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ENGINEERING AND IMPROVING SERVICE DELIVERY THROUGH HUMAN RESOURCES IN THE PUBLIC SECTOR

ADR IN THE PUBLIC SERVICE

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1. Introduction

I have been asked to look at why ADR should be advocated in the public service. To do this we need to understand:

- ADR and its applications
- the advantages of ADR
- how ADR may be introduced in the public service

2. What is ADR

“ADR” is usually used as an acronym for alternative dispute resolution, which is defined as any process or procedure other than adjudication by a presiding judge in court – litigation, in which a third party participates to assist in the resolution of issues in controversy. Theorists have suggested that we speak of “appropriate” rather than ”alternative” dispute resolution. This is because the aim of introducing, ADR is to provide parties in conflict with an alternative dispute resolution process, one which may be more suitable for engaging with the conflict, other than the court system. We are accordingly encouraged to view Alternative Dispute Resolution as a

system more appropriate for the end user, that is the parties in dispute, than as a system design to replace the traditional justice system.

The main types of ADR processes include negotiation, mediation and arbitration. Each of them includes numerous “hybrid” processes that can be ranked in terms of the time and resources needed to use them and reduction of the parties’ control.

3. What are the applications of ADR

ADR has found its home in many different applications and different disciplines. With reference to South Africa, ADR and more specifically mediation, has found a home in labour and family disputes. In terms of the Labour Relations Act of 1995, disputing parties have to first attempt to conciliate their disputes prior to resorting to arbitration or litigation through the Labour Court. In family matters, family advocates work with councillors to mediate disputes where children are involved. The Children’s Act expands this to include mediation in the drafting of family plans. The National Environmental Management Act requires parties to mediate their disputes prior to resorting to litigation. The Land Claims Commission utilises the services of mediators to attempt resolution of land claims disputes. Attempts are being made to encourage the use of mediation in resolving commercial disputes. Most commercial agreements are concluded with provisions requiring the parties to attempt resolution through mediation prior to referring the dispute to the formal litigious system. But it is only in the labour and family arenas that mediation or ADR has been truly institutionalised.

To give you a sense of the global trend in using ADR to improve access to justice and transform workplace relationships, lets take a quick look at the Global Arena:

- *Burkina Faso and Mediation in the Commercial Courts*

  In 2006 the legislature considered the passage of a bill establishing commercial courts with a system of voluntary mediation. The principle is that a judge will be obligated to advise the parties of the opportunity for mediation. Currently mediation and arbitration services are offered by CAMC-O, an organisation established and currently funded by the Chamber of Commerce.

- *Nigeria and the Multi-door Court House: Lagos*

Lagos and Abuja now have a multi-door court house system. Here parties to a dispute have the option of either going to court or utilising the service of ADR practitioners professionally trained and funded by the government. The system is replicates the manner in which a number of states in America have institutionalised ADR.

- Uganda

In Uganda the Arbitration and Conciliation Amendment Bill was passed in May 2008 mandating the government to fund arbitration and mediation processes.

- *Village Mediation Centres – Malawi*

Malawi has recently benefitted from an internationally funded programme which saw the establishment of “village mediation centres”. Grass-roots intervention promotes access to justice and the speedy resolution of disputes. One chief of a village was reported as stating: 'In Malawi we are fortunate that we don't have the conflict experienced by so many other African countries. With this Village Mediation Programme, we now know that we will never have such conflict'.

- Arab world

In the Arab world, mediation on the tribal and village level has for centuries been the traditional method of settling disputes, and the same method has, in modern times, been adapted for settling political and military issues within and between Arab states. In many Middle Eastern and North African societies, intermediary services are performed by a mediator who is a person of respect. In Iraq and among tribal groups in Morocco and Algeria, such a person may even come from a special descent group with high status. Generally,

mediators in the Arab world must be seen as neutral and impartial, and of high status so that neither of the parties can exert undue pressure on such person.

- China

Turning to the Asia-Pacific, the People's Republic of China has long practiced mediation to resolve interpersonal, community and civil disputes through People's Conciliation Committees and court conciliation. The mediators are often retired village leaders with high prestige. More recently mediation has been introduced to manage environmental and interjurisdictional disputes between government entities which have been given increasing degrees of autonomy from the central government.

- Latin America

Latin American indigenous and Hispanic cultures have used mediation historically and they currently use it to address a range of disputes. Argentina is in the process of developing family, labour-management and commercial mediation, with Brazil having a thriving mediation movement.

- United States

The FMCS is a United States government agency whose primary responsibilities are to promote sound and stable labour-management relations, and to minimise the effects of strikes and lockouts through mediation of disputes between companies and their unionised workforces. Its services are available to all companies and the unions that represent their workforces. In any collective bargaining setting, its services are free.

This conference shifts our focus to consider the ways in which we can engineer and improve service delivery through human resources in the public sector. We will

therefore concentrate the remaining portion of this paper on the application of ADR in a human resource context.

I am sure we are all aware of conciliation, arbitration and its application to disputes concerning the employment relationship. Where an employee claims she was unfairly dismissed for misconduct or was forced to resign because a department had made continued employment intolerable, such employee may refer a dispute to one of the bargaining councils governing dispute resolution in the public service. Here a commissioner will attempt to conciliate, or mediate, the dispute and where it is not resolved, the dispute will be arbitrated or adjudicated in the Labour Court. But there are many questions to ask about the path the dispute has travelled toward resolution. Let us use a practical case study to illustrate the point:

Facts:

- ✓ Cindy Khumalo appointed manager of Informatics – previously employed by Wisebank as a manager of the IT Department
- ✓ 10 operations officers report to Khumalo – Jan Theron one of the ten
- ✓ Khumalo – new broom “sweeps clean” – introduces new procedures
- ✓ Theron not used to change –worked for the department for 20 years - knows everything there is to know about how things should be done.
- ✓ Theron had applied for Khumalo’s job but did not get it – “you know, affirmative action, nepotism and all those policies of the new government”
- ✓ Theron decides not going to listen attentively to new instructions - from a woman to top it all - continues to do things “the old and the right way”
- ✓ Khumalo senses Theron’s reluctance - puts it down to envy for not getting her job - calls Theron to a meeting – tells him how this works in the private sector –he must adapt to new procedures being introduced – to achieve service delivery targets – does he need training?
- ✓ Theron finds manner “cheeky” – of course no training required – says he will try but knows he wont
- ✓ Eventually Khumalo issues written instruction for Theron to follow new procedures

- ✓ Theron decides he will try but then realises he does not know how – he needs training – will not ask for it – undermining his position – decides he will lodge a grievance against Khumalo for bad management style
- ✓ Khumalo issues second written instruction – Theron still not following
- ✓ Khumalo approaches labour relations to advise – told to institute disciplinary proceedings
- ✓ Grievance committee investigates – tells Theron he must comply, nothing wrong with Khumalo – Theron defiant and determined to fight the disciplinary action
- ✓ Employer follows formal route, appoints chairperson for hearing
- ✓ PSA representing Theron – request chairperson's recusal – allegedly a friend of Khumalo
- ✓ Chairperson only met Khumalo once – no training in chairing hearings – accepts he must recuse
- ✓ Hearing set down 2 months later – new chair appointed
- ✓ Theron advised – plead not guilty – hearing takes 3 months to complete
- ✓ Theron dismissed – lodges dispute at the GPSSBC
- ✓ Conciliation – department given no mandate to settle – certificate issued
- ✓ Arbitration – commissioner finds Theron guilty but sanction of dismissal too harsh – reinstates Theron with back pay.
- ✓ Theron reports for work – Khumalo is the manager at the IT Department – she has pinned on the wall a list of the ways things are to be done – Theron slumps behind his desk – only 10 years to retirement!!

So, let us consider the path that this conflict has travelled along and ponder the following:

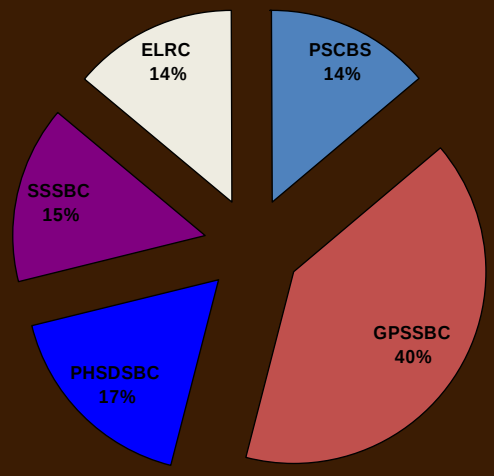
- What role did Khumalo play in managing the conflict positively?
- Is there anything she could have done differently?
- What suitable outcome did the grievance procedure yield?
- The conflict ended in dispute – could this have been avoided? How?
- Why should we consider doing things differently?

These questions can be answered by initially considering whether there are any benefits to ADR generally, and then with application to this case specifically.

4. Why ADR in the Public Service

The Public Service is employer to approximately 1.3 million employees. The following tables reflect the most recent statistics from the PSCBC's annual report regarding disputes:

Number of cases received by the various public service bargaining Councils, in relation to the total number of cases received by all the Councils.

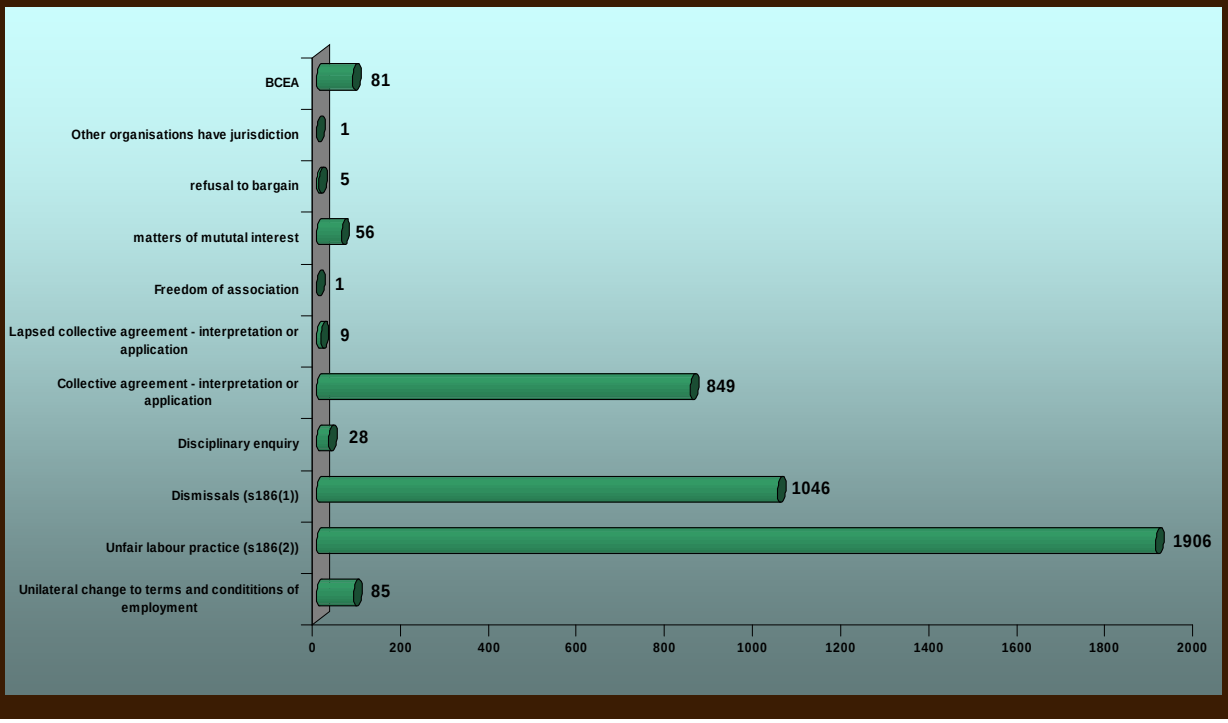


CASES REFERRED			
Councils	**2007/08**	**2008/09**	**Variance**
PSCBC	524	549	5% increase
GPSSBC	1410	1640	14% increase
PHSDSBC	687	686	0.5% decrease
SSSBC	637	603	5% decrease
ELRC	955	575	40% decrease
Total	**4213**	**4053**	**4% decrease**

CONFLICT DYNAMICS

TYPES OF DISPUTES REFERRED

Classification of disputes as depicted by the CMS report provided by the CCMA and as per the ELRC annual report



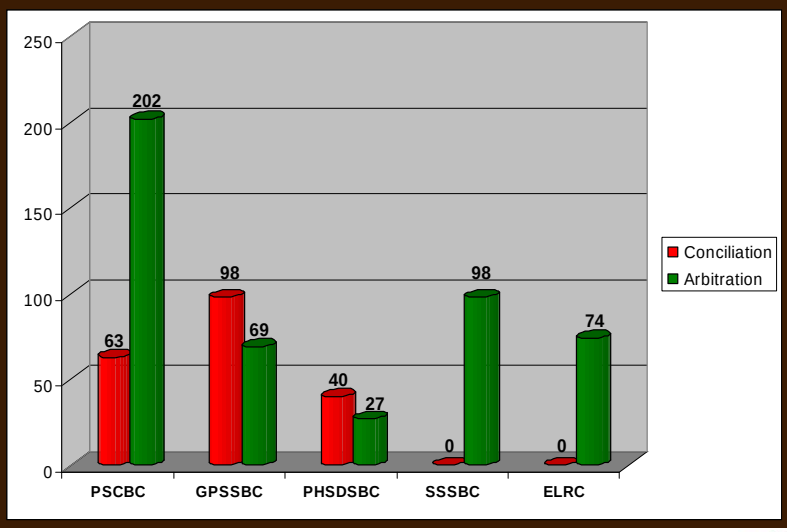
CONFLICT DYNAMICS

A range of outcomes of different processes in the individual Councils.

OUTCOMES					
	PSCBC	GPSSBC	PHSDSBC	SSSBC	ELRC
Not settled and completed	53	227	57	-	368
Not settled and completed non-attendance	-	5	2	-	-
Out of jurisdiction	90	336	107	16	75
Settled	35	13	25	21	35
Settled by parties	6	82	16	-	-
Postponements (incl postponed sine die)	27	8	38	185	75
Withdrawals	222	65	35	72	39
Arbitration awards rendered	23	125	335	268	40
Default awards	3	-	-	-	-
Settlement agreement made an arbitration award	1	-	-	-	-
Dismissed due non attendance	1	14	2	21	12
Other (unrecorded)	86	590	388	-	-

CONFLICT DYNAMICS

The number of disputes settled at conciliation and arbitration per sector



CONFLICT DYNAMICS

Let us consider the impact of employment disputes from the following perspectives:

- ✓ Cost: Financial and Human Resource Allocation
- ✓ Relationships and Performance

Cost: Financial and Human Resource Allocation

The voluntary services offered by the Advisory Conciliation and Arbitration Service in the United Kingdom (ACAS) have conducted a number of studies regarding the cost of employment disputes, a study which might not have automatic applicability to the South African system but is certainly illuminating when considering the impact of disputes from a cost perspective. Here are some of the statistics:

- The Gibbons report estimated that the average cost of defending an employment tribunal (equivalent of a case heard by the CCMA/bargaining councils) was £9000.
- One simple sum – one tribunal saved amounts to a £9000 saving.
- Employers spend on average £20,000 on responding or defending a claim of unfair dismissal/unfair labour practice
- Formal disciplinary enquiries take up an average of 351 days of management and HR time per annum
- Poorly managed conflicts have a cost attached to them: the average employee spends 2.1 hours a week dealing with conflict. For the UK alone, that translates to 370 million working days lost every year as a result of conflict in the workplace
- Reducing the incidence of grievances from one for every 355 to one for every 400 employees would produce savings in management time of nearly £19 million.
- Reducing the incidence of disciplinary cases from one in every 158 to one in every 175 employees would produce £53 million savings in management time

- Workplaces with trained mediators experienced a halving in the number of disciplinary cases and a reduction of more than a quarter in the number of grievances
- Whereas employees spend an average of a day per month dealing with conflict situations, for HR professionals that jumps to half a day per week for almost half (48%) of them and, for 12%, the equivalent of an entire day a week. A significant proportion of HR time is being spent on managing and resolving workplace conflict.

In summary, the ACAS report suggests that where mediation is utilised, savings can be made in two respects: savings on legal fees and employees/employers time savings.

Relationships and Performance

- Output costs – unresolved conflict harms productivity, working relationships and team functioning
- Individual impact – when conflicts are not addressed effectively, emotions can run high and individuals suffer. Impact: more difficult to calculate but no less serious, particularly on staff engagement levels.
- Over a quarter of employees (27%) have been involved in a workplace disagreement that led to personal insults or attacks, while a similar percentage (25%) have seen conflict lead to sickness or absence
- Absenteeism, sacking, project failure – one in five employees (18%) say that people have left the organisation because of conflict; 16% say that people were fired and one in ten (9%) even attribute project failure to disagreements between those involved
- Disengagement – the destructive emotions experienced by those involved in a conflict at work don't simply vanish. Over half of employees (57%) have left a conflict situation with negative feelings, most commonly demotivation, anger and frustration. Workers in the UK are most likely to feel this way, with 65% admitting to negative emotions from conflict, while only 41% of Brazilians have this problem.

- Conflict reduces cooperation and a sense of “team” when it is poorly handed. Two thirds of employees (67%) have gone out of their way to avoid a colleague because of a disagreement at work, which is likely to create a distraction and de-focusing of the team, at the very least. While smaller numbers of people take more extreme measures in the face of conflict, the cost to teams and organisations of even one in ten employees failing to attend meetings (10%) or taking multiple days of (9%) to avoid conflict situations quickly becomes significant in terms of lost productivity.

We can only assume that whilst the exact percentages may differ, the impact of conflict on the workplace has a similar negative effect on the South African public service in terms of financial and human resource cost, and in terms of damaging relationships and hampering productivity.

We must also acknowledge that the SA Public Service faces very particular challenges in this regard. The Case study we looked at is not simply based on facts – it is also typical of a situation in which two systems, the old and the new, are struggling to reconcile themselves in a single workplace. There are the challenges we are only now taking on in bringing people of diverse cultures together – providing ample opportunities for misunderstandings and a lack of empathy to arise. Finally, there is the enormous burden of service delivery where resources are sometimes inadequate, and the public and private pressure this brings to the public service.

Conflict itself follows a generic path, from latent conflict to expressed, in the form of a dispute. It is far easier to resolve a conflict at its latent stages, where the parties to the conflict have not entrenched their positions or become too attached emotionally to the underlying causes of the conflict. Yet the first time we really sit up and pay attention is when an employee lodges a dispute. Imagine the impact if we were given an opportunity to engage with the conflict at its latent stages, alternatively be given an opportunity to mediate as managers. We would certainly save the public service enormous amounts of money, as well as human resource allocation in chairing and representing departments at enquiries or hearings. We would also be able to work on relationship building and ensure ongoing sustainability in this regard.

So how can we do this?

5. Introducing ADR in the Public Service

There are a number of mechanisms that can be used to effectively introduce ADR, more specifically mediation, in the public service.

Managers as Mediators

"Whenever people work together, there will always be the risk of conflict. It is an unfortunate but unavoidable consequence of the pressure and personal proximity that most jobs bring. Generally these are minor problems but, if left unresolved, conflict can be extremely damaging to long-term working relationships. And any managers who want to maintain a happy, motivated and high-performing team need to learn to be skilled and confident mediators." Skills File, Mediation, ILM

When a person in a position of authority acts as a neutral agent to bring disputing parties together to resolve differences, it is called managerial mediation. Managerial mediation should be developed as a core competency of a manager's position. But not every manager can mediate. Therefore potential managers should decide if they are able to perform mediation as an aspect of their job. And existing managers should only take on the task if they are suitable. The best managerial mediators are respected for their reasonableness, their sound judgement, and their ability to achieve consensus without forcing solutions on others. Managerial mediators are most effective when they have good communication skills and understand the mediation process. In cases of existing managers it may be advisable to choose carefully who should embark on such a program. By far the most important aspect of any workplace mediation process is the need for strict confidentiality. Managerial mediators should not be compelled in any way to divulge information provided in confidence to them unless that information concerns the violation of a criminal law.

If Theron had called upon a managerial mediator to talk to Khumalo about how he was feeling the moment she arrived on the scene, and Khumalo in turn was able to express her frustrations to a colleague confidentially, there was certainly more

chance for them to find a way forward together. If Khumalo was trained in effective communication skills and positive conflict management, she may have felt more comfortable talking to Theron about the situation, having the skills to guide the conversation toward resolution. The cost saved in the employer not having to defend the claim for unfair dismissal is obvious. Less obvious is the relationship-building aspect which would be completely lost in any traditional dispute resolution process. Theron returning to work under order from an arbitrator or judge has no positive meaning for Khumalo. The same problems will reoccur continuously. If a managerial mediator had the opportunity to work with Theron and Khumalo, helping them to find an outcome which both could view as positive, this would be far more beneficial to the Department.

A snapshot of the skills a manager would need to mediate effectively would reveal an ability to[1]:

- Listen Reflectively
    - Meet somewhere private and neutral where conversations won,t be interrupted
    - Ask questions to establish detail and understand what exactly the issue is and what is important for each person concerned. The funnel technique is a useful way of doing this. It involves moving steadily from open questions to more closed ones:
        - Start with open questions
        - Probe with an open prompt
        - Focus down with closed questions
        - Verify
    - Demonstrate understanding
    - Stay impartial

- Explore Options
    - Ask people what they need from the other parties involved, rather than what they think of them

[1] Excerpt from Skills File: Mediation; ILM

- Ask them to think in detail about how they might get these needs met
- Plan how to handle the hurdles that might get in the way
- Encourage them to come up with win/win options where appropriate

Peer mediation

Some workplaces train a pool of employees in mediation skills so they may help disputants resolve their differences. This is distinguished from managerial mediation in that the peer-mediator has no power over the disputants and imposes no solutions. Peer mediation emphasises resolving the conflict in question rather than improving the conflict management skills of workplace participants. Peer mediation is usually less formal than an external mediation. It can be a simple set of conversations between the peer mediator and the parties in conflict. It is a quick and efficient option for managing conflicts as soon as they arise. As peer mediators develop a sense of confidence in their ability to have a positive effect on their workplaces, this can improve employee morale. On the down side, peer mediators are not always perceived as being neutral. This limits the effectiveness of this option. Where senior management is involved in the conflict, it is difficult to find an internal or peer mediator who is viewed as impartial. In these circumstances an external mediator is preferable. Moreover, when using human resources professionals as mediators, care must be taken to ensure that they are acting purely in this capacity – and are seen to be doing so - rather than as representatives of the employer in either perception or reality.

Dispute Systems Design

The public service is heavily regulated by collective agreements stipulating the manner in which disputes are to be handled. While the introduction of a peer mediator or managerial mediator programme will not contravene any of these agreements, the public service should be urged to embark upon a comprehensive review of dispute resolution procedures. Such a review should entail a dispute systems design element that considers whether the introduction of pre-claim conciliation/mediation may be applicable. Pre-claim conciliation is a voluntary process where parties are able to seek the services or a mediator prior to lodging a claim. In fact, it would be interesting to determine whether a voluntary mediation centre specifically for the public sector would not be worth establishing. Similar to

ACAS in the United Kingdom, parties would be able to approach the mediation centre to seek resolution of the dispute prior to engaging the formal and more litigious process.

Conclusion

The cost and human relationship aspects considered above provide a powerful argument for the introduction of ADR in the public service. But a recent judgement from the High Court suggests that a strong push for mediation and its application to disputes will be embarked upon by our courts. In the unreported case of Brownlee v Brownlee handed down in August 2009 the honourable Judge Brassey penalised the attorneys for not having encouraged the parties to attempt mediation prior to approaching the court. The attorneys had to limit the costs they sought to recover. In passing judgement on the issue, Brassey AJ said the following:

"Mediation can produce the most remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisors, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.... Nudged by a facilitative intermediary, I have little doubt that [the parties] would have been able to solve most of the monetary disputes that stood between them. ... In short, mediation was the better alternative and it should have been tried. On the facts before me it is impossible to know whether the parties knew about the benefits of mediation, but I can see no reason why they would have turned their backs on the process, especially if they had been counselled on the matter by the attorneys. What is clear,

however, is that the attorneys did not provide this counsel ... For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients."

I wonder how long it will be before an employer is penalised for not attempting to resolve a dispute before it was referred to a bargaining council for resolution? I wonder how long it will be before Khumalo and Theron's failure to attempt resolution is an act for which an employer may be held accountable? But, it is not the threat of what might occur were ADR not implemented that should be our driving force. It is the proven benefits and inherent value which ADR holds. We should all work together to alter fundamentally the manner in which disputes are currently being dealt with.