CHAPTER 3.1

MANDATORY MEDIATION IN SOUTH AFRICA: ARE THERE CONSTITUTIONAL IMPLICATIONS?

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1. Introduction

When we reflect on recent initiatives to promote mediation in South Africa, which are inevitably gaining ground in the civil justice system even if not at the pace we would like, we cannot help reflecting on the extent to which public and professional misconceptions about the process of mediation continue to obstruct its development to its full potential within that system.

This article is a response to concerns, whispered rather than spoken out loud, that compulsory or 'mandatory' mediation in the civil justice system is (or may be) unconstitutional because it violates the right of access to courts. Although whispered, the concern appears to be one of a number that has impeded the progress of initiatives to introduce mediation formally into the civil justice system in South Africa. The effect of this has been that our civil justice system continues to totter behind modern best practice, long accepted in the US, Australia, England and Wales, and in many other jurisdictions on the African continent.

While mediation is frequently bundled together, conceptually, with arbitration as a process of 'alternative dispute resolution' or ADR, the process itself is different in a fundamental way. It involves, in its classic version, facilitated negotiation in which the parties themselves attempt to agree on the outcome of a dispute. This contrasts with arbitration, in which a privately appointed dispute resolver decides, much as a court would, what outcome should be imposed on the parties, and they are obliged to accept this.

Both mediation and arbitration, however, reflect, and are deeply rooted in, a desire for co-operative, collaborative, and consensual dispute resolution as far as possible. Where consensus cannot be reached on an outcome, adjudication may take place through an agreed process by a jointly selected third party.

2. The possible introduction of mandatory mediation

It seems to us to be likely that litigants will in future be faced with increasing pressure to consider or to participate in mediation in consequence of new rules of court, or the initiative to introduce more active judicial case management throughout the court system, or the risk of adverse cost orders resulting from unreasonable refusal

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to participate in mediation.[2] Parties will inevitably face increased judicial awareness of mediation. Since this may be regarded, in whatever way pressure is brought to bear, as introducing a new procedural step for a party prior to commencement or continuation of litigation, we must consider on what grounds this might be considered objectionable.

Is there a basis for contending that this imposes an unjustifiable limitation on the right of access to courts? What distinguishes this from the substantial body of other rules for the conduct of proceedings in civil courts?

3. Is mandatory mediation unconstitutional?

The place to start is with the Constitution itself.

3.1 The Constitution

Under the heading 'access to courts', s 34 of the Bill of Rights[3] says this:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The language, as Budlender points out,[4] appears to be derived from art 6 para 1 of the European Convention on Human Rights. The European Convention has been held to contain two inter-related rights: a right of access to court and a right to a fair hearing once a person is before court.[5]

For present purposes we assume that we are considering disputes that can be resolved by the application of law. Section 34, like its European counterpart, confers the right, first, to have such a dispute decided by a court (or where appropriate other independent and impartial tribunal or forum); and second to have the dispute 'decided in a fair public hearing'.

The argument that we intend to develop is that there is in fact no legitimate constitutional objection to mandatory mediation. There is, however, a genuine concern about the impact that compulsion may have on the philosophy that underpins mediation. It is a concern that has been grappled with in other jurisdictions that have actively promoted mediation in the civil justice system. A further concern is the risk that compulsion may pose to weaker, possibly indigent, parties to litigation who may feel intimidated or bullied into settlement on unfavourable terms. On the whole it seems to us, having regard to existing barriers to access to justice for the poor, that the introduction of professionally supervised mediation presents fewer risks than unstructured settlement discussions that may otherwise take place between the parties.

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2 Following the lead in the UK, in the cases referred to in note 12 below; and in South Africa in, for example, *MB v NB* 2010 (3) SA 220 (GSJ).

3 Chapter 2 of the Constitution of the Republic of South Africa, 1996.

4 'Access to Courts' (2004) *SALJ* 339–341.

5 *P, C and S v United Kingdom* (2002) 35 EHRR 31 at paras 89 and 91, referred to in Budlender (note 4) at 339.

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3.2 Does mediation limit or exclude access to court?

Mediation is a process that does not produce a *decision* in the sense contemplated in s 34. It is a process, whether initiated voluntarily or compulsorily, that involves negotiation with a view to the parties reaching agreement. It can only produce a resolution of the dispute if this is agreed. Absent agreement, there is no barrier to a party seeking resolution of the dispute before a court, and it is difficult, at first blush, to see how it can be contended that access to court is either limited or excluded. We should, we suppose, acknowledge the difficulty that may be experienced in understanding, within our current legal framework, a compulsory process that has voluntary outcomes. In a 1987 paper on collective bargaining[6] Clive Thompson described collective bargaining in circumstances where there was a legal duty to bargain as 'a process grounded in compulsion but consummated in voluntarism, a paradox not readily appreciated anywhere.'

On closer inspection, the constitutional concerns appear to be based on each of the two separate but related components of the s 34 right.

First, if mediation is introduced in rules of court as a necessary step that must be taken before a litigant has access to court,[7] this may (in common with a wide range of other procedural rules) be construed as a limitation of the right.

Second, if a court orders mediation in the course of pending proceedings, something which cannot sensibly be construed as a barrier that limits or precludes *access* to court (the litigants are, after all, already before court), this may impact on the fairness of the hearing.

3.3 The imposition of mediation as a procedural step

A person contending for the unconstitutionality of mediation rules on the ground that they limit access to courts would presumably contend that mandatory mediation imposed as a necessary procedural step in other areas of our law also unjustifiably limits the right of access to courts in those areas. A good example where this is the case is labour law, where mediation is a compulsory step (in the form of conciliation) before any claimant can initiate unfair dismissal or unfair labour practice proceedings under the Labour Relations Act.[8]

We have counted some 50 Acts currently on the Statute book that provide for mediation in one form or another. For the most part these are empowering or facilitative of mediation and impose no express sanction for failure to attend or participate in the mediation. The Labour Relations Act requires a party to request mediation, but does not insist on that party attending it.[9]

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6 'On Bargaining and Legal Intervention' (1987) 8 *ILJ* 1.

7 There are a large number of procedural rules that do limit access to court. These include rules that set time limits on claims, the requirement of written pleadings, time limits within the rules, discovery, the requirement that a pre-trial conference be held and minute filed, and so on. See *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC). We refer to these in more detail further below.

8 Act 66 of 1995, s 191.

9 See *NUMSA v Driveline Technologies* [2000] BLLR 20 (LAC) at paras 65–81. But note that the provisions of s 157(4) of the LRA empower the Labour Court to refuse to determine a dispute if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation (mediation).

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4. The approach to mandatory mediation in other jurisdictions

In Commonwealth jurisdictions the most frequently referred to authority that calls into question whether mediation can or should be *imposed* is the decision of the UK Court of Appeal in *Halsey v Milton Keynes General NHS Trust.*[10] In this 2004 judgment the Court of Appeal was concerned with the question of when a cost sanction should be imposed against a successful litigant on the grounds that it had refused to take part in 'an alternative dispute resolution (ADR)'. Following the ground-breaking decision in *Dunnett v Railtrack,*[11] some uncertainty had arisen as to the approach that should be adopted, and this had been the subject of consideration by courts in the UK on a number of occasions.

After strongly approving the 'general encouragement of the use of ADR' that had followed the Woolf reforms, and after referring to the fact that UK courts had given strong support for the use of ADR in general, and mediation in particular,[12] the Court of Appeal went on to consider a question not directly at issue in the proceedings, namely whether a UK Court has the power to order parties to submit their disputes to mediation 'against their will'. Dyson J then said the following:

> 9. We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to 'particularly careful review' to ensure that the claimant is not subject to 'constraint': see *Deweer v Belgium* (1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an *agreement* to arbitrate, it seems to us likely that *compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:
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> > 'The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.'
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> 10. If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the

[10] [2004] EWCA Civ 576.
[11] [2002] EWCA CIV 303, [2002] 1 WLR 2434.
[12] In cases such as *R Cowl v Plymouth City Council* [2001] EWCA CIV 1935, [2002] 1 WLR 803, *Dunnett v Railtrack Plc* supra and *Hurst v Leeming* [2001] EWHC 1051 (Ch).

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expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.

11. Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far. The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court's role is to encourage, not to compel. The form of encouragement may be robust.[13]

The extract from the UK civil procedure 'white book' endorsed by the court is a little surprising, for at least two reasons.

First, although it is possible for parties to agree that ADR processes should produce non-binding outcomes, that characteristic is seldom regarded as key to the effectiveness of ADR processes in general. ADR processes are regarded as effective because of their *process* flexibility rather than because a non-binding outcome can be produced.

Second, the imperative language used (that the court 'cannot' direct that such methods be used) does not follow from the assertion, widely accepted, that ADR procedures are most effective because they are voluntarily entered into. The proper conclusion is that a court with the power to direct mediation should be slow to do so where one or more parties does not volunteer or agree to mediation. The impact on mediation of imposing the process on unwilling parties gives rise to legitimate concerns that must be understood and addressed. But it does not follow, in our view, that if one party remains 'intransigently opposed to ADR' it 'would be wrong for the court to compel them to embrace it'.

Before we refer to the Australian and US experience that bears this out, it is useful to consider the 'more robust' form of encouragement which the court (in *Halsey*) did not consider to be objectionable. The following passages are also from the judgment in *Halsey*:

30. An ADR order made in the Admiralty and Commercial Court in the form set out in Appendix 7 to the Guide is the strongest form of encouragement. It requires the parties to exchange lists of neutral individuals who are available to conduct 'ADR procedures', to endeavour in good faith to agree a neutral individual or panel and to take 'such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen'. The order also provides that if the case is not settled, 'the parties shall inform the court what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed'. It is to be noted, however, that this form of order stops short of actually compelling the parties to undertake an ADR.
31. Nevertheless, a party who, despite such an order, simply refuses to embark on the ADR process at all would run the risk that *for that reason alone* his refusal to agree to ADR would be held to have been unreasonable, and that he should therefore be

[13] *Dunnett v Railtrack Plc* (note 11) at 9-11

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> penalised in costs. It is to be assumed that the court would not make such an order unless it was of the opinion that the dispute was suitable for ADR.

By contrast, a 'less strong' form of encouragement of mediation is reflected in a standard form order widely used in clinical negligence cases in the UK, which runs along the following lines:

> The parties shall consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when considering the appropriate costs order to make.
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> The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable.

The Court of Appeal in *Halsey* considered this to comprise a 'lesser form of encouragement', and to have –

> the merit that (a) it recognises the importance of encouraging the parties to *consider* whether the case is suitable for ADR, and (b) it is calculated to bring home to them that, if they refuse even to consider that question, they may be at risk on costs even if they are ultimately held by the court to be the successful party. ... a party who refuses even to consider whether a case is suitable for ADR is always at risk of an adverse finding at the cost stage of litigation, and particularly so where the court has made an order requiring the parties to consider ADR.

It seems to us that the *dicta* in *Halsey* that suggest that a UK Court does not have the *power* to make an order compelling parties to attempt mediation is founded on the wrong assumption that mediation could, like arbitration, be construed as a replacement of some kind of the right of access to a court. The court appeared to bundle mediation, because of its more broad association with 'ADR', with arbitration or other forms of third party determination. But no 'waiver' of a right of access to court could reasonably be construed in a compulsory mediation order.

Furthermore, whatever the law on this point in Europe, our Constitutional Court has made it very clear that an agreement to arbitrate does not amount to a waiver of the right of access to courts. In the majority judgment in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*,[14] O'Regan ADCJ made a number of findings that are of relevance for present purposes. First, the primary purpose of s 34 of the Constitution is to ensure that the state provides courts or, where appropriate, other tribunals, to determine disputes that arise between citizens.[15] Second, s 34 of the Constitution does not have direct application to private arbitration. This distinguishes it from compulsory arbitration such as may take place, for example, under the LRA. Third, if parties go to private arbitration and have chosen not to exercise a right under s 34, the arbitration proceedings are still regulated by law and by the Constitution.[16] It follows that –

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14 2009 (6) BCLR 527 (CC).
15 Paragraph 200.
16 Paragraph 210.

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> the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under section 34. They have instead chosen not to exercise their right under section 34. I do not think, therefore, that the language of waiver used by both the European Court of Human Rights in *Suovaniemi* ... and by the Supreme Court of Appeal in *Telcordia* ... is apt.[17]

An objection to mandatory mediation resulted in recent constitutional litigation in Italy. A decision of the Italian Constitutional Court in October 2012,[18] reported on widely at the time,[19] struck down that country's mandatory mediation provision. The impugned provision was what is referred to as a legislative decree,[20] introduced by the Italian government in 2010 under the authority of a 2009 law[21] which had authorised the government to regulate civil and commercial mediation.[22]

The legislative decree identified a range of disputes that could not be brought before a civil court unless the plaintiff had attempted mediation. One of the primary declared aims of introducing mandatory mediation in Italy was to reduce the enormous backlog of cases pending before Italian courts – it was reported that the average time for concluding civil claims in the courts was some eight years.[23]

The introduction of mediation caused a significant growth in requests for mediation. The obligation to attempt mediation rested on the plaintiff, with the defendant having no duty to appear at mediation. The costs of mediation were prescribed by a schedule and reflected the value of the dispute. If the respondent failed to turn up, only a nominal fee would be charged to obtain a certificate that mediation had been attempted.

The main complaints against this form of mandatory mediation appear to have been that it resulted in a delay of up to four months before court proceedings could be initiated, and that it increased the overall cost of litigation. This, so representatives of the legal profession argued, violated the rights of citizens to bring or defend claims.[24] This complaint, it seems to us, could properly be characterised as an objection to the imposition of a new procedural step before a litigant may gain access to court.

Although the decree was struck down by decision of the constitutional court in December 2012, this was not because the objections succeeded on their merits. The court in fact decided the matter on the grounds that the government had not been expressly authorised by the empowering provision to introduce the compulsory pre-trial mediation system.

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17 Paragraph 216. The CCMA, by contrast, is a forum of the kind contemplated by s 34, and must satisfy the requirements of independence and impartiality, and must conduct fair public hearings.

18 Award no 272/2012 of the Italian Constitutional Court.

19 See for example at http://www.lexology.com/library (search mandatory mediation in Italy); http://www.jamsinternational.com/mediation (search 'mandatory mediation in Italy').

20 Law no 28/2010.

21 Law no 69/2009, which had been enacted to give effect to the 2008 European mediation directive.

22 See generally (eds) G de Palo & M Trevor *EU Mediation: Law and Practice* (OUP, 2012) ch 15.

23 De Palo & Trevor (note 22) at ch 15.06.

24 In fact, flourishing mediation centres were believed to pose a significant threat to the general business of a majority of Italian lawyers: http://www.internationallawoffice.com/newsletters (search 'mandatory mediation italy').

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In September 2013 a fresh decree was introduced, with significant modifications but retaining compulsory pre-trial mediation in a listed category of cases.[25] A withdrawal from mediation or failure to accept a mediator's proposed solution may attract an adverse cost order. And parties must be assisted by counsel in mediation. This last provision, strongly advocated by the legal profession during the legislative process, appears to have eliminated the previously spirited objections to the impact of the provision on litigants' rights, and that question, raised in the earlier constitutional litigation, has been left unanswered in Italy.

5. Does the imposition of a new procedural step limit the right of access?

Does the imposition of a new or additional *procedural* step before court proceedings may be instituted produce an unfair or unreasonable restriction on a party's right of access to court?

Procedural rules that impose limitations on access to courts are commonplace. In *Giddey*[26] the Constitutional Court (O'Regan J) confirmed that rules of this kind do not, without more, offend, the s 34 right:

> [15] Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. This important right finds its normative base in the rule of law. As Mokgoro J stated in *Chief Lesapo v North West Agricultural Bank and Another* –
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> 'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance.'
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> [16] But for courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence. A common example is the rule regulating the notice of bar in terms of which defendants may be called upon to lodge their plea within a certain time failing which they will lose the right to raise their defence. Many of the rules of court require compliance with fixed time limits, and a failure to observe those time limits may result, in the absence of good cause shown, in a plaintiff or defendant being prevented from pursuing their claim or defence. Of course, all these rules must be compliant with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of section 36 of the Constitution. If the limitation caused by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint. The rules may well contemplate that at times the right of access to court

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[25] See, for example, the discussion by Rafal Morek, K&L Gates *Mandatory Mediation in Italy – Reloaded* (9 October 2013) available at http://kluwermediationblog.com/2013/10/09/mandatory-mediation-in-italy-reloaded/; Martin Svatos Mandatory Mediation Strikes Back (November 2013) available at http://www.mediate.com/mobile/article.cfm?id=10428; Massimiliano Di Marino 'The return of the Italian mandatory mediation procedure' (21 September 2013) available at http://www.internationalcommerciallawblog.com/2013/09/the-return-of-the-italian-mandatory-mediation-procedure/.

[26] *Giddey NO v Barnard and Partners* (note 7).

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> will be limited. A challenge to the legitimacy of that effect, however, would require a challenge to the rule itself. In the absence of such a challenge, a litigant's only complaint can be that the rule was not properly applied by the court. Very often the interpretation and application of the rule will require consideration of the provisions of the Constitution, as section 39(2) of the Constitution instructs. A court that fails to adequately consider the relevant constitutional provisions will not have properly applied the rules at all.

Applying this approach, there seems to us to be little prospect that our courts would find that a requirement of mediation before proceedings are initiated *by itself* violates the right of access to courts. There has been no suggestion of this concerning the dispute resolution process in the LRA, despite the issue having been quite specifically ventilated to Labour Appeal Court level – though admittedly without a constitutional point having been taken.[27] Nor has there been any challenge to the constitutional validity of s 157(4) of the LRA, which empowers the Labour Court to refuse to determine a dispute that is otherwise properly before it if it is not satisfied that an attempt has been made to resolve the dispute through mediation.[28]

To the extent that a new procedural requirement does limit the right of access to courts, this would be found to be a justifiable limitation *provided only that it* could be shown, first that this does not lead to a significant delay in the resolution of disputes; and second, that the mediation process did not involve costs that might preclude litigation by indigent parties.

This is particularly so when one considers the public interest considerations that powerfully support the introduction of mediation into the civil justice system. Here, too, it is useful to reflect on experience in other comparable jurisdictions.

New civil procedure rules were introduced in 1999 in England and Wales, aimed at dealing with concerns about access to justice, delay in the civil justice system, and cost. Fundamental objectives of these reforms were: to ensure that cases could be dealt with in a manner which, as far as practicable, ensured that the parties were 'on an equal footing'; to save expense; to deal with cases in ways that were proportionate to the amount involved, the importance and complexity of the case and the financial position of each party; to ensure that cases were dealt with expeditiously and fairly; and to allot an appropriate share of court resources to cases.[29]

Although these overriding objectives were addressed primarily through the introduction of active case management, the introduction of the civil procedure rules had a profound effect on the conduct of civil litigation. Tony Allen[30] identifies a clear correlation between efficiency in the civil justice system and the growth of mediation. He summarises the principal effects of the reforms in England and Wales as having been: a significant reduction in time from the issue of proceedings to trial, and a reduction in congestion of trial rolls; the elimination of evidential ambush; a very significant reduction in trivial interlocutory issues; a reduction in adjournments; and a marked reduction in the number of settlements reached 'at the doors of court'.

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27 See *NUMSA v Driveline Technologies* (note 9).

28 Mediation is referred to in the LRA as 'conciliation', but the processes are for all practical purposes the same.

29 CPR Part 1.

30 'Efficiency in Civil Justice and the Right Place for Mediation' (unpublished, 2013) and see Tony Allen, *Mediation Law and Civil Practice* (Bloomsbury, 2013) especially chs 1 and 4.

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Significantly, Allen records a further consequence of these reforms as having been a huge increase in mediation, with judges now showing significant confidence in the use of mediation to assist in achieving the overriding objective of the civil procedure rules, including in reducing court rolls in cases that can settle, narrowing the issues between parties, reducing late settlement 'at the doors of court' and ensuring that cases that go to trial genuinely need the judicial time and skill allocated to them. There are now regular instances of judicial advice being given to parties to attempt mediation to secure more flexible outcomes than can be achieved at trial.[31]

In Australia, too, mediation has frequently been ordered under civil procedure rules in circumstances specifically targeted at avoiding delay, avoiding unnecessary costs, and promoting the public interest in efficiency of the court system.[32]

In summary, there seems to us to be little doubt that public interest considerations strongly support the use of mediation in the civil justice system, including mandatory mediation.

6. Court directed mediation and the right to a fair hearing

Does a court order that directs mediation limit the *right to a fair hearing*, the second component of the s 34 right?

When assessing whether the right to fair treatment has been violated in the context of access to courts, lawyers in particular should take note of the approach adopted by the Constitutional Court. In *Lufuno Mphaphuli* it had this to say:

> Of course, as this Court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context. Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As such the proceedings may be adversarial or investigative, and may dispense with pleadings, with oral evidence, and even oral argument.

As to whether courts can or should exercise a power to direct parties to mandatory mediation in certain circumstances, it seems to us that there are compelling reasons why this can and should be so.

First, among the range of interlocutory directives that a court may introduce concerning, for example, discovery, postponements and similar orders, a direction that parties participate in mediation is hardly invasive at all.

Second, courts in a number of comparable jurisdictions have had no difficulty in exercising that authority, where given to them.

In the UK, for example, and despite the *dicta* in *Halsey* referred to earlier, court directed mediation is deeply entrenched. The limited circumstances contemplated in *Halsey* are in fact those where one party so strongly objects to a direction that it indicates upfront that it will not participate. There are few parties that either feel so strongly about it or that would risk not only an adverse sanction of costs but other

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31 Allen (note 30) at footnote 27.

32 This is dealt with in more detail in the following section 6.

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subtle influences that their approach might have on the judge who, failing settlement, will ultimately decide the case.

In the United States, courts have not hesitated to direct mediation in appropriate cases. Their power to do so came under scrutiny in *Atlantic Pipe Corporation.*[33] There the Court of Appeals, after referring to judicial concerns about the effectiveness of ADR procedures imposed on unwilling litigants, said the following:

> The concerns articulated by these two respected courts plainly apply to mandatory mediation orders. When mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished. Requiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient. ...
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> The fact remains, however, that none of these considerations establishes that mandatory mediation is always inappropriate. There may well be specific cases in which such a protocol is likely to conserve judicial resources without significantly burdening the objective rights to full, fair, and speedy trial. Much depends on the idiosyncrasies of a particular case and the details of the mediation order.
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> In some cases, a court may be warranted in believing that compulsory mediation could yield significant benefits even if one or more parties object. After all, a party may resist mediation simply out of unfamiliarity with the process or out of fear that a willingness to submit would be perceived as a lack of confidence in her legal position.

The Court of Appeals went on to uphold a district court order directing mediation, but subject to imposing reasonable limitations as to cost and duration so that the mediation process did not unduly restrict continuation of litigation if it was not successful.

The source of the statutory authority to order mandatory non-binding mediation in the United States is the Alternative Dispute Resolution Act of 1998. Its purpose was to 'promote the utilisation of alternative dispute resolution methods in the federal courts and to set appropriate guidelines for their use'. The Act lists mediation as an appropriate ADR process, and sanctions the participation of 'professional neutrals from the private sector' as mediators. The Act requires district courts to obtain litigants' consent only when they order arbitration, not when they order the use of other ADR mechanisms (such as non-binding mediation).[34]

Mediation and mandatory mediation is used more widely still in Australia. In 1991 the Federal Courts of Australia Act, 1976 was amended by the addition of a new s 53A(1):

> Subject to the rules of court, the court may by order refer the proceedings in the court, or any part of them or any matter arising out of them, to a mediator or an arbitrator for mediation or arbitration, as the case may be, in accordance with the rules of court.

This provision gave the Federal court power to order disputes to mediation but it relied on the parties agreeing to such a referral from the court. [35]

In 1997, a further subsec was added which stated as follows:

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33 304F.3D135, US Court of Appeals.

34 See *Atlantic Pipe Corporation* ibid at para 24.

35 See generally David Spencer & Michael Brogan *Mediation Law and Practice* (Cambridge University Press, 2007) at 272.

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> Referrals under subsection (1) to a mediator may be made with or without the consent of the parties to the proceedings. However, referrals to an arbitrator may be made only with the consent of the parties.

Subsequently each of the separate states introduced or amended provisions permitting mandatory mediation even without the consent of parties, with the exception of Western Australia where the rules are limited to a provision of directions to the parties to confer on a without prejudice basis and directing that a mediator be appointed, provided that this is not done without the consent of the parties if any party would become liable to remunerate a mediator.

Spencer and Brogan[36] identify 22 'landmark' decisions in Australia between 2001 and 2005 in which the court considered making an order of compulsory mediation.

Where the court decided to order mediation, its reasons included that: mediation can be a mechanism for public vindication; costs would be reduced; the trial would be lengthy and involve a substantial time of court time that could otherwise be allocated to other matters; it was in the public interest to prevent straining court resources because of the length of interlocutory applications, hearings and appeals; uncertainty that would result from the continuation of the hearing; potential for success of mediation; and that mediation promotes a co-operative environment between the parties who are required to participate in good faith.

Where the court refused to order mediation, its reasons included: poor prospects of success of the mediation or where previous attempts at settlement have failed; the risk of increase to overall costs through mediation; the parties' readiness to proceed with a trial and a proximity of trial dates; where a dispute was 'poised to settle anyway'; where one party was 'adamantly opposed to mediation'; and where there were a large number of issues in dispute.

Mediation has also been recognised in Australia as an extremely valuable process for narrowing issues in dispute or limiting issues even where settlement is unlikely.

In summary, the approach in Australia has been to weigh the underlying philosophy of mediation as a voluntary process against the public interest in keeping matters out of court that need not take up the time of a trial, and freeing up court resources.[37]

Hamilton J summarised the position in 2001[38] with these words:

> This is an area in which the received wisdom has in my experience changed radically in a period of a few months. A short time ago there was general acceptance of the view... that there was no point in a mediation engaged in by reluctant parties. Of course, there may be situations where the Court will, in the exercise of its discretion, take the view that mediation is pointless in a particular case because of the attitudes of the parties or other circumstances and decline to order a mediation. However, since the power was conferred upon the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show

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36 Ibid at 306–311.

37 See Spencer & Brogan (note 35) at 304.

38 *In Remuneration Claiming Corp (Pty) Ltd v Fitton* [2001] NSWSC 1208 at para 3.

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willingness to do so may appear a sign of weakness, yet engage in successful mediation where mediation is ordered.

7. Conclusion

It seems to us that mandatory mediation does not, whether required by rules or directed by a court, infringe the right of access to courts. There are compelling public policy reasons, well recognised in a number of other comparable jurisdictions, to encourage, even to strongly encourage parties, including unwilling parties, to participate in mediation. A primary consideration, among these, is access to justice.

There is little prospect, in our view, that court directed or 'mandatory' mediation would be found to be unconstitutional in South Africa.

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