

Short notes on:

MEDIATION – IS IT AN ALTERNATIVE TO LITIGATION?

Mediation can be described as a flexible process conducted in confidentiality, in which a neutral third party actively assists parties in working towards a negotiated agreement of a dispute or difference. This article seeks to explore whether Mediation is a suitable alternative to Litigation.

Disputes in Civil Proceedings:

Disputes in Civil Proceedings are commonly viewed as having to be resolved in court. Therefore, Civil proceedings are either brought about by way of application or action proceedings.

However, as is common cause, South Africa's court rolls, across lower and higher courts face significant backlog leading lengthy waiting periods in an aggrieved party awaiting their day in court. In response to the aforementioned, the Department of Justice and Constitutional Development piloted court-annexed mediation in both District and Regional Magistrate Courts as an attempt to transform civil justice and enhance access to justice.

More importantly, the abovementioned amendment was done with a view of introducing Alternative Dispute Resolution by way of court-annexed mediation, similar to the model of the CCMA, in the court system. Amongst other aims, court-annexed mediation aims to promote restorative justice and preserve the potential litigant relationship from the adverse effect of litigation. In effect, parties are able to refer the matter, whether from action or application proceedings, to mediation before litigation commences or at any stage during court process but before judgment is handed down. It is noteworthy to note that there are potential legislative developments relating to the Uniform Rules of Court where parties wanting to institute action or application proceedings will be queried as to whether they have considered mediation, before being able to institute such proceedings.

Mediation is binding when both parties come to an agreement which is reduced to in writing. However, one must note that the aforementioned does not rule out the right or ability to bring a matter before court and litigate. Commonly, the outcome of mediation is often parties reaching a Settlement Agreement, which is then made an Order of Court, by agreement between the parties.

Comparative analysis:

- **United States of America:**

In an article titled *Mediation: The Sensible Alternative to Litigation*, the author identifies that parties often angrily utter the words "I want my day in court" while not realising that getting such a day in court puts them at astronomical odds due the court system struggling to deal with a mountain of litigation.¹

Once again, a popular alternative proves to be mediation due the parties controlling their own destiny and mediation being confidential in nature unlike litigation, in contrast.

- **Australia:**

The emergence of mediation in Australia occurred as a result of pressure on politicians and governments to respond to an inefficient and unaffordable litigation process.² Therefore, Australia now practices court-referred mediation. However, the mediation process is defined broadly with no specific requirements set out for training and accreditation. Having considered the above, Australia holds both voluntary as well as mandatory mediation. But in the context of legal disputes, court-referred mediation is said to be the primary vehicle for the encouragement and mobilisation of mediation.

Is mediation a substitute for litigation?

Mediation often proves to be of great value due to it being time and cost efficient. Comparative legal systems see a great use for mediation. In the United States of America, mediation serves to benefit the court system as it relaxes its workload, resulting in less litigation. Additionally, in Australia mediation is a solution for ineffective and unaffordable litigation, more especially amongst the lower class.

Mediation thus proves to be an alternative to litigation and not a substitute thereto. A substitute would entail mediation being the sole dispute resolution mechanism. Instead, mediation is intended as a point in limine and where parties are not satisfied with the outcome of mediation, they have the option of litigation open to them, as an alternative.

¹ Emery Barker J "Mediation: The Sensible Alternative to Litigation" available at <https://www.mcrazlaw.com/mediation-the-sensible-alternative-to-litigation/>.

² Naja A "Mediating in the shadow of Australian Law: Structural Influences on ADR" (2006) 9 NZLII 334.