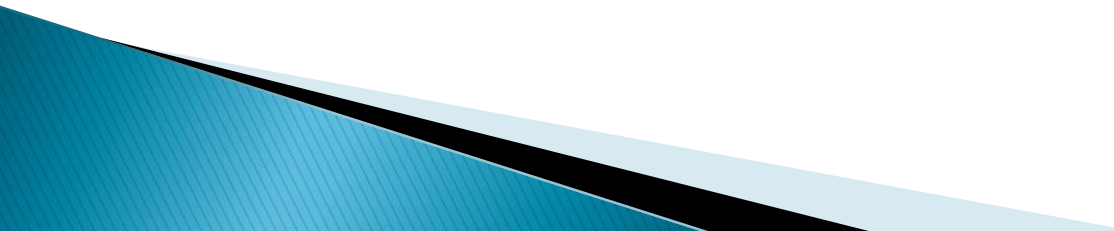


COURT ANNEXED MEDIATION: WHAT HAVE WE LEARNED

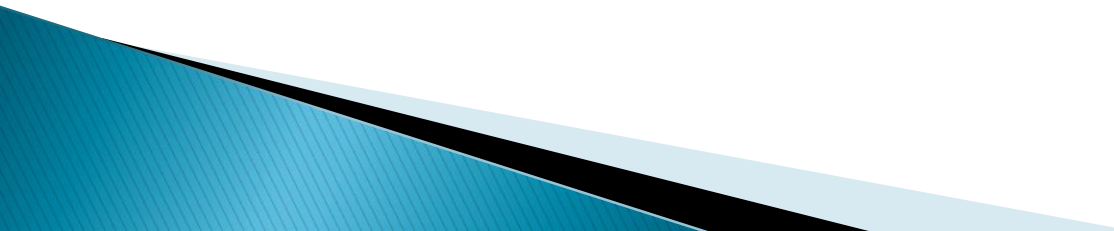
By
Dr. Mohamed Ali Chicktay

- ▶ Good afternoon everyone
 - ▶ What follow is a round up of some of the important points that were brought up in the conference over the past two days.
 - ▶ It is no means a comprehensive analyses of all the papers.
 - ▶ For a more richer experience please read all the presentations
- 

Voluntary/mandatory

- ▶ **Uganda** (mandatory) Sanctions: Non-attendance fee can be imposed.
- ▶ In **Australia** states differ. In some states cost orders can be imposed on parties or their attorneys for not partaking in mediation processes.
- ▶
- ▶ In **Nigeria** mediation is normally voluntary. Although courts do have the power to refer matters to mediation. Matters can be referred to mediation at any stage
- ▶
- ▶ In **UK** there is no court annexed mediation but Some mediation occurs because courts make an 'ADR Order' and if parties don't comply they could be subject to a cost orders. The new Civil Procedure Rules (CPR) allows courts to issue cost orders where parties have conducted themselves unreasonably e.g. if they unreasonably refuse mediation when called upon to do so.
- ▶ -
- ▶ In **SA** mediation needs to be made compulsory. One needs to impose a cost order against parties that fail to mediate in good faith. According to all our foreign speakers this is not unconstitutional. You not denying litigants the right not to go to court. You merely denying them the Right to use mediation before that

Time periods

- ▶ In **SA** the time used to refer matters for litigation are suspended and only resume if the mediation is unsuccessful
 - ▶ Speakers warned that this could be used to delay access to justice.
 - ▶ **IN SA** there should be no suspension of time periods to litigate
- 

COSTS

- ▶ **Uganda** each party bears their own costs.
- ▶ In **SA** each party bears their own cost unless they agree to pay it 50/50 (**John Brand** argued that this is too rigid).
- ▶
- ▶ In **Namibia** state pays mediation costs. Mr. Aina stated that The court must provide some remuneration to the mediators so the parties do not carry the burden. Otherwise this might discourage litigants. Aida stated that in Namibia they have found that the fact they do not have to pay for the mediator is a great incentive
- ▶
- ▶
- ▶ In **Nigeria** parties generally pay the costs. In some MDC's mediators do it pro bono subject to a means test.
- ▶
- ▶ **Nic Swart** from the Law Society suggested that candidate attorneys or attorneys could perform this function as pro bono work in South Africa.
- ▶ In **SA** either the state must pay mediation fees or we must have a means test whereby parties who cannot afford mediation be assisted for free. Candidate attorneys, Universities and clinics need to be utilised more to assist with pro bono work .

Effect of Settlement agreements

- ▶ **Uganda** Full or partial settlement is entered as a consent judgment of the court.
- ▶ In **SA** and **Namibia** Parties can request settlement to be converted into an Order of the Court but this is not automatic.
- ▶ In **SA** settlement agreements should automatically be made orders of courts. It was suggested that maybe this could be extended to settlement agreements entered into outside the formal sector e.g. by traditional leaders, church leader etc. In order to do this there needs to be more training so that those outside the court annexed mediation system learn from the formal structure and mediators within the formal structure learn from traditional mediation method's. We need more research on traditional methods.

Appointment of mediators

- ▶ **Uganda** Uses hybrid system of judicial and non-judicial officers.
- ▶ In **SA** we appoint accredited mediators.
- ▶ In **Australia** and **Nigeria** states differ.
- ▶ In **England** mediation is conducted by private agencies
- ▶
- ▶ **Namibia** has 156 private mediators trained by the government. Their accreditation is renewed every year depending on performance. They are also required to attend continues training. majority of the mediators are qualified legal practitioners. But some are law lecturers , architects, clinical psychologists, magistrates and social welfare officers
- ▶ According to **Hendrik Kotze** from DIASAC) SA needs a system to protect standards and training and make mediation a profession
- ▶
- ▶ According to **Steve Lanken** there is controversy on whether judges should mediate.
- ▶ In SA we should have the option of using private mediators, judges , registrars etc. Its not who does the mediation. Its whether they are given the right training. As we have seen from our African judges they passionate and committed to mediation. In SA we need to educate our judiciary

Mediator liability

- ▶ In terms of the **Australian Civil Procedure Act (NSW)** Mediators are given the same protection and immunity that a judicial officer of the court has in the exercise of his or her functions as a judicial officer.
- ▶ Its not clear what protection is given to mediators in SA

Confidentiality

- ▶ According to **John Brand** In the mediators report he must indicate why the mediation was unsuccessful. This could effect the confidentiality of mediation
- ▶
- ▶ In some **Australian** jurisdictions not all information said in mediation is protected. Information would not be protected if parties consent or if *disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,*
- ▶
- ▶ In **Steve Lanken's** paper he refers to Alan Limbury who states that protection should not be at the total expense of justice. It should not apply
 - where there is a dispute about whether an agreement was reached,
 - where mediator or party misconduct is alleged or
 - where an agreement at mediation is reached as a result of fraud or dishonesty
 - If the Court might be misled,
 - If there are allegations of misrepresentation, oppression or unconscionable conduct.
 - Where a party seeks to sue its solicitor or the mediator for negligence.
 - **In SA we need to develop rules on confidentiality with regard to mediators**

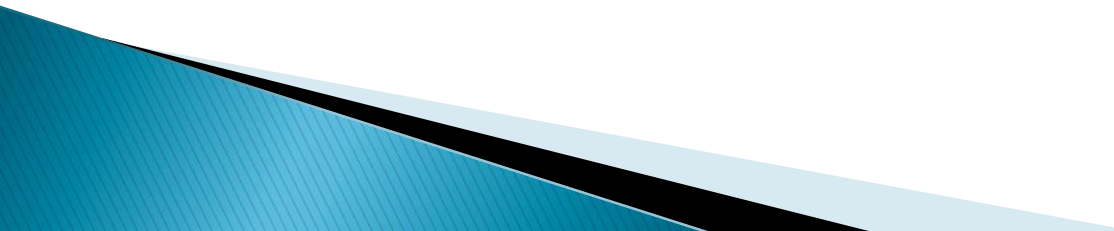
Timing/when to mediate

- ▶ In **SA**, cases can be referred to mediation either by the parties themselves or by the judge
- ▶
- ▶ According to **John Brand** the rule allows parties to refer matters to mediation before trial begins. This is too narrow parties should be allowed to choose mediation at any stage and they should be allowed to appoint their own mediator other even if its not from the list of court annexed mediators.
- ▶
- ▶ **Steve Lanken** argues that while in some jurisdictions 95% of cases are settled one must consider the timing of that settlement. If its settled later it can have a dramatic impact on the cost to the Courts and the parties. in Victoria, the Courts may make two referrals to mediation: first early on to see if the costs can be avoided, and later when fuller information is available.
- ▶ In **SA** we need to identify cases that can be referred to mediation as early as possible so as to avoid costs

Magistrate court/high court

- ▶ In SA court annexed mediation is done through a pilot project in some magistrates courts.
- ▶ In Namibia, Uganda and Nigeria its done the High court.
- ▶ Justice Geoffrey Kiryabwire indicated that if one had begun mediation in the high courts its more likely that the magistrate would comply thereafter. Its more difficult to persuade a higher court to do what's being done at the lower courts
- ▶
- ▶ In SA we need to have court Annexed mediation in all courts.
- ▶ **WE ALSO NEED TO MOVE THE CONTROL OF MEDIATION FROM THE EXECUTIVE TO THE JUDICIARY AS IS DONE IN OUR FELLOW AFRICAN COUNTRIES**

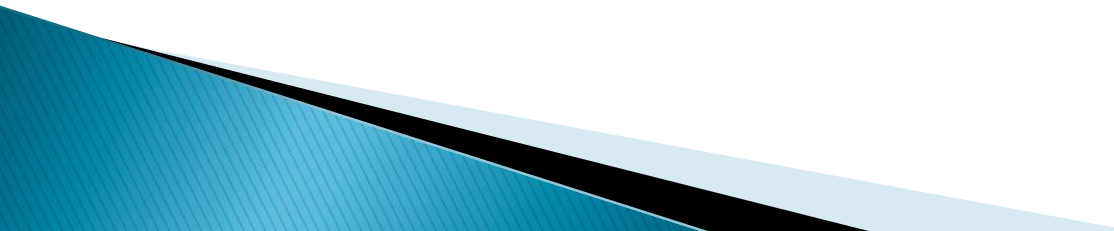
ADR Pledge

- ▶ In **England** 2001 Government made an Alternative Dispute Resolution Pledge. Those who sign it (corporations, law firms, governmental agencies etc.) declare to adopt a systemic approach to dispute resolution with more focus on mediation
 - ▶ **Ms. Varsha Sewlal** from the State Attorneys spoke about the state adopting a pledge
 - ▶ In **SA** a pledge to mediate by the State is welcome. We should encourage the private sector to do the same
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Training the Legal Profession

- ▶ According to **Ms. Felicity Steadman** in the UK people from different backgrounds are trained in mediation especially those from the legal profession.
- ▶ We need to change the mind-set of the profession. Not only must they understand the benefits of mediation. They must also know how to present a case in mediation (as illustrated by **Ebrahim Patelia**).
- ▶ We need to create a new interest based attorney. This must be done from grass roots level at Universities, by law Societies and private agencies
- ▶ According to **Nic Swart** from the Law Society the legal profession is changing. Lawyers are being trained in mediation. They need to be client centred and have an ethical duty to advise their clients on the best process for them which may include mediation.
- ▶ **Mr. Aina** indicated that one needs greater consultation with the profession

Contractual Obligations

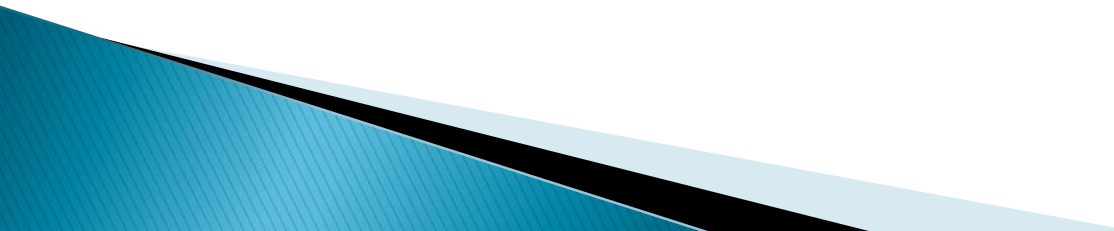
- ▶ According to **Felicity Steadman** in **England** mediation clauses are increasingly found in contracts.
 - ▶ In **South Africa** we find that there are more referrals in contracts to arbitration than mediation
 - ▶ In **SA** more contracts need to have clauses requiring parties to refer disputes to mediation prior to litigation.
- 

The need for better infrastructure

- ▶ In **SA** the rules tend to overburden the registrar and clerks.
- ▶ **Mr. Aina from Nigeria** indicated that we need to start caring about what happens in the kitchen and not only the food. In other words don't only concentrate on the judges and mediators but support registrars and clerks who have more contact with the public.

In SA Registrars and clerks need to be given better infrastructure, training and support.

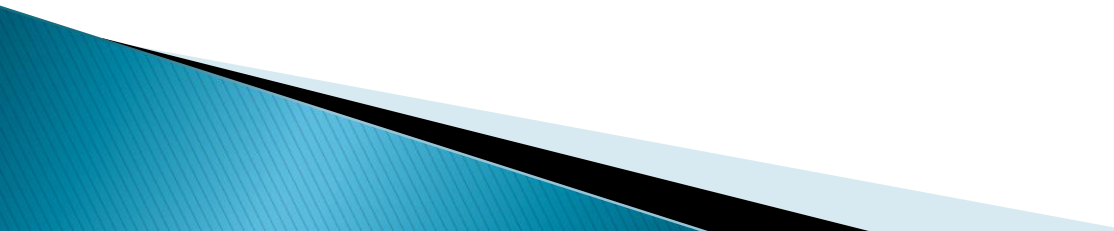
Changing Terminology

- ▶ In **SA** where parties have not begun pleadings they must exchange a statement of claim and a statement of defence.
 - ▶ According to **John Brand** these terms are adjudicative and rights based and they should have rather been called mediation statements, which is more mediation friendly.
 - ▶ Maybe this should be changed to the **Namibian** approach where the plaintiff and defendant must exchange a settlement proposal.
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Saving time and money.

- ▶ According to Deputy Chief Justice **Tileinge Damaseb** In Namibia court connected amounted to a saving to litigants of more than N\$ 100 000 000 and it provided at least 2157 trial days to other cases not being susceptible to amicable resolution
- ▶
- ▶ **Ms. Varsha Sewlal** from the State Attorneys indicated that the state spent R 642 000 000.00 In 2014/2015 on legal counsel
- ▶
- ▶ According to **Mr. Aina** from Nigeria the average lifespan of a case could be up to 10 years. This excludes appeals which could take another 6 years.
- ▶ The benefits of mediation in saving time and money creates an ethical obligation on the SA government to extend it to all courts

Educating the public and students

- ▶ **Ms. Varsha Sewlal** spoke about the states responsibility in creating awareness amongst the public
 - ▶ **Mr. Nic Swart** and **Mr. Ebrahim Patelia** indicated that we need to increase education on mediation at law schools
 - ▶ **In SA we need more meaningful marketing and training at all levels**
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Other Dispute Resolution options

- **Laurence Boule suggested alternatives other than mediation that could be used together with mediation**
- **Pre-filing DR**– parties engage in preliminary dispute resolution activities before filing proceeding
- **Judicial case management**– the increased managerial and supervisory role for judges in the progression of litigation from its earliest commencement
- **Court-referred DR**– Referrals are made to court personnel, such as registrars or to mediators nominated by the courts, and in yet others to mediators agreed to by the litigants
- **Conclaves of experts**– the experts first providing a joint statement on which they agree, those where there is no agreement, and the reasons for the latter. In relation to areas of disagreement they give conjoint evidence in round-table conversational style in which judges, lawyers and litigants can participate. The outcome is as much consensus as possible which requires the judge to adjudicate on a significantly lesser range of matters,
- **The less adversarial trial**– It involves initial education for parents on the proceedings, early provision of information from parents to the court, flexible methods of evidence collection and relaxation of evidential rules, and the writing of reports by family consultants

SUMMARY

- ▶ IN SA there should be no suspension of time periods to litigate
- ▶ In SA mediation needs to be made compulsory. One needs to impose a cost order against parties that fail to mediate in good faith. According to all our foreign speakers this is not unconstitutional. You not denying litigants the right not to go to court. You merely denying them the Right to use mediation before that.
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- ▶ Terminology of the rules need to be changed to be more in tone with mediation e.g. replace statement of claim and statement of defense with mediation plans

SUMMARY

- ▶ In SA we should have the option of using private. mediators, judges , registrars etc. its not who does the mediation. Its whether they are given the right training. SA we need to develop rules on confidentiality with regard to mediators
- ▶ In SA we need to identify cases that can be referred to mediation as early as possible so as to avoid costs
- ▶ In SA we need to have court Annexed mediation in all courts.
- ▶ We also need to move the control of mediation from the executive to the judiciary as is done in our fellow African countries
- ▶ The states undertaking a pledge to mediate is welcome. The private sector should also be encouraged to adopt a pledge.
- ▶ The legal profession need to be trained in how to present cases at mediation.
- ▶ The consumer needs to be educated on the benefits of mediation
- ▶ In SA more contracts need to have clauses requiring parties to refer disputes to mediation prior litigation.
- ▶ In SA Registrars and clerks need to be given better infrastructure, training and support.
- ▶ In addition to mediation we can use other processes e.g. Pre-filing, Court-referred, Conclaves of experts, The less adversarial trial.

- ▶ Thank you for attending the conference

Dr. Mohamed Alli Chicktay
(mohamed.chicktay@wits.ac.za)