COURT-BASED MEDIATION BECOMING A REALITY IN SA CIVIL JUSTICE SYSTEM

Barney Jordaan

Introduction

Following an initiative started by the office of the previous Chief Justice in 2003, the Department of Justice is going full-steam ahead with the introduction of Court Based Mediation with a three-year pilot project kicking off in 2012 in a number of selected lower and high courts. Rules for Court Based Mediation are to be published shortly.

Many of our major trading partners in the developed and developing world, including the more influential ones on the African continent, have, wisely, opted for mediation in civil and commercial disputes. In some jurisdictions Court Based Mediation has been in operation for many years. It is not well-known that while we have in the order of 41 pieces of legislation providing for mediation as the primary form of dispute resolution for matters arising from their provisions. Despite this mediation is only active in a tiny handful of those, primarily in the area of labour and divorce matters.

Court Based Mediation, coupled with new systems for case-flow management (CFM) in the courts, will dramatically affect the practice of law and, as a result, also affect all individuals and organisations involved in litigation. Essentially, it will require that an attempt should be made to resolve a dispute through mediation before proceeding to litigation. Failure or unwillingness to do so can attract cost sanctions, even against a successful litigating party. We already have examples of courts taking strong exception to legal practitioners who do not advise clients of the option of mediation and even penalising them with adverse cost orders for their failure to do so. With Court Based Mediation formally becoming part of our civil justice system, the courts will have even greater justification for taking such a stance.

Why mediate?

All too often people end up in litigation over issues that could very easily have been resolved through mediation, especially if mediation is introduced in the earlier stages of the conflict. Mediation is suited for most disputes, except, e.g., for those few hard-core matters that require a precedent, or involve parties whose intransigent attitudes are so embedded that nothing short of the legal equivalent of warfare, at any cost, will satisfy their lust for victory.

While the law can be a wonderful instrument for social change and the development and protection of rights, it has a dark side too: when we decide – or are advised – to litigate. We give up control not only over the duration of the process, but also over the cost and the outcome of the process. More importantly perhaps, is that litigation provides a sure-fire way of destroying business and other relationships in the process. It is immaterial whether litigation takes place in the courts or arbitration: the downsides are the same.

What is the alternative? Mediation is a decision-making process in which a neutral third party, the mediator, helps the parties to a dispute to negotiate an agreed solution to their dispute. The process is largely facilitative: the mediator has no decision-making powers. The process is also confidential and without prejudice, providing a safe space for the disputing parties, with the help of the mediator, to arrive at a sensible, cost effective solution to their dispute with an improved chance of their business or other relationships surviving the dispute. The parties have control over the duration, timing, cost and outcome of the dispute.
Mediation differs from conciliation, as used in the construction sector, in that the third party will in conciliation recommend a solution to the parties. In classic mediation, the mediator does not do this.

**The benefits of mediation**

**Improved communication and understanding**

When people are engaged in an argument or dispute emotions often become heated. Research suggests that when one is angry or upset, not only does your heart rate increase, one’s heart rate exceeds about 100 beats per minute, one’s ability to listen to what the other person is saying is greatly diminished.

The mediation process provides a space for the parties to meet and talk safely in a confidential setting with the mediator and the other party. In this way, the real issues between the parties, as opposed to the parties’ (legal) demands or positions, can be unearthed and explored. Once that has happened, different solutions to the parties’ demands often become apparent, for the simple reason that they are led to see the tip of the proverbial iceberg from the other side’s point of view as well, instead of assuming that everyone has the same view of things.

Sometimes the lawyer and the client are just not hearing each other. They may have very different perceptions of the merits of the case and where they want it to go, or circumstances may have changed since the litigation process started. Mediation can help to ensure that they see the matter in the same light again.

Finally, because large portions of the process are conducted in confidence with a party, in the absence of the other party, mediation tends to lessen the need for parties and their representatives to posture.

**Litigation remains an option**

If mediation fails, the parties are free to resort to, or continue with, litigation. In other words, the parties remain in control of the result of the mediation, although they leave the running of the process itself in the hands of the mediator.

In civil and commercial mediation, it is the norm for the parties' legal representatives to be present. This allows them a chance to assess the strength of their case and to assist in the exploration of options for settlement that would be to the client's benefit.

For the lawyer, it is sometimes difficult to change roles from litigation counsel to settlement counsel championing because the client might want the lawyer to remain confident in the merits of his or her case while searching for a mediated settlement. The mediator can help the lawyer bring about a reassessment of the case, without undermining the client’s confidence in the lawyer, by helping to develop a more realistic view of the case and assisting with the generation of options for settlement that take into account the real interests of the client, or, at the very least, helps the client understand that the risks associated with litigation in the matter outweighs the benefits of a mediated settlement.

For the client, in those cases where the lawyer wants to draw out the matter beyond the client’s means or needs, mediation can ensure that the client has the final say on whether a settlement should be negotiated and on what terms.
If mediation fails to produce a settlement, the parties may still be able to arrive at an agreement on the issues that remain in dispute and other matters pertinent to the pending litigation process.

‘Having your day in court’

Mediation allows a party to have its say and be heard, probably for the first time in the entire dispute. Not only this, mediation also ensures that the message is conveyed accurately in a controlled atmosphere. Sometimes just getting things off the chest satisfies a huge need in many litigants. The mediator fills that role and enables the litigant to get the cathartic release of telling his or her story to one who is willing to listen.

Mediation provides for solutions that aren’t possible in litigation. Saying sorry to the other party is the worst thing one can do to your case, but in mediation, because of its off-the-record nature, a party can do so in an appropriate way without fear that this would scupper chances of litigation success.

Very often also, because mediation focuses on discovering the issue behind the issues (i.e. the real needs of the parties), the solutions crafted by the mediator satisfy interests that are far deeper than the position which a party has put forward in the dispute process up to the point that mediation is used. The old saying goes: ‘In commercial disputes, it is always about money but never only about money’.

Identifying settlement blockages

Because of the unique position the mediator occupies, he or she is in a far better position to identify what is really going on between the parties and what impedes their progress towards a settlement. The mediator has access to information that neither the lawyers nor the clients have and is able to move beyond the narrow confines of the dispute, giving the mediator a more holistic view of the dispute.

Risk assessment

Mediators will sometimes do a ‘reality’ check with a recalcitrant party, exploring the consequences and risks of a failure to settle. This is a powerful mechanism as it provides an independent unbiased review of the case and can assist in the development of a more realistic analysis of the likelihood of success.

Mediators, knowing what each side really wants, are also able to assess the feasibility of proposals that are put forward for the resolution of the dispute and can guide a party in formulating a settlement offer in a manner that does not involve a loss of face.

Getting the decision-makers involved

Standard practice in civil and commercial mediations is that the parties to the process must have the authority to settle, or at least be able to obtain the necessary authority to conclude a deal. In this way mediation keeps the decision-makers informed of the strengths and weaknesses of their respective cases and of the pros and cons of a failure to settle. The mediation provides the opportunity to get the attention of those who must make the decision on settling the dispute.

Informality and flexibility

The mediation process is governed by an agreement between the parties. There are no formal rules with which to comply, nor is there a requirement of document discovery or of
evidence having to be led. The mediation is generally conducted at a venue decided on by the parties, at a time determined by them, in agreement with the mediator (or a mediation agency that supplies mediators). All in all, the process is far less stressful than court proceedings.

**Compliance**

Research suggests that mediated settlements tend to have a higher rate of compliance that court judgments. The reason for this lies, first, in the fact that the settlement will often conclusively deal with the underlying issues and not merely the positions adopted by the parties. Second, because of its problem-solving nature, mediation leaves parties with a sense that they have arrived at a fair outcome through a process that is conducive to the building, rather than the destruction, of relationships.

**Implications of Court Based Mediation for business**

Court Based Mediation will affect a business’s dispute resolution strategy in many ways, e.g.:

- Preparation for mediation is very different from preparation for litigation
- Because the timing of a mediation is only dependent on the availability of the parties and the mediator, decision-making around legal strategy will have to be expedited
- What will the mediator’s terms of reference be?; should the parties opt for a court-appointed mediator or choose private mediation instead?; who pays for the process?; where do we mediate?; who will be mandated to enter into a settlement agreement and what will that mandate be?; should the mediator be accredited or not?; should we have external representation at mediation and if so, whom do we settle for, a litigator or someone who understands mediation and its benefits, but can also fight a good fight if needed?; when do we use or suggest mediation and how do we do it without appearing uncertain about the merits of the case?; to what extent do we insist on the mediation being confidential?
- What do we included in our opening statement to the mediator?
- How do we manage the flow of information disclosure: what is given to the other party and what is for the exclusive knowledge of the mediator?
- What are the acceptable terms of a possible settlement?
- What is our fall-back if mediation fails? What is the other side’s?
- What is the best possible outcome for us, and at what cost, versus the worst outcome for us?
- What is our business case, as opposed to the legal one?
- Business will need to have, or develop, the capacity to do an early assessment of disputes to determine the best dispute resolution option in terms of risk, cost effectiveness and impact on business relationships
- Commercial contracts need to be adapted to include multi-tiered dispute resolution options in the event of disputes, with the emphasis on negotiation and mediation as first choice options, with litigation as the last resort alternative

**Implications for lawyers**

Mediation is a much misunderstood process. Legal representatives often view it with suspicion, believing that the acronym for alternative forms of dispute resolution, ‘ADR’, refers to ‘Alarming Drop in Revenue’!

The benefits of mediation for their clients are self-evident. The challenge for lawyers is to get to learn more about the mediation process, perhaps even to acquire those skills themselves,
and to find creative ways of generating decent fees from the process. Mediation, because it is speedy, can improve cash flow and enhance the lawyer’s reputation with clients, who want certainty and cost effective solutions.

Options include being trained and acting as mediators themselves; doing mediation advocacy work on behalf of clients; or broadening the scope of their practices to become dispute settlement practitioners and to include negotiation skills, mediation skills and general dispute resolution skills, in conjunction with litigation, as part of their practices.

Who will mediate cases?

Over the years South Africa and the international community have developed and adopted generally accepted standards for the training and accreditation of mediators. In South Africa these standards are managed by the Dispute Settlement Accreditation Council [DiSAC]. DiSAC is a voluntary industry association that publishes and maintains accreditation standards for mediators and arbitrators. These standards accord with internationally accepted minimum standards.

The Government has indicated (in the Draft Rule for Court Based Mediation) that accreditation standards will be set, and that panels of accredited mediators will be constituted. It is to be hoped that Government will work with the industry in determining these.

There are a number of well established businesses in South Africa who already offer mediation services to disputing parties. Anyone can refer a dispute to one of these bodies for resolution. These organisations have also committed to the accreditation standards referred to above.

Conclusion

When conciliation, mediation and arbitration was introduced in the arena of labour disputes in South Africa in the late 1980’s, this was initially met with strong resistance and opposition. However, once the obvious benefits and success of the system became apparent, opposition soon changed into complete acceptance of the process.

The introduction of Court Based Mediation brings a new and exciting era to the way that we view and deal with civil disputes. Disputing parties and their lawyers will have to reassess strategies that may have worked in the past. Those that adapt quickest will benefit most from these changes.

Prof Barney Jordaan
Head: Africa Centre for Dispute Settlement; admitted attorney

At the Africa Centre for Dispute Settlement (www.usb.ac.za/disputesettlement) we are committed to promoting dialogue and mediation to resolve differences, particularly, but not exclusively, in the commercial sphere