WITS MEDIATION WORKSHOP

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COURT ANNEXED MEDIATION: SUCCESSES, CHALLENGES AND POSSIBILITIES

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MEDIATION IN THE HIGH COURT

- Court-connected mediation as an alternative dispute resolution mechanism was introduced in the High Court of Namibia with the coming into operation of the new High Court Rules Published on 16 April 2014. During the period May – June 2014 a total number of 103 court-accredited mediators were trained. During March 2015 an additional 69 persons were trained as court-accredited mediators.

MEDIATORS

- Currently we have 156 court accredited mediators who actively mediate
- All accredited court mediators need to undergo our customized training
- Accredited court mediators are all 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, personal growth and general compliance with the Code of Ethics and the Rules and Policies of the Court
- The majority of our mediators are qualified legal practitioners. But we also have law lecturers , architects, clinical psychologists, magistrates and other professionals such as social welfare officers

HOW ARE MEDIATORS APPOINTED?

- Must have undergone the court's compulsory customized training programme. That is so even if they did mediation training elsewhere
- Programme was designed specifically for the court
- Includes mediation techniques and rules of the court. For non-lawyers basics of civil procedure also included.
- At the end of the training every mediator is accredited by the Judge-President at a formal ceremony which includes signing off the Code of Conduct

HOW ARE MEDIATION STANDARDS CONTROLLED?

- A mediator signs up to a code of conduct which is enforced by the court
- The mediator is required to submit dates of availability. If fails may be dis-accredited by the Judge President
- Need JP's approval not to do mediations for a particular length of time
- Continuing professional training conducted by the court is compulsory. May lose status if fails to attend. JP's permission required not to attend.
- Mediators are officers of the court and thus subject to the supervision of the court.

WHAT MATTERS DO THE MEDIATORS HEAR?

- All action proceedings
- Only applications excluded for now
- - Matrimonial / Family Law matters
- - Defamation claims
- - Loan default claims
- - Medical negligence
- - Building contracts
- - MVA claims
- Insurance claims
- - Professional negligence claims

WHICH COURT OFFERS MEDIATION?

- At the moment only the High Court offers mediation.
- The Judiciary is considering ways of introducing it in the magistrates' courts

WHO PAYS THE MEDIATORS?

- If it is a court-connected mediation, the mediator is paid a fee by the court for each session conducted.
- The parties may opt for a private mediation. But to trigger Rule 38(3) it must be conducted by a court accredited mediator. In that event the parties agree the fee with the mediator.
- Private Mediation is not governed by any formal procedure
- Court connected mediation is governed by the Rules of the High Court
- Mediators who are also employed by Government or employed as judicial officer do not get remunerated for acting as mediator
- Mediators from the private sector are paid per mediation to a maximum of two sessions per mediation (2014: ND1500; 2015:ND3500; 2016:ND3675/session), if payment is required by mediator
- Payment to mediators in court connected mediation is done with State funds (revenue)
- Many mediators do it pro bono to build up mediation practices

IS LEGAL REPRESENTATION ALLOWED AT MEDIATION

- Legal representation is a prerequisite for a court-connected mediation.

THE COSTS OF THE MEDIATION

- Court connected mediation is a service provided by the court in the public interest of promoting settlement and decongesting the court system. It is therefore free of charge as far as the Court is concerned.
- But in terms of rule 38(2), the costs of ADR in ter partes is 'in the cause.'

IS MEDIATION VOLUNTARY?

- Mediation may be ordered by the judge at anytime. It is also ordered if one of the parties or both want it. It has become a norm in all action proceedings.

AT WHAT STAGE IS A CASE REFERRED TO MEDIATION?

- At any stage of the proceedings (Rule 38(1)

WHO CAN REFER A CASE TO MEDIATION?

- The managing judge
- The parties

WHAT DOCUMENTATION IS EXCHANGED FOR THE MEDIATION?

- Rule 39 governs this issue
- The plaintiff's settlement proposal
- The defendant's counter proposal

INFORMAL SECTOR: TRADITIONAL LEADERS?

- Our mediation programme relates only to matters in respect of which the High Court has jurisdiction.

SETTLEMENTS MADE ORDER OF COURT?

- Not unheard of for the parties to choose to keep their settlement private
- Invariably the parties ask the court to make settlement an order of court
- The court must formally make an order that the matter was resolved and is considered finalised in the court's system

MEDIATION PROCESS…

- Rule 38(3) states as follows:

  "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."

- Initial referral order: Either of its own motion or at the request of the parties the court makes an initial referral order. That order directs the parties to approach the mediation office to book a mediator and a date for the mediation. The order has a return date.
- On the return date the parties come with a draft order proposing a mediator, the date for the mediation, the identities of the persons to be present at the mediation, the lawyers to represent the parties and the date the report of the mediator should be submitted. The available dates for each mediator are published on the court's website.

…MEDIATION PROCESS

- The court then makes the mediation referral order designating the mediator, the person(s) to represent a party, the venue and whether or not an interpreter will be required.
- Only a person with full settlement authority must attend The mediations are conducted on the court premises. We provide a computer and a printer.
- The mediator submits a report to the court after the mediation.

THE STATISTICS SHOW THAT OUR MEDIATION IS A SUCCESS

- Registrar: as taxing master keeps the statistics and reports to me regularly
- I will show you the overall statistics since we started
- Then share with you the cost-saving paradigm (for the parties)
- And demonstrate the Court time saved paradigm

FAILURE versus SUCCESS

- Court Connected Mediation in the High Court of Namibia has shown to be a huge success
- The success is seen from the statistics of the reported mediations which actually took place and were finalized
- Of the three hundred and forty nine (349) reported mediations concluded during 2014, 57,6% (201) were successful and 42,4% were unsuccessful (148)
- During 2015, one thousand and nine (1009) reported mediations were concluded, of which 518 (51,3%) were successful and 491 (48.7%) failed
- The total figures for the period June 2014 – December 2015, thus amount to:
- * 1358 reported mediations concluded
- * 719 successful
- * 639 failed

- As I always say these are cases which would have occupied the judges if not settled

SAVING LITIGATION COSTS

- The average litigation costs in defended High Court actions amounts to approximately N$ 50 000 – N$ 100 000 per litigant, if represented. It is thus a fare assumption to say that the total fees to be paid in respect of the average defended High Court action will amount to approximately N$ 100 000 – N$ 200 000. The 719 successful mediations in the High Court, therefore amounted to a minimum saving in the hands of the public (litigants) of approximately N$ 71 900 000 – N$ 143 800 000
- The revenue expenditure incurred by the State to conduct 1358 court-connected mediations amounted to:
- 2014 N$ 259 896
- 2015 N$ 1 695 120

SAVING COURT TIME

- The average High Court action needs approximately 3 court days for trial. It is thus a fare assumption to say that the 719 successful mediations in the High Court, saved at least 2157 trial days (8 years 7 months).
- In addition to the trial days saved, a considerable amount of court time is saved which would otherwise have been taken up by judicial case management hearings, general court administration, preparation, research and judgment writing.

CONCLUSION

- In the beginning it was mentioned that the aim of alternative dispute resolution in the High Court is inter alia to
- * create an opportunity to litigants to reduce litigation costs in a controlled environment; and
- * to free judicial time for the hearing of only those matters which are not susceptible to amicable resolution.

- We may thus conclude to say that court connected mediation is successful in respect of both the aforementioned aims, in that in less than two years, it amounted to a saving to litigants of more than N$ 100 000 000 and it provided at least 2157 trial days to other cases not being susceptible to amicable resolution

www.ejustice.moj.na

More information on mediation in the High Court of Namibia is contained in our publication, "Mediation Programme in the High Court of Namibia Outreach Paper", which may be downloaded from our Superior Courts website, www.ejustice.moj.na.

LESSONS FOR SOUTH AFRICA

- Strong leadership from the top is needed to push reform and to stay the course.
- Consult the legal profession on the proposed system.
- Get them actively involved as mediators.
- The court must provide some remuneration to the mediators so the parties do not carry the burden. Otherwise might discourage litigants. We have found that the fact they do not have to pay for the mediator is a great incentive

OBLIGATIONS OF PARTIES WHERE MATTER REFERRED FOR ADR : Rule 39

- 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

OBLIGATIONS OF PARTIES WHERE MATTER REFERRED FOR ADR

- (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.

OBLIGATIONS OF PARTIES WHERE MATTER REFERRED FOR ADR

- (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.
- (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.

OBLIGATIONS OF PARTIES WHERE MATTER REFERRED FOR ADR

- (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 – 51
  - (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;

OBLIGATIONS OF PARTIES WHERE MATTER REFERRED FOR ADR

- (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.

OBLIGATIONS OF PARTIES WHERE MATTER REFERRED FOR ADR

- (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.