COURT-CONNECTED MEDIATION IN THE HIGH COURT OF NAMIBIA

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ABSTRACT

Since 2011 radical judiciary-led reforms have taken place in the civil practice of the High Court of Namibia. These reforms are driven by two impulses: reducing delay in the finalisation of civil cases and reducing the costs of litigation. The latest instalment of these reforms is court-connected mediation, introduced in 2014 for the first time in Namibia, radically transforming the way civil justice is administered in the superior courts and marking a paradigm shift from the orthodox adversarial system of justice. In this article I will set out the salient aspects of the mediation process of the High Court of Namibia and demonstrate the positive impact it has had on the administration of civil justice.

CONSTITUTIONAL IMPERATIVE

Article 12 of the Namibian Constitution guarantees the right of access to court.[1] Increasingly, fewer and fewer people are able to afford the services of lawyers to ventilate their civil and constitutional rights in the courts. The sad reality is that lawyers are expensive. Government's legal aid programme is limited because of budget cuts that have permeated the entire spectrum of public services. Alternatives to adversarial justice are therefore necessary.

HISTORICAL BACKGROUND

[1] Article 12 (1) (a) of the Namibian Constitution states that: "In the determination of their civil rights and obligations . . . all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law.' And sub-article (1) (c) of Article 12 states: "All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice."

Namibia's colonial name was South West Africa (SWA). Namibia attained political independence from South Africa on 21 March 1990. Prior to that it was administered by South Africa (SA) as its fifth province. As a fifth province of SA the South West Africa Division of the Supreme Court of SA applied South Africa's Uniform Rules of Court. At independence, the Judge President of the day made cosmetic changes to the Uniform Rules of Court to reflect the reality that the country was now a sovereign state but retained the Uniform rules in both form and substance. In the years leading to 2011, as the fourth judge president I resolved to overhaul the High Court Rules. I undertook several benchmarking visits to common law jurisdictions that implemented judicial case management (JCM). The visits culminated in the publication of a report "*Access to Justice in the High Court of Namibia: The Case for Judicial case management*"(*Access to Justice Report*).[2] Following the *Access to Justice Report*, and after extensive consultation with the legal profession, I promulgated a new set of autochthonous rules for Namibia's High Court[3] which, amongst others, introduced a system of docket allocation[4] to managing judges[5] thus wresting control of cases filed at the court from litigants and their lawyers[6], setting defined goals and objectives for the civil litigation process called the overriding objective[7], imposing obligations on litigants and their lawyers[8], setting disposal benchmarks for cases[9], and introducing

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[2] Damaseb P .2010. *Promoting Access to Justice in the High Court of Namibia: The case for Judicial Case Management*. Windhoek. The report is available on the High Court website at www.ejustice@moj.na

[3] GN. 4 in GG 5392 of 17 January 2014.

[4] In terms of the definitions section of the High Court Rules, read with Rule 21 "docket allocation" involves assignment of a case filed at court to a judge who manages the case until it is completed. That involves the judge attending to all interlocutory matters that might arise, regularly following up with the parties about progress in the case at a status hearing or case management conference, requiring the parties to narrow areas of dispute at a pre-trial conference and assigning a trial or hearing date within the disposal benchmarks contained in Practice Direction 62. This in short is the essence of judicial case management (JCM) applicable in the High Court under 'Part 3' of the Rules of Court.

[5] In terms of the definitions section of the Rules, a "managing judge" means a judge to whom a case is allocated to manage the docket or a case under JCM.

[6] Rule 17 (2) states that "Under these rules the control and management of cases filed at the court is the primary responsibility of the court and the parties and their legal representatives must cooperate with the court to achieve the overriding objective". Rule 18 (1) provides that "In order to further the overriding objective the court must actively manage cases. . ."

[7] Rule 1 (2) provides that: "The overriding objective of these rules is to facilitate the resolution of the real issue in dispute justly and speedily, efficiently and cost effectively as far as practicable. . ."

[8] Rule 19 imposes obligations on parties and their lawyers which, pre-eminently, include: the duty to cooperate with the court to achieve the overriding objective; to assist the court in curtailing proceedings; to use reasonable endeavours to resolve a dispute by agreement between the persons in the dispute and to ensure that costs are reasonable and proportionate.

[9] The judge president issued practice directions (PD) on 16 April 2014 under GN 67 in GG 5461 of 2014. PD 62 sets out disposal benchmarks for different case types.

alternative dispute resolution (ADR)[10] as an essential feature of the High Court's civil justice architecture.

Rationale of ADR

It is impossible for the court system to entertain all disputes requiring adjudication in an expeditious and competent manner. Either the quality of justice will suffer, or delay is inevitable, because the resources required to adjudicate disputes are finite and it is next to impossible and unrealistic to devote equal time and judicial resources to each and every dispute making entrance to the judicial system, regardless of complexity or value of the claim or underlying dispute.

In most systems that operate an adversarial civil justice process, the majority of civil cases (in Namibia those commenced by way of combined summons[11]) are settled at the door of the court. That being the case, it is only sensible to explore early settlement of legal disputes and save costs. Litigation is a zero-sum game: there is always a winner and a loser! Even the party that wins does not always do so on its terms. As the adage goes, a negotiated settlement is better than an unfavorable judgment. There is therefore a public policy rationale and a legitimate governmental objective in encouraging litigants to seek to resolve their disputes out of court.

Encouraging litigants to settle disputes outside court is now an important pillar of the civil justice system of the High Court of Namibia. Thus, rule 1(3)*(f)* of the High Court Rules elevates settlement of disputes to the exalted status of an overriding objective by requiring the court and the parties to facilitate the resolution of disputes by as far as practicable promoting the public interest in limiting issues in dispute through early settlement by agreement between the parties. An important plank on which the reform of the rules of the High Court is based is the need for diversionary measures from the court adjudication process, as a way of easing pressure on the court system. The following was stated in the *Access to Justice Report*:

[10] Rules 38 and 39, read with Practice Direction (PD) 19, the High Court Registrar's Notes published on 23 May 2014 and the Judge President's Practice Note 1 of 2004 embedded in the Registrar's Notes.
[11] Commenced in terms of Rule 7.

> We have . . . come to conclude that complete reliance on the formal court system for the resolution of all civil disputes is unrealistic and adds to the problem of case backlog. Our interaction with other court administrators in the jurisdictions we visited has shown that introduction of court-connected ADR is an essential strategic intervention in the quest to address case backlog.[12]

Generally, ADR takes one of three forms: conciliation, mediation and arbitration. All three of these forms of ADR are recognised under Namibian law. Namibian law provides for a comprehensive system of conciliation and arbitration in labour disputes.[13] Arbitration is also statutorily regulated under the Arbitration Act 42 of 1965. Arbitration is a private agreement between parties to a justiciable dispute to resolve it at a forum of their choice instead of recourse to the courts. The parties may or may not choose to have the outcome of that process (arbitral award) made an order of court.

When is ADR appropriate?

Every dispute differs in character, and therefore one has in all cases to consider whether a particular dispute is suitable for mediation instead of trial in court. Mediation is more likely to be effective in the following situations:

- where the parties know each other and want to save or maintain their relationship. For example, parents going through a divorce need, for the sake of their children, to work with each other after divorce;
- where there is a need to reach a quick resolution of the dispute to enable the parties to continue with their commercial relationship. For instance, while a legal claim may appear to be for breach of contract, in reality it may be communication issues between the disputing parties that have to be resolved;

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[12] *Access to Justice* Report 14, para 4.4.
[13] Parts B and C under Chapter 8 of the Labour Act No. 11 of 2007.

- where the parties want to avoid publicity or to maintain confidentiality;[14]
- where the law does not provide a solution that meets the parties' real interest: By way of illustration, a party may file a suit for defamation, but he or she may really be seeking an apology which is not a normal legal remedy given by the courts; and
- where the parties want to save legal costs by avoiding protracted litigation.

When ADR may not be appropriate

Based on what has been said above, it must follow that certain disputes may not be suitable for mediation. Mediation is not appropriate where:

- there is a need to establish a binding legal pronouncement. For instance, a company may need a court decision concerning how to interpret a clause in its standard contract; or a party may want an authoritative and binding interpretation of a statute or the Constitution;
- one or more parties may be engaged in mediation not in good faith (e.g. to gather more information to its advantage and to the prejudice of the opponent without any intention of exploring a settlement).

Courts should be careful not to compel premature mediation which may only lead to unnecessary costs.

WHAT IS MEDIATION?

An American source defines mediation as follows:

> Mediation is a flexible, nonbinding dispute resolution procedure in which a neutral third party – the mediator – facilitates negotiations between the parties to help them settle. A hallmark of mediation is its capacity to help parties expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy. Mediation sessions are confidential and structured to help parties communicate – to clarify their understanding of underlying interests and

[14] In terms of Article 12(1) (a) of the Constitution, every trial must be in public, except for reasons of 'morals, the public order or national security'. That means the goings-on in a trial are not immune from the media, and therefore, public interest.

> concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options.[15]

The Code of Ethics signed by Namibia's accredited mediators describes mediation applicable in Namibia in the following terms:

> Mediation is a process in which an impartial person…facilitates the resolution of a dispute by promoting uncoerced agreement by the parties to the dispute. A court-accredited mediator facilitates communication, promotes understanding, assists the parties to identify their needs and interests, and uses creative problem-solving techniques to enable the parties to reach their own agreement.

Mediation is therefore a process by which a neutral third party, a mediator (who may or may not be a judge), assists the parties in negotiating a possible settlement of their dispute without going to trial. Unlike a trial judge, the mediator does not determine who is at fault in the dispute. ADR is much more flexible and informal than the trial process with the focus being on moving forward in a way that meets the disputing parties' underlying interests.

INTRODUCTION OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN THE HIGH COURT

The High Court Amendment Act 12 of 2013 laid the basis for the introduction of alternative dispute resolution initiatives in Namibia's High Court civil practice by empowering the judge-president of the High Court, with the approval of the president of the Republic, to make rules:

to regulate compulsory alternative dispute resolution mechanisms in certain causes and matters that are before the court , and prescribe therein that-

[15] Plapinger and Stienstra ADR *and Settlement in the Federal Courts: A sourcebook for Judges and Lawyers* A Joint Project of the Federal Judicial Centre and the CPR Institute for Dispute Resolution (1996) 65.

(i) a judge may order the parties to refer their dispute to any of the prescribed alternative dispute resolution mechanisms; and

(ii) it is only when the alternative dispute resolution is unsuccessful and a certificate in that behalf is issued, that the parties or nay of them may set the matter down for hearing or trial.

The amendment to the High Court Act was followed by the promulgation on 14 April 2014 by the judge president of Rules 38 and 39 of the High Court Rules which is the governing framework for ADR in Namibia. In terms of rule 38(1), the managing judge may at any time either of his or her own initiative or at the request of a party refer 'a case or any part of the proceeding or any issue' to ADR.

DIFFERENT FORMS OF ADR IN NAMIBIA

In terms of PD 19(3), the judge president prescribed that ADR may be either court-connected where parties are ordered by the managing judge to participate in ADR or chose to do so of own accord, alternatively it may be ADR under a private agreement and not under the prescripts of the Rules of Court. The judge president's practice directions make provision for either conciliation or mediation.[16] PD (4) provides that only persons accredited by the judge president may be appointed as conciliators or mediators, except that the parties may under a private arrangement appoint a conciliator or mediator to resolve their dispute. The form of ADR applied by the High Court in terms of the Registrar's Practice Notes issued on 23 May 2014 under PD 65, and incorporating the judge-president's Practice Note 1 of 2014, is mediation.

MEDIATION NOT END IN ITSELF

[16] PD 19 (3) and (4).

Although the rules contemplate compulsory mediation in the designated case types as discussed below, it should be borne in mind that all rules and practice directions must be interpreted and applied subject to the overriding objective of the High Court's civil procedure which, in rule 1(3), states that:

'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by–

> (d) Ensuring that cases are dealt with expeditiously and fairly;
>
> (e) …; and
>
> (f) considering the public interest in limiting issues in dispute and in the early settlement of disputes by agreement between the parties in dispute.

Rule 17(1) for its part states that:

> The court must seek to give effect to the overriding objective referred to in rule 1 when it exercises any power given to it under these rules or in interpreting any other rule of procedure or practice direction applicable in the court.

It is apparent then that (a) the primary focus of the High Court Rules is expeditious and fair disposal of matters and (b) ADR must have the result of an early disposal of a matter. Therefore, mediation must not be seen as an end in itself but as a means to an end – the end being the expeditious disposal of matters at minimum cost. If the only available mediation date is too far in the future, the managing judge must require the parties to complete the pleadings then outstanding, move the case to pre-trial and allocate trial dates in tandem with the court's disposal benchmark contained in PD 62 (5).[17] The Court must guard against practitioners using mediation as a way of stalling a matter. If mediation is not possible within a time frame that promotes the disposal benchmark, unless the parties pursue private mediation within

[17] PD (5) states as follows: "The High Court pursues a 100% clearance rate policy, and in pursuit of the policy , the court must, unless there are compelling reasons to adjourn or vacate, apply a strict non-adjournment or non-vacation policy on matters set down for trial or hearing."

a reasonable time, the matter must proceed in the normal course and be finalised through trial.

SALIENT FEATURES OF NAMIBIA'S MEDIATION SCHEME

(a) How mediation commences

The rules of court stipulate that ADR may be resorted to at any stage of the proceedings.[18] The judge president's practice directions state that ADR must be considered at the earliest stage of the proceedings.[19] The managing judge may, *mero motu*, direct mediation or she may direct mediation at the request of the parties.[20]

(b) ***Compulsory mediation***

In terms of PD 19(5), the judge-president has prescribed compulsory ADR in the following case types: insurance claims, medical negligence, professional negligence claim against a legal practitioner, building contract claims, divorce, custody of or access to minor children, spousal or child maintenance, loan default claims, motor vehicle accident claims, and defamation. The managing judge refers a matter for mediation to an accredited mediator using the pro-forma 'Court Connected Mediation Referral Order'.[21] In terms of the pudge-president's Practice Note 1 of 2004, a matter may only be referred for mediation if each of the parties is legally represented.[22] The obvious rationale of this requirement is that an unrepresented litigant is not coerced or induced into reaching a settlement to his or her prejudice without the benefit of legal advice.

(c) Who conducts mediation?

The identity of the mediator is largely a function of the origin of the referral. If the mediation is ordered by the court, it is conducted by a person chosen by the parties

[18] Rule 38(1).
[19] PD 19(1).
[20] Rule 38(1) read with PD 19(3).
[21] Registrar's Notes: Example 1.
[22] Registrar's Notes: 4(4).

from a list of accredited mediators or, failing agreement, one appointed by the court. If the referral is the result of the parties requesting it on the strength of an agreement between them, they have an option to conduct it under court-connected ADR or to choose their own third party mediator.[23] Court-connected ADR may be conducted only by a person duly accredited by the court.[24] Judges of the court are *ex officio* mediators, but once a judge has acted as mediator in a matter, she may not thereafter try the matter.[25] The judge-president discourages judges from acting as mediators but has exceptionally granted permission at the request of parties for judges to act as mediators.

If the mediation results in a settlement between the parties, the mediator as a rule encourages the parties to continue the process until they have addressed the question of enforceability, and record the terms of the settlement.

(d) Duties and responsibilities of the mediator

The Code of Conduct describes the mediator as an 'officer of the court' and imposes on her important duties and responsibilities as follows:

i. Impartiality

The Code of Conduct states in particular that the mediator must avoid partiality or prejudice and avoid conduct that may embarrass the court. If a mediator is unable to conduct the mediation in an impartial manner, he or she is required to withdraw. A mediator should avoid the appearance of partiality, such as spending more time with one party than another, or socialising with one party. The mediator is not precluded, however, from expressing a neutral assessment to the parties about the strengths and weaknesses of their respective cases, as long as it is done in private caucus with a party and such view must not be disclosed to the other side.

ii. *Avoid conflict of interest*

[23] PD 19(4).
[24] PD 19(4).
[25] PD 19(8).

The mediator is required to disclose to the parties prior to the mediation commencing all actual and potential conflicts of interest known to him or her. Any conflicts that arise only after the mediation has commenced must also be disclosed to the parties.

iii. *Competence*

The mediator must only mediate in a matter if he or she has the necessary competence to do so. Thus, he or she must have the necessary mediation skills and the subject matter of the dispute.

iv. *Duty to terminate mediation*

The mediator must terminate the mediation if she considers that a party is abusing the process, if there is no reasonable prospect of settlement or if the proposed settlement appears to be illegal or against the public interest.

Once the mediator is satisfied that mediation has failed or there is no prospect of the matter settling, she has a duty, as an officer of the court, to ensure that the matter returns post-haste to the active management of the managing judge who must immediately enrol the matter for further directions, assign trial dates and proceed swiftly to hear it under the court's strict non-adjournment policy.[26]

v. *Duty to disclose fees*

A court-accredited mediator, who is engaged privately by the parties and therefore not entitled to payment by the court, is still an officer of the court and is required to fully disclose her fees and expenses to the parties and reach agreement with the parties on the fee due to her. It is preferable to record the agreement on fees in writing.

MEDIATION PROCESS

(a) Initiation of mediation suspends proceedings

Rule 38(3) provides that:

> No further proceedings must take place until an order by the managing judge is made in respect of [an] ADR procedure based on the report of the . . . mediator.

[26] PD 62(5)

(b) Initial referral order

A case, or 'any part of a proceeding', is referred for mediation either at the initiative of the court or at the request of the parties.[27] As a first step, the court issues the 'initial referral order'[28] with a return date. That order directs the parties to approach the mediation office of the High Court to book a mediator[29] and to determine a date for the mediation in consultation with the mediator. The initial referral order must include the following:[30]

- Whether it is referred for court-funded mediation or private mediation;
- The legal practitioner to represent each party;
- in case of a court-funded mediation, the language or languages in which a party requires translation;
- In case of a private mediation, directing any party requiring the proceedings to be interpreted, to arrange for such translation; and
- The date to which the matter is postponed for referral to mediation.

In the case of a private mediation, after the initial referral order, the parties must contact the mediator of their choice, reserve her and agree a date for the holding of a settlement conference.[31] The parties must obtain written proof of the mediator's consent to act as mediator and the date, time and place for the settlement conference.[32]

(c) Mediation referral order

The court convenes on the return date determined by it in the initial referral order, for formal referral of the matter to mediation. On the return date, the parties present the managing judge with a draft order proposing a mediator, the date for the mediation, the identities of the persons to be present at the mediation, the lawyers to represent the parties and the date the mediator's report should be submitted to the managing

[27] Rule 38(1).
[28] Judge-President's Practice Note 1 of 2004: incorporated in the Registrar's Notes: 3(3).
[29] The available dates for each mediator are published on the court's website.

[30] Judge-President's Practice Note 1 of 2004: incorporated in the Registrar's Notes: 3(6).
[31] Registrar's Notes: 3(9)(a).
[32] Registrar's Notes: 3(9)(b).

judge. If satisfied with the terms of the proposed order, the court issues a 'mediation referral order' designating the mediator, the person(s) and the specific legal practitioner(s) to represent the parties, the venue for the mediation and whether or not an interpreter will be required.

The managing judge's ensuing referral order must therefore include the following:[33]

- Whether the mediation is private or court-funded;
- The name of the mediator who will conduct the mediation;
- The time, date and venue of the settlement conference;
- When the mediator is to submit her report to the managing judge. (The mediator's report must be submitted within two months of the matter being referred for mediation);
- The deadlines for submission by the parties of their respective settlement proposals;
- In the case of private mediation, the mediation agreement signed by the parties;
- In the case of court-funded mediation, the languages chosen for translation;
- The persons with full settlement authority who will attend the settlement conference;
- The names of the parties' respective legal practitioners; and
- The date for the status hearing before the managing judge, being a date after which the mediator's report is submitted to the managing judge.

The orders and directions given by the managing judge must ensure that after referral to mediation, the matter does not stall. It should be remembered that mediation is not an end in itself but a means to an end – the end being the speedy, expeditious and less costly disposal of a cause in tandem with the overriding objective.

It is the responsibility[34] of the ADR office to deliver the mediation file[35] to the mediator. As an officer of the court the mediator is obliged to make herself available

[33] Registrar's Notes: 3(12).
[34] Registrar's Note 3(14).

for the mediation on the date, time and venue reflected in the mediation referral order.[36]

(d) Obligations of parties upon referral

In terms of rule 39(1), where a matter has been referred for ADR the parties are enjoined to follow a prescribed procedure. The principal obligation resting on the parties is that they must exchange settlement proposals in writing as follows:

i. The plaintiff

The plaintiff must by a letter, either personally or, if legally represented, through a legal practitioner, set out the following:

- a brief summary of the evidence and legal principles that he relies on for his claim;
- a brief explanation of why, in his opinion the relief claimed would succeed at the trial;
- an itemisation of the damages and other relief he or she believes can be established at the trial and a brief summary of the evidence and legal principles supporting the damages or other relief; and
- a concise settlement proposal.

ii. The defendant

Once served with the plaintiff's settlement proposal letter, the defendant must either personally or through a legal practitioner if represented, by letter respond to the plaintiff's proposal, setting out the following:

[35] Containing the initial mediation referral order; mediation referral order and the parties' settlement proposals: Registrar's Notes: 3(15).
[36] Judge-President's Note 1 of 2004: incorporated in the Registrar's Note 3(15).

- any points in the plaintiff's letter with which the defendant agrees;
- any points in the plaintiff's letter with which the defendant disagrees; and
- a concise settlement offer.

iii. Collective obligations

In terms of rule 39(3), the parties or their legal practitioners, if they are represented, are required to hold a settlement conference before the chosen mediator within seven days after they have exchanged settlement proposals. The legal practitioners of the parties are obligated to furnish their respective clients with the opposing party's position letter before the holding of a settlement conference.[37] The settlement conference must be attended only by a person with full settlement authority.[38] But this requirement does not apply where the Government is a party or where the managing judge or the court issues a contrary order.[39] There is this special dispensation for the Government because in terms of section 17 of the State Finance Act 31 of 1991, the approval of Treasury is required before any agreement imposing financial liability on the State can be concluded.

Section 17 (a) – (b) states that:

> (a) no expenditure shall be incurred as a charge to the State Revenue Fund;
> (b) no payments shall be made as a charge to the State Revenue Fund;
> …
> without the authorisation of the Treasury.

(e) Settlement proposals are without prejudice

The mediator is not the judge to decide which party must prevail and he or she must not under any circumstances put undue pressure on the parties to settle. The managing judge must not know and should not seek to know what was discussed

[37] Rule 39(4).
[38] Rule 39(5).
[39] Rule 39(5).

during the ADR procedure. The only report the mediator makes to the managing judge is either that the matter has settled or has not settled. The parties will, if they so choose, present the settlement terms to the managing judge. Details of the settlement proposals must under no circumstances be brought to the attention of the managing judge or the court.[40] Besides, the settlement proposals and anything discussed during a settlement conference are without prejudice and may not be used by any party in the proceedings to which the letters and the conference relate or in any other proceeding.[41]

The 'without prejudice' rule is recognised at common law and is based on the public policy ground that litigants must be encouraged to discuss possible settlement to avoid litigation without being damned for disclosures made in the course of such settlement discussions.[42] It is trite that disclosures made without prejudice are premised on the foundation that they are privileged and shall be covered by absolute secrecy.[43] It was held in *Gcabashe v Nene*[44] that negotiations conducted without prejudice are designed to resolve disputes between the parties and if the negotiations result in a settlement then logically evidence about the settlement and the negotiations leading up to it should be available to the trial court if the settlement is disputed, because the whole basis for non-disclosure had fallen away.

(f) Representation of parties at settlement conference

In terms of rule 39(6), a party that is –

- a natural person must be represented by that natural person, or if that natural person is under a disability, by his or her legal representative;
- a juristic person must be represented by a person duly authorised in writing by that juristic person, other than the legal practitioner of record;

[40] Subrule (2) read with PD 19(7).
[41] Subrule (9) of rule 38.
[42] *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 674A–C.
[43] *Kurtz & Co v Spence & Sons* (1887) LJ Ch 238 at 241; *Coetzee v Union Government* 1941 TPD 1 and *Merry v Machin* 1926 NPD 236.
[44] 1975 (3) SA 912 (N).

- a regional or local authority council must be represented by the chief executive officer of that council or his or her duly authorised representative, who is not the legal practitioner of record; or

- an insured party who intends to claim immunity from an insurer under an insurance policy, must be represented by a duly authorised representative of the insurer with settlement authority, together with the person representing the insured party.

Only one legal practitioner may represent a party at a settlement conference.[45]

A party representative must have the requisite authority and be able, without reference to any other person not present at the settlement conference, to make a final and binding settlement regarding any offer or demand.[46] If the party representative has no such authority and it results in the settlement conference being adjourned to enable him to obtain additional authority, that party may have an order for costs made against it if the ADR procedure fails and the matter proceeds to trial.[47] The same approach is adopted in Australia. There, if a party fails to attend and mediation collapses as a result, the party in default may be mulcted in costs.[48]

(g)Mediator's report

If the ADR procedure fails to produce a settlement, the mediator must in her report state the fact that the settlement discussions have failed, without stating the reason for such failure, except where it is necessary to inform the court for the possible imposition of sanctions if the failure was occasioned by a party representative not having the necessary authority to reach a settlement at the settlement conference.[49] The mediation report must conform to the notes issued by the registrar[50] stating whether the mediation failed or whether it resulted in a settlement. In terms of the

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[45] Judge President's Practice Note 1 of 2004, incorporated in the Registrar's Notes: 3(5).
[46] Subrule (7).
[47] Subrule (8).
[48] *Kullilli People v Queensland* [1999] FCA 1449; BC 9906952, per Drummond J.
[49] Subrule (4) and also Registrar's Notes issued on 23 May 2014 in terms of PD 65, para 5(2).
[50] Registrar's Notes para 5.

Registrar's Notes, apart from stating whether or not the mediation succeeded, the mediation report must disclose to the managing judge any evidence of child abuse not previously reported; the mediator's belief that a child is in need of protection; and whether a party is in danger of bodily harm.[51]

The mediation report may also make recommendations to the managing judge to request an extension of the mediation on good cause shown or for the referral of the dispute for mediation by an accredited mediator with specific expertise.

The managing judge is not obliged to follow the recommendation or conclusion of the mediator; and may make any order as he or she considers appropriate.[52] This power assumes a special significance in matters relating to the custody and maintenance of minor children over whom the court is Upper Guardian.[53] If a mediated settlement is, in the managing judge's view, not in the best interests of the minor child of the marriage, the court may well choose not to give effect to it.

PAYMENT FOR MEDIATOR

In Namibia, mediation is considered to be a necessary diversionary measure to ease the burden on the court. Therefore, it is the court's policy to provide a mediation service in respect of matters where the court *mero motu* directs ADR, or where the parties request it and wish to take advantage of the court's mediation service. The registrar has created an ADR office in both divisions of the High Court,[54] responsible for the co-ordination of the court's ADR service to court users.

If it is a court-connected mediation, the mediator is paid a fee by the court for each session conducted. Some mediators conduct mediation under the court-connected mediation program pro bono to build up mediation practices.

The parties may opt for a private mediation in which case they must agree the fee with the mediator.

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[51] Registrar's Notes para 5(2).
[52] Rule 38(5).
[53] At common law, the High Court is upper guardian of all minor children and the mentally incompetent.
[54] Registrar's Notes dated 23 May 2014, para 1.

Mediators who are Government employees do not get remunerated for acting as mediators. The fees payable at any given time are published by the registrar on the court's official website. Mediators from the private sector are paid per mediation to a maximum of two sessions per mediation. It is also possible for parties to choose a court-accredited mediator but to assume responsibility for paying the professional fees of the mediator.[55] In the latter respect, the parties will agree the quantum and manner of payment of the mediator's fee. A mediator's fee is only due and payable upon the mediator filing[56] her report with the ADR office.[57]

COSTS OF MEDIATION

Court connected mediation is a service provided by the court in the public interest of promoting settlement and decongesting the court system. It is therefore free of charge as far as the Court is concerned. But in terms of rule 38(2), the costs of ADR in *ter partes* is 'in the cause.'

ENSURING MEDIATION STANDARDS

During the period May – June 2014 a total number of 103 court-accredited mediators were trained. During March 2015 an additional 69 persons were trained as court-accredited mediators. Currently we have 156 court accredited mediators who actively mediate. All accredited court mediators need to undergo our customized training.

Accredited court mediators are bound to a Code of Ethics, signed by the mediator before being accredited. Mediators are closely monitored and accreditation is renewed annually. Re-accreditation is based on performance, personal growth and general compliance with the Code of Ethics and the Rules and Policies of the Court. The majority of our mediators are qualified legal practitioners. But we also have law lecturers, architects, clinical psychologists, magistrates and other professionals such as social welfare officers.

[55] Registrar's Notes para 7(2).
[56] Registrar's Notes para 7(3).
[57] As contemplated in the Registrar's Notes para 1.

A mediator must have undergone the court's compulsory customised training to be eligible for accreditation. That is so even if they did mediation training elsewhere.

The training program was designed specifically for the court and it includes mediation techniques and rules of court. For non-lawyers basic civil procedure is included.

At the end of the training every mediator is accredited by the judge-president at a formal ceremony which includes signing of the Code of Conduct.

The mediator is required to submit dates of availability to the Registrar which are then published on the court's website and the parties have access to it. If she fails to she may be dis-accredited by the judge president.

All accredited mediators require the judge president's approval not to do mediations for any length of time.

Continuing professional training conducted by the court is compulsory and an accredited mediator may be removed as mediator if she fails to attend a training program arranged by the court.

Mediators are officers of the court and thus subject to the supervision of the court.

ENFORCEMENT OF SETTLEMENTS

Invariably, the parties ask the court to make the settlement reached at mediation an order of court. However, it is not uncommon for the parties to choose to keep their settlement private. In that case, the court issues an order to the effect that the matter had become settled and is considered finalised and removed from the court's roll.

SUCCESS OF MEDIATION IN NAMIBIA

(a) Saving legal costs

The average litigation costs in respect of a defended High Court action proceeding amounts to anything between N$50000 – N$ 100 000 per litigant, if represented.

With at least two parties in every defended trial, a combined total trial fee to be paid by litigants in respect of a run-of-the-mill defended High Court action is in the order of N$100 000 – N$200 000 (depending on whether the baseline is N$50 000 or N$100 000). During the 2015 and 2016 legal years a total of 1767 court-connected mediations took place in both divisions of the High Court. Of these, 1020 (57, 72%) were successful, representing a minimum saving in the hands of litigants of approximately N$102 000 000. The corresponding revenue expenditure incurred by the State in respect of the 1767 court-connected mediations during the period January 2015 – December 2016 amounted to N$4 409 704 in the form of payment to mediators.

(b) Saving court time

The average High Court action trial takes up approximately 3 court days. Therefore, the 1020 successful mediations conducted under the court's auspices saved the court at least 5301 trial days; in other words, time which can be devoted to other matters. In addition to judge-time saved, considerable amount of court time was saved which, but for the saving, would have been spent on judicial case management hearings, general court administration, preparation, research and judgment writing.

LESSONS

Namibia's experience shows that strong leadership from the top is needed to push reform and to stay the course. It is essential to consult the legal profession on the proposed system and get them actively involved as mediators once the system is implemented. The success of Namibia's mediation program is the result of very active involvement of the practicing profession and the fact that the court provides some remuneration to the mediators so the parties do not carry the burden. We have found that the fact the parties do not have to pay for the mediator under the court-connected mediation process is a great incentive to seek to find an out-of-court settlement to disputes pending in the High Court.