



# **PRIVATE MEDIATION AGENCIES AND THEIR ROLE ALONGSIDE COURT ANNEXED MEDIATION PROCESSES**

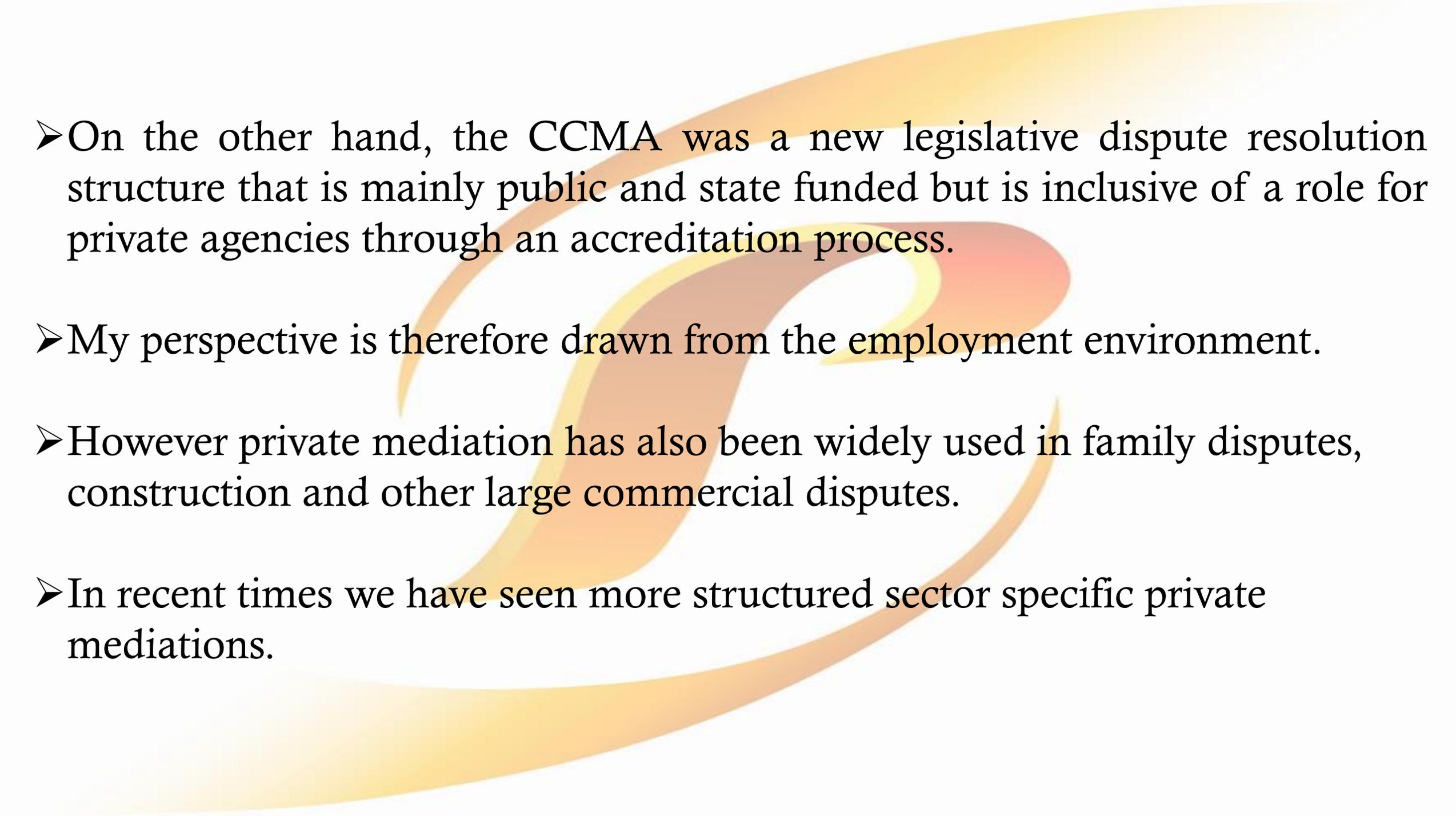
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**Chairman of Tokiso Dispute Settlement**

# 1. INTRODUCTION

- Tokiso was established in 2001 after the closure of the Independent Mediation Service of SA (IMSSA). My chairmanship of Tokiso follows stints as National Director of IMSSA and the Commission for Conciliation, Mediation and Arbitration (CCMA) respectively.
- IMSSA was formed as a private dispute resolution agency in response to the exclusionary and repressive apartheid labour laws to cater for alternative dispute resolution between employers and Black trade unions.

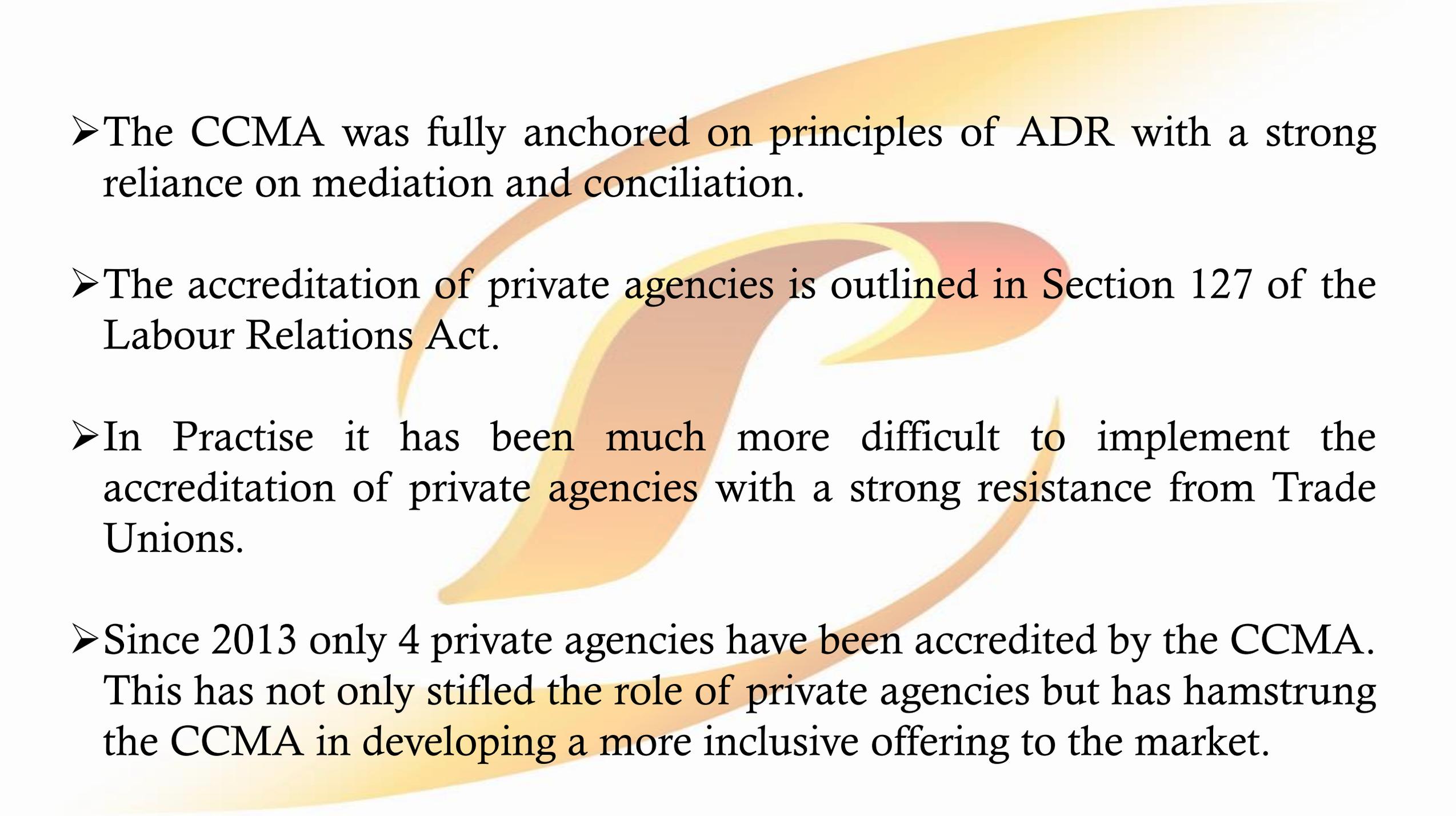
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- On the other hand, the CCMA was a new legislative dispute resolution structure that is mainly public and state funded but is inclusive of a role for private agencies through an accreditation process.
  - My perspective is therefore drawn from the employment environment.
  - However private mediation has also been widely used in family disputes, construction and other large commercial disputes.
  - In recent times we have seen more structured sector specific private mediations.

## 2. IMSSA AS THE PRECURSOR TO THE CCMA

- IMSSA was born out of necessity. Until the Wiehahn Commission, Blacks were not recognised as employees in terms of the Labour Laws of the country.
- Even the implementation of some of the Wiehahn Commission recommendations did not go far enough to protect Black employees.
- Under pressure from Black Workers, through emergent trade unions big business agreed to negotiate outside the perimeters of the labour legislation.
- This led to Alternative Dispute Resolution (ADR) and the establishment of IMSSA.

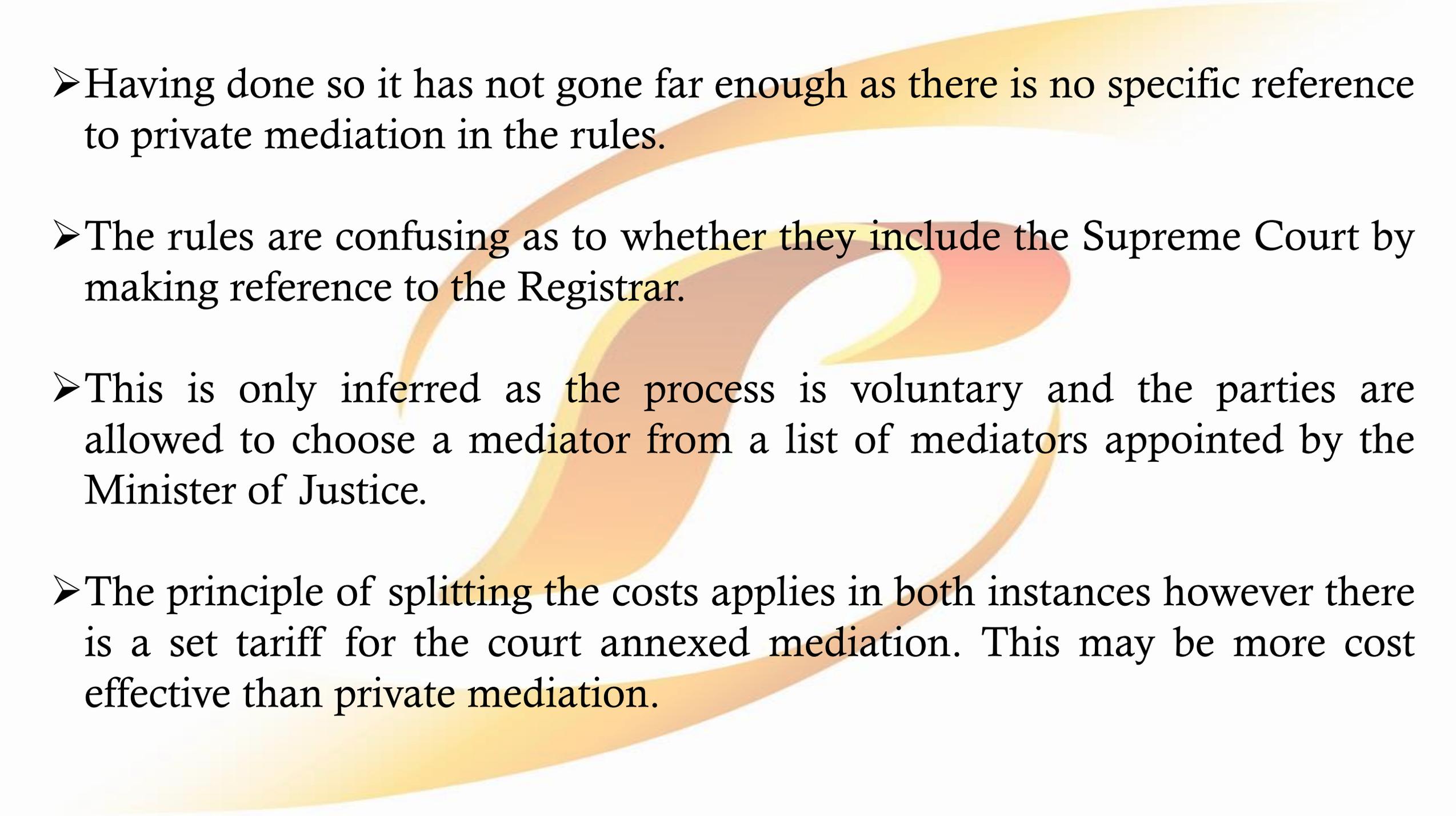
### **3. CCMA AND INCLUSION OF PRIVATE AGENCIES IN THE LEGISLATION**

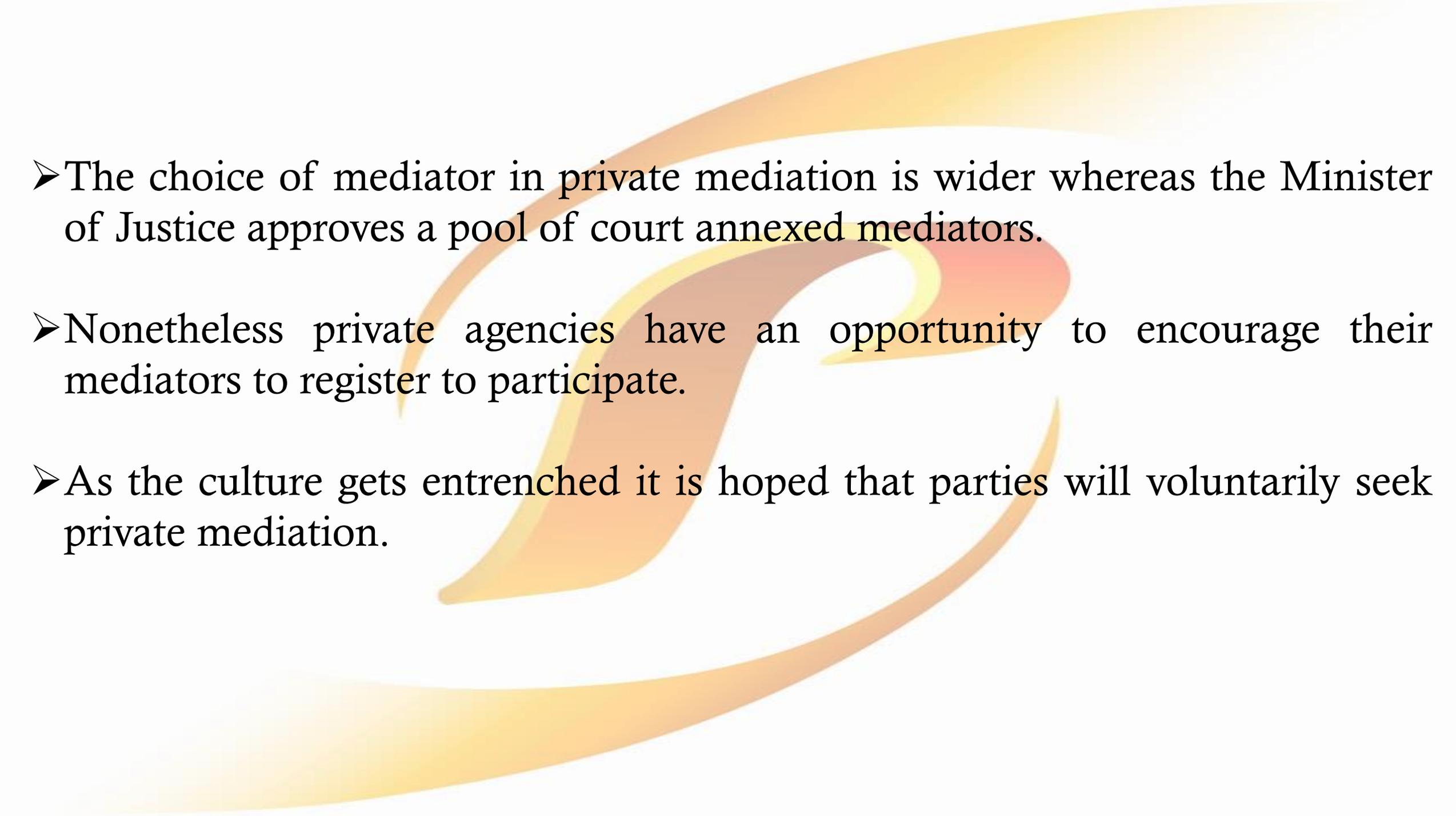
- The team that drove the drafting of the Labour Relations Act of 1995 had been founders of IMSSA.
- It made sense that the principles developed in establishing IMSSA would be incorporated into the legislation.
- Over and above that principles were drawn from the German, Australian, UK and other developed jurisdictions. The International Labour Organisation (ILO) also played a significant role in developing the Labour Law system in South Africa.

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- The CCMA was fully anchored on principles of ADR with a strong reliance on mediation and conciliation.
  - The accreditation of private agencies is outlined in Section 127 of the Labour Relations Act.
  - In Practice it has been much more difficult to implement the accreditation of private agencies with a strong resistance from Trade Unions.
  - Since 2013 only 4 private agencies have been accredited by the CCMA. This has not only stifled the role of private agencies but has hamstrung the CCMA in developing a more inclusive offering to the market.

# 4. 2014 RULES ON MAGISTRATE COURT ANNEXED MEDIATION AND ROLE OF PRIVATE MEDIATION

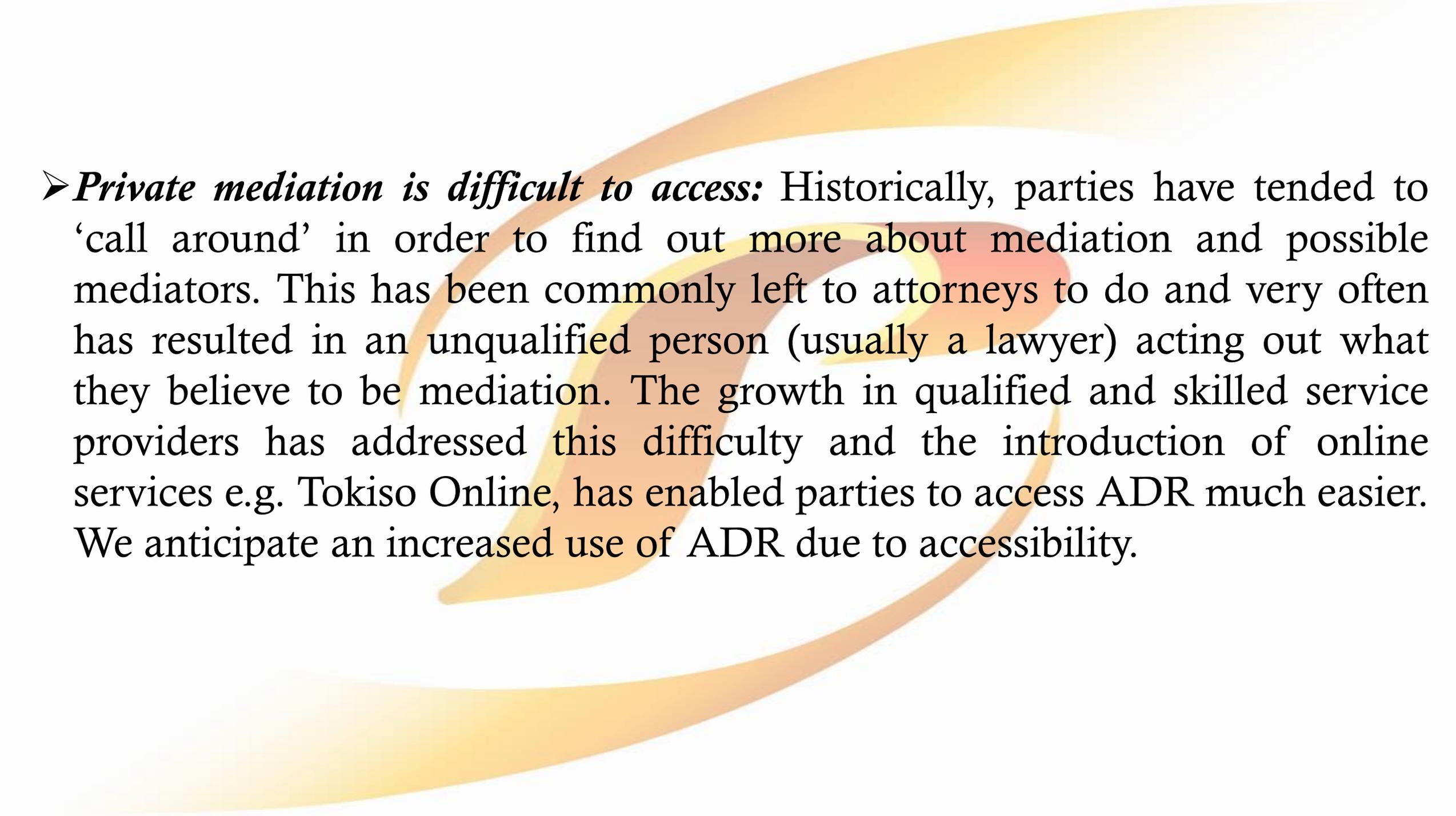
- South Africa is a country that is known world-wide for its negotiation and mediation culture.
- Despite this culture, it has taken it a long time to introduce court annexed mediation alongside litigation.

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- Having done so it has not gone far enough as there is no specific reference to private mediation in the rules.
  - The rules are confusing as to whether they include the Supreme Court by making reference to the Registrar.
  - This is only inferred as the process is voluntary and the parties are allowed to choose a mediator from a list of mediators appointed by the Minister of Justice.
  - The principle of splitting the costs applies in both instances however there is a set tariff for the court annexed mediation. This may be more cost effective than private mediation.

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- The choice of mediator in private mediation is wider whereas the Minister of Justice approves a pool of court annexed mediators.
  - Nonetheless private agencies have an opportunity to encourage their mediators to register to participate.
  - As the culture gets entrenched it is hoped that parties will voluntarily seek private mediation.

## 5. MISCONCEPTIONS ABOUT PRIVATE MEDIATION

- *Private mediation is the preserve of White men:* when Tokiso last reviewed its work allocation in 2012, over 60% of its work was handled by Black panellists. This has confirmed the presence of Black mediator talent and that this talent is sought after and used.
- *Private mediation is only for big commercial matters:* Tokiso has seen a rise in the use of private mediation in areas such as medico-legal cases, most often including business-to-consumer (B2C) disputes. For example, the Council for Medical Schemes has introduced a mediation process through Tokiso at the appeal stage, and 60% of matters mediated are resolved. Efforts are underway to introduce mediation earlier in the life of the dispute.



➤ ***Private mediation is difficult to access:*** Historically, parties have tended to ‘call around’ in order to find out more about mediation and possible mediators. This has been commonly left to attorneys to do and very often has resulted in an unqualified person (usually a lawyer) acting out what they believe to be mediation. The growth in qualified and skilled service providers has addressed this difficulty and the introduction of online services e.g. Tokiso Online, has enabled parties to access ADR much easier. We anticipate an increased use of ADR due to accessibility.

## 6. STRENGTHENING THE RELATIONSHIP

- As parties are not precluded from using private mediation, this can be offered as a complement to the court annexed mediation. This can provide more flexibility on the mediator choice and scope of the dispute need not be limited to what is contained in the summons as well as confidentiality of the process.
- Private mediators should be encouraged to register to strengthen the court annexed mediation. In time the culture of mediation will be embedded and parties can make informed choices. Court annexed mediation and private mediation will be able to work in parallel and support each other for the benefit of everyone.

# 7. CONCLUSION

- It is still early days for court annexed mediation as there are pilot sites and implementation has been very slow.
- As long as there are entrenched interests e.g. litigation lawyer interests, it is going to take time to develop court annexed mediation.
- Training, skills development and strengthening the profession of ADR practitioners will go a long way to support and embed court annexed mediation. Private mediation can play a constructive role in this development as happened in the CCMA.