



BOWMANS

THE VALUE OF KNOWING

THE DEVELOPMENT OF LEGISLATION TO PROMOTE ALTERNATIVE DISPUTE RESOLUTION & ACCESS TO JUSTICE IN SOUTH AFRICA – THE WAY FORWARD

Presented by John Brand

23 August 2017



INTRODUCTION



CONTENT

- **The Background to ADR Legislative Developments in South Africa**
- **A Synopsis of the ADR Legislative Developments in South Africa**
- **Some Key Issues for Future ADR Legislation in South Africa**

THE BACKGROUND TO ADR LEGISLATIVE DEVELOPMENTS IN SOUTH AFRICA

- Mediation has a long history as a major way of resolving disputes in indigenous African communities
- Colonialism disrupted this tradition because the colonisers preferred adjudicative outcomes to consensual ones, and thus preferred arbitration and litigation
- However, there has been a mediation renaissance since at least the 1980's via:
 - IMSSA
 - The National Peace Accord
 - Family and divorce mediation
 - Environmental mediation
 - Increasing statutory support for mediation – there are now approximately fifty statutes which provide for mediation in some way or another

THE BACKGROUND TO ADR LEGISLATIVE DEVELOPMENTS IN SOUTH AFRICA

- However, there has been mediation renaissance the 1980's via:
 - Employment mediation in terms of the Labour Relations Act
- Mediation has also belatedly come to the commercial and civil sphere via:
 - Paragraph 81 of the Code of Corporate Governance which states the following:
 - “External disputes may be referred to arbitration or a court. However these are not always the appropriate or most effective means of resolving such disputes. Mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.”

THE BACKGROUND TO ADR LEGISLATIVE DEVELOPMENTS IN SOUTH AFRICA

- Mediation has also belatedly come to the commercial and civil sphere via:
 - The new Companies Act of 2011 which encourages parties to refer disputes to mediation
 - The Magistrates Court mediation project of 2014 which encourages mediation in selected Magistrates Courts
- But, what has been missing is an overarching mediation statute to encourage and govern private mediation and, where necessary, statutory mediation

A SYNOPSIS OF ADR LEGISLATIVE DEVELOPMENTS IN SOUTH AFRICA

- Since 1994 there have been endeavours to develop modern overarching ADR legislation in South Africa
- On 29 August 1994 the Minister of Justice approved Project 94 of the South African Law Reform Commission (SALRC) to investigate arbitration
- Then on 8 July 1996 Project 94 was broadened to include the investigation of all other aspects of ADR and the civil law
- In Project 94 it was decided to give priority to international arbitration and in July 1998 the SALRC published a report “Arbitration: An International Arbitration Act for South Africa”

A SYNOPSIS OF ADR LEGISLATIVE DEVELOPMENTS IN SOUTH AFRICA

- The draft bill which accompanied the report was approved by the Cabinet in 1998 but was not submitted to Parliament until 2017
- This delay was caused by a 1999 change in Government which resulted in the Government being ADR unfriendly between then and 2015
- Notwithstanding this, in 2001 Project 94 of the SALRC published a further report including a draft bill on domestic arbitration
- In 2013 Project 94 of the SALRC updated the International Arbitration Bill and it was again submitted to the Minister of Justice in 2014

A SYNOPSIS OF ADR LEGISLATIVE DEVELOPMENTS IN SOUTH AFRICA

- On 13 April 2016 the International Arbitration Bill was, at last, approved by the Cabinet and introduced into Parliament on 21 April 2017 as the International Arbitration Bill of 2017
- The International Arbitration Bill has not been enacted and is unlikely to be enacted in 2017 but, hopefully, it will be enacted in 2018
- In 2013 Project 94 of the SALRC also updated the Domestic Arbitration Bill and it was submitted to the Minister of Justice in 2014 but has not yet been approved by the Cabinet or submitted to Parliament. Hopefully this will happen during 2018
- In 2014 a separate project was included in the SALRC's Project 94 on court annexed mediation and the two sub-projects, "ADR and the civil law", and "court annexed mediation" were combined into one investigation which is referred to as the "Alternative Dispute Resolution" investigation

A SYNOPSIS OF ADR LEGISLATIVE DEVELOPMENTS IN SOUTH AFRICA

- This investigation commenced its work on 4 July 2017 and it is unlikely to complete its work before late 2018
- There are also a number of ADR related family law investigations underway by the SALRC
 - Project 100D deals with
 - Family dispute resolution
 - care of and contact with minor children / family dispute resolution
 - Project 100B deals with
 - The review of aspects of matrimonial property law
 - Project 100C
 - The review of the law of maintenance
- All of these projects are considering ADR in one way or the other

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Scope
 - national only?
 - international as well?
 - range of disputes?
 - existing?
 - future?
 - contractual?
 - delictual?
 - other?

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Scope
 - range of parties?
 - private?
 - public?
 - government?
 - schools?
 - students?
 - communities?
 - others?

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Scope
 - automatic application or by incorporation or fallback?
 - with or without exception?
- The Definition of mediation
 - chairing?
 - facilitation?
 - conciliation?

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Mandatory vs voluntary mediation
 - constitutional?
 - always or situation by situation?
 - by contract, legislation, judicial order?
- Agreement to mediate
 - oral ?
 - written only?

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Confidentiality and privilege
 - between parties?
 - between the parties and the mediator?
 - between the parties and the administrator?
 - to outsiders?
 - exceptions?
 - by law?
 - for enforcement?

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Confidentiality and privilege
 - fact of?
 - documents prepared for?
 - other documents?
 - outcome of?
 - detailed content of settlement agreement?

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Enforcement of mediation outcomes
 - if oral ?
 - if written?
 - like a contract?
 - like an award?
 - like a judgment?
- A right to information?
- A right to legal assistance and representation?

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Mediator appointment
 - number?
 - method?
- Mediator quality
 - training?
 - accreditation?
 - standards?

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Mediation process
 - rules, mandatory or voluntary?
 - mediator discretion?
 - mandatory requirements – fairness?
 - joint and/or side meetings
 - confidentiality of side meetings?
 - mediator recommendations?
- Prescription
 - interruption of?
 - from when to when?
 - when does mediation start?
 - when does mediation end?

SOME KEY ISSUES FOR FUTURE ADR LEGISLATION IN SOUTH AFRICA

- Interruption of judicial proceedings
 - suspended or not?
- Termination of mediation
 - when?
 - by whom?
- Mediator as arbitrator
 - permissible?
 - by agreement?
 - conditions?
- Judge as mediator
 - covered?

CONCLUSION

- Some progress has been made
 - But it has been very slow
 - If South Africa wants to:
 - greatly enhance access to justice
 - facilitate national economic development
 - encourage foreign investment
- it needs to substantively accelerate the pace of ADR reform

BOWMANS OFFICE CONTACTS

Cape Town

T: +27 21 480 7800

E: info-cpt@bowmanslaw.com

Dar es Salaam

T: +255 76 898 8640

E: info-tz@bowmanslaw.com

Durban

T: +27 31 265 0651

E: info-dbn@bowmanslaw.com

Follow us on

 @Bowmans_Law

 Bowmans

 Bowmans

www.bowmanslaw.com

Johannesburg

T: +27 11 669 9000

E: info-jhb@bowmanslaw.com

Kampala

T: +256 41 425 4540

E: info-ug@bowmanslaw.com

Nairobi

T: +254 20 289 9000

E: info-ke@bowmanslaw.com



BOWMANS

THE VALUE OF KNOWING

THANK YOU

