s 3(1)(b)(ii) the mediation process as an 'interview and investigation.' The phrase suggests that the mediation contemplated is *hands on* with the mediator exercising an interventionist role. The directive from s 3(d) that 'the mediator entrusted with mediation proceedings may make such enquiries and institute such investigation as he may deem necessary' confirms this. Although there is nothing fundamentally wrong with a mediator assuming an interventionist role, the blasé manner in which the powers of the mediator are stated in SPCA is cause for concern. It is hard to guarantee that a mediator will not take an adjudicative role when exercising these powers.

The problem is highlighted further when one considers the oath of office that a mediator is expected to take prior to assuming his/her function. In terms of SPCA at s 2(2), s/he is expected to *inter alia* swear that s/he:

will administer justice over all persons alike without fear, favour or prejudice and, as the circumstances of a particular case may require, in accordance with the law and customs of the Republic of South Africa applying to the case concerned.

The reference to 'administer[ing] justice', it is submitted, blurs the line between mediation and adjudication.

Significantly, however, the SPCA in s 3, recognises the fundamental purpose of mediation, which is to achieve 'settlement out of court.' Section 3(1) also entrenches mediation as a voluntary process, providing that the parties or their legal representatives *may* at any time prior to or after the issuing of a

summons for the institution of a civil action (be it in the ordinary Magistrates' Court, or the Short Process Court) refer a dispute to mediation.

When the parties agree to mediation, the clerk of the court must arrange a suitable date and time for the parties to appear before a mediator and the proceedings must take place in chambers. The reference in s 3(1)(b)(ii) to chambers presumably means that the interview and investigation take place in the court building of the court that has jurisdiction over the matter. Though this venue may be convenient, it imposes surroundings that are not necessarily conducive to negotiated settlement. Parties should be free to mediate at a place of their choice.

A further, and perhaps minor, problem with the legislation is that it prevents the parties, in some instances, from having an unfettered right to refer a matter to mediation. Prior to summons, the parties have an unfettered right to refer a matter to mediation. However, where summons is issued, the parties' right to mediation *is* fettered. Section 3 states that in such cases, the court concerned 'must be satisfied that mediation proceedings will not delay the trial unreasonably and will not prejudice the parties.' The discretion given to the presiding magistrate is, in my opinion, meaningless.

Under the normal rules of procedure, the parties are, in any event, permitted to *informally* settle a matter at any time prior to judgment without approval of the presiding magistrate and when settlement is reached, the court may be requested to make the settlement an order of court. The discretion given to the court under the SPCA thus has no real practical effect other than to prevent parties from having an absolute right to refer a matter to *formal* mediation under the Act.

A more significant problem with the SPCA is that it does not permit parties to choose their own mediator — a mediator is assigned to the parties. It is submitted that parties ought to be free to choose their mediator; parties intending to appoint mediators with special qualifications should be free to do so.

Furthermore, the pool for choosing mediators is very limited. In terms of the

SPCA, the Minister of Justice is responsible for appointing mediators to each magisterial district from a list of persons who have been nominated for that purpose by the General Council of the Bar and the Association of Law Societies.⁶ This means that mediators are appointed from the ranks of attorneys and advocates. The pool for choosing mediators should be much wider than this; specialists in other disciplines, for example engineers and doctors, should be permitted to act as mediators in certain matters.

The training of mediators is also not addressed in the legislation. While lawyers are perhaps tailor-made to act as mediators, their indoctrination in the process and methods of adversarial litigation mean they must be 're-educated to bring about a change in mindset when mediating.'⁷ Perhaps, the issue of training might not have been essential if a mediator profession was recognised in South Africa. However, since this is not the case, and there are also no uniform guiding standards for mediators, a statutory entrenchment of mediator training becomes quite important.

On close inspection of the SPCA and its accompanying Rules, the following conclusions can be drawn: mediation as a mechanism for dispute resolution is half-baked. The true nature of mediation does not surface from the legislation. The SPCA does not facilitate mediation as a process: 'the mechanisms are more concerned with process than with finding a solution.' The process mentioned in SPCA should be seen as a 'pre-adjudicative procedure'⁸ rather than mediation. In the words of one commentator: 'Whatever else [the SPCA] may be, it is simply not mediation.'⁹ Another commentator characterises the SPCA as a curate's omelette.¹⁰ With such strong sentiments expressed against the SPCA, it comes as no surprise that very few attorneys use the SPCA to settle disputes.

High Court Rule 37

The High Court is the most important higher court in the country. Although the practice and procedure of the High Court is regulated by statute,¹¹ both under the common law and the Constitution¹² the

High Court's jurisdiction is extensive.

The only mechanism available to date to accommodate ADR is entrenched in Rule 37. This Rule, which obliges parties to hold a pre-trial conference, represents a poor attempt at introducing court connected ADR and more particularly, mediation in the High Court. Even though the objective of the Rule seems to be to curtail the duration of trials,¹³ to narrow disputed issues,¹⁴ to curb costs¹⁵ and to facilitate agreements,¹⁶ the Rule fails to directly facilitate mediation.

According to the Rule, the parties are obliged to hold a pre-trial conference (Rule 37(2)). The process is thus not voluntary and cannot be waived by agreement.¹⁷ The parties must arrange a date, time and place for the conference and if they cannot agree on any of these, the Registrar of the High Court must resolve the impasse by making the relevant determination (Rule 37(3)(b)).

The Rule sets out strict time periods when the conference must be held

must contain. Such information includes inter alia:

- whether a party feels that it has been prejudiced because the other party has not complied with the rules of court (Rule 37(6)(b));
- the reactions of each party to request settlement on an issue (Rule 37(6)(c));
- whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred (Rule 37(6)(d));
- the admissions made by each party (Rule 37(6)(g)).

From the above it is clear that mediation is mentioned only in passing. The Rule does not facilitate mediation. It simply *accommodates* mediation as a mechanism to achieve settlement. The argument becomes more compelling when one considers sub-rule 8.

According to the sub-rule, a judge may call parties to a pre-trial conference if s/he deems it advisable. The judge (who may or may not be the judge who will

tasked to embark on a wide consultative process involving all major players and make recommendations for reform. The failure of the SPCA and Rule 37 should not be seen as a failure for ADR. South African lawyers must persevere in their struggle for effective court connected mediation in civil litigation. Court connected ADR is not simply a convenient tool for dispute resolution; it may be the key to our constitutional right to access to justice. ●

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Endnotes

1. Lord Woolf *Access to Justice* (Interim Report), United Kingdom, 1995, as cited by Road Accident Fund Commission, *Report*, Vol 2 (South Africa: 2002) 724.
2. Act 108 of 1996, s 34.
3. Government Notice R1108 *RG* 980 of 21 June 1968.
4. *Magistrates' Courts Act 1944* s 29 read with s 46.
5. Government Notice R2196 *GG* 14188 of 31 July 1992.
6. SPCA s 2(1).
7. C Cohen 'Mediation: terminology is important' (1993) 3 *De Rebus* 221 at 222.
8. *Ibid* at 222.
9. *Ibid* at 222.
10. H Brown 'A Visitor's Perspective on South African Mediation' (1994) 1 *De Rebus* 61 at 63.
11. *Supreme Court Act 59 1959* read with the *Uniform Rules of Court* (Regulation Gazette No 437 *GG* 999 of 12 January 1965).
12. Section 173 of the *Constitution of the Republic of South Africa Act 1996*.
13. *Bosman v A A Mutual Insurance Association Limited* 1977 (2) SA 407 (C) at 408F.
14. *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614C.
15. *Lekota v Editor, 'Tribute' Magazine and Another* 1995 (2) SA 706 (W) at 707H.
16. *Ibid* at 707H.
17. *Ibid* at §B37.2.
18. *Ibid* at 708F.

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(Rule 37(3)(a)), when minutes of the conference must be filed (Rule 37(7)), when parties must exchange lists detailing the admissions which each party is required to make, enquiries that the parties will direct, and other matters regarding preparation for trial (Rule 37(4)).

If the purpose of the Rule is to encourage mediation, the strict time periods are certainly not helpful. Mediation takes time. When strict time periods are imposed on parties, it places unnecessary pressure on the parties *not* to achieve settlement but to comply with the narrow precepts of the Rule.¹⁸

The Rule also does not govern the conduct of the parties at the meeting. After setting out the preliminary procedural steps (with their appropriate time periods) for holding the conference, the Rule simply proceeds to explain the kind of information which the minutes

ultimately try the matter) must preside over the conference. A conference called under these circumstances, it is submitted, is inimical to the spirit of mediation; the process is more akin to informal adjudication than to mediation.

Conclusion

Although the SPCA and Rule 37 are significant in that they recognise mediation as an alternative to adversarial litigation, the SPCA fails to fully appreciate the character of mediation and Rule 37 may simply be characterised as a case management mechanism.

To effectively incorporate ADR as part of our litigation process, the government must revise our civil procedure rules and not simply squeeze in ADR in an *ad hoc* fashion as it has with the SPCA and Rule 37. The South African Law Commission must be