ADR

DEVELOPMENTS OVER THE PAST FEW YEARS-

A NAMIBIAN PERSPECTIVE

Introduction

1. By way of background and context to our legal system, Namibia is an erstwhile colony of South Africa that obtained independence on 21 March 1990. Article 140 of the Namibian Constitution provides that all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.

2. In the result, the Arbitration Act 1965, No 42 of 1965 remains in existence, and maintains its reputation as an impractical dinosaur, especially with regard to domestic disputes because it only provides for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements, and for the enforcement of the awards of such arbitration tribunals.

3. Our jurisdiction is small, with 836 admitted legal practitioners[1] 147 firms, 365 members practising at firms (attorneys) and 36 advocates.

4. During 2014, the Judge President of the High Court introduced a case management system in an attempt to find alternative ways to reduce legal costs. On 16 April 2014, the new rules of the High Court came into force.

5. An important feature of the new rules is the introduction, for the first time in our legal system, of court-connected mediation which at its core, includes legal practitioners as mediators.

[1] The Legal Practitioners Act 1995, No 15 of 1995 abolished the differentiation between advocate and attorney. All admitted legal practitioners have a right of appearance in the High Court. Advocates are generally referred to as ‘advocate’ or ‘instructed’ counsel, and have exemptions from holding a Fidelity Fund certificate.

6. The High Court's mediation programme is an adjunct to the adjudicatory function of the court. The first mediation under the new Rules was conducted on 6 June 2014. Since then mediation has become an important feature of the Namibian High Court's civil litigation process.

7. A remarkable feature of our mediation programme is apart from legal practitioners and even judges, a significant number of our mediators are private persons who are not court employees, such as architects, quantity surveyors and psychologists, to name a few. This demonstrates public buy-in to the Court's mediation programme. As the adage goes: A negotiated settlement is by far better than a judgment which, even if a party is successful, does not guarantee everything that the party came to court for.

8. Section 39 (d) of our High Court Act 1990, No 16 of 1990 provides that the Judge-President, with the approval of the President, may make rules to regulate compulsory alternative dispute resolution mechanisms in certain causes and matters that are before the court, and prescribe that -

   8.1 a judge may order the parties to refer their dispute to any of the prescribed alternative dispute resolution mechanisms; and

   8.2 only when the alternative dispute resolution is unsuccessful and a certificate to that effect is issued, that the parties or one of them may set the matter down for hearing or trial.

9. The procedure for ADR has also been dealt with by the High Court Rules rules of the High Court of Namibia[2]. In terms of the rules, the managing

[2] **Referral to alternative dispute resolution (ADR)**

38. (1) The managing judge may, at any time in terms of practice directions issued by the Judge-President, either of his or her own initiative or at the request of a party refer any part of the proceeding or any issue to an alternative dispute resolution (ADR) process or in an attempt to

resolve that part of the proceeding or issue by way of alternative dispute resolution and towards that end the managing judge must, after hearing the parties –

(a) give directions concerning terms of reference, where and how, and if not agreed by the parties, by whom such ADR is to be conducted; and

(b) stipulate the time when it is to be conducted, as well as the time when or within which a report by the conciliator or mediator concerned is to be submitted to court.

(2) The costs of any ADR procedure referred to in subrule (1) are costs in the cause, unless the parties agree otherwise.

(3) No further proceedings must take place until an order by the managing judge is made in respect of such ADR procedure based on the report of the conciliator or mediator.

(4) If the ADR procedure fails to produce a settlement the report referred to in subrule (1)(b) must only state the fact that the settlement discussions have failed, without stating the reason for such failure, except where it is necessary to inform the court for the possible imposition of sanctions contemplated in rule 39(8).

(5) The managing judge is not obliged to follow the recommendation or conclusion of the conciliator or mediator and he or she may make any order as he or she considers appropriate.

Obligations of parties where matter referred for ADR

39. (1) Where a matter has been referred for ADR in terms of rule 38, the parties must exchange their settlement proposals in writing as follows

(a) the letter of the plaintiff or of his or her legal practitioner, if represented, must set out the following information -

(i) a brief summary of the evidence and legal principles that the plaintiff relies on to establish his or her claim;

(ii) a brief explanation of why, in the opinion of the plaintiff, the relief claimed would succeed at the trial;

(iii) an itemisation of the damages and other relief the plaintiff believes can be established at the trial and a brief summary of the evidence and legal principles supporting the damages or other relief; and

(iv) a concise settlement proposal; and

(b) the letter of the defendant or of his or her legal practitioner, if represented, in response to the plaintiff's letter must set out the following information -

(i) any points in the plaintiff's letter with which the defendant agrees;

(ii) any points in the plaintiff's letter with which the defendant disagrees; and

(iii) a concise settlement offer.

(2) Copies of the letters referred to in subrule (1) must not under any circumstances be brought to the attention of the managing judge or the court.

(3) The parties or the legal practitioners of the parties, if represented, must within seven days after the exchange of letters referred to in subrule (1) hold a settlement conference before the conciliator or mediator.

judge may at any time, either of her own initiative or at the request of a party, refer the proceedings or any issue to mediation in an attempt to resolve that issue or part of the proceeding or issue by way of alternative dispute resolution.

10. The Judge President also (through the issue of Practice directions ancillary to the rules) designated certain case types in respect of which the court will require the parties to undergo compulsory mediation, should they not themselves seek mediation of their dispute (parties are also

---

(4) The legal practitioners of the parties must provide their respective clients with the opposing party's letter referred to in subrule (1) before the holding of a settlement conference.

(5) Only a person with full settlement authority must attend a settlement conference convened by the parties within a time limit as directed by the managing judge or the court, but this subrule does not apply where the Government is a party or where the managing judge or the court issues a contrary order.

(6) For the purposes of subrule (5), a party that is –

(a) a natural person, must be represented by that natural person or if that natural person is under a disability by his or her legal representative;

(b) a juristic person, must be represented by a person duly authorised in writing by that juristic person, other than the legal practitioner of record;

(c) a regional or local authority council, must be represented by the chief executive officer of that council or his or her duly authorised representative who is not the legal practitioner of record;

(d) insured and will in the cause or matter claim immunity from an insurer under an insurance policy, must be represented by a duly authorised representative of the insurer with settlement authority, together with the person representing the insured party.

(7) A person referred to in subrule (5) must, without reference to any other person not present at the settlement conference, have the necessary authority to make a final and binding settlement regarding any offer or demand.

(8) If the person referred to in subrule (5) has no such authority which results in the settlement conference being adjourned to enable him or her to obtain additional authority, he or she may have an order for costs made against him or her if the ADR procedure fails and the matter proceeds to trial.

(9) The letters referred to in subrule (1) and anything discussed during a settlement conference are without prejudice and may not be used by any party in the proceedings to which the letters and the conference relate or in any other proceedings.

encouraged to engage in mediation at an early stage in the proceedings). This includes

- Insurance claims;
- Medical negligence claims;
- Professional negligence claims;
- Building contract claims;
- Divorce and disputes involving custody of children and maintenance for children and a spouse;
- Loan default claims;
- Motor vehicle accident claims;
- Defamation.[3]

11. In order to encourage the participation of legal practitioners and other professionals, attorneys and advocates we were invited to attend customised mediation training which comprised a three day course consisting of theory and practicums presented by a retired judge and mediation expert. The course was presented for free. After attendance, a mediator would then become accredited and bound to a Code of Ethics, signed by the mediator before being accredited. Mediators are closely monitored and accreditation is renewed annually. Re-accreditation is based on performance, general compliance with the Code of Ethics and the Rules and Policies of the Court, as well as the Mediation Programme in general.

12. A court connected mediator receives a small sum (in the vicinity of R3000) for each mediation (irrespective of length). This means that after training, practitioners are in a position to earn additional income as well as contribute to the development of the profession.

[3] High Court Practice Direction 2015 (19)

13. Court connected mediation has also jump started and significantly increased private arbitrations. Litigating parties have been encouraged to choose private mediation (where the mediator charges his or her own rate) by an accredited mediator, especially when the mediation Roll is full. Although we are adversarial at heart, many practitioners have developed a mediation practice either as a court connected or private mediator. Rule 19(b) of our rules requires legal practitioners to assist in curtailing court proceedings.

14. Court Connected Mediation in the High Court of Namibia has shown to be a huge success. The success is gleaned from the statistics of the reported mediations which actually took place and were finalized from 2014 to 2017.

15. Of the 349 reported mediations concluded during 2014, a total number of 201 (57,6%) were successful, whilst 148 were unsuccessful (40,4%).

16. During 2015, 129 reported mediations were concluded, of which 77 (59,7%) were successful and 52 (40,3%) failed.

17. The total figures for the period June 2014 – 4 March 2015 amounts to:

- 478 reported mediations concluded
- 278 successful
- 200 failed

17. The year 2017 marked the fourth year of the High Court's mediation initiative and, as in the past, mediation has proved to be very effective in resolving matters before being enrolled for trial. The continued success of the mediation initiative is attributed to the continued dedication and co-operation of the 117 active Court accredited mediators, legal practitioners and most importantly, the parties themselves. A total of 684 mediations were finalized, 405 matters settled in the process at a success rate of 59%.

18. The statistics for the two divisions are as follows:

Region	Mediations Finalized	Successful Mediations	Success Rate
MAIN	610	366	60%
NORTHERN	74	39	52%

19. In the main division 25 of the mediations were conducted at the coast and 21 were successful.[4]

20. The court connected mediation centre is housed at the SADC Tribunal in Windhoek.[5] This is the hub of ADR, although parties are permitted to mediate at alternative venues as well.

[4] Office of the Chief Registrar – Luderitz Street, Windhoek