A discussion of the new mediation provisions in the South African Magistrates Courts Rules

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1 The general approach of the new Rules

I start by broadly supporting the stated intentions in the Preamble, both for the courts and as to what mediation seeks to achieve. It is in principle good for the courts to pronounce that mobilising mediation will move South Africa "*towards achieving the delivery of accessible and quality justice for all*". How this is actually intended to be done is not really defined. Is it by removing cases capable of settlement from the lists to enable judges to concentrate on cases worth trying? Or does mediation itself provide better access to and quality of justice than the courts? I would never argue the latter as being true. It is important that the civil courts are as good as they can possibly be, and that mediation broadly operates in their shadow, as I have argued in my paper "*Efficiency in civil justice and the right place for mediation"* . What I both agree and assert is that a good civil justice system will make it as easy as possible for parties to choose their route to settlement or trial, with trial being the last resort. This entails having mediation services readily available at the right time and cost as well as easy recourse to the courts if necessary.

The words "*to introduce ADR preferably court-annexed mediation or the CCMA kind of ADR into the court system*" read oddly. Mediation is not normally an integral part of any court system, even if it stands beside it and in close relationship to it. But it needs to be clear that judges are not mediators, and very few mediators world-wide are employees of the court service in which they mediate (England's Small Claims Mediation Service is an exception to that). Mediators are not judges nor are judges necessarily good mediators. And the separateness of mediators from judges and mediation from the courts is because the mediation process requires privacy to enable parties to speak to each other. There cannot be a chain of communication, however informal, from mediator to judge in a case which does not settle. Judges have statutory authority and broadly can order people to do things they don't want to do, possibly even court mediators, and it could well subvert the process if this remains even theoretically possible. So to imply that court-annexed mediation is "into" or "within" the court system from that point of view may be unsound.

Just to conclude the point, judges do not do the same job as mediators and each exercise different skills which hardly overlap. Judges have the skill to hear and analyse evidence and legal submissions and to decide cases for parties before them. Mediators manage a process in which the parties make their choices and (as the Rules emphasise) cannot and will not make decisions as to facts and law or decide the credibility of anyone attending. Indeed they will not advise any party: that is the role of the party's lawyer, both as to the strengths and weaknesses of any position, the advisability of settling on terms offered and the drawing up and effectiveness of the settlement agreement. Judges decide matters for those who cannot decide: mediators manage a process designed to help people decide things for themselves on

professional advice, and if the decision is not to settle, they return to the litigation process to invoke the help of a judge.

There is also a hint in the language used of monopoly and control of mediation by the court-annexed service. This is unrealistic, if indeed it was ever the intention of these Rules. No one can at any time be prevented from having settlement discussions, whether one-to-one, between lawyers in correspondence or face to face, or using a third party like a mediator. If these occur before proceedings are issued and lead to a binding agreement, there is an enforceable contract which, if broken, the courts must be prepared to enforce. They surely cannot refuse to do so if such discussions were not conducted within Rule 5. And if parties to issued litigation choose to mediate privately outside the scheme and reach an agreement, can the court decline to make that agreement an order of the court? There is a significant amount of commercial mediation in South Africa already, and presumably all current mediated settlement agreements can be enforced speedily through the courts. It surely cannot be the intention to compel all mediations through the scheme if the claim happens to qualify for issue in the Magistrates Court (presumably by virtue of the amount claimed being within its jurisdictional limit).

I conclude this section by pleading that you should use throughout these Rules the word "mediation" and <u>not</u> use "alternative dispute resolution". These are rules about mediation provision and nothing else. It confuses and complicates thinking, and has done in the UK, especially where there may be unwarranted fears that the process concerned is truly alternative in the sense of competing with a civil justice system by somehow leading to undesirable extra-judicial decision-making which excludes access to the courts in default of agreement. There is of course a direct route back to court if a mediation does not produce a full settlement. So if (as it seems you do) you are talking about mediation as the preferred process, then say so!

2 The nature of the Scheme

What does a disputant get under these Rules that they do not currently have, and which enhances a litigant's access to mediation?

Mediating before issue of proceedings
Presumably if an informal approach by one party to the other has been rebuffed, the party keen to mediate can apply in writing on Form 1, setting out the nature of the dispute and identifying potential party/ies to the clerk or registrar of the relevant court, who will:

- contact all potential parties and require attendance at a bi/multi-lateral meeting within 10 days to see if mediation can be agreed;
- explain before or at that meeting the nature and purpose of mediation;
- explain the costs involved

Then, if mediation is agreed by at least some of the parties (or if only two, those two parties) , the court officer will

- try to get agreement as to who the mediator should be, and in default of agreement appoint a panel mediator (presumably who is not conflicted out in any way);
- get the parties to sign a standard form mediation agreement then or before the mediation date;

- confer with the mediator over date and venue;
- forward the mediation and the parties' position papers and other related documents to the mediator, these being due 10 days after signing of the mediation agreement;

This means that a party who is keen on mediation has a fall-back in terms of generating a meeting run by a court officer to try to ensure that a mediation happens. Once in the hands of the court officer, the procedure is clear if mediation is agreed. Currently if one party continues to refuse the other party's invitation to mediate (or any advice to mediate from the court officer), there is presumably no sanction clearly available, unless *Brownlee v Brownlee* is felt to have created one in theory. What the Rules are silent about is what happens if anyone refuses to mediate after the court-run meeting. I return to this later, as the same question arises with mediation proposals and recommendations after issue.

One feature of this scheme is the presumed existence of a tariff for mediator's fees, so that if a private mediation would cost too much, the tariff fee might be regarded as more acceptable.

Also I note that there is no suggestion that the cost of representing a party at mediation can later be treated as recoverable costs. This is certainly not the case in England and Wales, where the parties can either opt that each party bears their costs of representation, or (the normal default position) that the party's legal costs of preparing and attending the mediation plus the mediator's fees are costs in the case/cause, and can be allocated as such by a judge in default of agreement between the parties at any later hearing, whether the mediation settles the case or not. There are arguments on both sides. Taking costs out of the equation simplifies things, but it may mean that a slice comes off the damages of a successful plaintiff in a personal injury case which they need for compensation, and it can dis-incentivise parties from using the mediation process in which they might never get a defendant found liable for their litigation costs to pay their mediation costs as well, wholly or in part, even though incurring such costs contributed either to settlement or were an integral part of progressing through the litigation. If the costs of negotiating settlements are normally paid as part of a claimant's costs, there is no logical reason why their mediation costs should be payable, since mediation is merely another form of settlement negotiation.

Mediating after proceedings have been issued

Much the same applies here, save that not only one party can seek to invoke the scheme by applying to the court, but the court can of its own motion "*enquire into the possibility of mediation and accord the parties an opportunity to refer the dispute to the clerk or registrar to facilitate mediation*. A mediation meeting must then be summoned within ten days by the clerk.

At the end of any mediation, if it does not settle, the mediator must report this fact to the court, when presumably the litigation resumes or is started without further ado. If it does settle at mediation, the mediator is to report the outcome to the court in five days.

I have separate comments to be made about the detail of the content of the mediation agreement, and the role of the mediator both during the mediation and also in facilitating drafting of any settlement agreement which I will set out later. Meanwhile I discuss the general implications of the above summary of the scheme as created by the rules.

3 General implications of the scheme structure

3.1 What if neither party wants to mediate or the lawyers collude to avoid mediation?

The earliest the court can do anything about that is once proceedings have been started, and I do not know how early any Magistrates Court case goes before a judge for review. It might even not be until trial, if the court has no management responsibilities under which the parties are required to attend court for directions. Is this acceptable, or should some kind of duty to consider mediation before issue of proceedings be created (and can this be done by Rule without primary legislation?) If the consequence of not doing this is a possible costs sanction the answer should be (as it is in England) Yes. Mediating for the first time during a trial is a very wasteful piece of timing, as no costs will be saved.

3.2 How "voluntary" will mediation be?

In England judges have repeatedly bemoaned failure to mediate in cases where the costs seriously outweigh the damages, such as small building disputes. Where one party has offered and the other refused or ignored the invitation but "won" at trial, judges have been ready to penalise such a refusal by varying the normal favourable order for costs. If a court expresses even a tentative view that mediation should be tried, what will happen if one or indeed both parties decline? *Brownlee* suggests a sanction, novel even to English ears, of placing a cap on what a lawyer can charge his own client. Is there room for a warning that an unreasonable refusal to mediate may lead to a costs sanction? I very much fear that unless the fear of a costs sanction lurks for lawyers who fail to look into mediation properly, the existence of a scheme which they can ignore with impunity will make no difference whatsoever to "*accessible and quality justice for all.*" People – parties and lawyers alike - act out of self-interest. Litigation lawyers in the UK have not generally seized hold of the idea that to get an early settlement of a difficult case through mediation means a happy client and a case concluded and paid for, thus enhancing their cash-flow. Some (not all) lawyers believe that the longer a case runs the more they can legitimately earn, whatever the interests of the client may be. That kind of lawyerly self-interest can only be diverted by warning that, if mediation is unreasonably declined, costs may not be awarded even if that case is won.

In England, there is authority for the proposition that if a judge's recommendation to mediate is just ignored, that **of itself** may well attract a costs sanction.

3.3 The role of the clerk or registrar

The earlier draft Magistrates Rules provided for a named Dispute Resolution Officer (DRO) who would (if the scheme were to be taken up as much as hoped) have been a very busy person with a number of aspects to the job which will require time and training to fulfil well. With the job devolving on a doubtless already very busy clerk or registrar, for whom management of mediation processes will presumably be only part of a wider administrative job, there must be a risk that such people will be side-tracked by other court duties. Will they be trained well enough to understand mediation and what it can offer? Will they have the status to seem authoritative to lawyers whom they have to persuade? Will they be free from any possibility of pressure to disclose confidential mediation information to the Magistrate in that court. And will parties believe that such a Chinese Wall will operate to keep confidential

information from a judge trying a case? Are the limits on what the court officer must report on conclusion of a mediation (settled or not) clear and unambiguous? Will the their files be secure from other access within the court system? What will be the relationship between the Registrar or clerk and the judge who tries an unsettled case or was going to try a case settled through mediation? In the event of a dispute over whether a mediation could or should have been convened, can the relevant court officer be compelled to be a witness either by a party or even a judge?

These are important questions which need thinking through before the scheme settles in too far. I would comment in passing that in England there has been a sad history of court clerks assigned to run court-annexed mediation schemes who have simply been too pressed by other responsibilities to fit this extra job in efficiently. With the Court of Appeal and the Mayor's and City of London Court mediation schemes, both have contracted out administration to a reputable independent mediation provider who can answer questions about mediation easily, know how to put together mediation agreements and arrange venues and mediators (even from an alien panel), and can preserve separateness from the court administration that is perceived to be effective by users. They are paid by taking a proportion of the mediation fee. Whether such an independent alternative is possible or desirable in South Africa I cannot tell. But to train and pay clerks and registrars to run successful administration in a number of courts is going to be essential and costly. They have to conduct meetings with reluctant or under-informed lawyers, who will be keen not to be shown up in the presence of their clients, explaining the benefits of mediation in general and the Court-annexed Scheme in particular. If this is a small part of a much fuller job, they will find it very challenging if they have not experienced mediation personally as a process. Having trained mediators world-wide, I can testify to the fact that the only way to teach mediation well to people is to get them to do it. Reading a book and answering a test simply will not qualify anyone to speak authoritatively about it to others, especially sceptics.

4 The legal assumptions behind the scheme

I fully understand why the scheme has been set up by Rule, thus avoiding the need for primary legislation. I just want to make the following points, which may or may not be able to be dealt with by Rule alone:

- I am assuming that the law of evidence and confidentiality in South Africa, coupled with the view likely to be taken that mediation agreements are enforceable and not merely "agreements to negotiate" mean that the secure environment vital to the success of any mediation once the mediation agreement has been signed and the mediation is under way are all safe and sound. What goes on at a mediation needs to be legally sacrosanct. This is an area where changes would probably need primary legislation, which I hope will not be needed.
- There is a general consensus among the English judiciary now that to bring pressure to bear and even to order a party or parties to mediate will not offend constitutional rights (whether the European Convention on Human Rights or any other such document). US citizens are very demanding on human rights and yet mandatory mediation exists in many States. In truth, mediation does not obstruct the right to a "*fair public hearing*" , to quote s.31 of the South African constitution as set out in the

Preamble to the Rules, as parties are always free to leave the process without settling and revert to the courts.

- I have commented in my other paper *Efficiency in civil justice and the right place for mediation* about the likely need to build in the possibility of costs sanctions for unreasonable refusal to mediate. Such concepts were introduced in England by rule and court precedent (see *Dunnett v Railtrack* and *Halsey v Milton Keynes NHS Trust* and other cases, full details of which I can furnish if required. No primary legislation was required: indeed there is hardly any primary legislation about mediation in England and Wales.
- I have seen the mediation agreement in the appendix to the rules. This does a brave job of explaining the mediation process and the mediator's role to lay users, plus regulating the financial aspects of the mediation and also actually seeking to give legal definition to these matters. It seeks to serve the purpose of guide, terms and conditions, legal contract and code of conduct for mediators. This is a demanding range of objectives, and in future it may be wise to seek to have several different documents to achieve each task separately. As to the important task of defining the legal parameters of the mediation process, it very properly provides for:
    - Identification of the parties, and the mediator; though I believe a brief but clear identification of the dispute itself on the face of the agreement would be wise, rather than just referring to the documents which define it.
    - A commitment to try to settle, coupled with freedom to withdraw.
    - Contractual confidentiality undertaken by all parties and the mediator about all mediation discussions;
    - Confirmation of "without prejudice "status for all mediation discussions;
    - An undertaking by each party **not** to call the mediator as a witness in any subsequent proceedings; and provision for immunity from suit for the mediator

I suggest that two more points might usefully be included when the form is revised in future, based on my English experience of developing model mediation agreements for CEDR, all of whose model documents are generally available for use and adaptation on its website www.cedr.com/about-us/modeldocs . Firstly, a warranty should be included that those attending have authority to settle. This is not always complied with in England, though problems about this seem to be dissipating in practice. No enforcement of such a provision has been tried in the UK, unlike in the US. I note that such a warranty is set out in the Settlement Agreement form in the Rules, but while this is good and wise, it might be even wiser to make it a condition in the mediation agreement as well.

Secondly, it is wise to provide that nothing binds the parties until and unless reduced to writing and signed by each party (not by the mediator). Rule 82(6) provides that "settlement agreements must be reduced to writing and signed by the parties", but does not go so far as to say that the process is non-binding until terms are put into such a signed written agreement. Nor does Clause 15 of the Mediation Agreement do more than say that the parties agree to reduce terms into writing. We have had significant case-law on this topic in England which clarity on this topic ought to prevent. Absence of signed writing should invalidate the effect of any settlement agreement in my view.

5 Other detailed comments on drafting

- In relation to Rule 80, I would comment:
    - A mediation is not strictly *"inquisitorial"* (see 80(1)(c) : a mediator is not there to find anything out, let alone make a ruling on what emerges after investigation: rather the task is to manage the process which enables the parties to find out **each other's** positions and interests off the record, and to assist them in negotiating their own settlement in the light of what emerges. Information exchange is for the mutual benefit of the parties and not for the mediator, who cannot compel answers to any question posed.
    - In that respect I am not sure what is meant by the mediator encouraging "*full disclosure"*. I cannot second guess (as mediator) what a party can or might disclose. I can encourage them to be open, but they must decide whether to respond, as is rather implied by 80(1)(g).
    - Mediators should try to avoid being involved in drafting settlement agreements: this is a job for each party's lawyer who takes responsibility for the advice on which the settlement is based and for compliance with any requisite formalities. Mediators try to avoid any possible responsibility for such matters, as to do otherwise risks their neutrality and independence, and forces them in effect to become an adviser to either or all parties. Added to which, mediators are not normally insured against giving negligent advice, unless they are practising lawyers as well!

- On Rule 81, this appears to operate as a stay of proceedings. Stays are sometimes ordered in England and Wales to create a mediation "window", though they are not by any means always sought or ordered, simply to avoid the impression that litigation can be obstructed by mediation. Mediations can be set up extremely quickly if necessary. There is no harm in this provision so long as it does not attract that kind of criticism and stays are not too long. There has been some controversy in Europe over whether any relevant limitation period should be suspended between start and finish of a mediation, and Clause 14 of the Mediation Agreement appended to the Rules wisely draws attention to the fact that prescription periods are not suspended by the mediation process. Even so, it may be necessary to specify when a mediation is taken to have ended, so as to define the length of the stay visualised by Rule 81

- On Rule 82 , will a mediated settlement (whether proceedings have been issued or not) be capable of swift enforcement if one party defaults, either (before proceedings) by applying for summary judgment based on the clear terms of the settlement agreement, or (after issue) based on a consent order giving a direct route to enforcement without the need to issue fresh proceedings? Is this clear from Clause 3 of the Settlement Agreement?

- I have no comment on Rules 85 and 86, save to say that standards should (and can be) high, with a good cadre of commercial mediators and good provider organisations in South Africa. As to lawyers at mediations, I am glad to see that they are welcome at scheme mediations. My heart sinks when I mediate with one or more unrepresented party, and I very rarely do. Mediators cannot advise individual parties as to their rights and interests – this is a job for their lawyer. Any myth that mediation takes work away from lawyers needs to be exploded, They are vitally necessary as advisers in mediations and what they do there is entirely different from what mediators do. It

is different from their normal litigation work, but it is very stimulating and satisfying (I speak as one who represented clients at mediation quite frequently when in private practice, and also from seeing how lawyers work in mediations since). Lawyers are highly adaptable beings and I hope that given time and the opportunity to learn the slightly different skills of being effective representatives of their clients' interests at mediation, they will come to embrace it willingly and without needing the threat of sanctions to persuade them to use mediation. Until then, however, I think you may find that sanctions are a necessary backdrop to the introduction of the scheme, otherwise they may simply ignore it and let it wither on the vine.

- I have also noted the Settlement Agreement and notification of outcome forms in the Appendix to the Rules. I have commented on the former above, and have nothing more to add. My only concern is what form a report might take when a mediation has not settled and how detailed that report might be. Form Med 15 visualises that the mediator will set out why a mediation failed. This is not really appropriate when confidentiality should apply even when a party unreasonably leaves the process or (as even the mediator might privately think) declined sensible settlement terms. Parties must remain free to be unreasonable within the confidential surroundings of a mediation,. Courts must trust mediators to do their best with unreasonable parties. The comfort is that it is very hard for a party or lawyer who is unreasonable within a mediation to resist continuing to be unreasonable outside it, when judges can readily assess and penalise such attitudes!

I close by saying how much I have enjoyed this analysis from afar, and can only hope that the occasional comment may be helpful in setting the course into the exciting future. The very existence of these Rules marks a very significant step in the development of a proper and constructive relationship between civil justice and mediation in South Africa, which I cannot claim to have been achieved yet in England and Wales.

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