



Mediation in the State Environment

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THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT



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Introduction

THE TRANSFORMATION OF STATE LEGAL SERVICES: What does the Transformation of State Legal Services seek to achieve?

- Redress of past inequalities thus ensuring previously disadvantaged and black female practitioners are afforded opportunities.
- Reformed legal services aligned with our Constitution(fair, equitable, transparent and cost effective services)
- Advancement of the State Attorneys office
- Professional legal services rendered by the state
- Reduced litigation costs
- **Alternate Dispute Mechanisms** being preferred to Litigation



Challenges facing the State :

- The state is sieged with litigation at an alarming cost;
- Exorbitant legal fees have had a debilitating effect on some state departments;
- Numerous matters are being outsourced at great cost due to capacity challenges;
- Once competency levels within the state attorneys and legal directorates are raised legal costs can be reduced;
- Poor practice management systems create delays and ineffective handling of cases;
- Lengthy delays occasioned before a matter can be finalised to the detriment of both the state and the litigant



1. What does Litigation Cost the State ?

Payments to Counsel :

In 2013/2014 almost R 642 000 000.00

In 2014/2015 almost R 639 000 000.00

2015/2016 as at the 30th March 2016 almost R 525 000 000.00 and rising

These costs are not sustainable and have impacted negatively on our economy and state services leaving little for proper services to be rendered. The citizens of our country ultimately bear the brunt of these costs.

In view of the prevailing costs a policy is being developed on Briefing and Fee Parameters to assume control over briefing and the resultant costs of counsel. A policy has been drafted on the use of Mediation in the state environment.



The Importance of Section 217 of the Constitution

- The Constitution underpins the principle that contracts for services must be **fair, equitable, transparent and cost-effective**.
- The ever increasing cost of counsel's fees has placed a significant strain on public funds.

Objective of the Policy on Mediation within the State Environment

- Reduce the high volume of cases brought before courts resulting in exorbitant legal costs to the state
- Unclogging of the court roll.
- The capacity of the state structures to manage such litigation is being compromised due to high volumes. It is in the interest of all parties concerned to have quick and effective resolution of disputes against the State.



Benefits of Mediation for the State:

- Mediation is an essential mechanism that will be instrumental in reducing the exacerbated costs of litigation.
- The training of all State Attorneys on Mediation is being procured to ensure that all State Attorneys are equipped with necessary knowledge.
- Client departments will also be encouraged to attend Mediation training to appreciate the full benefits of Mediation.
- A government pledge on Mediation is essential as it will ensure that all matters are not litigated as a matter of first recourse.
- Penalties should be imposed on parties who insist on litigation when the matter could have been resolved through Alternate Dispute Mechanisms.
- Mediation will be recommended in the strategy on State litigation. The potential of Mediation has not been fully explored by the State



INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002

- Section 3(1) of this Act states that “ no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the state a notice in writing of their intention to institute the legal proceedings in question.
- Section 5(2) states that no process may be served as contemplated as aforesaid before the expiry of a period of 30 days after the notice has been served on the organ of state.



- This 30 day period affords the state a window of opportunity to resort to alternate dispute mechanisms like Mediation for instance.
- This period fast dissipates with no initiative being taken by either the state attorney or the organ of state.
- We have to capitalise on this period and promote Mediation to reduce the costs of litigation and advance the best interests of the state and litigants.
- State attorneys and State Department should investigate and consider the merits of each matter and where a dispute has been confirmed between the parties, the State Attorneys must immediately advise the client departments of the suitability of mediation.



Cases that can be considered for Mediation:

- Motor vehicle accidents;
 - Unlawful arrests and detention;
 - Police assaults and shootings;
 - Malicious prosecutions;
 - Medical negligence matters;
 - Breach of contracts;
 - Claims for eviction;
 - Claims for delivery of movable property;
 - Claims for the transfer of immovable property;
 - Land restitution matters; and
- and any other appropriate matters



The Draft Policy on Mediation

- Serves as a guideline on how state attorneys can implement Mediation
- It outlines how a matter ought to be assessed for suitability of Mediation
- Covers Mediation Fees ,Selection of Mediators, The initiating of court annexed mediation processes, Mediation in Magistrates Courts to which court annexed mediation rules do not apply ,Mediation Agreements and Settlement Agreements



- Mediation as a form of alternate dispute resolution may be something of a contradiction in view of the number of matters that are settled out of court.
- Mediation eliminates the need to adopt an adversarial stance and recognises the rights and needs of both parties.
- Parties have more control over the outcome giving expression to a truly amenable settlement.
- It is in the best interest of the state to advance Mediation in a bid to reduce litigation costs and free up the courts which are under-resourced. Legal professionals are often reluctant to propose Mediation.



- A pledge across government to resolve disputes by Mediation at an early stage must be adopted.
- It is imperative that the state raise greater awareness on the benefits of Mediation.
- Mediation is an instrumental tool to achieve greater access to justice
- The use of Mediation by the state in the 30 day period before processes are served creates prospects for Mediators.
- The time has come for the state to move away from adopting an adversarial approach to resolving disputes and towards Mediation.
- The state has to ensure that public funds are spent judiciously and not frittered away in unnecessary litigation.



Thank you

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