Mediation can cool tempers and limit costs

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BUSINESS DAY
OCTOBER 21 2015

BOTH the private and public sectors are facing an increase in legal spend, court backlogs and unequal access to justice. Mediation can address these challenges.

The international mediation week theme this year is mediation: successes, challenges, trends and the next generation: looking to the past, present and future.

Mediation has a long history in SA as an effective method of resolving labour, family and community disputes. It was used to good effect in the pre-1994 labour dispensation and in the Convention for a Democratic SA (Codesa) process. The expertise of South African mediators is recognised internationally and they are used in volatile negotiations in Northern Ireland, Spain, the Middle East and elsewhere.

Surprisingly, disputants in the commercial arena have been slow to recognise the power of mediation.

Reasons include the inherent conservatism of the legal system; the limited understanding parties and their representatives have of mediation; the vested interests of lawyers; an entrenched view that mediation is a "soft" process that reflects weakness or indecisiveness; and limited mediation information, services and standards.

Decisive steps are being taken to establish commercial mediation.

Judicial support for mediation is evident at the Constitutional Court as it has urged parties to mediate their disputes and has endorsed agreement reached in mediation. The high court has also shown support by ordering parties to mediate and admonishing attorneys who do not attempt to do so. The Supreme Court of Appeal also recently advised parties to mediate.

High court rules require that mediation be considered by parties at pre-trial conferences. Judges are not expressly given the power to require pre-hearing mediation, but following recent judgments, some magistrates have instituted mediation before setting cases down for hearings.

In 2010, the judge president of the Labour Appeal Court issued new initiatives, including allowing judges to issue directives to mediate.

Last year, the minister of justice and constitutional development approved the amendment of rules to provide a procedure for the voluntary submission of civil disputes to mediation in magistrate’s courts.

The Court-Annexed Mediation Project was launched in February in 12 magisterial districts in Gauteng and North West. In the first six months, 400 cases were registered for mediation.

This is a clear signal that court directed mediation, and the recognition by judges of the role and value of mediation in the justice system, is becoming entrenched.

An important source of support for commercial mediation has come from corporate governance directives. The Institute of Directors in Southern Africa enacted its updated code on corporate governance in 2010. It encourages leaders to "ensure that disputes are resolved effectively, expeditiously and efficiently".

The code acknowledges that mediation is often a more appropriate dispute-resolution mechanism that enhances commercial relationships.

The 2011 Companies Act amendment provides that, as an alternative to applying to court or filing a complaint with the Companies Commission, a person may refer a matter either to the Companies Tribunal (a statutory body established to resolve disputes) or to a private dispute-resolution agency. The act and the corporate-governance code, together with the risk of an adverse costs order in the high court, will make it very difficult in future for any party to resist an attempt to mediate disputes in the corporate arena.

These moves towards mediation are a result of the cost of conflict to business and the state. Legal costs, delays, management time and the cost of providing a court system to deal with adversarial conflict presents an enormous financial drain on the economy.

There are other significant disadvantages to adversarial litigation. Court decisions can be unpredictable, and adjudicators are usually limited to declaring one party a winner and one a loser.

Parties must focus on asserting their rights, or perceived rights, and do so publicly — thus damaging relationships irreparably. Litigants who cannot afford the cost are often deprived of access to justice.

Commercial mediation is speedy. In the UK, 70%-80% of mediated disputes are settled within two days, and a further 10%-15% within a few weeks. Outcomes are usually achieved at a much lower cost and parties are able to retain control over the process and its outcomes. This may also have a positive effect on relationships that have deteriorated during the dispute.

Mediation allows the parties to explore creative solutions. Parties can tackle causes of the dispute, and ways to manage complex business interests that have arisen due to it. Effective mediators can deliver outcomes of mutual gain.

Mistrust can be bridged, poor communication rectified and lack of skills addressed. These characteristics make mediation particularly suitable for disputes in which an on-going business relationship may be beneficial, to the parties and broader society.

The most crucial advantage of mediation is that an 80%-90% settlement rate is realistically achievable in the right environment.

The legal and business environment will benefit greatly from these advantages. SA's major trading and investment partners regularly rely on mediation, which requires that we establish a world-class commercial mediation service, able to deal with complex cross-border disputes.

This has several important consequences for SA's dispute-resolution community.

The government and the legal community must establish a duty on disputants to pursue mediation as an alternative or adjunct to litigation. A government pledge to consider mediation to resolve all disputes to which it is a party will propel the programme.

The private sector should be encouraged to do the same. Sound corporate governance strongly dictates this approach, and the Companies Act now makes specific provision for mediation. Amendments to the rules of the courts would assist in building a culture of mediation. The Labour Court may refuse to determine any dispute, other than an appeal or review, if it is not satisfied that an attempt has been made to resolve the dispute through mediation. The high court should follow suit.

The backlog on court rolls requires moves towards mediation. These could include entitling judges to refuse to enrol cases in which no attempt has been made to mediate. Mediation services can be provided by public or private institutions.

The legal sector needs access to mediation advocacy and skills training. Universities should modify their curricula.

Although there is still much to be done, the growth of commercial mediation on the dispute-resolution landscape can offer huge benefits, and SA has a rich pool of mediation experience to build on. There should be nothing standing in its way.