



Legal counseling in family mediation to address unnecessary litigation.

By

Linda Tendesai Ndebele

Student Number: u28292601

Supervisor: Professor Rashri Baboolal-Frank

Department of Procedural Law, University of Pretoria

Faculty of Law – 2023

TABLE OF CONTENTS

Declaration of originality	i
Dedication.....	ii
Acknowledgements	iii
Summary.....	iv-v

CHAPTER 1: INTRODUCTION TO THE STUDY

1.	Introduction	1-2
1.1.	Background and problem statement	2-4
1.2.	Research question	5
1.3.	Research methodology and approach	6
1.4.	Significance of study	6-7
1.5.	General overview of alternative dispute resolution.....	8-13
1.6.	General overview of legal counseling	13-17
1.7.	Overview of the chapters.....	17-19

CHAPTER 2: A REVIEW OF THE ROLE OF LEGAL COUNSELING

IN EFFECTIVE MEDIATION

2.	Introduction.....	20
2.1.	General overview of mediation in South Africa	21-33
2.2.	Legal framework of mediation in South Africa	34-42
2.3.	The role of legal counseling in the mediation process	43-51
2.4.	Discussion of the practical effects of legal counseling on successful implementation of mediation to minimise needless litigation	51-59
2.5.	Conclusion	59-60

CHAPTER 3: A REVIEW OF THE IMPACT OF LEGAL COUNSELING ON EXPEDITIOUS RESOLUTION OF FAMILY CASES IN SOUTH AFRICA

3.	Introduction.....	61
3.1.	Overview of family cases in South Africa	62-72
3.2.	Regulatory framework governing family law and legal counseling in South Africa	72-80
3.3.	Legal counseling as a means to facilitate prompt. resolution of family cases in South Africa.....	80-88
3.4.	Attributes that contribute to the efficient resolution of family cases and effective legal counseling in South Africa.....	88-95
3.5.	Conclusion.....	95-96

CHAPTER 4: COMPARATIVE STUDY OF MEDIATION AND LEGAL COUNSELING IN AUSTRALIA AND SOUTH AFRICA

4.	Introduction.....	97-98
4.1.	Historical context and comparative background.....	99-106
4.2.	Establishment of Family Courts in Australia	106-124
4.3.	Regulation of legal counseling in the Family Courts of Australia	124-130
4.4.	Comparison of the current state of Family Courts in South Africa and Australia.....	130-138
4.5.	Conclusion	138-139

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.	Introduction	140
5.1.	Summary of the study	141-143
5.2.	Conclusion	143-144
5.2.1.	Analysis of most recent legal precedent	145-153
5.3.	Recommendations	153
5.3.1.	Stricter oversight and regulation of judicial referrals of family cases	154-155
5.3.2.	Establishment of family law practitioners.....	155-159
5.3.3.	The establishment and implementation of a Family Practitioner Division under the Legal Practice Council to oversee and regulate family law practitioners.	159-162
5.3.4.	Enhancement of the family case management process	162-164
5.3.5.	Integration of court-annexed mediators into the South African Family Court	165
6.	BIBLIOGRAPHY	166-186



Plagiarism declaration

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this thesis is my own original work. Where other people's work has been used (either from a printed source, internet, or any other source), this has been properly acknowledged and referenced in accordance with the requirements as stated in the University's plagiarism prevention policy.
3. I have not used another student's past written work to hand in as my own.
4. I have not allowed and will not allow anyone to copy my work with the intention of passing it off as his or her own work.

Signature: _____

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, written over a horizontal line.

DEDICATION

I am grateful to the Lord Jesus for affording me life and the ability to learn. This thesis is in honor of the memory of my late parents Brig. Gen Temba Kanganga and Martha Patronella Malaila who always believed in me and sacrificed a lot to educate me.

ACKNOWLEDGEMENT

My supervisor Professor Rashri Baboolal-Frank believed that I had the potential to research and write better than I ever realised. Pursuant to that faith in me, she continued to guide me strictly and demand a higher standard of work from me at every stage. I am very grateful for her relentless supervision.

My husband, Bevin Ndebele afforded me both time and resources to properly pursue this Masters degree. I am grateful for all that support and love.

My children and siblings continued to cheer me on and went out of their way to ensure that I remained committed to complete this thesis. I am grateful for their selflessness and continued support.

Summary

The purpose of this study is to examine the role of legal counseling in reducing the occurrence of avoidable and protracted litigation in cases involving family law. One distinguishing factor of family law cases is the proximity of the emotional relationships between the parties, and the fact that the parties often still need to closely relate with each other well after the dispute has been resolved.¹ Divorced parents who have minor children still need to co-parent for the benefit of their children long after the divorce is finalised. The main motivation for this research is the **realization** that legal counseling does play a pivotal role in promoting constructive or the contrary destructive dispute resolution in these family cases.² For purposes of this study, legal counseling refers to specific attitudes, skills and strategies employed by the legal counselor in his or her interaction with clients and opponents in the process of resolving the family law dispute.³ This study is premised on the Lawyer autonomy model.

¹ R Alberti & M Emmons 'Your Perfect Right' 110 (6th ed. 1984) (citing L Berkowitz 'The concept of aggressive drive: Some additional considerations.' (1965) 2 *Advances in experimental social psychology* 301-329.

² E Baggett 'Cross-Cultural Legal Counseling.' (1984) 18 *Creighton Law. Review* 1475.

³RS Redmount 'An Enquiry into Legal Counseling'
https://www.law.ua.edu/pubs/jlp_files/issues_files/vol04/vol04art06.pdf accessed on 10 January 2023.

The Lawyer autonomy model presumes that the legal counselor is fully in control of the dispute resolution process and influences the decisions made by the litigants.⁴ As such, legal counseling is a tool which can facilitate or frustrate the effective implementation of alternative dispute resolution processes.⁵ The basic elements of effective legal counseling such as the legal counselor's substantive knowledge of the law and procedure, the ability to communicate effectively and manage client expectations to promote settlement are key to this study.⁶ This research also explores how legislation, legal processes and systems can be improved to facilitate a move away from adversarial litigation to constructive legal counseling and effective resolution of family disputes through mediation. Certain jurisdictions such as Australia have also identified and are dealing with incidence of unnecessary litigation in family cases just like South Africa. This study will, review family law case management in these two jurisdictions. This research will also explore how the structures and processes implemented by the Family Court in Australia have contributed to constructive legal counseling and effective case management which has led to a significant reduction of the incidence of unnecessary litigation. Lastly this study will explore key lessons from the Australian Family Court system and how these can be applied to improve the South African family dispute resolution system.

⁴ R Rubinson 'Realizing dispute resolution: Meeting the challenges of legal realism through mediation' (2017) *18 Nevada Law Journal* 834.

⁵ Rubinson (n4 above) 834.

⁶ GS Goodpaster 'Human Arts of Lawyering: Interviewing and Counseling, The.' (1975) *27 Journal of Legal Education* 5.

CHAPTER ONE

1. INTRODUCTION

The lawyer's ability to listen to own clients, opponents and presiding officers, as well as the ability to effectively communicate professionally while managing emotions in the legal counseling process facilitates or frustrates effective dispute resolution processes and outcomes.⁷ In South Africa, it is a reality that the courts are inundated with litigious matters which can take long to finalize.⁸ According to the South African government website,⁹ a contested divorce case can take two to three years to go to trial and be finalised.¹⁰ This is a protracted period for the obvious emotional trauma associated with divorces not only on the married couple but also on children and other immediate family members.

⁷ Goodpaster (n6 above) 5.

⁸<https://www.gov.za/services-residents/relationships/marriage/how-get-divorce#:~:text=It%20can%20be%20finalised%20within,to%20an%20uncontested%2Funopposed%20divorce> accessed on 30 October 2023.

⁹ <https://www.gov.za/services-residents/relationships/marriage/how-get-divorce> accessed on 19 January 2023.

¹⁰ <https://www.gov.za/services-residents/relationships/marriage/how-get-divorce> accessed on 19 January 2023.

The case law and previous studies canvassed in this study illustrates that effective legal counseling can facilitate more constructive alternative dispute resolution and discourage the incidence of unnecessary litigation in areas such as family law cases.¹¹ The Family Courts in Australia have to a larger extent successfully managed to relieve and enhance the dispute resolution process by incorporating mediation into the divorce process.¹²

1.1. Background and problem statement

While there are various factors which may frustrate effective dispute resolution and promote long drawn litigation, this study identifies legal counseling as one of the significant factors.¹³ Goodpaster correctly concludes that some attorneys who are very knowledgeable in the substantive law are far less effective and skilful in their dealing with clients, opponents, and judges and that this has an impact on dispute resolution.¹⁴ This study is motivated by some frustrations which have been raised and recorded in a growing number of case law by judges and presiding officers who have questioned the role of legal counseling in encouraging unnecessary litigation.¹⁵

¹¹ *Mmamphsika v Mnamphsika* 2018 (33) ZAGPPHC 628

<https://www.saflii.org/za/cases/ZAGPPHC/2018/628.html> accessed on 20 January 2023.

¹² M De Jong 'Divorce mediation in Australia – valuable lessons for family law reform in South Africa' 2007 (40) *Comparative and International Law Journal of Southern Africa* 281.

¹³ Goodpaster (n7 above) 5.

¹⁴ Goodpaster (n13 above) 5.

¹⁵ *H.C.J v N.J and Another* (2023) ZAFSHC 182.

Acting Judge Sethene in the case of *University of South Africa v Socikwa* and others¹⁶, notes that courts are Constitutional constructs designed to serve justice and enhance the rule of law and not theatres of amusement to elevate heroism.¹⁷ In this instance Judge Sethene was complaining about the role of legal counsel in lodging this case which had no prospects of success. He went further to suggest that where a hopeless case is brought with the assistance of legal counsel it is deemed that the legal counsel is either incompetent or knowingly chose to assist in the abuse of court process.¹⁸

The essence of legal representation is to effectively assist the client to find the most suited legal remedy and effectively persuade others to accept that legal position or at least reach a mutually acceptable compromise.¹⁹ As such, legal counseling ought to always facilitate speedy and constructive dispute resolution and not fan long drawn litigation. In most cases disputes are resolved quicker through alternative dispute resolution processes such as mediation, which ultimately enhances the preservation of relationships.²⁰ In comparison to a divorce that goes to trial, a settled divorce case can be finalised in approximately three months.²¹

¹⁶ (2023) ZALCJHB 172.

¹⁷ *University of South Africa* (n16 above) para 1.

¹⁸ D Webb 'Hopeless Cases: In Defence of Compensating Litigants at the Advocate's Expense.' (1999) 30 (1) *Victoria University of Wellington Law Review* 299.

¹⁹ Goodpaster (n14 above) 10.

²⁰ TG Wiese *Alternative dispute resolution in South Africa: Negotiation, mediation, arbitration, and ombudsmen* (2016) v.

²¹ <https://www.gov.za/services-residents/relationships/marriage/how-get-divorce> accessed on 29 May 2023.

Alternative dispute resolution is also an increasingly popular complement to official legal channels which helps to resolve disputes speedily while enhancing the parties' sense of justice.²² Rule 41A of the High Court Rules provides for mediation as a form of dispute resolution.²³ It is however important to **emphasise** that mediation is a voluntary process whereby the parties to a dispute make use of a neutral third party to assist them in resolving their dispute.²⁴ The fact that mediation is voluntary means that its success is solely dependent on the parties' attitudes because the parties can withdraw at any stage and are not obliged to accept the outcome of the mediation.²⁵

Where parties and legal counselors do not fully compromise and cooperate, this mediation can end up prolonging matters further as the matter would still need to be referred to court.²⁶ The role of the lawyer in the legal counseling process is thus key to constructive and effective dispute resolution. This view will be explored in this study as it presupposes that the attorneys are able to influence the client at material times. In this regard two main lawyering models, namely client autonomy and lawyer autonomy model will be considered.²⁷

²² EE Uwazie 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' (2011) 16 *Washington, DC: Africa Center for Strategic Studies*.

²³ Supreme Court Act 59 of 1959.

²⁴ Wiese (n20 above) 47.

²⁵ Wiese (n24 above) 47.

²⁶ Wiese (n25 above) 47.

²⁷ M Hausman 'The Ethics of Lawyering in the Public Interest: Using Client and Lawyer Autonomy as a Guidepost' (1990) 4 *Georgetown Journal of Legal Ethics* 383-402.

1.2. Research question

This research seeks to establish the role of legal counseling in reducing the incidence of unnecessary litigation and promoting effective alternative dispute resolution.

The following sub questions will be answered during the study:

- 1.2.1. How does the quality of legal counseling impact on the effectiveness of Mediation?
- 1.2.2. How does legal counseling facilitate expeditious dispute resolution in family cases in South Africa?
- 1.2.3. How has legal counseling and mediation promoted effective dispute resolution in another jurisdiction such as Australia compared to South Africa?
- 1.2.4. How does legal counseling reduce unnecessary litigation?

1.3. Research methodology and approach

This study is based upon desktop research. The researcher will consider, review, and analyse sources such as textbooks, journals, case law and personal experience on alternative dispute resolution and legal counseling in South Africa and Australia. This study compares South Africa to Australia because since 1976, the Australian Family Courts have successfully integrated alternative dispute resolution processes such as mediation into their divorce court procedure. This has yielded significant reduction of long drawn divorce litigation and other positive benefits to the litigants and affected children.²⁸ As such, many lessons can be drawn from the functioning of these Australian Family Courts to be implemented in the South African family law system.

1.4. Significance of the study

Redmount correctly submits that legal counselors serve as intermediaries for interpreting and applying the law, and for guiding individuals who are preoccupied with their own matters in complying with the law.²⁹ There is therefore a need to continuously review and develop the legal counseling process in a bid to improve its effectiveness and contribution to administration of justice in any country.³⁰

²⁸ De Jong (n12) 281.

²⁹ Redmount (n3 above) 182.

³⁰ Redmount (n29 above) 182.

While there are various factors which may frustrate effective dispute resolution and promote long drawn litigation, this study identifies legal counseling as one of the most significant factors in South Africa. Specific attitudes, skills, and strategies which legal counselors engage need to be constantly reviewed in keeping with legal developments which have seen a major shift from traditional adversarial litigation to more mediatory alternative dispute resolution processes.³¹

Furthermore, the capacity to establish a harmonious relationship with clients and adversaries, together with the ability to inform and convince, not only influences the final result but also defines the efficiency of the conflict resolution process to be pursued.³² This study will show that there is a correlation between effective legal counseling and the success of any alternative dispute resolution process.³³

³¹ Redmount (n30 above) 181.

³² Goodpaster (n19 above) 5.

³³ S Jayakumar 'Client Counselling for tomorrow's Lawyers' (2011) *All India High Court Cases Journal* 13.

1.5. General overview of alternative dispute resolution

Section 34 of the South African Constitution guarantees the right for all to have their disputes resolved in the courts, where possible.³⁴ However, where appropriate, disputes must also be resolved in alternative forums and through alternative dispute resolution processes.³⁵ The South African justice system therefore allows for alternative dispute resolution even in family law disputes. There are specific guidelines to such alternative dispute resolution processes regulated by *inter alia* legislation such as the Children's Act³⁶ and the Divorce Act³⁷, where applicable.

The outcomes in these processes however would still need to be confirmed by the courts. For example, even where the parties have settled their divorce case through negotiation or mediation, they must still approach the court for an order which confirms their agreement. The process of confirming an agreement in court is significantly faster than a trial.³⁸ In general, there are four main types of alternative dispute resolution processes, being, negotiation, mediation, arbitration, and Ombudsmen.³⁹

³⁴ Act 108 of 1996.

³⁵ Act 108 of 1996.

³⁶ Act 38 of 2005.

³⁷ Act 70 of 1979.

³⁸ Alternative dispute resolution in Family matters – South African Law Reform Commission 16 <https://www.justice.gov.za/salrc> accessed on 11 May 2023.

³⁹ Wiese (n26 above) 47.

However, as can be gleaned from available literature, mediation is the form of alternative dispute resolution most employed in South African family law matters.⁴⁰ This study will thus focus on mediation in family cases. There has been development of alternative dispute resolution processes in the South African justice system, all in a bid to improve general access to justice for all.⁴¹ Recent developments have seen the introduction of *inter alia* compulsory mediation in some cases.⁴²

One example is the introduction of Uniform Court Rule 41A which came into effect on the 9th of March 2020 and applies to all High Court matters in the country.⁴³ This rule establishes mediation as a compulsory step prior to pursuing litigation. In terms of this rule 41A, before initiating an action or application, in the High Court, a party must notify their opposition, giving them a chance to agree to the referral of the matter to mediation, or refuse mediation, with good cause.⁴⁴ Compliance with Rule 41A can be waived in urgent applications.

⁴⁰ Wiese (n39 above) 47.

⁴¹ South African Law Commission 'Alternative Dispute Resolution' Issue Paper 8, Project 94 https://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf accessed on 30 October 2023.

⁴² JJ Joubert 'Mediation Rule 41A of the High Court' (2020) Lexis Nexis South Africa <https://www.lexisnexis.co.za/lexis-digest/resources/covid-19-resource-centre/practice-areas/mediation-and-arbitration/mediation-rule-41a-of-the-high-court> accessed on 30 October 2023.

⁴³ Joubert (n42 above).

⁴⁴ [https://www.justice.gov.za/legislation/rules/UniformRulesCourt\[26jun2009](https://www.justice.gov.za/legislation/rules/UniformRulesCourt[26jun2009) accessed on 21 January 2023.

In the unreported case of *Koetsioe and Others v Minister of Defence and Military Veterans and Others*⁴⁵, the court emphasised the fact that mediation is compulsory in terms of Rule 41A, and legal counselors must comply. Judge Davis in this case emphasised that Rule 41A of the Uniform Rules of this Court places an obligation on parties to refer the dispute to mediation.⁴⁶ He also notes that many disputes in his division have successfully been referred to mediation, mostly by judges especially trained in alternative dispute resolution.⁴⁷ It is clear from this case that the judiciary acknowledges the role of alternative dispute resolution in facilitating speedy resolution of disputes.

The increasing number of Judges being educated in alternative conflict resolution suggests that alternative dispute resolution will play a more prominent role in the near future.⁴⁸ As can be gleaned from the above case of *Koetsie*, legal counsel can be dismissive of the requirement to mediate.⁴⁹ The court's condemnation of legal counsel for neglecting to participate in the mediation process will further promote adherence to the mediation requirement. Judge Davis explicitly recorded that such a demeanor shown by legal counsel is inappropriate in this context.⁵⁰

⁴⁵ (2021) ZAGPPHC 203 para 6.2.

⁴⁶ *Koetsie* (n45 above) para 6.2.

⁴⁷ *Koetsie* (n46 above) para 6.2.

⁴⁸ *Koetsie* (n47 above) para 6.2.

⁴⁹ *Koetsie* (n48 above) para 6.3.

⁵⁰ *Koetsie* (n49 above) para 6.4.

It is therefore crucial to examine the function of legal counselors in alternative dispute resolution procedures in order to highlight the increasing need for well-trained and empowered legal counsel. These skills are essential for effectively resolving disputes through alternative dispute resolution methods. The South African Courts continue to encourage resolution of disputes between the parties and their attorneys through the compulsory pretrial conferences. In terms of rule 37(6), all litigants, including those in contested divorces, are encouraged to consider settlement of their dispute first before they will be allocated a trial date.⁵¹

Another significant development in our justice system has been the establishment of the court annexed mediation program by the Department of Justice.⁵² The Rules of Voluntary Court-Annexed Mediation (Chapter 2 of the Magistrates' Courts Rules) came into operation on 1 December 2014.⁵³ The main objective of these Rules is to facilitate case-flow management with the hope of reducing the number of disputes ending up in Court.⁵⁴ However, the court annexed mediation process has been suspended indefinitely from the 15th of March 2022.⁵⁵

⁵¹ Rule 37 (6) High Court Rules.

⁵² <https://www.justice.gov.za/mediation/mediation.html> accessed on 20 January 2023.

⁵³ Rules of Court: Amendment: Mediation Chapter 2, G 37448 RG 10151 GoN 183, 18 Mar 2014.

⁵⁴ <https://www.justice.gov.za/mediation/mediation.html> accessed on 20 January 2023.

⁵⁵ <https://www.justice.gov.za/mediation/mediation.html#:~:text=Court%2DAnnexed%20Mediation,Dated%3A%2015%20Mar%202022> accessed on 29 May 2023.

Family law cases are often highly emotional and characterised by significant financial, interpersonal, and psychological stress for family members.⁵⁶ The courts are actively encouraging parties to mediate these disputes. Legal counselors play a key role in this process. In the unreported case of *Mmamphsika v Mmamphsika*,⁵⁷ the facts related to a dispute between two siblings in a deceased estate. Judge Van Der Schyff expressed her frustration that this dispute had to be litigated.⁵⁸ The court was of the view that the legal representatives of the parties, should have considered mediation as the preferred method of dispute resolution to *inter alia* facilitate and promote reconciliation.⁵⁹

Based on the preceding case, it can be inferred that legal counselors possessing the requisite expertise to facilitate the parties' transition from litigation to mediation are required. The courts expect that they will employ these abilities to promote the constructive resolution especially in family law cases.⁶⁰ Studies have shown that traditional adversarial approaches used by the court for civil litigation have, to a larger extent, not worked well for family law cases.⁶¹

⁵⁶ Alternative dispute resolution in Family matters – South African Law Reform Commission page 16 <https://www.justice.gov.za/salrc> accessed on 11 May 2023.

⁵⁷ (2018) ZAGPPHC 628.

⁵⁸ *Mmamphsika* (n11 above) para 33.

⁵⁹ *Mmamphsika* (n58 above) para 33.

⁶⁰ *Mmamphsika* (n60 above) para 33.

⁶¹ N Bala et al 'One Judge for One Family: Differentiated Case Management For Families In Continuing Conflict' (2010) 26 *Canadian Journal of Family Law* 396.

The South African civil justice system is to a greater extent expensive, slow, complex, fragmented, and overly adversarial.⁶² The combination of these factors can be very damaging to relationships in family law cases. One primary characteristic of mediation is that the mediator assists the parties to get back on speaking terms and resolve their issues through dialogue.⁶³ In most instances, once the parties can speak to each other, then it increases their chances to resolve their dispute. However, in litigation, the parties place greater emphasis on case preparation in order to persuade the presiding officer of their respective positions when the trial day arrives.⁶⁴

1.6. General overview of legal counseling

Different lawyers approach cases differently by applying legal counseling techniques which suit the facts the most. This is called lawyering and there are different lawyering models available to legal counsellors.⁶⁵ According to Federle, there are two basic lawyering models which are the client autonomy model and the lawyer autonomy model.⁶⁶ The objective of this study is to analyse the two lawyering models and their impact on the process of providing legal advice.

⁶²Alternative Dispute Resolution in Family Matters -SA Law Reform Commission Discussion Paper 148, June 2019 21 <https://www.justice.gov.za/salrc> accessed on 11 May 2023.

⁶³ Wiese (n40 above) 49.

⁶⁴ Wiese (n63 above) 49.

⁶⁵ KH Federle 'The Ethics of Empowerment: Rethinking the Role of Lawyers In Interviewing And Counseling The Child Client' (1995) 64 *Fordham Law Review* 1659.

⁶⁶ Federle (n65 above)1657.

The client autonomy model is defined by a focus on meeting the client's legal needs and empowering them. In this model, the attorney takes on a position that is one-sided, submissive, and morally exempt from being held accountable for the independent decisions made by the client.⁶⁷ This model is particularly significant because it calls into doubt the ability of legal counsel to independently lead the process toward a specific resolution. Furthermore, according to this model, after the client is duly apprised of their legal rights and procedures, they provide explicit instructions to their legal counsel, who executes these instructions exclusively.⁶⁸

The lawyer autonomy model refers to a scenario in which the legal counsel maintains professional independence from the client and may even operate in a paternalistic manner. Additionally, the legal counsel is ethically responsible for his or her conduct of the case.⁶⁹ This model is crucial to this research because it places greater emphasis on the legal counsel's responsibility to direct cases away from litigation and toward mediation when that is more suitable. This is the case because, according to this theory, the client will entirely rely on the attorney to direct the dispute resolution process and will adhere to the legal counsel provided.⁷⁰

⁶⁷ Federle (n65 above) 1657.

⁶⁸ Federle (n67 above) 1657.

⁶⁹ Federle (n69 above) 1658.

⁷⁰ Federle (n69 above) 1658.

Taskinen contends that the practice of law can be categorized primarily as preventative or adversarial in character. He asserts that within an adversarial framework, the principal obligation of an attorney is to embrace the strengths of their client's position and expose the error of the opposing party, thereby operating as a legal activist.⁷¹ This position is akin to the client autonomy approach discussed above. The preventive approach primarily **emphasises** the prevention of problems and the promotion of a client's success by addressing the root causes of the dispute.⁷² This approach is akin to the lawyer autonomy approach which assumes that the legal counselor has the power to influence the client as well as the outcome of the case.

.

It is generally accepted that the primary job of legal counsel is to promote access to justice in a number of ways which include educating a client on their legal rights and assisting the client to defend those rights in different forums.⁷³ The client generally seeks the assistance of the attorney to understand the law, to evaluate options and make decisions.⁷⁴ The attorney is thus expected to be not only knowledgeable of the substantive law but also the procedures available to assist the client to implement the knowledge so received.

⁷¹TKJ Taskinen 'Some Thoughts on Proactive Counselling and Legal Mentality', *Scandinavian Law* (226) 230 <https://scandinavianlaw.se/pdf/49-12.pdf> accessed on 20 January 2023.

⁷² Taskien (n71 above) 231.

⁷³ SL Pepper 'Counseling at the Limits of the Law: An Exercise in the Jurisprudence and ethics of Lawyering' (1995) *Yale Law Journal* 1546.

⁷⁴ Pepper (n73 above) 1547.

According to Srividhiya Jayakumar⁷⁵, the process of legal counseling serves two primary functions. Firstly, it facilitates the individual in expressing, examining, and comprehending their thoughts and emotions, enabling them to determine their course of action. Secondly, it aids the individual in independently formulating and selecting their own solutions.⁷⁶ This study seeks to evaluate these functions as an aid to mediation of family law disputes in South Africa. According to Edward⁷⁷, legal counsel plays a role in avoiding controversy and assist to resolve disputes without resorting to litigation. This view will be applied against the lawyering models discussed above by comparing outcomes in scenarios where the different lawyering models have been applied and the effect thereon.

In instances where the lawyer autonomy model is applied, then the parties are guided mostly by the legal counsel. However, where the client autonomy model is applied the legal counsel's power to drive the process away from litigation may be less.⁷⁸ Lawyering skills involve a great degree of self-discipline or habits, which the lawyer can be taught in their training process. Skills such as attentive listening as opposed to partial or interpretive listening are key elements which influence the development of a case.

⁷⁵ Jayakumar (n33 above) 13.

⁷⁶ Jayakumar (n75 above) 13.

⁷⁷ D Edward 'The Lawyer as Counselor and the Prevention of Litigation' (1982) 31 *Catholic University Law Review* 689.

⁷⁸ Edward (n77 above) 689.

The lawyer must have the ability to listen to gain understanding of the problem rather than to use what is said to further own arguments. Once a lawyer learns good listening skills, they are better placed to guide a client to effective dispute resolution.⁷⁹ It is however true that, in most cases where a mediatory approach is employed, the lifespan of a case is significantly shortened. This is so even if the matter subsequently goes to litigation. Where parties mediate, the issues in dispute are identified quicker and parties can isolate issues which require adjudication by a judge and those which can be mediated.⁸⁰ This study will thus evaluate what constitutes effective legal counseling in family cases and how this can reduce unnecessary litigation.

1.7 Overview of the chapters

Chapter 1: Introduction

This is the introduction to the study as elucidated.

Chapter 2: Legal Counseling and its role in mediation

This chapter seeks to answer the following question:

‘How does the quality of legal counseling impact on the effectiveness of mediation?’

⁷⁹ Goodpaster (n32 above) 19.

⁸⁰ Goodpaster (n79 above) 19.

The particular skills, attitudes and strategies which a lawyer engages , mostly in his office to assist individual clients to meet specific legal needs and to resolve specific legal problems will be explored in this sub chapter. The lawyer`s attitude and strategies employed are based on the lawyering model preferred by the lawyer. At any given point in the dispute resolution process, a client and his lawyer are presented with a variety of dispute resolution alternatives which includes litigation and mediation. The suitability of the dispute resolution adopted is determined by the legal counselor and the client in the legal counseling process. This subchapter explored two main lawyering models and the legal counselor`s effectiveness. This chapter also evaluates the impact on effective mediation.

Chapter 3: The impact of legal Counseling on effective mediation of family cases in South Africa

This chapter seeks to answer the following question:

‘How does effective legal counseling facilitate expeditious resolution in family cases in South Africa?’

This chapter explores the legal counseling process as a tool to facilitate effective mediation in family cases. This chapter also explores case law in South Africa where judges have been very clear that mediation is more suited to family law cases as it *interalia* can encourage restoration of relationships better than adversarial litigation processes.

Chapter 4: A comparative analysis - South Africa and Australia

This chapter seeks to answer the following question:

‘How has effective legal counseling and mediation promoted effective dispute resolution in another jurisdiction such as Australia compared to South Africa?’

This chapter examines the integration of legal counseling and mediation in family cases within the Australian context, drawing comparisons to the corresponding developments in South Africa. Additionally, this chapter delves into the examination of how legal counseling can effectively facilitate the resolution of disputes and mitigate avoidable litigation in the jurisdictions.

Chapter 5: Recommendations and Conclusion

This chapter will substantiate the conclusion that there is a clear nexus between the quality of legal counseling and effective dispute resolution and provide recommendations to facilitate effective legal counseling and mediation to address unnecessary litigation.

CHAPTER TWO

A REVIEW OF THE ROLE OF LEGAL COUNSELING IN EFFECTIVE MEDIATION

2. Introduction

This chapter provides a comprehensive examination of mediation, detailing its practical implementation within the South African justice system. Also, to be addressed are legislative and procedural guidelines applicable to mediation in South Africa. Through an examination of case law, this chapter examines the way legal counseling facilitates access to justice through mediation.

2.1 General overview of mediation in South Africa

Mediation, just like all other forms of alternative dispute resolution processes is aimed at improving the efficiency of dispute resolution by *inter alia* promoting constructive engagement between the parties and relieving mainstream courts of huge workloads created by litigious cases.⁸¹ One of the key weaknesses of the mainstream adversarial justice system, largely applied by the South African courts, is that it creates opportunity for abuse by some litigants and legal counsel which ultimately frustrates the weaker party's effective access to justice.⁸²

Factors such as financial discrepancies between parties can easily be exploited to the extent that it can frustrate the weaker party's access to justice.⁸³ Access to justice must be sacrosanct for any justice system to function effectively.⁸⁴ Legal processes followed by the courts and other tribunals must be structured in a manner which promotes key outcomes such as fairness, efficiency, cost effectiveness and judicial independence.⁸⁵

A society achieves effective access to justice when laws and legal procedure are not only codified but are also consistently applied for purposes of efficiently resolving legal disputes.⁸⁶ The South African Constitution,⁸⁷ is one of the key instruments used by our justice system to guarantee the right to access to justice.⁸⁸ It is structured to safeguard restorative justice and ensure that social unity is achieved by ensuring that legal disputes are resolved efficiently by applying the law effectively.⁸⁹ The Constitution also seeks to ensure that courts and other tribunals are empowered to hear and decide disputes effectively and in a manner that promotes access to justice by all.⁹⁰

Access to the abovementioned courts and tribunals specified in the Constitution, however, is to a larger extent dependent on the parties' ability to afford legal counseling

⁸³ Lavi (n82 above) 4.

⁸⁴ W Winlock 'The Fundamental Right of Access to Justice.' (2005) 3 *East African Court of Justice's Human Rights & Democracy* 43.

⁸⁵ Winlock (n84 above) 43.

⁸⁶ Winlock (n85 above) 43.

⁸⁷ Act 108 of 1996.

⁸⁸ Act 108 of 1996.

services especially in the higher court litigation process.⁹¹ This arises from the fact that, despite the Constitution's objective of facilitating universal access to the judiciary, the provision of pro bono legal assistance in South Africa, particularly in civil cases, is not guaranteed.⁹²

As much as the Constitution provides for parties to represent themselves, most times the intricacies of the law and strict court procedures makes it difficult for parties to effectively access the courts and justice as a whole without legal counsel who come at a cost.⁹³ The adversarial set up of the court process is mostly challenging for an unrepresented person.⁹⁴ As such, most people are largely reliant on legal counsel to assist them to properly access justice and enforce their rights against others.

There are however some organisations such as the Legal Aid South Africa established in terms of the Legal Aid South Africa Act⁹⁵, which facilitate access to civil courts by *inter alia* providing legal education and information concerning legal rights and obligations to prepare a client to represent themselves.⁹⁶ However these organisations can only help a

⁸⁹ Act 108 of 1996.

⁹⁰ Act 108 of 1996.

⁹¹D McQuoid-Mason 'Access to Justice in South Africa.' (1999) 17 *Windsor Yearbook of Access to Justice* 234.

⁹² McQuoid-Mason (n91 above) 234.

⁹³ Act 108 of 1996 sec 38.

⁹⁴ McQuoid-Mason (n92 above) 244.

⁹⁵ Act 39 of 2014, sec 3.

⁹⁶ Act 39 of 2014, sec 3.

few minorities who qualify in terms of the set means test.⁹⁷ In a bid to further promote access to effective and efficient resolution of legal disputes in South Africa, there are other key legislative measures in place to complement the objectives of the South African Constitution.

The South African Law Reform Commission Act, as amended⁹⁸, makes provision for the establishment of the South African Law Reform Commission (the Law Reform Commission).⁹⁹ This Law Reform Commission was established with the sole objective of preserving the rule of law in South Africa by, *inter alia*, organizing and facilitating progressive transformation of the laws of South Africa.¹⁰⁰

Of significant relevance to this study is the work which has been done to date by the Law Reform Commission in researching and advancing recommendations aimed at improving legal counseling and dispute resolution in the courts through alternative dispute resolution processes such as mediation.¹⁰¹ From as early as July 1996, the Law Reform Commission has been investigating and driving the formal adoption of alternative dispute

⁹⁷ McQuoid-Mason (n94 above) 251.

⁹⁸ Act 19 of 1973.

⁹⁹ Act 19 of 1973 sec 4.

¹⁰⁰ Act 19 of 1973 sec 4.

¹⁰¹ SA Law Reform Commission Project 142 'Investigation into legal fees -including access to justice and other interventions' <https://www.saflii.org/za/other/ZALRC/2022/3.pdf> accessed on 31 October 2023 page xiv.

resolution processes in South Africa for purposes of addressing the challenge of adversarial, abrasive, long drawn litigation and overburdened courts.¹⁰²

¹⁰² SA Law Commission Project 94, Issue paper 8 'Alternative dispute resolution'
https://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf accessed on 31 October 2023, 11.

In terms of this research it was established that alternative dispute resolution processes actually present parties with an opportunity to resolve their legal issues through processes which are most suitable under the parties' circumstances.¹⁰³ One of the key concerns raised with respect to the adversarial litigation system in South Africa is that most litigants find the process frustrating because the parties lose control of the process as they are mostly represented by legal counsel who speaks to the judges on the parties' behalf in complex legal jargon.¹⁰⁴

In most instances, the parties also lose control of the process because they participate only in an indirect manner where they are limited to giving evidence only where applicable.¹⁰⁵ The trial process was also identified to limit the parties to discussing only key legal points and does not afford the parties an opportunity to ventilate broader issues which are deemed not legal.¹⁰⁶ Litigation was also deemed to be expensive in that the more the case is delayed or long drawn due to factors such as the complexity of the case, the more costly it is for the parties, which effectively affects the parties' financial access to justice.¹⁰⁷

¹⁰³ SA Law Commission Project 94 (n102 above) 13.

¹⁰⁴ SA Law Commission Project 94 (n103 above) 13.

¹⁰⁵ SA Law Commission Project 94 (n104 above) 13.

¹⁰⁶ SA Law Commission Project 94 (n105 above) 13.

¹⁰⁷ SA Law Commission Project 94 (n106 above) 13.

The society is changing at an extremely fast pace and thus it is trite that the South African Justice system and legal counseling approaches ought to develop and implement alternative dispute resolution mechanisms to match these changes thereof.¹⁰⁸ Mediation is identified by the Law Reform Commission as one of the substantial dispute resolution alternatives, which, if properly formalised and implemented has the potential to offer a notably efficient and less expensive avenue of resolving a dispute than adversarial litigation.¹⁰⁹

There is therefore a need in South Africa today, to facilitate increased use of mediation in legal counseling for purposes of improving access to justice for all by mitigating the abuse of process typical of the adversarial litigation system. Mediation is a notable means to improving access to justice as anticipated by the South African Constitution. It is a confidential process whereby the parties engage the assistance of a neutral third party to facilitate resolution of the dispute through constructive dialogue.¹¹⁰ The duly appointed mediator assists the parties to simplify the dispute by identifying the relevant issues and to consider solutions mutually beneficial to the parties.¹¹¹

¹⁰⁸ SA Law Commission Project 94 (n107 above) 20.

¹⁰⁹ SA Law Commission Project 94 (n108 above) 22.

¹¹⁰ Lavi (n83 above) 4.

¹¹¹M Mantle 'Mediation: A practical guide for Lawyers' eBook (2017) Second edition Edinburgh: Edinburgh University Press Ltd 22.

Mediation is generally voluntary and is wholly dependent on the parties' commitment to discuss the issues in good faith.¹¹² It is therefore important to ensure that parties, through the legal counseling process, are properly educated about their rights as well as the availability of mediation as a viable dispute resolution process.¹¹³ Confidentiality in the mediation process is compulsory and the parties are bound to this confidentiality in terms of a signed mediation agreement. In addition to the confidentiality requirement, the parties can agree to any other terms suitable for the facilitation of successful resolution of the dispute.¹¹⁴

This ensures that the parties can retain control of the process and own the outcome thereof. The discussions between the parties are without prejudice and as such information is exchanged solely for the purposes of attempting to present the other party with enough information to engage in the discussion in an informed manner and not meant to be used as evidence against the other party as is the case in the adversarial system.¹¹⁵ This encourages the parties to consider each other's submissions for purposes of settling and not fighting or proving the other party wrong.¹¹⁶

¹¹² Mantle (n111 above) 22.

¹¹³ Mantle (n112 above) 15.

¹¹⁴ Mantle (n113 above) 15.

¹¹⁵ Mantle (n114 above) 16.

¹¹⁶ Mantle (n115 above) 16.

The main essence of mediation is also to mitigate continued loss to the parties by facilitating speedy resolution and exploring mutually beneficial solutions to the dispute. The costs of mediation are usually split equally between the parties which in most instances is deemed to be fair.¹¹⁷ The resolution in mediation results in a settlement agreement on the parties' own terms unlike the case where an order is imposed by a judge following litigation.

The success of mediation is premised on the parties' willingness to compromise and not win at the full expense of the other party.¹¹⁸ One notable feature of mediation is that the mediator does not have to be a lawyer and can be anyone agreed upon by the parties.¹¹⁹ This is largely beneficial where the dispute is of a technical nature. In that instance, the parties can agree to employ the services of someone who specializes in the subject area to assist the parties to negotiate a solution.¹²⁰ In most instances, this becomes cheaper in that the parties are presented with cheaper alternatives to legal fees as well as other expenses such as expert fees and extensive expert reports.

¹¹⁷ Mantle (n116 above) 25.

¹¹⁸ Mantle (n117 above) 25.

¹¹⁹ Mantle (n118 above) 25.

¹²⁰ De Jong (n28 above) 286.

For example, parties to a divorce case can opt to make use of the services of a religious leader from their own religious organization to mediate the dispute at no cost to them. The settlement agreement from this process can then be presented to legal counsel to formalise and submit to court to be confirmed as a court order.¹²¹ Mediation not only promotes resolution of the dispute but goes further to allow the parties to deal with the underlying causes of the conflict as well. Unlike the adversarial litigation process, the parties can fully ventilate both the non-legal and legal issues between them for purposes of obtaining a wholistic settlement agreement.¹²²

The mediation procedure is deemed to present a platform where the parties willingly participate in the process based on common principles and for the purposes of settling the dispute without competition.¹²³ Mediation seeks to move away from a loser and winner position to a compromised outcome.¹²⁴ In essence the parties are encouraged to properly assess the benefits of resolving the dispute sooner other than employing more resources to fan long drawn litigation at the risk of losing the case completely.¹²⁵

¹²¹ *Egan v Motor Services (Bath) Ltd (2007)*
<https://www.casemine.com/judgement/uk/5a8ff71360d03e7f57ea72fe> para 52.

¹²² *Egan* (n121 above) para 52.

¹²³ R Fisher & W Ury 'Getting to Yes: Negotiating Agreement Without Giving In' (2011) 3rd Edition *New York, Penguin Books* 16.

¹²⁴ Fisher & Ury (n123 above) 16.

¹²⁵ *MB v NB* (2010) (3) SA 220 para 55.

One of the advantages of the mediation process is that the parties are assisted by the mediator to identify and focus on their mutual interests which often encourages cooperation where each party sees an opportunity for their interests and rights to be safeguarded.¹²⁶ The adversarial litigation process in most instances focuses more on proving correctness other than a compromise which encourages competition as both parties hope to win by convincing the judge that they are right, and the other party is wrong.¹²⁷

The autonomy of mediation is also evident from the voluntary nature of the process.¹²⁸ The parties are not bound by strict procedural requirements and the need to make complex substantive arguments which renders the process simpler for unrepresented parties to understand.¹²⁹ The settlement agreement can be specific to the parties' standards and not to external non-negotiable norms imposed by courts in a court order.¹³⁰ The parties therefore have the opportunity to choose what is fair for them with the assistance and guidance of the mediator.

¹²⁶ Lavi (n110 above) 7.

¹²⁷ Lavi (n126 above) 7.

¹²⁸ Lavi (n127 above) 18.

¹²⁹ Lavi (n128 above) 18.

¹³⁰ Lavi (n128 above) 19.

One of the significant roles of the litigation process is to expose the truth from the evidence presented by the parties. This is one of the key contributing factors to the lengthy procedure in trials because legal counsel must exhaustively present evidence to prove the case to the judge.¹³¹ In mediation, the parties do not have to prove their cases but seek to understand each other for purposes of reaching a mutual compromise. This simplistic approach of mediation, however, may lead to the frustration of the party who sees his truth as not being properly ventilated. This inevitably results in that party walking away from the mediation process and resorting to further litigation thereafter which then lengthens the dispute resolution process.¹³²

A case in point is the case of *Kalagadi Manganese (Pty) Ltd (Kalagadi) and others v Industrial Development Corporation (IDC) and others*¹³³. In this case the IDC suggested that the parties engage in mediation in a bid to seek a financially sound solution to the issues in dispute. The parties then proceeded to conclude a written mediation agreement in terms of High Court Rule 41A of the Uniform Courts Rules.¹³⁴ However, before the mediation process could be concluded, the IDC withdrew from the process seemingly on the basis that it did not perceive that continuing with the process would yield meaningful outcomes for them.¹³⁵

¹³¹ Lavi (n130 above) 27.

¹³² Lavi (n131 above) 27.

¹³³(2021) ZAGPJHC 127.

¹³⁴ Kalagadi case (n133 above) para 5.

¹³⁵ Kalagadi case (n134 above) para 17.

This led Kalagadi Manganese to accuse IDC of not mediating in good faith and prompted Kalagadi to bring an application to declare the withdrawal from mediation unlawful.¹³⁶ The Kgalagadi case thus defines and highlights importance of mediating in good faith. The court emphasised that the fact that the parties cannot agree or find a resolution does not amount to mediating in bad faith.¹³⁷ This means the parties can freely engage in the mediation process without necessarily having to accept settlement options which are not beneficial to them. Parties are therefore free to withdraw from the mediation if there are no prospects that a suitable resolution will be achieved.¹³⁸

The court in the Kalagadi case above was also required to decide on the publication and reliance on documents and information disclosed during the mediation process to prove a case in court. The court clearly emphasised the importance of confidentiality with respect to information and documentation exchanged by the parties in the mediation process. The Kalagadi case also highlights another key aspect with regards to appointing mediators in a strategic manner to create better chances of resolution in that process.¹³⁹

¹³⁶ Kalagadi case (n135 above) para 8.

¹³⁷ Kalagadi case (n136 above) para 17.

¹³⁸ Kalagadi case (n137 above) para 30.

¹³⁹ Kalagadi case (n138 above) para 30.

Where the matter is complex, the parties can appoint more than one specialist mediator whom they trust enough to properly facilitate the dispute. In this case, the parties engaged former Chief Justice Moseneke and former judge, Advocate John Myburg to facilitate the mediation based on their vast commercial dispute resolution experience and knowledge.¹⁴⁰ The honourable judge Spilg in this case also highlighted another key advantage of mediation, which is that it suspends and stays all other proceedings to enable the parties to properly apply themselves to the negotiations.¹⁴¹ However the success of the mediation process is thus totally dependent on the understanding and cooperation of the parties and their legal counselors and a willingness to trust each other enough to engage in *bona fide* discussions and compromise.¹⁴²

The key to the success of mediation is intimately linked to the legal counseling process as will be discussed in this chapter.¹⁴³ The disadvantages of mediation are beyond the scope of this research. Legislative guidelines to mediation and to the legal counseling process are key to achieving effective resolution of disputes through mediation. The legislative framework of mediation in South Africa today is discussed herein below.

¹⁴⁰ Kalagadi case (n139 above) para 7.

¹⁴¹ Kalagadi case (n140 above) para 11.

¹⁴² C Marumoagae 'Does collaborative divorce have a place in South African divorce law?' (2016) 49.1 *De Jure Law Journal* 41-57.

¹⁴³ Mantle (n119 above) 76.

2.2 Legal framework of mediation in South Africa

Over the past few years, there have been significant strides to incorporate mediation in Legal Education and Development training courses in South Africa.¹⁴⁴ The academic fraternity has also been largely contributing to the advancement of the mediation process through the development of affordable and accessible training programs to supplement the legal counseling skills of key players in the justice system such as judges and legal counselors.¹⁴⁵ Higher education institutions such as the University of Pretoria now offer mediation training courses structured to educate legal counsel and other professionals in the field of mediation.

The abovementioned courses are meant to assist legal counselors as well as non-legal counselors in acquiring the necessary skills to assist them in effective mediation.¹⁴⁶ In addition to the above efforts there has also been the establishment of professional bodies such as the Dispute Settlement Accreditation Council (DSAC) which was created in South Africa during 2010.¹⁴⁷

¹⁴⁴ <https://www.lssalead.org.za/course/civil-mediation-online-course/> accessed on 13 October 2023.

¹⁴⁵ <https://www.lssalead.org.za/course/civil-mediation-online-course/> accessed on 13 October 2023.

¹⁴⁶ https://www.enterprises.up.ac.za/mediation-training-course_afsa-11 accessed on 12 October 2023.

¹⁴⁷ http://disac.co.za/wp-content/uploads/2014/12/DiSAC_-Code-of-Professional-Conduct-for-Mediators.pdf accessed on 1 November 2023.

The sole objective of this organization is to outline and publish accreditation standards for dispute-resolution practitioners such as mediators in South Africa.¹⁴⁸ The DSAC also produces training material and offers training courses for alternative dispute resolution practitioners based on the standards set by the International Mediation Institute based in the Hague.¹⁴⁹ It is trite that the success of the mediation process is to a larger extent dependent on the professionalism and skills exhibited by the mediator. Organisations such as the Dispute Settlement Accreditation Council are available resources for mediators seeking proper training and accreditation on effective mediation practices suitable for the South African context. It also serves as a monitoring and oversight body for registered mediators.¹⁵⁰

One of the initial attempts to incorporate and formalise mediation in the South African courts system was in terms of the *Short Process Courts and Mediation In Certain Civil Cases Act (The Mediation Act)*,¹⁵¹ which was intended to commence in 1992. This Act was promulgated for the purposes of *inter alia* providing for mediation in certain civil cases in the Magistrates` Court and established a formalised mediation process for the lower courts.¹⁵²

¹⁴⁸http://disac.co.za/wp-content/uploads/2014/12/DiSAC_-Code-of-Professional-Conduct-for-Mediators.pdf accessed on 1 November 2023.

¹⁴⁹ <https://imimmediation.org/about/> accessed on 1 November 2023.

¹⁵⁰ DiSAC Code of Professional Conduct for Mediators accessed at http://disac.co.za/wp-content/uploads/2014/12/DiSAC_-Code-of-Professional-Conduct-for-Mediators.pdf 1.

¹⁵¹ Act 103 of 1991.

¹⁵² Act 103 of 1991.

In terms of section 2 of this Act, qualified members of the Association of Law Societies of the Republic of South Africa, the General Bar Council of South Africa and the Department of Justice could be sworn in to the office of mediator by the senior Magistrate in their respective jurisdiction to act as mediators in that magisterial court jurisdiction.¹⁵³ The Mediation Act in section 3, allowed parties or their legal counsel to apply for a dispute to be referred to mediation at any stage prior to the issuing of summons. Further, this Act provided for the parties or their legal counsel to refer a dispute to mediation after summons has been issued but before judgment has been granted.¹⁵⁴

In terms of this Act, section 3 (1)(a)(ii) , the court was empowered to grant an adjournment to allow for mediation only if it is satisfied that such mediation attempts will not delay the finalization of the matter or prejudice any of the parties.¹⁵⁵ Mediation under this Act was meant to be conducted at court and in chambers before the mediator.¹⁵⁶ This Act however was never implemented and remains un repealed.¹⁵⁷ More efforts continue to be made to formalise and incorporate mediation in the District and Regional Magistrates Courts in South Africa through the introduction of the Court Annexed mediation project in 2014.

¹⁵³ Act 103 of 1991.

¹⁵⁴ Act 103 of 1991.

¹⁵⁵ Act 103 of 1991.

¹⁵⁶ Act 103 of 1991.

¹⁵⁷ A Hutchison & M Porter-Wright 'Private ordering and dispute resolution.' (2018) 135.2 *South African Law Journal* 338.

In terms of section 71 of the Mediation rules,¹⁵⁸ regulating this court annexed mediation, the main objective of mediation is to promote access to justice and to promote restorative justice. Another key objective is to preserve relationships between the parties to the dispute.¹⁵⁹ Court annexed mediation is meant to provide litigants with a resolution option which extends beyond the legal scope of magistrates and to facilitate a speedy and cost-effective dispute resolution alternative.¹⁶⁰ As with the above mediation Act, mediators were appointed to complement the functioning of magistrates in specific magisterial jurisdictions. Despite the appointment of these mediators and publication of the readiness of the court annexed mediation process by the department of Justice, same was suspended with effect from the 15th of March 2022 indefinitely.¹⁶¹

Similar to the aforementioned discussion on the Short Process Courts and Mediation In Certain Civil Cases Act, no justifications have been provided for the cessation of this significant court annexed mediation initiative that would have provided substantial benefits to the general populace in the overburdened Magistrate's courts. Some scholars have attributed these failures to implement mediation to a combination of factors such as lack of political will to provide the necessary funding to ensure that these legislative provisions are successfully implemented.¹⁶²

¹⁵⁸ Rules of Court: Amendment: Mediation Chapter 2, G 37448 RG 10151 GoN 183, 18 Mar 2014.

¹⁵⁹ 2014 amendment of rules regulating the conduct of the proceedings of the Magistrates Court of South Africa.

¹⁶⁰ 2014 Amendment of Rules regulating the conduct of the proceedings of the Magistrates Court of South Africa.

¹⁶¹ <https://www.justice.gov.za/mediation/mediation.html> accessed on 1 November 2023.

¹⁶² Hutchinson & Porter-Wright (n157 above) 334.

Other scholars attribute it to a deemed resistance by legal counsel who simply ignore the mediation process and continue to pursue the adversarial litigation system which they are properly trained for.¹⁶³ There are also those scholars who believe that there is a general resistance to alternative dispute resolution processes in a bid to protect the development of the law through legal precedent.¹⁶⁴ A case in point dealing with the reluctance of legal counsel and parties to implement mediation before attempting litigation is the Constitutional court case of *Port Elizabeth Municipality v Various Occupiers*.¹⁶⁵ In this case, the parties failed to mediate the dispute as provided for in terms of section 7 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)¹⁶⁶.

The court was **interalia** required to decide whether it is appropriate for the court to direct the parties to attend to mediation in an appeal court after they have failed to do so in the court of first instance. The court found that a failure to mediate at the earliest possible opportunity can prejudice the process because by the time a case gets to appeal some advantages of mediation such as saving costs and preserving the relationship between the parties has already been defeated and thus mediation is unlikely to succeed.¹⁶⁷ However, the court also found that the failure to mediate, in the context of the PIE Act will determine whether the eviction itself is just and equitable.¹⁶⁸

¹⁶³ Hutchison & Porter-Wright (n162 above) 337.

¹⁶⁴ Hutchinson & Porter-Wright (n163 above) 334.

¹⁶⁵ 2005 (1) SA 217 (CC).

¹⁶⁶ Act 19 of 1998.

¹⁶⁷ *Port Elizabeth Municipality* (n165 above) para 47.

¹⁶⁸ *Port Elizabeth Municipality* (n167 above) para 47.

Section 7 of PIE provides for mediation and negotiation before a matter can be referred to litigation. In terms of section 7(1), where the municipality is not the owner of the land in dispute, the municipality is empowered to appoint experts in dispute resolution to inter alia attempt to mediate and settle the dispute before referring to litigation¹⁶⁹. In terms of section 7(2), where the municipality is not the owner of the land in dispute, the member of the Executive Council designated by the Premier of the province concerned may appoint mediators to attempt to mediate and settle any dispute in terms of this Act.¹⁷⁰

Despite the existence of these mediation provisions, legal counsel had not mediated the dispute before approaching the High Court. Judge Sachs remarked that our modern legal systems are transitioning to compel parties to participate in the mediation process.¹⁷¹ This is beneficial to the parties even if settlements are not achieved in that mediation can avoid exacerbation of tensions which are characteristic of the litigation process in addition to saving costs.¹⁷²

¹⁶⁹ Act 19 of 1998.

¹⁷⁰ Act 19 of 1998.

¹⁷¹ *Port Elizabeth Municipality* (n168 above) para 40.

¹⁷² *Port Elizabeth Municipality* (n171 above) para 42.

There are many other legislative provisions in South Africa which formalise mediation such as the Mediation of Certain Divorce Cases Act,¹⁷³ and the Commission for Conciliation and Mediation in South Africa established in terms of section 112 of the Labor Relations Act¹⁷⁴. However, key to this study is the latest attempt to formalise mediation in the High Courts of South Africa through the amendment of the Uniform Rules of Court to incorporate a new rule 41A.¹⁷⁵ In terms of this rule 41 A (1), mediation is legally defined as a voluntary process whereby the litigants agree to appoint an unbiased mediator to assist the parties to resolve the dispute between them.¹⁷⁶

The mediator in terms of the abovementioned court rule may also assist the parties to identify issues in dispute and the issues which are no longer disputed and can be settled.¹⁷⁷ The role of the mediator is to assist the parties to craft a settlement agreement after they have jointly considered possible compromise options. In terms of this rule 41, the mediator can also assist the parties to simplify their priorities through amicable discussions with the hope to ultimately resolve the dispute.¹⁷⁸

¹⁷³ Act 24 of 1987.

¹⁷⁴ Act 66 of 1995

¹⁷⁵ Act 59 of 1959 – Uniform Rules of Court amendment (19 June 2023).

¹⁷⁶ Act 59 of 1959.

¹⁷⁷ Act 59 of 1959.

¹⁷⁸ Act 59 of 1959.

The legal definition of mediation in Rule 41 A above is very significant because it provides a broad meaning of the application of mediation in South Africa. Of note is the fact that the parties do not have to agree on all aspects of the case but can settle what they can and refer the balance of the issues to trial.¹⁷⁹ The parties are therefore required to earnestly assess their dispute for purposes of attempting to settle as much of the case as they can by *interalia* exploring other options to resolve the issues in dispute until they reach a compromise.¹⁸⁰

One practical way of properly applying rule 41 A (1) is to engage an expert like a doctor to be a mediator in a medical dispute as opposed to engaging him as a witness in a lengthy trial. The way this rule 41 (A) (1) is structured, encourages earnest engagement without necessarily forcing the parties to compromise to their detriment.¹⁸¹ It is noteworthy that the mediation process and outcomes remain confidential and do not form part of the court record and the mediation is conducted independent of the court itself. The parties are thus not compromised by complying with the requirement to mediate in terms of this rule.¹⁸²

¹⁷⁹ Act 59 of 1959.

¹⁸⁰ Act 59 of 1959.

¹⁸¹ Act 59 of 1959.

¹⁸² Act 59 of 1959.

The application of Rule 41A is more fully illustrated in the case of *The Industrial Development Corporation (“the IDC”) v Kalagadi Manganese (Pty) Ltd (“Kalagadi”)*¹⁸³. In this case, the court found that the judicially sanctioned Rule 41 A imposes a legal duty on all the parties to diligently participate in the mediation process and that refusal to comply with this requirement without just cause can attract adverse costs and consequences for the party at fault.¹⁸⁴

The above case also clarifies that an unwilling party cannot be compelled to mediate, and the parties are not forced to reach an agreement. The success of the mediation process itself is therefore entirely dependent on the party’s commitment to a compromised solution¹⁸⁵. The court also notes that the parties in terms of Rule 41 are protected from unnecessary delays in that the mediation process must be concluded within 30 days. In exceptional cases where the parties require more time to discuss, they may apply to the court for extension upon good cause shown. Similarly, where a party is not cooperating, the other party is not bound to wait until the expiry of the 30-day period to proceed with litigation.¹⁸⁶ The affected party can withdraw from the mediation and set the matter down for hearing prior to the expiry of the 30-day period.

¹⁸³ *Kalagadi* (n141 above) para 28.

¹⁸⁴ *Kalagadi* (n183 above) para 28.

¹⁸⁵ *Kalagadi* (n184 above) para 30.

¹⁸⁶ *Kalagadi* (n185 above) para 30.

2.3 The role of legal counseling in the mediation process

Despite the significant developments in mediation discussed above, the issue of long drawn litigation remains a real problem in both the High and Lower Courts in South Africa. There is therefore a need to critically assess the legal counseling process in the context of mediation processes which have been established especially because of the growing concerns expressed by *inter alia* Judges, members of the legal fraternity as well as the public about the impact of legal counseling in mediation.¹⁸⁷

As can be gleaned from caselaw discussed above, the voluntary nature of mediation creates room for the parties and legal counsel to ignore same even where it is the most effective way to resolve the dispute. This study presupposes that the legal counselor is autonomous and that the clients act in accordance with the legal advice rendered (The lawyer autonomy model). This means that when representing their clients, legal counselors are required to exercise independent professional judgment at all times and be objective when giving legal advice and guiding clients through the dispute resolution process.¹⁸⁸

¹⁸⁷ *MB* (n125 above) para 48.

¹⁸⁸ Hausman (n27 above) 384.

In order to advise the client constructively, in terms of this model, the legal counsel must also consider moral, economic, social as well as political factors which are relevant to the client's facts.¹⁸⁹ On the whole, the legal counselor is obliged to also exhaustively assess and carefully consider other relevant factors which may facilitate effective dispute resolution and access to justice such as mediation.¹⁹⁰ In addition to legislative efforts as discussed in this study, it is imperative that legal counsel and judicial officers must be fully committed to the proper implementation of mediation in our justice system process¹⁹¹.

In terms of section 3.10 of the South African Legal Council Code of Conduct,¹⁹² legal counsel is obliged to adopt effective dispute resolution options. They are mandated to advise their clients, at the earliest possible opportunity about the likely success of the clients' case and not to persist with a case which has no merits.¹⁹³ It is unethical and unprofessional for legal counsel to generate unnecessary work for themselves and in so doing raise unnecessary legal expenses for their clients.¹⁹⁴ Failing to properly advise a client of the option to mediate is potentially a violation of this rule and it is trite that legal counsel must be held accountable in this regard to ensure that they do not become an unnecessary hinderance to mediation at the expense of the client.¹⁹⁵

¹⁸⁹ Hausman (n188 above) 384.

¹⁹⁰ Hausman (n190 above) 384.

¹⁹¹ Hausman (n191 above) 384.

¹⁹² Act 28 of 2014 sec 36(1).

¹⁹³ Act 28 of 2014 sec 36(1).

¹⁹⁴ Act 28 of 2014.

¹⁹⁵ SA Law Journal (2018) 342.

Judicial response to Legal counsel's reluctance or refusal to engage in mediation by granting adverse cost orders is a key driver to the adoption of mediation by legal counsel.¹⁹⁶ In the case of *MB v NB (Brownlee v Brownlee)*¹⁹⁷, the court reiterates that legal counsel at times fall short of the duty to act professionally as officers of the court who must always display objectivity and well calculated value judgement.¹⁹⁸ It is this well calculated value judgement which is key to effective mediation. Instead of using the law to facilitate constructive dispute resolution processes such as mediation, legal counsel sometimes employs the law as a weapon to ensure that the winner takes all. This approach inevitably frustrates the adoption of the mediation process and the benefits which the parties could obtain from same.¹⁹⁹

In the *MB v NB* case, judge Brassey criticized the manner in which this divorce case had been dragged through litigation at enormous costs of approximately Five Hundred Thousand Rands.²⁰⁰ Although the legal counsel is said to have followed court process and managed the case well for adversarial litigation purposes, the judge was of the view that this case was more suited for referral to mediation and that legal counsel ought to have adopted that mediatory approach.²⁰¹

¹⁹⁶ Hutchinson (n164 above).

¹⁹⁷ *MB* (n187 above) para 53.

¹⁹⁸ *MB* (n197 above) para 48.

¹⁹⁹ *MB* (n198 above) para 53.

²⁰⁰ *MB* (n199 above) para 48.

²⁰¹ *MB* (n200 above) para 48.

The judge noted with concern that the school fees and the **maintanance** which the parties were fighting about could have been significantly reduced by the Five Hundred Thousand Rands which was ultimately paid by the parties in respect of legal fees.²⁰² Agreeing to allocate this money to **maintanance** at the commencement of the case through mediation would have been more beneficial to the minor child and would have mitigated the resultant damage to the parties' relationship through the long-drawn abrasive adversarial approach.

In a country where there is a real issue of overcrowding of the courts, it is imperative that parties and legal counsel must commit more to engaging in mediation so that the courts may apply resources to more complex matters which do not qualify for mediation such as public interests' disputes.²⁰³ Section 34 of the Constitution guarantees everyone's right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.²⁰⁴ It is therefore imperative for legal counsel to ensure that suitable cases are referred to appropriate mediation forums where they can potentially be finalised speedily in order to protect the clients' rights in terms of section 34 of the Constitution. In a bid to also give effect to the provisions of section 34, the courts have structures to oversee the overall management of cases by legal counsel and all relevant parties through the case management system.²⁰⁵

²⁰² *MB* (n201 above) para 48.

²⁰³ *MB* (n202 above) para 48.

Judges are increasingly rebuking and calling out the conduct of legal counsel who frustrate effective and efficient resolution of disputes in the courts by imposing punitive costs orders with the hope to discourage such abusive conduct.²⁰⁶ Legal counselors are officers of the court and are thus duty bound to conduct the legal counseling process in a manner that ensures the **realization** of the rights enshrined in section 34 of the Constitution.²⁰⁷

Upon admission in the High Court as a legal counselor in South Africa, every legal counselor undertakes to facilitate access to justice and the interests of their clients above selfish interests. Selfish interests which are detrimental to administration of justice include but are not limited to a failure to manage personal emotions while conducting the legal counseling process, engaging in cases that the legal counselor is not fully knowledgeable about as well as financial greed.²⁰⁸ These selfish interests also have the effect of frustrating the mediation process. It is imperative that legal counsel must at all material times ensure that they facilitate the fair resolution of disputes by ensuring effective and efficient client management. This entails proper explanation of the law to the client as well as managing client expectations by explaining the costs versus the benefits of pursuing a particular cause of action and resolution process.²⁰⁹

²⁰⁴ Act 108 of 1996.

²⁰⁵ Act 59 of 1959.

²⁰⁶ *Tyibilika v MEC for Health, Eastern Cape Province* (2021) ZAECBHC 38.

²⁰⁷ Act 28 of 2014.

²⁰⁸ *Egan* (n122 above) para 52.

²⁰⁹ *Egan* (n208 above) para 52.

As a general rule, the initial step to legal counseling is to screen the purported instructions and to ensure that the legal counselor is properly skilled in that area of law and has the requisite experience required to competently assist the client and the court as a whole.²¹⁰ Legal counsel must properly consult with a client for purposes of understanding the facts and advising on best possible cause of action which is not only lawful but also benefits the client the most. The legal counsel must endeavor to establish a trust relationship with the client because this is the only way a client will cooperate in processes such as mediation.

When a client is content with the professional judgment of a legal counselor, they frequently adhere to the advice provided.²¹¹ Legal counselors must always function as a representative of clients as well as custodians of the constitution with a specific duty to uphold and advance the highest quality of justice.²¹² In addition to advising and defending the client's rights, legal counsel must also be effective negotiators and communicators.²¹³ The failure by the legal counselor to properly uphold these responsibilities all the time compromises the effectiveness of the mediation process and the administration of justice.

²¹⁰ R Dinovitzer *et al* 'Reconsidering lawyer autonomy: The nexus between firm, lawyer, and client in large commercial practice.' (2014) 51.3 *American Business Law Journal* 667.

²¹¹ F Zacharias 'Limits on Client Autonomy in Legal Ethics Regulation' (2001) 81.1 *Boston University Law Review* 214.

²¹² Dinovitzer (n210 above) 667.

²¹³ Dinovitzer (n212 above) 667.

The judge in the Kalagadi case importantly noted that although mediation remains essentially voluntary in its nature, the courts are empowered to facilitate proper compliance with the requirement to mediate by issuing appropriate costs orders to discourage noncompliance.²¹⁴ The court made reference to the case of *Outar v Greno Industries*,²¹⁵ where the court found that the court cannot allow litigant to choose to ignore established procedures of the court and legislation.²¹⁶ The court also cited the precedent set on the American case of *Del Fuoco v Wells*,²¹⁷ where the court granted an order against the plaintiff and his legal counsel for abusing the mediation process to extort settlement.²¹⁸

The above challenges in the legal counseling process have led to the promulgation of rule 41 A (2) c which formally regulates the requirement to consider mediation before commencing litigation in the normal course. While mediation remains generally voluntary in terms of this rule, there is a requirement for legal counsel to properly justify a refusal to mediate.²¹⁹ In this regard, Rule 41 A (2) c, clearly defines the specific notices to be issued, which notices must specify the reasons why a party believes that the dispute cannot be capable of being mediated.²²⁰

²¹⁴ *Kalagadi* (n186 above) para 35.

²¹⁵ *Outar v Greno Industries* 2005 WL 238740(ND NY.Sep.27,2005) at 3.

²¹⁶ *Kalagadi* (n214 above) para 32.

²¹⁷ *Del Fuoco v. Wells*, 8:03-cv-161-T-23TGW (M.D. Fla. Jan. 4, 2007).

²¹⁸ *Kalagadi* (n216 above) para 32.

²¹⁹ Act 59 of 1959.

²²⁰ Act 59 of 1959.

Further to the above, it is important to note that the court retain the right to compel legal counsel to refer the matter to mediation where it is in the interest of justice to do so.²²¹In terms of Rule 41 (3) b, a Judge, or a Case Management Judge may, order the parties to consider referral of a dispute to mediation any time before judgement is granted. The above Rule 41(3) b, Rule 37 relating to the requirement to conduct pretrial conferences, as well as Rule 37A relating to judicial management complement each other to promote *bona fide* engagement between legal counsel to consider settlement before proceeding with a trial.²²²

One of the key points which legal counsel must discuss during a pretrial conference and judicial management is the possibility of settlement. To properly assess the possibility of settlement, the parties are required to properly engage in negotiation akin to mediation.²²³ The pretrial process is intended to curtail the issues in the matter and ensure that the case is ready for trial, thereby eliminating delays.²²⁴

²²¹ Act 59 of 1959.

²²² Act 59 of 1959.

²²³ Act 59 of 1959.

²²⁴ https://www.judiciary.org.za/images/news/2019/amendment_of_uniform_rules_of_court_with_the_insertion_of_case_management_rules page 1 accessed on 12 October 2023.

In a bid to ensure that the legal counsel have conducted the pretrial conference in earnest, a case management judge is required to certify a case trial ready only in instances where the judge is satisfied that there exist triable issues and the case is ready for trial and that all issues that are amenable to being resolved without a trial have been dealt with.²²⁵

The judge must also be satisfied that the remaining issues that are to go to trial have been adequately defined.²²⁶

2.4 Discussion of the practical effects of legal counseling on successful implementation of mediation to minimise unnecessary litigation.

Legal counseling plays a significant role in the effective use of mediation to curb the incidence of unnecessary, long drawn cases. This study has been largely influenced by some extreme cases where the attitudes of legal counsel to the mediation process have had detrimental effects to clients who have essentially lost valuable resources such as time and money. These cases have also cast doubt on the preparedness of most legal counsel to engage effectively in mediation in line with the recent legal developments.

²²⁵ *Tyibilika* (n206 above) para 38.

²²⁶ *Tyibilika* (n226 above) para 38.

In the case of *University of South Africa v Socikwa and Others*, the court notes in general that some the legal counsel`s knowledge of the law and its application is lacking which is most embarrassing to the legal profession as a whole.²²⁷ Proper knowledge of the facts and understanding of the law are key to effective dispute resolution. A case in point is the case of *Egan v Motor Services*²²⁸ where Lady Justice Arden, expressed her displeasure at the legal counseling process exhibited by the legal counsel who argued this case. The learned judge was of the view that this dispute ought to have been effectively resolved through mediation.²²⁹

This case highlights main aspects of legal counseling such as proper management of client expectations, the need for legal counsel to do proper costs benefit analysis before pursuing a case as well as proper case management.²³⁰ Most importantly, this case emphasises the need for legal counsel to make use of mediation in instances where it is the most beneficial resolution option to the client. In the context of this case, effective dispute resolution related to a cost-effective resolution of the case in a manner that is most beneficial to the parties so represented.²³¹

²²⁷ (2023) 8 BLLR 836 (LC).

²²⁸ *Egan* (n209 above) para 52.

²²⁹ *Egan* (n228 above) para 52.

²³⁰ *Egan* (n229 above) para 52.

²³¹ *Egan* (n230 above) para 52.

This case of *Egan v Motor Services (Bath) Ltd*²³² is an unfortunate case where the parties` spent approximately One Hundred Thousand Pounds to resolve a case which was worth only Six Thousand Pounds.²³³ This a *locus classicus* case of ineffective dispute resolution apparently fueled by legal counsel and their disregard of available more constructive mediation. The litigants in this case essentially lost financially and their relationship was further broken down.

The legal counsel were the only winners in this instance as they obtained financial gain.²³⁴ Where a client declines constructive legal advice, the legal counsel must protect the sanctity of the profession by withdrawing from such a case.²³⁵ A proper appreciation of the lawyer's role as a legal counselor must not be economic incentives which sometimes promote rather than discourage litigation. When legal counsel conducts themselves constructively the effect is that the burden of case backlogs in the courts is mitigated. Further, access to justice becomes more effective and beneficial to society in that the economic and emotional burden which mostly is associated with litigation is reduced.²³⁶

²³² *Egan* (n231 above) para 52.

²³³ *Egan* (n232 above) para 52.

²³⁴ *Egan* (n233 above) para 64.

²³⁵ *Egan* (n234 above) para 64.

²³⁶ Edward (n78 above) 690.

Of note in the Egan case was the judge's comments with regards to mediation being the best form of dispute resolution for this case. The judge was at pains to emphasise that effective legal counseling would have resulted in this case being referred for mediation.²³⁷ There is therefore a clear nexus between effective mediation and the legal counseling approach adopted by the legal counselor. The judge importantly also stated that good quality legal counseling results in effective and efficient dispute resolution through mediation where it is clearly appropriate.²³⁸

The judge also emphasised that in this specific case, it would have been advisable for both the dealer and the client to seek the guidance of legal counsel to resolve the disagreement via negotiation rather than litigation. The judgment underscores the obligation of professional legal advisers to consistently maintain objectivity and provide accurate advice to clients, especially in situations when the client proves to be challenging.²³⁹ The judge in the comment above reiterated the imperative duty of legal counsel to act rationally and promote beneficial legal representation. The learned judge correctly notes that it is not always easy for the legal counselor to persuade parties to mediate where they have strong feelings towards the case.²⁴⁰ In instances where clients refuse to consider objective legal advice, it is the writer's view that counsel must withdraw than persist with abusive processes.

²³⁷ *Egan* (n235 above).

²³⁸ *Egan* (n237 above).

²³⁹ *Egan* (n238 above).

²⁴⁰ *Egan* (n239 above).

The relationship between the legal counselor and his or her client is pivotal to the effectiveness of mediation. Professional ethics are key to the manner in which the legal counselor executes his instructions. There is a non-negotiable duty for the legal counselor to adhere to the codes of professional conduct laid down by the profession throughout the legal counseling process.²⁴¹ There is a basic presumption that the legal counselor is knowledgeable of both substantive and procedural law and can advise client fully to such an extent that the client becomes fully informed and is able to furnish the legal counselor with informed instructions.²⁴² It is the responsibility of legal counsel to ensure that the client is adequately informed of the benefits and drawbacks of the dispute resolution process chosen, in addition to the costs thereof.²⁴³

On the whole, effective legal counseling enhances access to justice by the society at large because effective legal counseling mitigates the escalation of conflict between parties and encourages mutual cooperation.²⁴⁴ Effective legal counselors are described as key lubricants which lessen the conflicts of our complex society."²⁴⁵ This analogy is well suited because to most members of the public, their ability to fully access justice is with the assistance of legal counsel.

²⁴¹ Dinovitzer (n213 above) 663.

²⁴² Zacharias (n211 above) 214.

²⁴³ Zacharias (n243 above) 218.

²⁴⁴ Edward (n236 above) 690.

²⁴⁵ Edward (n244 above) 691.

As can be gleaned from the *Egan* case discussed herein, sometimes legal counselors frustrate the intended outcomes of mediation due to a combination of factors such as financial benefit and a need to protect their own ego. Long drawn litigation provides more financial benefit to the legal counselor.²⁴⁶ The judge in the *Egan* case above also clarified the role of the mediator and the opportunity afforded to the parties to seek a suitable mediator who has the skill to understand the technicality of the dispute. It is trite that the mediator must be skilled enough to properly assist the parties to define the issues in dispute and to facilitate the possibility of a compromised solution which will benefit both parties.²⁴⁷ The judge also highlighted the massive saving of costs and time which the parties could have achieved by mediating the dispute. This is a crucial outcome of effective legal counseling and mediation which is most beneficial to the parties.²⁴⁸ The judge in the *Egan* case also highlights that the best time to mediate is before the litigation begins.

Further, the learned judge also importantly notes that initiating negotiation or mediation in a case by legal counsel is not an indication of lack of knowledge or that the party has a weak case and is not confident of prospects of success. In fact, this is an ethical way to proceed where mediation is an appropriate option and therefore the judge encourages legal counsel to implement mediation more often to facilitate speedy dispute resolution.²⁴⁹

²⁴⁶ Dinovitzer (n141 above) 663.

²⁴⁷ *Egan* (n240 above) para 52.

²⁴⁸ *Egan* (n247 above) para 52.

²⁴⁹ *Egan* (n248 above) para 52.

The above comment by the judge is particularly significant because the legal counselor is obligated to facilitate more constructive dispute resolution from the onset of a case by intentionally applying specific skills, attitudes and strategies which facilitate efficient resolution without compromising the rights of the client.²⁵⁰ The judge above, implies that one of the reasons why legal counsel and parties may be reluctant to suggest and pursue mediation from the inception of a case is because they think that it is a sign of weakness.²⁵¹

It is important for legal counsel to be trained and properly skilled so that they can shift from the traditional adversarial approach to cases. In the case of *MB v NB*²⁵², Acting Judge Brassey emphasised that effective counseling entails a proper explanation to clients of available dispute resolution processes. The legal counselor must be properly skilled to apply the law to assist the client to do costs benefit analysis from the onset of a case.²⁵³ Judge Brassey in this case indicated that he enquired from the Plaintiff whether she had been advised by her legal counsel about the availability of the mediation process and she indicated that she had not been advised.²⁵⁴ The neglect by legal counsel to properly advise clients in this regard inevitably frustrates the opportunity for clients to resolve their disputes more amicably through mediation.

²⁵⁰ Redmount (n31 above) 181.

²⁵¹ *Egan* (n249 above) para 52.

²⁵² *MB* (n203 above) para 52.

²⁵³ *MB* (n252 above) para 52.

²⁵⁴ *MB* (n253 above) para 52.

In the *MB v NB* case above, the learned judge highlights important advantages of mediation which include the fact that mediation can yield constructive outcomes especially when conducted by a well-trained mediator.²⁵⁵ However, if clients are not advised in the legal counseling process, these advantages remain academic. This principle was also reiterated by judge Sachs in the case of *Port Elizabeth Municipality v Various Occupiers*²⁵⁶

Legal counsel thus must be able to identify suitable experts who can advance successful mediation. This skill is obtained through training and knowledge of substantive law.²⁵⁷ In this case of *MB v NB*, the learned judge also emphasised another important advantage of effective mediation, being that it is conducted under strict confidentiality. This is important because matters that are decided in courts can generally be published with the exception of sensitive cases such as cases relating to children.²⁵⁸ It is the writer`s opinion that if clients are properly conscientized about this advantage by their legal counselor, then in most cases they are encouraged to engage in mediation. This principle was also emphasised by the court in the *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others case*.²⁵⁹

²⁵⁵ *MB* (n254 above) para 52.

²⁵⁶ 2004 (12) BCLR 1268 (CC).

²⁵⁷ *MB* (255 above) para 50.

²⁵⁸ *MB* (n257 above) para 52.

²⁵⁹ [2021] ZAGPJHC 127 para 21.

In the case of *Clemson v Clemson*,²⁶⁰ the court emphasised the importance of due commitment by legal counsel to effective mediation. The court stated that there is an expectation on legal counsel to display objectivity and a high degree of common sense in the whole legal counseling process.²⁶¹ The court reiterated the expectation that legal counselors must not be so occupied in an adversarial approach to dispute resolution to the extent that they apply legal principles and court rules as weapons meant to fight and destroy their opponents.²⁶² This only fans long drawn litigation and benefits only the legal counselors at the expense of the parties and ultimately frustrates the parties' right to have any dispute resolved in terms of section 34 of the Constitution.²⁶³

2.5 Conclusion

Overall, as can be gleaned from the caselaw discussed above, effective legal counseling as defined in this chapter is key to the realization of the benefits of mediation to clients. Effective counseling is achieved when Legal counsel have proper substantive knowledge of the law and approach dispute resolution objectively. As can be gleaned from this Chapter, it is not sufficient to only enact legislation and structure legal processes which regulate the mediation process.

²⁶⁰ (2001) 1 All SA 622 W at 627 para 53.

²⁶¹ *Clemson* (n260 above) para 53.

²⁶² *Clemson* (n261 above) para 53.

²⁶³ *Clemson* (n261 above) para 53.

It is even more important to ensure that legal counsel, judges, and other officers of the court must work together to ensure that society benefits by accessing these dispute resolution alternatives timeously and effectively. The success of mediation, as can be gleaned from the *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* case is solely dependent on the parties` and their legal counsel`s commitment to attempting to mediate in good faith. Mediation in good faith entails attending to mediation diligently and ensuring that legal counsel and parties are properly prepared to engage in constructive discussion.

This however does not mean that parties are compelled to compromise to their detriment. Legal counsel **needs** to always remain ethical and put the needs of the client and access to justice above own financial gain. Although it is clear from the legislation, court rules and legal precedent that much is being done to create a formal legislative framework which encourages the adoption of mediation as an alternative to litigation, more still needs to be done in terms of training legal counsel to ensure that they actually facilitate effective use of mediation platforms to improve access to justice, improved dispute resolution efficiently as well as alleviating the burden of long drawn cases in the courts.

CHAPTER THREE

A REVIEW OF THE IMPACT OF LEGAL COUNSELING ON EXPEDITIOUS RESOLUTION OF FAMILY CASES IN SOUTH AFRICA

3. Introduction

This study presupposes that the manner and quality of legal counseling has a bearing on reducing the negative and unintended consequences resulting from an adversarial approach to family law dispute resolution in South Africa.²⁶⁴ Appropriate and effective legal counseling in the context of divorces involving minor children will be canvassed in this chapter. Overall, this chapter discusses effective legal counseling to facilitate expeditious resolution of divorces and as means to mitigate some of those negative effects discussed in family cases in South Africa.

3.1 Overview of family cases in South Africa

It is settled in South African law, that the family and marital institutions are fundamental in that they provide stability, support, and companionship to members of the society and play an important role in child-rearing.²⁶⁵ The marriage relationship thus creates moral and legal obligations such as the reciprocal duty of support between the married parties and a joint legal duty to maintain and raise children born of the marriage. Understanding the background of the family systems and dynamics in South Africa is thus key to developing appropriate dispute resolution mechanisms.²⁶⁶

Families are in nature comprised of relationships which cannot simply be severed completely when misunderstanding or conflict arises, largely owing to permanent ties such as blood connections.²⁶⁷ As a result of this fact, family disputes such as divorces and custody disputes usually have the effect of modifying the dynamics of those relationships rather than ending their existence.²⁶⁸ Legal counseling as well as the development of appropriate dispute resolution systems in family law cases must therefore be cognizant of this fact and be structured and conducted in a manner which encourages constructive resolution that supports relationship restoration rather than fanning conflict.²⁶⁹

²⁶⁴ L Dohoon & S McLanahan 'Family structure transitions and child development: Instability, selection, and population heterogeneity.' (2015) 80.4 *American sociological review* 738-763.

²⁶⁵ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 para 31.

²⁶⁶ *Dawood* (n265 above) para 31.

²⁶⁷ J Lande & FS Mosten 'Family lawyering: past, present, and future.' (2013) 51.1 *Family Court Review* 24.

²⁶⁸ Lande & Mosten (n267 above) 24.

²⁶⁹ Lande & Mosten (n268 above) 24.

Marriages established in South Africa are essentially classified into three main types, being civil marriages, customary marriages as well as civil unions. Civil marriages are established in terms of the formalities stipulated under the Marriage Act of 1961.²⁷⁰ These civil marriages are executed by licensed marriage officers at the Department of Home Affairs.²⁷¹ Customary marriages on the other hand are negotiated, celebrated, and concluded in accordance with any of the systems of indigenous African customary law which exists in South Africa as stipulated in the Recognition of Customary Marriages Act.²⁷²

Finally, there are civil unions, which are voluntary unions between two people who are both 18 years of age and older.²⁷³ These civil unions can be between parties of the same sex and are solemnized and registered through either a marriage or a civil partnership, in accordance with the processes outlined in the Civil Union Act.²⁷⁴ The abovementioned diverse marriages establish extensively diverse family structures which are prone to diverse conflict dynamics which have in turn influenced the development of the family dispute resolution processes in the Republic of South Africa. Cultural, religious, and moral practices *interalia* makes formal dispute resolution as well as legal counseling approaches in family law disputes complicated.²⁷⁵

²⁷⁰ Act 25 of 1961.

²⁷¹ <http://www.dha.gov.za/images/PDFs/White-Paper-on-Marriage-in-SA-5-May2022.pdf> accessed on 8 November 2023, 11.

²⁷² Act 120 of 1998.

²⁷³ <https://www.statssa.gov.za/publications/P0307/P03072021.pdf> accessed on 8 November 2023, 49.

²⁷⁴ Act 17 of 2006.

²⁷⁵ BN Adams & J Trost 'Handbook of world families' (2004) *Sage Publications* 48.

Family law dispute resolution in the South African context therefore often requires a balancing of opposing religious values, formal divorce laws, as well as other customary norms to achieve outcomes which are acceptable to the parties.²⁷⁶ This ultimately influences the dispute resolution processes appropriate to different clients. In most customary and religious cultures in South Africa, marriage is deemed to be both a covenant between the spouses, their families, and a spiritual agreement.²⁷⁷ Judicial processes and legal counseling must therefore continuously evolve to appropriately address these issues in holistic family dispute resolution.

In most of the traditional communities in South Africa, the marriage process is also deemed to bind the wife to the husband's family and spiritually to the clan's ancestral spirits.²⁷⁸ This keen belief in ancestral rule, particularly among Black South Africans and involvement of family in the marriage institution presents an additional challenge to the marriage institution which can also lead to disputes involving third parties.²⁷⁹ These stern beliefs often contribute to strong emotions attached to the family disputes which contributes to long drawn litigation or in some instances a refusal by some members of the family to accept the simplicity of the formal marriage system.²⁸⁰

²⁷⁶ Adams & Trost (n275 above) 48.

²⁷⁷ Adams & Trost (n276 above) 48.

²⁷⁸ Adams & Trost (n277 above) 48.

²⁷⁹ Adams & Trost (n278 above) 48.

²⁸⁰ Adams & Trost (n279 above) 48.

A case in point is the case of *Mgenge v Mokoena and Another*,²⁸¹ where a mother to the deceased husband disputed the validity of a marriage certificate and thus the marriage between her now deceased son and the defendant. This marriage had been registered under the provisions of the Recognition of Customary Marriages Act.²⁸² The requirement that a customary marriage must be negotiated, entered into, or celebrated in accordance with customary law presents legal difficulties because the validity of the marriage depends not only on the individuals involved but also on adherence to customs, which involves families.²⁸³

Occasionally, there is even ambiguity amongst the parties themselves when one party feels they are married while the other party believes they are not. This discrepancy often results in legal disputes questioning the legitimacy of the marriage. The dissolution of a marital bond is thus more intricate than a mere separation of the individuals involved. Within the majority of South African communities, there is a strong emphasis placed on the importance of successful marriages and a negative view towards divorce. This societal expectation adds extra stress to those going through a divorce and creates difficulties in resolving the divorce.²⁸⁴

²⁸¹ (2023) 2 All SA 513 (GJ).

²⁸² Act 120 of 1998.

²⁸³ *Mgenge* (n281 above) para 19.

²⁸⁴ *Adams & Trost* (n279 above) 48.

Divorcing parties in some communities in South Africa are also burdened by the impact of negative judgment from family and the religious society in addition to their own sense of failure for falling short of their own expectations.²⁸⁵ This dynamic is relevant because it has the effect of exaggerating the issues in dispute and sometimes leads to unnecessary resistance to settlement of the divorce. These nuances make it difficult to pass legislation which fully incorporates and regulates the formalities and consequences of every single religious or cultural marriage practice and divorce process.²⁸⁶

Furthermore, the diversity of personalities among married people also influences the kind of problems which arise as a result of their marriage partnership. Divorce is however generally an undeniably painful experience which often evokes powerful sentiments of loss together with anger, remorse, and disappointment for most people.²⁸⁷ The family justice system has been evolving to incorporate these dynamics to improve the effectiveness of the dispute resolution process. It is trite that changes which are inevitable as a result of the divorce order impact people from different backgrounds differently.

²⁸⁵ RC Mussehl 'From advocate to counselor: The emerging role of the family law practitioner.' (1976). 12 *Gonzaga. Law. Review* 444.

²⁸⁶ <http://www.dha.gov.za/images/PDFs/White-Paper-on-Marriage-in-SA-5-May2022.pdf> page 7.

²⁸⁷ Mussehl (n285 above) 444.

Legal counsel must thus properly understand the impact of the divorce on own clients in order for that legal counsel to properly manage the client`s expectations in the process.²⁸⁸ Client management through legal counseling entails educating the client on the achievable outcomes through the court system and assisting the client to properly understand the other parties` legal rights.²⁸⁹ The uncertainty of the future, societal prejudices, the need for economic stability after the divorce as well as the possibilities of new relationships and the forced emotional detachment can impact the contested nature of the dispute.²⁹⁰ Some of the issues may even end up in the parties instituting delictual claims against each other, influenced by a deep sense of loss and betrayal.

A case in point is the case of *C W v G T*.²⁹¹ In this case the wife was deeply aggrieved by the fact that the marriage was falling apart and alleged that the husband fraudulently declared love and a desire to spend the rest of his life with her, which caused her to accept the marriage proposal. Pursuant to this marriage proposal, she spent a huge amount of R331 342.36 in respect of wedding expenses.²⁹² However, she alleged that the Respondent`s behavior soon after the marriage did not align with his promise and largely demonstrated a lack of devotion to the marriage.²⁹³

²⁸⁸B Simpson 'Changing families: An ethnographic approach to divorce and separation.' (2020) *Routledge New York* 5.

²⁸⁹ Simpson (n288 above) 4.

²⁹⁰ Simpson (n289 above) 4.

²⁹¹ (2023) ZASCA 23.

²⁹² *CW* (n292 above) para 10.

²⁹³ *CW* (n292 above) para 10.

In adjudicating this case on appeal, Judge Mokgoka, concurring with Judge Mjali, aptly emphasised that key to a marriage is the responsibility on both parties not to falsely misrepresent their intentions to the other causing loss.²⁹⁴ Judge Mokgoka also reiterated the principle which was established in the case of *Dawood and Others v Minister of Home Affairs and Others*²⁹⁵, that marriage and the family are fundamental social institutions and thus entering into marriage has public implications and must thus be managed diligently.²⁹⁶

Understanding the impact of marriage on society as well as the sometimes-far-reaching consequences of a breakdown in family relationships is critical to facilitating expeditious legal counseling.²⁹⁷ Research by scholars such as Lee Dohoon in America²⁹⁸ have found that divorces and separation can contribute also to an increased risk for child and adolescent adjustment problems such as learning difficulties, disorderly behaviors, and depression.²⁹⁹ Similar studies in South Africa have also shown that family instability can negatively impact children's development. However, the degree of impact on children is largely dependent on the way parents handle the separation and their ability to coparent regardless of their personal differences.³⁰⁰

²⁹⁴ CW (n293 above) para 27.

²⁹⁵ *Dawood* (n265 above) 31.

²⁹⁶ CW (n294 above) para 41.

²⁹⁷ Dohoon & McLanahan (n264 above) 757.

²⁹⁸ Dohoon & McLanahan (n297 above) 760.

²⁹⁹ SR Rappaport 'Deconstructing the Impact of Divorce on Children' (2013) 47.3 *Family Law Quarterly* 353–77.

³⁰⁰ Rappaport (n299 above) 353-77.

Divorce statistics in South Africa impose an urgent duty on the justice system to review *interalia* divorce processes as well as the legal counseling approaches so that they align with more constructive dispute resolution alternatives such as mediation.³⁰¹ The divorce rate in 2021 was observed to be 30 divorces per 100,000 estimated resident population. In addition, 22.1% of husbands and 28.5% of wives were not economically active or unemployed at the time of divorce.³⁰² This creates an opportunity for the financially stronger spouse to abuse the weaker spouse through long drawn litigation.³⁰³ It is therefore that family dispute resolution must be structured to protect these vulnerable groups.

In 2021, more than half of all divorces (56.6%) involved couples with children under the age of 18. The majority of children affected by divorce, 55.6%, were found to be from the black African population group, followed by the white population group at 19.4%. The Indian/Asian population group was 14.9% while the colored population group (4.3%).³⁰⁴ These statistics are important in that they influence the development of the family dispute resolution structures to properly protect these vulnerable children by ensuring that they are well provided for in resultant court divorce orders and settlement agreements.³⁰⁵

³⁰¹ Dohoon & McLanahan (n298 above) 762.

³⁰² South African Divorce Statistics accessed at <https://www.divorcelaws.co.za/divorce-statistics.html> accessed 27 November 2023.

³⁰³ South African Divorce Statistics (n302 above).

³⁰⁴ South African Divorce Statistics (n303 above).

³⁰⁵ South African Divorce Statistics (n304 above).

Qualitative research in the South African context shows that these children are prone to suffer painful emotional traumas resulting from the separation of the family even long after the divorce itself has been finalised³⁰⁶. It is thus important for the overall divorce process to be handled by properly skilled legal counsel to assist parents to consider these detrimental effects and adopt more constructive resolution options to mitigate these undesirable effects on children.³⁰⁷

In South Africa, the courts ensure that the “best interests of children” is the prevailing custody standard. However, the courts rely on legal counsel to assist the court with sufficient information to make a proper determination regarding the minor children. This can easily be clouded by an adversarial approach to dispute as each party focuses on winning the argument other than protecting the best interests of the minor children.³⁰⁸ The courts have a duty to ensure that they uphold the best interests of children in all cases.

³⁰⁶Dykes & Ward ‘Parents and adolescents in the post-divorce period: the effects on adolescent psychosocial development.’ (2022) 58.3 *Social Work* 366-381.

³⁰⁷ Dykes & Ward (n307 above) 368.

³⁰⁸ B D’Onofrio and R Emery ‘Parental divorce or separation and children’s mental health.’ (2019) 18.1 *World Psychiatry* 100.

In the case of *S v J*³⁰⁹, the Supreme Court of Appeal found that it was not in the best interests of the minor child for the parties to continue litigating on issues with respect to the minor child. The court ordered hence that, in the event that the litigants had further issues in the future with regard to arranging contact with the minor child, they must resolve those issues through mediation instead of litigating again at court.³¹⁰ However, the courts rely on legal counsel to assist the court with sufficient information to make a proper determination regarding the minor children.

In the case of *LV v GJV*³¹¹, the parties who were both assisted by legal counsel reached a negotiated settlement agreement with respect to the divorce, accrual, division of the joint estate as well as the minor children's primary residence, contact and guardianship. This saved the court time as the court was able to grant the divorce order on the basis of the agreed terms and assist the parties to adjudicate the remaining maintenance issues.³¹² The parties' receptiveness to mediation and settlement can easily be clouded by an adversarial approach to dispute as each party focuses on winning the argument other than protecting the best interests of the minor children.³¹³

³⁰⁹ (2010) ZASCA 139 para 55.

³¹⁰ *S v J* (n309 above) para 55.

³¹¹ (2022) ZAFSHC 165 para 1.

³¹² *LV* (n312 above) para 1.

³¹³ *D'Onofrio and Emery* (n308 above) 100.

A failure on the part of legal representation to appropriately recognise and confront the abovementioned fundamental concerns in the legal counseling process may result in an extended duration of the resolution process and a deeper deterioration of the parties' relationships. The majority of parents, while navigating their own emotional distress, neglect to recognise the degree to which their children are affected and require counseling and reassurance.³¹⁴

3.2 Regulatory framework governing family law and legal counseling in South Africa

As has been discussed above, the South African society is diverse owing to the many cultural and religious influences which creates a system of legal pluralism especially in family cases. The issue of legal plurality creates multiple legal difficulties as these individuals from diverse cultural and religious communities who live under their own cultural and religious systems approach the South African courts for adjudication of their family disputes.³¹⁵

³¹⁴ Dykes & Ward (n307 above) 368.

³¹⁵ P Bakker 'Chaos in family law: a model for the recognition of intimate relationships in South Africa.' (2013) 16.3 *Potchefstroom Electronic Law Journal* 115-150.

The regulatory framework for family law disputes must therefore constantly be developed so that it properly protects the people. Similarly, legal counsel must be fully aware of these religious and cultural systems before they can effectively assist parties to effectively resolve their disputes and to access justice effectively. Despite these underlying cultural and religious systems which affect families, the principal sources of law in relation to marriage, marital breakdown, domestic violence, and the welfare of children in South Africa is principally governed by the Constitution, common law, customary law and decided cases.³¹⁶

The South African Constitution provides for the enactment of legislation which recognises marriage in various religious, personal, or family law systems, as long as it is compatible with the Bill of Rights.³¹⁷ The applicable legislation includes *inter alia* the Marriage Act, the Divorce Act, Recognition of Customary Marriages Act, the Domestic Violence Act as well as the Matrimonial Property Act.³¹⁸ Matters relating to children in divorce cases are in addition to these Acts, also regulated by the Children's Act as well as The Mediation in Certain Divorce Matters Act.³¹⁹

³¹⁶ A Catto 'Family Law in South Africa: Overview'

[https://content.next.westlaw.com/practicallaw/document/I63cd7e63e68b11e398db8b09b4f043e0/Family-law-in-South-Africa-overview?viewType=FullText&transitionType=Default&contextData=\(sc.Default\)#co_anchor_a280774](https://content.next.westlaw.com/practicallaw/document/I63cd7e63e68b11e398db8b09b4f043e0/Family-law-in-South-Africa-overview?viewType=FullText&transitionType=Default&contextData=(sc.Default)#co_anchor_a280774) on 20 October 2023.

³¹⁷ Bakker (n315 above) 119.

³¹⁸ Catto (n316 above).

³¹⁹ Act 24 of 1987.

The provisions of these Acts essentially safeguard children from all types of marriages or family structures by imposing a duty on the court to grant court orders to prioritize the best interests of the children.³²⁰ It is thus imperative for legal counsel who practice in family law to have proper substantive knowledge of these laws in order for them to properly facilitate effective access to justice. In South Africa, parties can choose to enter into any kind of religious marriage. However, the marriage is formally recognised when it is conducted by a formally registered marriage officer. Where the marriage officer is not registered, the parties may formalise their marriage by approaching the Department of Home Affairs to register the marriage under the Marriage Act or the Civil Union Act.³²¹

In cases where parties enter into a religious or customary marriage, their marriage is fully subject the religious or customary laws of that particular religion. In addition to these religious laws, a duly registered marriage is also duly subject to the legislative provisions of the Marriage Act or the Civil union Act.³²² This has the potential to create conflict especially when the parties are divorcing as these religious laws may impose different procedures for the divorce which conflict with the legislative requirements. Effective legal counseling and adjudication processes must be able to balance these complications in a manner which promotes justice for the parties.

³²⁰ Act 38 of 2005.

³²¹ file:///C:/Users/Linda/Downloads/ajol-file-journals_366_articles_94430_submission_proof_94430-4369-242686-1-10-20130919.pdf accessed on 9 November 2023.

³²² file:///C:/Users/Linda/Downloads/ajol-file-journals_366_articles_94430_submission_proof_94430-4369-242686-1-10-20130919.pdf accessed on 9 November 2023.

Overall, marriages in South Africa are governed by status and agreement, with societal and religious influences dictating the specific consequences of such marriage. Although statutory laws like the Marriage Act set out the unavoidable consequences of a registered marriage, the parties can also conclude antenuptial contracts which govern the economic consequences of their marriage.³²³ These antenuptial contracts are applicable to civil, customary, or civil union marriages. They are valid to the extent that the terms thereof are not unlawful, immoral, impossible, or against marriage essence.³²⁴ The Divorce Act allows domestic partnerships to be ended through agreement without necessarily obtaining a court order. However civil unions or marriages can only be terminated by a court order.³²⁵

The current adversarial divorce process creates a platform for the parties to apply the above laws and ventilate their issues through legal arguments for the sole purpose of convincing the court that they are entitled to the relief sought with regards to aspects such as custody of the children , maintenance and patrimonial aspects of the marriage.³²⁶ Although the court process affords the parties closure through the court order, it does not necessarily address the emotional predicament of the spouses which is often aggravated by the adversarial approach.³²⁷

³²³ Bakker (n317 above) 131.

³²⁴ Bakker (n323 above) 131.

³²⁵ Section 3 of the Divorce Act.

³²⁶ T Carbonneau 'A Consideration of Alternatives to Divorce Litigation.' (1986) 4 *University of Illinois Law Review* 1124.

³²⁷ Carbonneau (n326 above) 1125.

The court is also not empowered to undo whatever emotional damage has been done by the parties to each other. The court also cannot force couples to develop more positive attitudes towards each other in combined responsibilities such as looking after the minor children. The litigation process in divorces is often fueled by anger and disappointment which sometimes has the effect of exaggerating the dispute.³²⁸ The adversarial trial is premised on the principle that the court will be able to fully adjudicate the issues presented and determine the truth of a matter for purposes of granting an impartial judgement if each party presents its strongest case.³²⁹

In order to effectively advocate for their clients, legal professionals must possess a diverse set of abilities, apply various techniques, and possess a demeanor that enables them to deliver a thorough and persuasive presentation of the case, eventually aiming to secure acceptance of their client's perspective.³³⁰ This often creates an opportunity for the case to become long drawn as the procedures are followed. As a general rule, legal counseling is *inter alia* governed by the General Council of The Bar of South Africa Uniform Rules of Professional Conduct.³³¹

³²⁸ Carbonneau (n327 above) 1125.

³²⁹ M Karels 'The triumvirate role of legal counsel for child offenders: representative, intercessor or agent?' (2013) 26.3 *South African Journal of Criminal Justice* 276-301.

³³⁰ Baggett (n2 above)

³³¹ General Council of the Bar of South Africa: Uniform rules of professional conduct. Accessed at <https://gcbsa.co.za/wpcontent/uploads/2020/03/GCB%20Uniform%20Rules%20of%20Ethics%20updated%202017%20AGM.pdf> accessed on 19 October 2023 page 278.

In terms of these rules, legal counsel has a duty to fearlessly uphold the interests of the client without regard to any unpleasant consequences either to legal counsel or to any other persons.³³² Legal counsel further has the obligation to make use of every legal argument available to advance the case, and this can in some instances inflame the dispute as each legal counsel sets out to elevate his or her own client's case above the other often without due regard to the feelings of the other party to the dispute.³³³

The above guidelines for legal counsel have largely influenced the legal counseling process in terms of the skills and strategies suitable to successfully represent clients. The legal counsel's duty in the current adversarial system does not extend to moral and other emotional consolation which may be needed to facilitate the restoration of the parties' relationship.³³⁴ As can also be gleaned from above, legal counsel is not empowered to counsel the clients with respect to their emotions and yet it is these very same emotions that form the basis of the dispute and drive the parties to either settle or continue to fight. There have been studies which have shown that in most instances the anger associated with a divorce lingers long after the case is finalised especially if not properly addressed through processes such as divorce counseling.³³⁵

³³² General Council of the Bar of South Africa: Uniform rules of professional conduct (n331 above).

³³³ General Council of the Bar of South Africa: Uniform Rules of Professional Conduct. (n332 above).

³³⁴ Federle (n70 above) 1664.

³³⁵ Alberti & Emmons (n1 above) 327.

Further, it has also been discovered through research that ventilating issues in an adversarial system often affords negligible emotional reprieve to the litigants and may frustrate holistic resolution of the issues in dispute.³³⁶ As such presenting the reasons for the breakdown of the divorce in pleadings or fighting on the basis of winning the court case may in most instances frustrate expeditious dispute resolution. The appointment of family advocates in terms of the Mediation in Certain Divorce Matters Act³³⁷ safeguards the interests of the children in divorce cases.

The sole purpose of the family advocates is to institute inquiries at the request of legal counsel for either of the parties to the divorce case. The court or someone representing the minor children may also refer the dispute to the office of the Family Advocate. As a general rule, in South Africa, where there are minor children, a divorce order may not be granted without the family advocate's report or endorsement.³³⁸ It is therefore imperative that legal counsel must be fully aware of these processes and refer cases as soon as possible where they identify that the parties are having difficulties agreeing with each other on a suitable parenting plan.

³³⁶ Alberti & Emmons (n335 above) 328.

³³⁷ Act 24 of 1987.

³³⁸ J Sinclair 'South Africa: Children, Race, Divorce.' (1989) 28.3 *Journal of Family Law* 608.

The South African legal framework for the marriage institution has been largely criticized for not sufficiently recognizing legal pluralism and cultural and religious diversity which is characteristic of the society. These shortcomings also inevitably have an impact on the Legal counseling training and formal court divorce resolution process.³³⁹ Civil and religious marriage ceremonies are recognised as valid only if they are performed by an authorized marriage officer. However, in the event of the breakdown of the marriage, only a court is authorized to dissolve that marriage formally and lawfully by issuing a divorce decree.³⁴⁰

The standard considered by the courts in granting divorces often differs from standards imposed by religion and customary law which creates potential complication for the legal counseling process. These dynamics have a direct impact on the parties' general approach to family cases.³⁴¹ Legal counseling in divorce cases is largely governed by the terms of section 3 and 4 of the Divorce Act which stipulates that parties can obtain a divorce order where there is evidence of an irretrievable breakdown of the marriage.³⁴² A party may seek the assistance of legal counsel in order to obtain a divorce if there is

³³⁹ <http://www.dha.gov.za/images/PDFs/White-Paper-on-Marriage-in-SA-5-May2022.pdf> accessed on 8 November 2023 Page 6.

³⁴⁰ NR McDonald 'Marriage and Divorce Laws in South Africa.' (1974) *Washington, D.C., Law Library of Congress* 1.

³⁴¹ B Oppermann 'The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States.' (2006) 17.1 *Hastings Women's Law Journal* 74.

³⁴² Act 70 of 1979.

substantial evidence that the spouses have not cohabitated as husband and wife for at least one year prior to the issuance of the divorce summons.³⁴³

In addition, legal representation can facilitate a divorce in cases where one spouse has engaged in adultery and the other spouse finds it so repugnant that they are unable to maintain the marriage. Additionally, legal counsel will aid a client in obtaining a divorce if one of the spouses is a recidivist criminal serving a sentence of incarceration.³⁴⁴ In the majority of cases, these legal considerations in divorces are inconsistent with religious and customary grounds for divorce.

3.3 Legal counseling as a means to facilitate prompt resolution of family cases in South Africa

One distinguishing factor of family law cases is the proximity of the relationships between the parties, which relationships often still need to be preserved well after the dispute has been resolved.³⁴⁵ For example, divorced parents who have minor children still need to co-parent for the benefit of their children. If the parties become so consumed in bitterness after the divorce, this can have detrimental effects on the overall wellbeing of the minor children. The main motivation for this research is the **realization** that legal counseling does

³⁴³ Act 70 of 1979.

³⁴⁴ Act 70 of 1979.

³⁴⁵ Alberti & Emmons (n336 above) 310.

play a pivotal role in promoting constructive dispute resolution in family cases in addition to alternative dispute resolution mechanisms such as mediation.

While there has been much study on the attitudes, skills and strategies utilized by legal counsel, more still needs to be done with respect to developing legal counseling methods which encourage constructive resolution of family disputes.³⁴⁶ There is therefore an urgent need for legal counsel to recognise and deal with the unique difficulties which arise in family law cases of people from diverse cultural and religious sectors.³⁴⁷ The divorce process becomes complex because of strong emotional, cultural, and religious beliefs which sometimes appear to be undermined by the formal justice system. It is therefore the legal counsel`s duty to remain objective and manage the client`s expectations.³⁴⁸

In order to be effective in these cases, the legal counselor needs to be trained and equipped with better counseling, listening, communication, and emotional support skills.³⁴⁹ It is critical for the legal counsel to be skilled enough to assist customers in distinguishing between their emotional sentiments and legal difficulties. This promotes the clients to make objective judgments which are forward thinking rather focusing on the current emotional.³⁵⁰

³⁴⁶ Bagget (n330 above) 1475.

³⁴⁷ Baggett (n346 above) 1475.

³⁴⁸ Mussehl (n287 above) 443.

³⁴⁹ Mussel (n349 above) 443.

³⁵⁰ Mussehl (n350 above) 449.

In addition to proper knowledge of substantive law and procedure, there is a special responsibility upon legal counsel acting in family law cases to properly manage their own emotions well enough to remain objective at all times and avoid becoming a barrier to settlement of cases.³⁵¹ In the case of *MB v NB*³⁵², the learned judge correctly highlights that clients are not solely responsible for the attitudes that they assume in litigation but that the legal advice rendered by their legal counsel also hugely influences the demands as well as the propensity to settle or persist with litigation.³⁵³

If the legal counsel is not objective and properly skilled enough to manage own client expectations, the dispute can be inflamed so easily.³⁵⁴ The legal counselor can use his objective discretion, specific attributes, and strategies to promote access to justice. This can be achieved by acknowledging and discussing with the client, the implications of their actions long after the case is settled.³⁵⁵ Strategic legal counseling can influence the client to only pursue those objectives that encourage a fair outcome for his children, even when this involves compromise.³⁵⁶

³⁵¹ (2010 (3) SA 220 (GSJ) para 54.

³⁵² *MB* (n351 above) para 54.

³⁵³ *MB* (n352 above) para 54.

³⁵⁴ Federle (n334 above) 1666.

³⁵⁵ Federle (n355 above) 1666.

³⁵⁶ Federle (n356 above) 1666.

The case of *Townsend-Turner and Another v Morrow*³⁵⁷, was a dispute relating to the access of a minor child to a grandparent where the mother to the minor child had passed away. In this case the deceased's husband owing to a dispute restricted the grandmother's access of the minor child. This dispute became litigious and long drawn with each party being assisted and duly represented by legal counsel. Despite the complexity of the case, the court was of the view that these issues would have been better resolved through mediation.

Judge Knoll noted the efforts which had been made by the parties through discussions which were held between the court and the relevant legal counsels in the judge's chambers before case could be heard. The sole purpose of these discussions was to jointly attempt to find common ground and facilitate settlement of the matter out of court.³⁵⁸ The mediation process led the parties to ultimately conclude a settlement agreement, which agreement was incorporated in the court order.³⁵⁹ In line with the definition of legal counseling rendered by Jayakumar³⁶⁰, the legal counselor's role is to assist clients to select the most suitable dispute resolution process to follow under given circumstances.³⁶¹

³⁵⁷ (2003) ZAWCHC 53.

³⁵⁸ *Townsend-Turner* (n357 above) page 36.

³⁵⁹ *Townsend-Turner* (n358 above) page 36-37.

³⁶⁰ Jayakumar (n76 above) 13.

³⁶¹ Jayakumar (n361 above).

Further to the above, the role of the legal counsel is to assist the client to talk about the issues, explore and understand the client's feelings, thoughts and finally to assist the client to decide on the manner of resolution to employ.³⁶² During consultation and in the prelitigation stages, legal counsel can assist clients to manage their emotions to avoid frustrating the resolution of the main dispute by *interalia* referral to professionals such as psychologists who are trained to offer divorce counseling or anger counseling.³⁶³

In the *Townsend-Turner case*, an expert, an independent clinical psychologist Dr Bredenkamp was engaged to intervene in the matter for the purpose of assisting the court and the parties to properly understand the impact of their various roles in the minor's child's wellbeing.³⁶⁴ In the aforementioned case, Dr. Bredenkamp discussed the significance of extended family members in situations where the family structure undergoes changes following the demise of a parent. He provided expert assistance to the court in resolving the dispute in a manner that promotes the developmental requirements of the minor child. Doctor Bredenkamp administered personality assessments to both the applicant and the respondent in order to compile a complete report that would aid the parties in effectively resolving the dispute.³⁶⁵

³⁶² Jayakumar (n361 above).

³⁶³ Jayakumar (n362 above).

³⁶⁴ *Townsend Turner* (n359 above) page 23.

³⁶⁵ *Townsend-Turner* (n364 above) page 29-30.

It is significant to note that during consultation and in the pre-litigation stage, the legal counselor can also refer the parties to offices such as the family Advocate who are trained to counsel the clients with respect to the minor children and assist them to adopt solutions which are in the best interests of the minor children.³⁶⁶ The Family Advocate in this instance assists the parties to reach an agreement on disputed issues such as custody, access and guardianship.³⁶⁷ The Family Advocate also has a duty to conduct an in-depth enquiry into the parties' circumstances in light of the best interests of the child and makes a recommendation to the Court with regard to custody, access or guardianship.³⁶⁸ This limits the issues which the parties fight about and promotes speedy resolution of the dispute.³⁶⁹

The legal counseling process begins with the legal counselor's ability to properly define the legal problem from the facts presented by the client and clarifying the client's intended outcomes. The legal counselor must be able to objectively evaluate the possible positive and negative consequences of available resolution mechanisms in order to pursue the most suitable for the context.³⁷⁰ The legal counselor's conduct and failure to assist the client may fuel long drawn litigation and further damage family relations unnecessarily.

³⁶⁶ https://www.justice.gov.za/fmadv/f_main.htm accessed on 20 October 2023.

³⁶⁷ https://www.justice.gov.za/fmadv/f_main.htm accessed on 20 October 2023.

³⁶⁸ https://www.justice.gov.za/fmadv/f_main.htm accessed on 20 October 2023.

³⁶⁹ J DiPippa 'How prospect theory can improve legal counseling.' (2001) 24 *University of Arkansas at Little Rock Law Review* 83.

³⁷⁰ DiPippa (n369 above) 107.

In the case of *Mmamphsika and Another v Mmamphiska and Another*³⁷¹, legal counsel failed to file opposing papers on time despite having assured the clients that he would file the papers on time. This resulted in a default judgement being granted which then necessitated a rescission application. This case was a deceased estate dispute and by its nature, it was a very emotional case.³⁷² In the above case the legal counsel prejudiced the parties in that he even advised the clients not to attend at court on the relevant court date on the basis that he would represent them in their absence. The legal counsel failed to attend at court and the client could not assist herself in that situation due to the complexity of court processes. She was forced to incur further costs of appointing another legal team.³⁷³

On the basis of the abovementioned carelessness by legal counsel dealing with such a sensitive family dispute, Judge van der Schyff expressed concern on the manner in which this family law case had been handled. He expressed his sadness at the fact that disputes between siblings ended up being referred to court for resolution which will inevitably lead to a further breakdown of relationships at unreasonable legal costs. Judge van der Schyff pointed out that legal counsel should rather refer family disputes to mediation which encourages speedy resolution and possible restoration of peace and reconciliation between the siblings.³⁷⁴

³⁷¹ (2018) ZAGPPHC 628 para 22.

³⁷² *Mmamphsika* (n371 above) para 22.

³⁷³ *Mmamphsika* (n372 above) para 23.

³⁷⁴ *Mmamphsika* (n373 above) para 33.

In this case, the court also ordered that the parties consider mediation prior to persisting with the dispute.³⁷⁵ The legal counselor must be aware of own weaknesses and strengths and how they may influence the legal counselor's attitude towards certain causes of action.³⁷⁶ In terms of the lawyer autonomy model the legal counselor's character and personality have a key influence on the dispute resolution outcomes of the case, particularly in family law cases in that the legal counsel is deemed to influence the resolution methods adopted by the client.³⁷⁷ Legal counsel through consultation process develop and clarify the expectations of the client which assist the client to process the dispute outside just emotional feelings.

An effective communicator has the effect of limiting lengthy processes caused by miscommunication and misunderstanding as he is able to properly present client's key objectives and intended outcomes which limits unnecessary arguing.³⁷⁸ Prejudices may become evident in the behavior of legal counsel to the extent that they drive the parties to litigate where they could easily have settled. Legal counsel's mannerisms have the potential to induce particular response patterns from clients and opponents in a dispute resolution process and should thus be properly monitored and controlled by the legal counselor.³⁷⁹

³⁷⁵ *Mmamphsika* (n374 above) para 33.

³⁷⁶ Federle (n356 above) 1664 -1665.

³⁷⁷ Federle (n376 above) 1665.

³⁷⁸ Baggert (n347 above) 1481.

³⁷⁹ Baggert (n378 above) 1475.

Specific biases of the legal counsel may easily be evident and can influence the client and opponent to fight where they could have settled. For example, a rude, indifferent legal counsel may prompt hostile behavior from a client.³⁸⁰ The legal counselor may invoke a further exaggerated sense of betrayal in the client unnecessarily where they ought to just assist the client to focus on the relief sought which is the divorce itself. A similar problem may arise when an attorney is unsympathetic or harsh when a dependent spouse seeks financial reprieve from his well to do client. Legal counsel can influence their client to be overly condescending to the needy spouse.³⁸¹

3.4 Attributes that contribute to the efficient resolution of family cases and effective legal counseling in South Africa.

There has been a growing concern by judges, social workers, and members of the society at large regarding the current manner of legal counseling process which is geared towards adversarial litigation and its impact in family law cases.³⁸² There is definitely a need to adapt the legal counseling process to be more suited to the non-adversarial dispute resolution mechanism such as mediation. This can be achieved by continuing to enhance the law curriculum to improve emotional sensitivity and client awareness.

³⁸⁰ Baggert (n379 above) 1475.

³⁸¹ Baggert (n380 above) 1476.

³⁸² Baggert (n381 above) 1476.

Continuing education seminars and workshops also can be conducted to enhance legal counselors' skills.³⁸³ Legal counseling as a process is influenced by human qualities such as empathy. Empathy towards the client and minor children creates an environment where the client can fully disclose and share detailed facts with the confidence that the legal counselor understands and can assist.³⁸⁴ Empathy enables the legal counsel to facilitate a more wholesome outcome to the dispute. An adversarial approach by the legal counsel can frustrate the expeditious resolution of cases.

A case in point is the case of *S v S and Another*³⁸⁵, a divorce case which went all the way to the Constitutional court as the parties could not agree on interim maintenance payable pending the divorce. The relationship between the parties in this case was so acrimonious that they could not even compromise on this interim issue albeit with the assistance of legal counsel.³⁸⁶ The role of legal counsel, especially the adoption of an adversarial approach is also criticized in this case and the court advances that legal counsel could have played a more active role to assist the parties to mediate rather than fight to this extent.³⁸⁷

³⁸³ Mussehl (n350 above) 450.

³⁸⁴ Redmount (n31 above) 181.

³⁸⁵ (2019) (6) SA 1 (CC).

³⁸⁶ *S v S* (n385 above) para 30.

³⁸⁷ *S v S* (n386 above) para 30.

The adversarial process resulted in multiple applications and appeals, with the interim Rule 43 application taking three years to resolve. The court emphasised the frustration of such lengthy processes on the financially weaker party.³⁸⁸ This is a travesty especially considering that the parties still must jointly parent their children despite the animosity caused by the long-drawn litigation.³⁸⁹ It is thus important for legal counsel to be sympathetic to the financial implications in instances such as these. In addition to mediation and constructive legal counseling, the court in this case also emphasised the role of case management and allocation of preferential court dates to mitigate acrimony caused by long drawn divorce.³⁹⁰

The court also correctly notes that in the High Court in South Africa, such as the South Gauteng High Court and others practice directives have already been adopted to allow divorce cases to be heard in special family courts.³⁹¹ The implementation of case management discussed in Chapter 2 above as well as prelitigation mediation is also helpful to facilitate speedy resolution of divorces.³⁹² The cooperation of legal counsel in the case management of complex divorce matters is another means to prevent the delayed finalization of divorce matters.

³⁸⁸ S v S (n387 above) para 30.

³⁸⁹ S v S (n388 above) para 30.

³⁹⁰ S v S (n389 above) para 55.

³⁹¹ S v S (n390 above) para 55.

³⁹² S v S (n391 above) para 55.

The judge in *MB v NB*, emphasised that omission to comply with the requirement to mediate or refer the matter to the Family Advocate by legal counsel can hinder parties from reducing litigation costs and promoting amicable dispute settlement through mediation.³⁹³ The learned judge in this instance noted that that Plaintiff confirmed that legal counsel had not discussed the prospects of mediation with her.³⁹⁴ Although there is no guarantee that parties will settle through the mediation process, the parties will inevitably benefit from the cordial nature of the mediation process in the sense that they are encouraged to discuss constructively and give more credence to common benefits such as the best interests of the minor children or costs saving.³⁹⁵

The learned judge in the *MB v NB* case above indicated that the Plaintiff was of the view that mediation would be of no use to her. The judge was of the view that this response by the Plaintiff could be because of ignorance regarding the benefit of mediation.³⁹⁶ This response by the Plaintiff is also indicative of the influence which she may have received from the legal counsel or the legal counselor's failure to properly explain the benefits of mediation to her. This unfortunately leads to sometimes unnecessary full-blown litigation.³⁹⁷

³⁹³ *MB* (n353 above) para 50.

³⁹⁴ *MB* (n394 above) para 50.

³⁹⁵ *MB* (n395 above) para 50.

³⁹⁶ *MB* (n396 above) para 50.

³⁹⁷ *MB* (n397 above) para 50.

Thomas Carbonneau³⁹⁸ submits that divorces should not be primarily dealt with in terms of the adversarial justice system but rather a combination of processes such as mediation and effective legal counseling must be applied.³⁹⁹ He sites that the problem with sole reliance on the adversarial approach is that it promotes emotional retribution and the longer it takes to resolve the dispute has the effect of prolonging a painful relationship.⁴⁰⁰ Legal counsel is well placed to facilitate a willingness by parties to at least attempt mediation.

On the whole this study also finds that constructive legal counseling combined with mediation creates a real opportunity for the parties to confront their emotional and practical quandary resulting from the divorce and to find practical ways such as psychological counseling to deal with resultant traumas expeditiously.⁴⁰¹ Non adversarial dispute resolution mostly ensures that the parties retain some control over the process and enhances the parties' ability to engage more productively in parenting after divorce and provide them with insights valuable in future relationships.⁴⁰² Above all, mediation has the potential to safeguard the traditions of the involved parties while diminishing the impact of personal biases held by legal counsel and the judge, should the order be ultimately granted.⁴⁰³

³⁹⁸ Carbonneau (n328 above) 1125.

³⁹⁹ Carbonneau (n398 above) 1125.

⁴⁰⁰ Carbonneau (n399 above) 1125.

⁴⁰¹ Carbonneau (n400 above) 1125.

⁴⁰² Carbonneau (n401 above) 1125.

⁴⁰³ Carbonneau (n402 above) 1125.

Divorce mediation therefore supplements the court processes and provides an organized platform where the parties can possibly reach settlement of their patrimonial aspects as well as parental responsibilities.⁴⁰⁴ As such legal counsel can play a key role in facilitating tailor-made settlement agreements which can then be presented to the courts for confirmation.⁴⁰⁵ Legal counsel who encourage mediation inevitably assist the court to receive a more accurate parenting plan which permits the parents and not the court to make a ruling on what is in the best interests of their children.⁴⁰⁶ This is so because through mediation, information regarding the children is exchanged for the purposes of highlighting the needs of the children and not to gain advantage over the other party.⁴⁰⁷

During the mediation process, the mediator can potentially assist the parties to communicate with each other regarding common issues such as the minor children in a formal manner and to learn to compromise without necessarily surrendering to abusive behavior.⁴⁰⁸ Reasonable legal counselors are not necessarily weak, but they are realistic about the worth of fighting rather than negotiating.⁴⁰⁹ Legal counsel must act constructively in unavoidable litigation by conducting cost-benefit analyses and finding effective solutions.

⁴⁰⁴ Carbonneau (n403 above) 1167.

⁴⁰⁵ Carbonneau (n404 above) 1167.

⁴⁰⁶ Carbonneau (n405 above) 1169.

⁴⁰⁷ Carbonneau (n406 above) 1169.

⁴⁰⁸ Carbonneau (n407 above) 1169.

⁴⁰⁹ Lande & Mosten (n269 above) 23.

The client's best interests include child well-being, family tranquility, and economic stability. However, family attorneys often focus on their own client's interests without properly considering the other party's interests.⁴¹⁰ Effective legal counsel avoids worsening clients' issues and uses courts only as a last resort. Maintaining positive family connections is crucial, and aggressive advocacy by pursuing every potential benefit to client can easily jeopardize the health of future interactions between the parties. Legal counsel must be fully informed about the client's interests.⁴¹¹

Legal counsel have a duty to guard against clients' emotional excitement and potential confrontational strategies, which may prejudice client's own interests. In such instances legal counsel must be honest with client and remain objective while assisting the client to understand the legal consequences of the intended cause of action. Where clients are deeply overcome by emotions to the extent that they are failing to make value judgements, good legal counselors can assist clients by referring that client to divorce therapy or mental health providers for assistance before continuing with the case.⁴¹² Effective legal counseling also entails the Legal counsel's ability leverage current legal challenges to encourage clients to explore strategies which prevent future issues.⁴¹³

⁴¹⁰ Lande & Mosten (n409 above) 23.

⁴¹¹ Lande & Mosten (n410 above) 23.

⁴¹² Lande & Mosten (n411 above) 24.

⁴¹³ Lande & Mosten (n412 above) 24.

Legal counsel can achieve this through proper client education and counseling as well as mediation to help clients understand their issues and make informed judgments.⁴¹⁴ Often times, clients may struggle to understand all the legal information provided by the legal practitioner especially when that information does not seem to favor them. To ensure clarity, legal counsel must use plain language instead of legal jargon.⁴¹⁵

3.5 Conclusion

Overall, this study reveals that legal practitioners primarily engage with both individuals and legal principles. However, it is observed that counseling is not typically integrated into the curriculum of law schools, resulting in an inadequate development of this skill, particularly in the context of family law cases in South Africa.⁴¹⁶ This study proposes that the training for family law practitioners should integrate a more systematic framework for addressing human values within the context of legal education and counseling. The implementation of sensitivity training and counseling procedures is expected to result in an increased efficacy of legal counseling services.⁴¹⁷

⁴¹⁴ Lande & Mosten (n413 above) 24.

⁴¹⁵ Lande & Mosten (n414 above) 23.

⁴¹⁶ DW Sue and D Sue 'Barriers to effective cross-cultural counseling.' (1977) 24.5 *Journal of Counseling Psychology* 1495.

⁴¹⁷ Redmount (n384 above) 98.

The utilisation of a mediatory legal counseling method in family law disputes is very appropriate within the context of the South African jurisdiction due to its adoption of a no-fault divorce system. Therefore, the parties are not required to extensively argue the reasons for the dissolution of the marriage, but rather they are required to focus on the consequences of the dissolution of the marriage.⁴¹⁸ The provision of mediatory legal counseling has the potential to expedite the conclusion of divorce proceedings through the process of educating clients and effectively managing their expectations.

When clients possess a comprehensive understanding that the divorce system operates on a no-fault basis, their inclination to fixate on the causes of the marital breakdown is curtailed, and they are instead prompted to concentrate on potential outcomes such as the fair distribution of assets and the establishment of parenting arrangements after the separation.⁴¹⁹ Effective legal counseling therefore serves as a valuable mechanism for promoting efficient and comprehensive resolution of disputes, particularly in the context of family law matters, such as divorce proceedings.

⁴¹⁸ Carbonneau (n408 above) 1169.

⁴¹⁹ Carbonneau (n418 above).

CHAPTER 4

A COMPARATIVE STUDY OF MEDIATION AND LEGAL COUNSELING IN AUSTRALIA AND SOUTH AFRICA

4. Introduction

Studies have shown that competent mediation and legal counseling may greatly reduce the negative psychological and emotional effects of divorce on both the individuals participating in the legal process and the children affected by the separation.⁴²⁰ This research investigates the parallels and contrasts between the different challenges encountered in the family law systems of Australia and South Africa, with a particular emphasis on the consequences of adversarial litigation in divorce proceedings.

This study investigates the application of mediation in the South African legal system as a means to address certain shortcomings that are intrinsic to the existing divorce litigation procedures. This research paper investigates the obstacles faced by the Australian legal system and emphasises the advancements achieved so far through the implementation of suitable laws and the creation of essential infrastructure.

⁴²⁰BL Nelson 'Divorce mediation and its impact on children.' (2013) *Social Work Master's Clinical Research Papers* 239.

The court systems in Australia, akin to those in South Africa, faced obstacles such as lengthy and drawn-out cases, exorbitant expenses linked to divorce litigation, and intricate legal procedures that presented substantial obstacles for unrepresented litigants seeking to effectively advocate for themselves.⁴²¹ A significant concern in both Australia and South Africa pertains to the way in which the adversarial character of the litigation process within family law courts frequently intensifies parental discord, thereby impeding the capacity for successful co-parenting subsequent to the resolution of divorce cases. The aforementioned consequence negatively affects the welfare of the minor children involved.⁴²²

In July 2006, Australia implemented substantial reforms to its family law system, aimed at reducing parental disputes and promoting greater shared and cooperative parenting.⁴²³ This study focuses on the implementation of mandatory family dispute resolution in the Family Courts of Australia as a prerequisite for divorce and custody cases and examines its positive impact on the effectiveness of the family justice system.⁴²⁴

⁴²¹ B Smyth, et al 'Certifying mediation: a study of section 60I certificates' (2017) 2 *Center for Social Research and Methods Working Paper* 1.

⁴²² Smyth (n421 above) 1.

⁴²³ Smyth (n422 above) 1.

4.1 Historical context and comparative foundation

Due to the significant similarity of divorce laws in South Africa and Australia, this comparative study is relevant. An additional crucial aspect is the intersection of historical developments and colonial influences, which served to incorporate and protect previously marginalized and neglected minorities through the legal framework. The influence of British and Dutch colonialism on the evolution of South African legal systems was crucial to the formation of the present justice system.⁴²⁵ The English common law, the Roman-Dutch legal system, and the indigenous African customary legal traditions of the country's numerous tribal groups all had an impact on the development of contemporary South African law.

In areas of private law, such as family law, the Roman-Dutch influence is more pronounced, whereas the English influence is most evident in procedural law.⁴²⁶ Procedural law in South Africa just like Australia is generally characterised by an adversarial process in which legal representation presents a meticulously crafted legal argument to the court. This argument must contain, *inter alia*, a strict adherence to legal principles and precedents, and its sole objective is to secure a success against the opposing party.⁴²⁷

⁴²⁴ Smyth (n423 above) 1.

⁴²⁵ E Oliver & W Oliver 'The Colonisation of South Africa: A unique case.' (2017) 73.3 *HTS Theological Studies* 1-8 <https://dx.doi.org/10.4102/hts.v73i3.4498>.

⁴²⁶ A Barratt *et al* 'Researching South African Law.' (2007) 26.3 *Law Library Resource Exchange (LLRX)* <http://www.llrx.com/features/southafrica.Htm> accessed on 23 October 2023.

⁴²⁷ A Barratt and others (n426 above).

Due to the prevalence of adversarial court proceedings, legal counseling, training, and development have evolved over time to align with the adversarial approach, which is currently the dominant method in legal advising in South Africa.⁴²⁸ It is noteworthy that the South African justice system is distinguished by its heterogeneous society, which is comprised of individuals and groups with diverse religious affiliations, cultural practices, preferences, agreements, and traditions.⁴²⁹ This significant legal plurality gives rise to unique legal intricacies, specifically in regard to the resolution of family disputes.⁴³⁰

Members of various cultural and religious communities have constantly flooded the South African judicial system with legal cases that they have filed in an effort to uphold their human rights, including those that concern family law dynamics and are subject to their own set of religious principles.⁴³¹ *Women's Legal Centre Trust v. President of the Republic of South Africa and Others*,⁴³² is a recently decided case where the court ruled that the lack of legal recognition for Muslim matrimonial unions under South African legislation infringes upon the constitutional rights of Muslim women and their offspring.⁴³³ Lack of proper recognition of the marriage inevitably impacts the court's effectiveness in adjudicating disputes which result from such a family set up.

⁴²⁸ A Barratt and others (n427 above).

⁴²⁹ C Rautenbach 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010). 42 *The Journal of Legal Pluralism and Unofficial Law* 143-177.

⁴³⁰ Rautenbach (n429 above) 145.

⁴³¹ Rautenbach (n430 above) 148.

⁴³² (2023) (1) BCLR 80 (CC).

⁴³³ *Women's Legal Centre Trust* (n13 above).

According to this study, the establishment of formal mediation and alternative dispute resolution processes in South Africa enables litigants to reach resolutions through the involvement of mediators who possess expertise in particular cultural and religious beliefs. As a result, the workload placed on the courts to adjudicate the intricacies of such matters is reduced.⁴³⁴ It is critical to reiterate that despite the diverse makeup of the South African justice system, the country is governed by a supreme Constitution which dictates the alignment of all other laws and legislation. Section 2 of the South African Constitution declares null and void any legislation or conduct that is in conflict with it.⁴³⁵ The provisions of this primary source of law are universally applicable across the entire nation.

The Constitutional Court of South Africa exercises jurisdiction over both constitutional and non-constitutional challenges and possesses the highest authority within the country's judicial system.⁴³⁶ In addition, the jurisdiction of the Constitutional Court is outlined in section 167(3)(b)(ii) of the Constitution.⁴³⁷ It is crucial therefore that any advancements in legal counseling resulting from the implementation of formal mediation in judicial settings must adhere to the principles and provisions of the South African Constitution.

⁴³⁴ Rautenbach (n431 above) 164.

⁴³⁵ Act 108 of 1996.

⁴³⁶ Act 108 of 1996.

⁴³⁷ Act 108 of 1996.

The implementation of the South African Constitution has played a pivotal role in advancing the legal framework of South Africa to be more inclusive of historically marginalized groups, such as indigenous populations, children, and women.⁴³⁸ Since the ratification of the constitution in 1996, there has been a consistent and ongoing progression in legal advancements aimed at upholding the rights of all individuals and ensuring that legal processes are in line with the facilitation of accessible and efficient methods of resolving disputes.⁴³⁹ However, there is room for more improvement by adopting processes which have proved to be successful in comparative jurisdictions such as Australia. The procedures for legal advice and judicial proceedings must constantly be revised.

The constitutional validity of South Africa's marriage and divorce laws, as well as the safeguards for children and women, has been subject to ongoing scrutiny. In certain instances, these laws have been deemed unconstitutional and in need of revision.⁴⁴⁰ The ongoing modifications and legal advancements have implications for legal counseling, as it necessitates that legal counselors adapt their practices to properly implement the latest advances and amendments to the law.⁴⁴¹ Legal counsel must also be committed to align their legal counseling methods and attitudes to effectively facilitate adequate access to justice in accordance with the enhanced legal processes.

⁴³⁸ Act 108 of 1996.

⁴³⁹ Act 108 of 1996.

⁴⁴⁰ *Women's Legal Centre Trust* (n433 above) para 1.

⁴⁴¹ *Women's Legal Centre Trust* (n440 above) para 1.

It is thus important to consider positive developments in other jurisdictions for purposes of improving the South African legal systems. Analogous to the legal system in South Africa, Australia's legal framework can be described as that of a pluralistic society characterized by the coexistence of numerous legal systems, with colonial law superseding Indigenous law.⁴⁴² The legal system of Australia is predominantly derived from the English common law tradition.⁴⁴³ However, it is important to note that certain individuals continue to govern their conduct in accordance with their distinct cultural and religious practices.⁴⁴⁴

Similar to the South African system, the Australian system is likewise undergoing a process of development aimed at fostering more inclusivity for historically marginalized groups.⁴⁴⁵ There have been noteworthy instances where the courts have formally acknowledged the existence of legal plurality, which is determined on a case-by-case basis. Due to this advancement, there is an ongoing need to integrate cultural competency into the judicial system in order to resolve a wider array of legal issues in an equitable and effective manner.

⁴⁴² E Cubillo ' Legal Pluralism Treaty – Making in Australia'
<https://law.unimelb.edu.au/iljh/research/research-projects/current-projects/legal-pluralism-and-treaty-making-in> accessed on 10 November 2023.

⁴⁴³ Cubillo (n442 above).

⁴⁴⁴ Cubillo (n443 above).

⁴⁴⁵ Cubillo (n444 above).

An influential legal case, *Mabo v. Queensland*,⁴⁴⁶ yielded a landmark decision by the High Court.⁴⁴⁷ This case is remarkable for its legal, historical, and political importance in the advancement of the acknowledgment of the rights of Aboriginal and Torres Strait Islander Australians.⁴⁴⁸ The legal structure of Australia is based on the English legal system, encompassing a written constitution, unwritten conventions, statutes, and regulations. Furthermore, Australia has adopted a common law system that evolved from the English legal framework.⁴⁴⁹

The Australian Constitution establishes a federal political framework with a central legislative body, distinct state legislatures, courts, as well as regional legislatures designated for specific areas.⁴⁵⁰ The establishment of the Commonwealth of Australia in 1901 was a direct outcome of the passing of the Commonwealth of Australia Constitution Act by the Parliament of the United Kingdom.⁴⁵¹ This legislation resulted in the consolidation of the Australian states into a unified political entity. In conjunction with the Constitution of the Commonwealth of Australia, the several state governments in Australia have their separate unique constitutional documents.⁴⁵²

⁴⁴⁶ (1992) 175 Commonwealth Law Report 1.

⁴⁴⁷ *Mabo* (n446 above).

⁴⁴⁸ Cubillo (n445 above).

⁴⁴⁹ A Black 'Cultural Expertise in Australia: Colonial Laws, Customs, and Emergent Legal Pluralism' (2019) 78 *Cultural Expertise and Socio-Legal Studies* 133-155.

⁴⁵⁰ *Mabo* (n447 above).

⁴⁵¹ Black (n449 above) 136.

⁴⁵² Australian Legal System. In *Wikipedia*. https://en.wikipedia.org/wiki/Australian_legal_system accessed on 10 November 2023.

Nevertheless, due to the susceptibility of those constitutions to state legislation, they lack the same level of binding authority over the state legislatures as Australia's written constitution, which serves as the supreme law for both the Commonwealth and the States.⁴⁵³ Over the course of its history, the common law system in Australia has undergone a process of continuous development that may be traced back to the common law system in the United Kingdom. A decision was made by the High Court, which is the highest court in Australia, establishing that the common law system of Australia is applied in the same manner across all of the country's states.⁴⁵⁴

The Australian constitutional system has both the Australian Constitution and several state constitutions, whereas South Africa has a single supreme Constitution.⁴⁵⁵ The Australian state constitutions are identified by the name of the respective state they are associated with, such as the Constitution of New South Wales or the Constitution of Victoria.⁴⁵⁶ As per the stipulations outlined in Chapter 5 of the Australian Constitution, the aforementioned states are generally obligated to uphold the constitutions, authorities, and legislations that were in effect prior to the establishment of the federation, except for any provisions that have been modified by the Australian Constitution.⁴⁵⁷

⁴⁵³ Australian legal system (n452 above).

⁴⁵⁴ Australian legal system (n453 above).

⁴⁵⁵ Australian legal system (n454 above).

⁴⁵⁶ D Gordon 'Legal Systems in Australia: Overview' <https://www.studocu.com/vn/document/truong-dai-hoc-kinh-te-thanh-pho-ho-chi-minh/luat-kinh-doanh/legal-systems-in-australia-overview/65594465> accessed on 23 October 2023.

⁴⁵⁷ Commonwealth of Australia Constitution Act 1900 www.aph.gov.au/constitution accessed on 24 October 2023.

In instances where there are conflicts arising from the overlapping legislative authority held by both the Commonwealth and the states, it is commonly recognised that Commonwealth law takes precedence over state law.⁴⁵⁸ Therefore, any state legislation which is in conflict with the Australian constitution is considered to be invalid to the extent of the discrepancy.⁴⁵⁹

4.2 Establishment of family courts in Australia

The Australian judicial system encounters comparable obstacles to the South African legal system when it comes to resolving divorce matters through an adversarial court system.⁴⁶⁰ Marriage in Australia is governed by the federal government, which is given the authority to enact marriage laws under section 51(xxi) of the constitution.⁴⁶¹ The Marriage Act of 1961 applies uniformly in all states in Australia.⁴⁶² Australian law recognises only monogamous marriages, which are marriages between two persons, including same-sex marriages, and does not recognise any other type of union, including traditional Aboriginal marriages.⁴⁶³

⁴⁵⁸ Gordon (n456 above).

The South African system on the other hand recognises a wider variety of unions including polygamous customary and religious marriages. Section 94 of the Marriage Act 1961 in Australia prohibits polygamous marriages, punishable by up to 5 years in jail for those who marry someone with a valid prior marriage.⁴⁶⁴ The charge of bigamy, however, only pertains to attempts to form a legally recognised marriage but it does not apply to polygamous marriages if no attempt is made to acquire registration for the marriage under Australian law.⁴⁶⁵ Some indigenous and religious societies in Australia have polygamous partnerships and they regulate those marriages themselves without formalizing them.⁴⁶⁶

According to section 6 of the Family Law Act, it is stipulated that polygamous marriages, which are contracted outside the jurisdiction of Australia, must be recognised as valid marriages.⁴⁶⁷ It is inevitable that some disputes may arise in these relationships which require legal adjudication. The Australian judicial system encounters a tremendous barrier in navigating these complexities arising from the many cultural and moral values existing

⁴⁵⁹ Commonwealth of Australia Constitution Act 1900 www.aph.gov.au/constitution accessed on 24 October 2023.

⁴⁶⁰ Gordon (n458 above).

⁴⁶¹ Marriage in Australia accessed at https://en.wikipedia.org/wiki/Marriage_in_Australia on 11 October 2023.

⁴⁶² Marriage in Australia (n461 above).

⁴⁶³ Marriage in Australia (n462 above).

⁴⁶⁴ Polygamy in Australia (2023, September 17) In Wikipedia https://en.wikipedia.org/wiki/Polygamy_in_Australia.

⁴⁶⁵ Polygamy in Australia (n464 above).

⁴⁶⁶ M Reay 'Aboriginal and white Australian family structure: An enquiry into assimilation trends.' (1963). 11.1 *The Sociological Review* 19-47.

⁴⁶⁷ Family Law Act 1975.

within society. These values exert a substantial influence on the expectations held by individuals seeking settlement of their family cases through the court system.⁴⁶⁸

In both South African and Australian jurisdictions, it is impossible to align family laws and legal procedure to exhaustively assuage all these cultural elements which have a bearing on the parties' willingness to approach the formal justice system for resolution of their disputes.⁴⁶⁹ However, Australia has made huge strides and has to a larger extent successfully addressed some of these issues through their Family Courts. The Australian government implemented national legislation, known as the Family Law Act (The Act), in order to tackle the issue of lengthy litigation and enhance the regulation and resolution of divorce cases.⁴⁷⁰

This legislation has undergone consistent amendments and improvements to specifically address the recognized gaps in family law litigation throughout the years.⁴⁷¹ Either spouse in a marriage has the legal entitlement to commence divorce proceedings in the Federal Circuit and Family Court of Australia. Alternatively, both parties in the marriage have the opportunity to collectively request a divorce. However, submitting a divorce application is dependent on a minimum period of two years from the start of the marriage.⁴⁷² The

⁴⁶⁸ Gordon (n458 above).

⁴⁶⁹ Gordon (n468 above).

⁴⁷⁰ Act 53 of 1975.

⁴⁷¹ Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) Schedule 1. as cited by Cooper, Donna, and Rachael Field. "The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an Independent Practitioner." *Queensland University of Technology Law and Justice Journal*, vol. 8, no. 1, 2008, pp. 158-175.

⁴⁷² Australian family law. (2023, September 15).

In *Wikipedia*. https://en.wikipedia.org/wiki/Australian_family_law accessed on 10 November 2023.

applicant is presented with the choice of submitting the divorce application through an online platform or in hard copy on paper.⁴⁷³

Australia formally adopted the no-fault divorce system with the passage of the Family Law Act 1975.⁴⁷⁴ The adversarial procedure in terms of the Matrimonial Causes Act of 1959, which was subsequently repealed, was prolonged and contentious due to the fault-based approach that was previously in place. The court required evidence of one of fourteen grounds, including but not limited to habitual intoxication, cruelty, and adultery, in order to grant a divorce.⁴⁷⁵ The legal processes frequently became prolonged, degrading, and financially onerous for the individuals concerned. In most instances, it became imperative for the parties to enlist legal counsel and detectives to get reliable evidence that would convince the court of the other party's culpability.⁴⁷⁶

In 1979, South Africa, similar to Australia, implemented a no-fault divorce system under the Divorce Act⁴⁷⁷, but adultery was still taken into consideration.⁴⁷⁸ However, in line with developments in jurisdictions such as Australia, adultery is no longer a basis for divorce today. This was decided in the case of *RH v DE*,⁴⁷⁹ where Judge Brand in the Supreme Court of Appeal in South Africa, determined that the action arising from adultery and

⁴⁷³ Australian family law (n472 above).

⁴⁷⁴ Section 51, Commonwealth of Australia Constitution Act 1900.

⁴⁷⁵ <https://aifs.gov.au/sites/default/files/publicationdocuments/familylawandmarriagebreakdowninaustralia> accessed on 23 October 2023.

⁴⁷⁶ <https://aifs.gov.au/sites/default/files/publicationdocuments/familylawandmarriagebreakdowninaustralia> accessed on 23 October 2023.

⁴⁷⁷ Act 70 of 1979.

⁴⁷⁸ Section 4(2)(b) of the Divorce Act.

⁴⁷⁹ 2014 (6) SA 436 (SCA).

derived from the *actio iniuriarum*, is no longer wrongful in the sense that it incurs liability. Consequently, it is no longer permissible under the legislation.⁴⁸⁰

⁴⁸⁰ *RH* (n479 above) para 41.

Since the implementation of the Family Law Act⁴⁸¹ in Australia, which essentially removes the burden of establishing culpability for the failure of the marriage, the procedure in the Family courts has been considerably streamlined.⁴⁸² Divorce can now be granted solely on the basis of irreparable breakdown of the marriage, as evidenced by factors such as a twelve-month separation.⁴⁸³ In divorce matters involving property settlement, however, there is still a "fault" component considerable by the courts.⁴⁸⁴

A case in point where the court had to adjudicate and decided on a property issue is the case of *Kowaliw & Kowaliw*.⁴⁸⁵ The court found that financial losses arising from the dissolution of a marriage need to be distributed among the parties involved, but not necessarily in an equal manner. However, this principle does not apply in situations where one party deliberately diminished the worth of marital assets or engaged in reckless or careless behavior that led to a decrease or devaluation of these assets.⁴⁸⁶

⁴⁸¹ Act 53 of 1975.

⁴⁸² <https://aifs.gov.au/sites/default/files/publicationdocuments/familylawandmarriagebreakdowninaustralia> accessed on 23 October 2023.

⁴⁸³ <https://aifs.gov.au/sites/default/files/publicationdocuments/familylawandmarriagebreakdowninaustralia> accessed on 23 October 2023.

⁴⁸⁴ Section 51, Commonwealth of Australia Constitution Act 1900.

⁴⁸⁵ (1981) FLC 91-092 accessed from <https://damiengreer.com.au/family-law/articles/most-famous-family-law-cases-australia/> accessed on 15 November 2023.

⁴⁸⁶ (1981) FLC 91-092 accessed from <https://damiengreer.com.au/family-law/articles/most-famous-family-law-cases-australia/> accessed on 15 November 2023.

The establishment of the Family Court of Australia was first mandated under Chapter 3 of the Australian Constitution.⁴⁸⁷ The Family Law Act of 1975 established rules for the Family Court. In 2021, the Australian government implemented laws that resulted in the consolidation of the Family Court with the Federal Circuit Court of Australia, leading to the establishment of the Federal Circuit and Family Court of Australia (collectively referred to as the Family Court). With effect from September 1, 2021, the Federal Circuit and Family Court of Australia have exclusive jurisdiction over all matters pertaining to family law.⁴⁸⁸

The Family Court was established with a focus on incorporating counseling and conciliation in divorce matters.⁴⁸⁹ This court was also created with the main focus on providing alternative dispute resolution processes and to encourage the parties to exhaust these alternative dispute resolution avenues before resorting to litigation.⁴⁹⁰ The federal government's main objective behind this approach was to encourage people to take responsibility for resolving family disputes themselves in a mediatory manner.⁴⁹¹

⁴⁸⁷ "Annual Report 2007-08" (PDF). Family Court of Australia. 21 October 2008. Retrieved 18 January 2009.

⁴⁸⁸ "Media Release - The Courts to receive \$100 million in Government funding announced in the 2021-22 Budget". *Family Court of Australia*. 12 May 2021. Archived from the original on 29 July 2021. Retrieved 29 July 2021.

⁴⁸⁹ De Jong (n28 above).

⁴⁹⁰ De Jong (n489 above) 280.

⁴⁹¹ Explanatory Memorandum (n471 above).

The Family Court presides over family law matters throughout all states and territories of Australia, with the exception of Western Australia, which maintains its own independent Family Court.⁴⁹² The major responsibility of the Family Court was to adjudicate family cases involving intricate legal matters and complex factual circumstances.⁴⁹³ Additionally, it had jurisdiction over specialised issues within family law and functioned as the supreme appellate court for resolving family law issues at the national level.⁴⁹⁴ In 1986-87, a consensus was reached among the states that it was appropriate to subject minor children to the same legislative framework. The Family Law Act of 1975 underwent revision in 1988 to incorporate this agreement. However, its implementation in Queensland was delayed until 1990.⁴⁹⁵

The founding of the Family Court of Australia resulted in the creation of a judicial entity consisting of a Chief Justice, Deputy Chief Justice, and a group of other judges. This judicial body comprises a collective of thirty-six judges, which include eight members dedicated to the Appeals Division. Furthermore, it upholds registers within each of the Australian states and territory.⁴⁹⁶ One significant element of this court is that it employs specialist judges with specific skills necessary to advance constructive outcomes in the adjudication of family disputes.⁴⁹⁷

⁴⁹² Family Court of Australia. (2023, August 7).

In *Wikipedia*. https://en.wikipedia.org/wiki/Family_Court_of_Australia.

⁴⁹³ Family Court of Australia (n492 above).

⁴⁹⁴ Family Court of Australia (n493 above).

⁴⁹⁵ Family Court of Australia (n494 above).

⁴⁹⁶ Family Court of Australia (n495 above).

⁴⁹⁷ De Jong (n489 above) 282.

The jurisdiction of this court includes the determination of the legality or invalidity of matrimonial unions, dissolution of marriages, matters pertaining to residency, communication, financial support, child welfare, and issues over property.⁴⁹⁸ Children of *de facto* spouses and those who have never lived together are likewise subject to the jurisdiction of the Family Court.⁴⁹⁹ One distinguishing factor about the setup of the Australian Family Court is that, in addition to the judges, the court is supported by trained staff such as marriage counselors, welfare officers and registrars who are available to the parties at any stage of the dispute resolution process for free.⁵⁰⁰

The Act imposes a duty on all officers of the court dealing with parties to ensure that they give the public full and clear information. In terms of section 12F of the Act, all principal executive officers of the Family Court are mandated to ensure that any individual contemplating initiating proceedings under this Act is adequately informed of the court's processes and services, as well as the availability of non-court-based family services, during their initial interaction with a registry of the court.⁵⁰¹ Further, these officers have a mandatory duty to respond to requests for information. In terms of this section, officers of the court must ensure that individuals requesting information about family counseling or dispute resolution services are also provided with relevant documents.⁵⁰²

⁴⁹⁸ Family Court of Australia (n496 above).

⁴⁹⁹ Family Court of Australia (n498 above).

⁵⁰⁰ De Jong (n78 above) 282.

⁵⁰¹ Family Law Act of Australia.

⁵⁰² Family Law Act of Australia sec 12F.

These Family Courts are also structured to provide help such as counseling and motivation to parties with marital problems.⁵⁰³ These services are applicable even where the parties do not have the ultimate intention to divorce. The family law system also has provisions structured to assist parties with parenting arrangements which safeguard the best interests of children pending the finalisation of the divorce proceedings.⁵⁰⁴ While child protection is primarily managed at the state and territory levels, the issue of parenting arrangements also falls under the purview of state and territory legislation, as outlined in the Family Law Act.⁵⁰⁵

Significantly, under section 60D of the Act, all advisors are required to inform the individual seeking their counsel or assistance with child-related matters that the child's best interests must take precedence over all other considerations.⁵⁰⁶ The advisor is also obliged to motivate the person to take action which ultimately safeguards the minor child from physical or psychological harm. In terms of this section, the adviser must further inform the person that the best interests of a child are most effectively promoted when the child has a meaningful relationship with both parents.⁵⁰⁷ For purposes of this Act, an adviser is a legal practitioner, family counselor, conflict resolution practitioner, or family consultant.⁵⁰⁸

⁵⁰³ 'Australian laws online: Family Court of Australia – a separate court of Australia' as cited by De Jong (n497 above) 283.

⁵⁰⁴ De Jong (n497 above) 283.

⁵⁰⁵ Family Law Act 1975 sec 60a.

⁵⁰⁶ Family Law Act sec 60.

⁵⁰⁷ Family Act 1975 sec 60D (1).

⁵⁰⁸ Family Court Act sec 60D (2).

In July 2006, the Court implemented its framework for "less adversarial trials" in the Family Court. This framework was mandated for all new child-related processes, without requiring the agreement of the involved parties. This initiative was established under Division 12A of Part VII of the Family Law Act.⁵⁰⁹ The transition from a conventional common law adversarial approach to a more cooperative trial process has significant implications for family law litigation.⁵¹⁰ In a trial characterized by reduced adversarial dynamics, the pre-trial filing of affidavits is excluded, and instead, parents are required to complete a comprehensive questionnaire disclosing their circumstances.⁵¹¹

In these cases, the presiding judge assumes the responsibility of determining the trial's procedural framework, thereby guiding the participation of the parties and their legal representatives. The judge also assumes control over the case thereby ensuring that all participants remain focused on the primary areas of contention pertaining to the well-being of the children involved.⁵¹² Furthermore, parents and caregivers are afforded the opportunity to directly address the judge, bypassing the need to communicate solely through their legal counsel. The court determines the pertinent matters requiring resolution and the facts to be presented, with the aid of testimony provided by a family specialist where necessary.⁵¹³

⁵⁰⁹ Family Court of Australia (n499 above).

⁵¹⁰ Family Court of Australia (n509 above).

⁵¹¹ Family Law Act sec 69.

⁵¹² Family Law Act sec 69.

⁵¹³ Family Court of Australia (n510 above).

The South African Family law procedure could immensely improve its procedure by adopting the abovementioned approach especially in the Divorce Courts in the Regional Magistrates' Court as this will improve legal access to those people who cannot afford legal representatives. This approach could also be incorporated into the court annexed mediation project which is currently on hold. This procedure indeed has the potential to facilitate more efficient adjudication of the dispute where the parties have failed to settle on their own.

In the year 2006, the Family Law Act underwent substantial modifications that resulted in the establishment of a network including 65 Family Relationship Centers. These centers were established with the aim of providing assistance and support to families who were experiencing challenges in their relationships and facing conflicts linked to separation.⁵¹⁴ These centers prioritised the utilisation of Family Dispute Resolution Practitioners and mediation methods as means to resolve disagreements outside of court proceedings and minimize children's exposure to conflict. A certification system was also established to address the needs of families that are unable to reach a resolution through the process of mediation.⁵¹⁵

⁵¹⁴ Smyth (n424 above).

⁵¹⁵ Smyth (n514 above).

The Act also includes provisions for the inclusion of family dispute resolution practitioners. Section 10G of the Act defines a family dispute resolution practitioner as an individual who possesses accreditation as such, is authorised to represent an organisation designated by the Minister, or is authorised to practice family dispute resolution pursuant to Section 281 of the Federal Circuit and Family Court of Australia Act 2021.⁵¹⁶ The aforementioned broad definition of family dispute practitioner makes room for diverse professionals to be qualified and accredited to assist clients to access the benefits intended by the Family Courts.⁵¹⁷

The abundance of the abovementioned resources available to the public ensures that the Family Courts function optimally. The primary aim of Section 60I of the Family Law Act is to promote the resolution of disputes pertaining to children's matters through the process of family dispute resolution. This provision emphasises the importance of parties involved in such disputes to make sincere attempts to reach a resolution through this means before resorting to litigation.⁵¹⁸ With the exception of specific circumstances detailed in section 60(I)9, the Act stipulates that a court is prohibited from adjudicating an application under Part VII unless the applicant presents a 'certificate' issued by a family conflict resolution practitioner in accordance with subsection 8.⁵¹⁹

⁵¹⁶ Family Law Act sec 10F.

⁵¹⁷ Act 53 of 1975.

⁵¹⁸ Smyth (n515 above) 5.

⁵¹⁹ Smyth (n518 above) 5.

Unless one of several specified exceptions is applicable, parties are prohibited from commencing legal action relating to minor children unless they have shown the abovementioned certificate issued by a family dispute resolution practitioner attesting to their engagement in conflict resolution processes.⁵²⁰ The certificate serves as a confirmation that a sincere effort was made to participate in the process of mediation. The aforementioned certificate pertains to the potential outcomes resulting from mediation, namely the possibility of an unsuccessful mediation or the determination by practitioners that the issue is unsuited for mediation notwithstanding the commitment of the parties to participate.⁵²¹

In the South African legal framework, Rule 41 A (2)(a) is the relevant clause that mandates a plaintiff or applicant to submit a mandated Rule 41A Notice indicating their agreement or opposition to mediation. According to Rule 41 A (2)(b), the defendant or respondent is required to submit a designated Rule 41A Notice expressing their agreement or opposition to mediation prior to the issuance of a plea or opposing documents.⁵²² However, in contrast with the Australian requirement for detailed certificates, these notices lack the same level of detail.

⁵²⁰ Smyth (n519 above) 5.

⁵²¹ Smyth (n520 above) 5-6.

⁵²² Act 59 of 1959.

The family dispute resolution practitioner is obligated to provide family dispute resolution services in accordance with the Act, while considering pertinent factors including a family history of violence, safety concerns, the equilibrium of bargaining power, the potential for child abuse, and the emotional, psychological, and physical welfare of the parties concerned.⁵²³ In the event that the family dispute resolution practitioner is no longer satisfied that the dispute can be resolved through mediation, they are obliged to terminate the proceedings and refer the matter to court.⁵²⁴

Family Courts are also distinguished by their counseling services. In terms of section 10B of the Act, family counseling is broadly defined as a process whereby the family counsellor assists the parties to resolve individual and relational issues in relation to marriage.⁵²⁵ Family counseling also assists children who are affected or likely to be affected by separation or divorce to deal with individual and relational issues resulting from that process.⁵²⁶

⁵²³ Family Act sec 10G.

⁵²⁴ Smyth (n520 above) 7.

⁵²⁵ Act 53 of 1975.

⁵²⁶ Act 53 of 1975.

In addition to the abovementioned counseling services, the Family Courts also offer public mediation services directly through the courts as well as through private community based accredited mediators and mediation organisations at no costs to parties.⁵²⁷ This provides more resources to assist parties in need of mediation without necessarily burdening them financially as is the case currently in South Africa where the parties have to pay for private mediation. According to research done by Michael Cook⁵²⁸, the introduction of the Family Courts and the requirement to mediate has largely yielded positive results for Australia. Michael Cook, a retired circuit judge, referred to the statistical drop in matters filed in the High Court Queen's Bench Division since 1998.⁵²⁹

Cook attributed this decline to the increase of the use of mediation by the court's active promotion of dispute resolution coupled with the implementation of costs orders against legal counsel and parties who resist mediation.⁵³⁰ An important development of the Family Court in 1992 was the implementation of a pilot initiative for mediation at the Family Court in Melbourne.⁵³¹ In terms of this project, the court contracted community-based organisations to provide mediation services on behalf of the court to lessen pressure on the court itself.⁵³²

⁵²⁷ De Jong (n504 above) 281.

⁵²⁸ De Jong (n527 above).

⁵²⁹ De Jong (n529 above).

⁵³⁰ D Spencer 'Costs sanctions against parties refusing to mediate.' (2005) 43.4 *Law Society Journal* 62-64.

⁵³¹ Family Law Council - Report - Family Mediation, June 1992

https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2FHSTP07529_1990-92%22;src1=sm1 accessed on 25 October 2023.

⁵³² Family Law Council Report (n531 above).

Another key provision of the Family Law Act is the accreditation of organisations which qualify to apply to the Minister for recognition as mediation organisations.⁵³³ These organisations are an extension of the courts for mediation processes and can be called upon to assist the courts when the courts have insufficient capacity.⁵³⁴ Mediation in these Family Courts is structured such that it is made available to parties whose dispute relates to the interests of children.⁵³⁵ It is also made available to parties whose dispute relates to financial issues. Prelitigation mediation is compulsory where there are issues impacting children.⁵³⁶

Where the dispute relates to minor children, the Family Court provides for prelitigation mediation to be conducted by properly qualified court counselors. Where disputes do not concern minor children but relate to financial issues, they are mediated by the deputy registrars of the Family Court.⁵³⁷ In instances where the dispute involves both financial and minor children, the dispute is mediated by a team comprised of the deputy registrar and the court counselor together.⁵³⁸ This approach by the courts ensures that parties receive specific attention enough to enable them to make informed settlement decisions.

⁵³³ De Jong (n529 above) 285.

⁵³⁴ De Jong (n533 above) 289.

⁵³⁵ De Jong (n534 above) 284.

⁵³⁶ De Jong (n535 above) 286.

⁵³⁷ De Jong (n536 above) 286.

⁵³⁸ De Jong (n537 above) 286.

The Family Courts have simplified legal procedure by reducing legal formalities. They have also made counseling and mediation services available to remote areas by means of circuit courts which have childcare facilities to assist parents with minor children.⁵³⁹ The Family Courts are therefore structured in such a way that the best interests of the minor children take precedence of all other considerations in the case.⁵⁴⁰ Although the High Court in South Africa is the upper guardian of all minor children, mandated to protect the best interest of the minor children in all cases, they do not have such expansive resources as is the case in the Australian courts.⁵⁴¹

In terms of the Act⁵⁴², parties to a divorce where there is a dispute regarding parenting arrangements are obliged to engage in good faith negotiations for the purpose of settling a parenting plan.⁵⁴³ Where parties fail to reach an agreement, which often happens, the parties are compelled in terms of the Act to submit themselves to compulsory 'family dispute resolution' before they can be allowed to approach the family courts for litigation.⁵⁴⁴

⁵³⁹ De Jong (n538 above) 283.

⁵⁴⁰ De Jong (n539 above) 283.

⁵⁴¹ De Jong (n540 above) 283.

⁵⁴² Act 53, 1975.

⁵⁴³ D Cooper & R Field 'The family dispute resolution of parenting matters in Australia: An analysis of the notion of an independent practitioner.' (2008) 8.1 *Law and Justice Journal* 158-17.

⁵⁴⁴ Cooper & Field (n543 above) 159.

Further, where there are minor children involved, section 55A (2) of the Act⁵⁴⁵ provides that a divorce order may not be granted until a report has been obtained from a family and child counselor confirming that proper measures have been made for the care, welfare and development of a child.⁵⁴⁶ The exception to the above rule is only in urgent cases.⁵⁴⁷ Similar provisions are available in the South African context in terms of the Mediation in Certain Divorce Matters Act.⁵⁴⁸

In terms of this Act, mediation, and endorsement from the office of the Family Advocate is compulsory, where minor children are involved, prior to the granting of an order which affects minor children. The Family Courts in Australia have continued to develop with the sole purpose of expediting resolution of family cases. To this extent Family Court judges during 1999 delegated their powers to determine interim parenting and some other matters to a new category of senior registrars. This created more room for the judges to concentrate almost exclusively on adjudicating final defended matters.⁵⁴⁹

⁵⁴⁵ Act 53 of 1975.

⁵⁴⁶ M Harrison 'Australia's Family Law Act: The First Twenty-Five Years.' (2002) 16.1 *International Journal of Law, Policy, and the Family* 1-21.

⁵⁴⁷ Cooper & Field (n543 above).

⁵⁴⁸ Act 24 of 1987.

⁵⁴⁹ R Watson 'Family Court of Australia, The.' (1974) 1 *Legal Service Bull* 298.

Another distinguishing fact about the Australian Family Courts is the authority granted to judges, where possible, to direct that separate legal representation be afforded for minor children where there is a need. In terms of section 68L, if the court deems it necessary for the child's interests to be represented by legal counsel in the proceedings, the court has the authority to issue an order to that effect. Additionally, the court may issue any other necessary orders to ensure the child's interests are independently represented.⁵⁵⁰ This provision has a significant impact as it is not uncommon for divorcing parties to become so consumed in their fight that they prejudice the interests of the minor child.

4.3 Regulation of legal counseling in the family courts of Australia

As is the case in South Africa, promulgating laws alone does not in itself ensure that there is improved access to justice. Despite the efforts made in Australia in terms of the Family Law Act to facilitate constructive family dispute resolution, the role of legal counsel in the process has in some instances been seen to frustrate the process.⁵⁵¹ It has been noted that despite the efforts made thus far, the incidence of hostile divorces where children end up being traumatised is still inherent in the Australian court system.⁵⁵²

⁵⁵⁰ Family Law Act sec 68L.

⁵⁵¹ Spencer (n530 above) 15.

⁵⁵² R Field 'The use of litigation and mediation for the resolution of custody and access disputes: some issues for women' (1996) *Australian Dispute Resolution Journal* 15.

In the case of *Hurst v Leeming*,⁵⁵³ the honourable justice Lightman highlights that although mediation *per se* is not in law compulsory, alternative dispute resolution is at the core modern day civil justice system. He bemoans the fact that legal counsel sometimes persists with adversarial litigation where it is not necessary.⁵⁵⁴ In such instance, the court held that adverse costs orders must be considered where legal counsel, or a party unreasonably refuses to properly consider the opportunities afforded by mediation in any case where mediation affords a realistic prospect of resolution of dispute.⁵⁵⁵

It is significant to note that in the Australian context, it is a requirement for legal counsel practicing in family law to be properly trained as this is a sensitive area of law demanding a special set of legal counseling skills.⁵⁵⁶ Family lawyers in Australia are therefore regulated *inter alia* by the Family Law Council and Family Law Section of Law Council.⁵⁵⁷ It is therefore an obligation of legal counsel who wish to practice in family law to properly register as such and receive special training in that regard. The Best Practice Guidelines for Lawyers Doing Family Law,⁵⁵⁸ also compels all legal practitioners or conciliators who deal with parenting matters in terms of the Family Law Act to promote resolution outcomes which are in the best interests of the child.⁵⁵⁹

⁵⁵³ [2001] EWHC 1051 (Ch); [2003] 1 Lloyds Rep 379 at 380.

⁵⁵⁴ *Hurst* (n553 above) 380.

⁵⁵⁵ *Hurst* (n554 above) 380.

⁵⁵⁶ Council, Family Law 'Best practice guidelines for lawyers doing family law work.' (2004) accessed at <https://www.legislation.gov.au/Details/F2003B00392/Explanatory%20Statement/Text>.

⁵⁵⁷ Family Law Section of Law Council (n532 above).

⁵⁵⁸ Council, Family Law (n556 above).

⁵⁵⁹ Council, Family Law (n558 above).

In terms of Part 111 of the amended Family Law Act, there is a strict responsibility imposed on judges and legal practitioners to consider reconciliation between the parties.⁵⁶⁰ This imposes a duty, as far as is possible for these officers of court to protect the institution of marriage other than facilitate the dissolution of marriage.⁵⁶¹ In terms of sections 14F and 14G, the court and legal counsel are mandated to advise parties and clients on the appropriate primary dispute resolution methods in all cases except those cases where it is inappropriate.⁵⁶²

In Australian jurisdictions, the integrity and ethical responsibility of legal counselors are of utmost importance, particularly in family cases. The outcome of settlement discussions is directly impacted by the prohibition of dishonest remarks, as outlined in the New South Wales Barristers' Rules 104. It is incumbent upon practitioners to engage in ethical bargaining practices, refraining from any deliberate attempts to mislead or defraud the opposing party.⁵⁶³

⁵⁶⁰ Council, Family Law (n559 above).

⁵⁶¹ De Jong (n541 above) 288.

⁵⁶² De Jong (n561 above) 289.

⁵⁶³ Made under s 57A of the Legal Profession Act 1987 (NSW) by the New South Wales Bar Council; consolidated in June 2008 by incorporating amendments, which took effect upon gazettal, in NSW Government Gazette no 61, 30 May 2008, 4083.

Of particular significance to the development of legal counseling in Australia is the fact that bar associations and law societies have established professional rules of conduct which encourage constructive dispute resolution.⁵⁶⁴ Legal practitioners are strongly encouraged to pursue additional training in order to achieve accreditation as experts. The Specialist Accreditation test is offered in certain subjects of law such as family law, which are tested once every two years following a specialized certification examination.⁵⁶⁵

The certification process typically takes around six to seven months to complete. The process involves applying for expert certification prior to the specified date, writing periodic tests within the designated timeframe, and eventually undertaking formal written exams as well as practical assessments.⁵⁶⁶ When a legal practitioner exhibits the badge as an emblem of recognition, it signifies their status as a duly recognised expert. Members of the public can also ensure that they receive quality representation by only engaging these expert lawyers.⁵⁶⁷

⁵⁶⁴ De Jong (n562 above) 289.

⁵⁶⁵ Accredited specialist solicitor (Australia). (2022, August 24). In *Wikipedia*. [https://en.wikipedia.org/wiki/Accredited_specialist_solicitor_\(Australia\)](https://en.wikipedia.org/wiki/Accredited_specialist_solicitor_(Australia)).

⁵⁶⁶ Accredited specialist solicitor (Australia). (2022, August 24). In *Wikipedia*. [https://en.wikipedia.org/wiki/Accredited_specialist_solicitor_\(Australia\)](https://en.wikipedia.org/wiki/Accredited_specialist_solicitor_(Australia)).

⁵⁶⁷ Act 53 of 1975.

One example is the Specialist Accreditation program offered by the Queensland Law Society. This program grants accreditation in ten distinct areas of specialisation, thereby formally acknowledging legal practitioners for their exceptional level of skill and expertise in their respective fields. Additionally, it provides exposure to practitioners who are recognised as leaders in their respective areas of specialisation.⁵⁶⁸ In terms of the Family Law Act, there is a duty on Family Courts and legal practitioners to advise divorcing clients about the legal counseling services available to them.⁵⁶⁹

According to Section 60D (1) of the Family Law Act, it is mandatory for an advisor to apprise individuals of the paramount importance of the child's best interests. This entails encouraging them to make decisions that align with the child's best interests, which include fostering a meaningful relationship with both parents, safeguarding the child from physical or psychological harm, and prioritising the child's overall well-being.⁵⁷⁰ The Australian system has thus codified the requirement on legal counselors to properly advise clients and parties of the infrastructure and services provided by the Family Courts.⁵⁷¹

⁵⁶⁸ http://www.qls.com.au/For_the_profession/Professional_development/Specialist_accreditation.

⁵⁶⁹ Harrison (n546 above) 7.

⁵⁷⁰ Act 53 of 1975.

⁵⁷¹ Act 53 of 1975 (Cth) s 601(9).

The need to engage in honest conduct is rigorously upheld in all forms of mediation. In the matter of *Legal Services Commissioner v Mullins*,⁵⁷² a barrister involved in the mediation deliberately utilized reports as a basis for mediation, although being fully cognizant of their lack of veracity. As a result, the opposing party reached a resolution based on the erroneous belief that the assumptions presented in the reports were valid.⁵⁷³ According to the ruling made by Judge Byrne, it was established that Queensland barristers are required to adhere to the principles outlined in Rule 51 of the Bar Association of Queensland.

The abovementioned rule explicitly prohibits barristers from deliberately providing false or misleading information to the opposing party during the mediation process, including any discussions related to potential settlements. The court determined that the unprofessional behaviour of the legal counselor was of such gravity that it warranted a public admonishment and a substantial financial sanction.⁵⁷⁴ Further to the compulsory attendance to mediation, legal counsel is required to obtain and file at court a certificate of mediation together with any parenting application made to a Family Court.⁵⁷⁵

⁵⁷² [2006] LPT 012.

⁵⁷³ *Mullins* (n573 above) 52.

⁵⁷⁴ *Mullins* (n574 above) paras 35-36.

⁵⁷⁵ Cooper & Field (n547 above).

In the event of a failure to adhere to these regulations, the courts will impose a penalty where applicable.⁵⁷⁶ The practitioner risks being sanctioned for noncompliance with a court regulation and for failing to strengthen the client's position during the trial process.⁵⁷⁷ In instances when a plaintiff or their legal representative neglects to adhere to the prescribed local court regulations or instructions, it is established that such violations may lead to consequences, such as the complete dismissal of the case.⁵⁷⁸

4.4 Comparison of the current state of family courts in South Africa and Australia

The South African Family Justice system is undergoing rapid change in its adoption and implementation of mediation and other alternative conflict resolution techniques in general, according to the findings of this study. Currently, there is a multitude of laws, regulations, and standards that govern mediation, although their practical implementation is still largely in its nascent phase with respect to family law.⁵⁷⁹ The use of mediation is becoming increasingly common in the private sector, but it is still mostly optional in court proceedings.

⁵⁷⁶ A Levin & D Golash 'Alternative Dispute Resolution in Federal District Courts.' (1985) 37.1 *University of Florida Law Review* 32.

⁵⁷⁷ Levin & Golash (n576 above) 55.

⁵⁷⁸ Levin & Golash (n577 above) 55.

⁵⁷⁹ De Jong (n562 above) 607.

This study aims to contribute to the existing body of literature by examining the successful practices of the Australian family court system in order to propose potential improvements for the implementation of mediation in family law within the context of South African society.⁵⁸⁰ In addition to private mediation organisations and institutions such as the National Accreditation Board for Family Mediators (NABFAM) and the Dispute Settlement Accreditation Council (DiSAC), the judiciary and legislature have made notable efforts to regulate the conduct of mediators through the provisions of rule 41 of the Uniform Court Rules.⁵⁸¹

Furthermore, in accordance with Rule 86 (2) of the Court Annexed Mediation Rules, the South African Department of Justice has accredited court annexed mediators for family law and other areas of law to practice in various magisterial districts in order to regulate their conduct in the mediation process and its success, particularly in family dispute resolution.⁵⁸² The Minister of Justice in South Africa authorized the implementation of the Rules of Voluntary Court-Annexed Mediation, which took effect on the 1st of December 2014, as outlined in Chapter 2 of the Magistrates' Courts Rules.⁵⁸³

⁵⁸⁰ De Jong (n579 above) 607.

⁵⁸¹ <https://www.justice.gov.za/mediation/mediation.html> accessed on 13 November 2023.

⁵⁸² De Jong (n580) 607.

⁵⁸³ <https://www.justice.gov.za/mediation/mediation.html> accessed on 13 November 2023.

The pilot project sites were designated in the provinces of Gauteng and the North-West. The implementation of the court annexed mediation pilot project was originally planned for execution in the Gauteng and Northwest Provinces. Regrettably, the initiative was prematurely terminated on March 15, 2022, before its expansion to additional provinces could be realised.⁵⁸⁴ Consequently, it is evident that South Africa is now adopting a blended regulatory strategy towards mediation, encompassing the utilisation of both stringent legislative measures and more flexible forms of regulation. The utilisation of family mediation as a method for addressing family law matters has experienced a notable increase in popularity.⁵⁸⁵

There are several explicit statutes that deal especially with family cases, such as the Mediation in Certain Divorce affairs Act.⁵⁸⁶ This Act provides for limited court-annexed mediation by the office of the Family Advocate in both the High Courts and lower courts in cases involving minor children during or after divorce.⁵⁸⁷ Another example is the Children's Act, which clearly mandates mediation in some situations involving children and gives the court an option to compel mediation in certain circumstances where it considers suitable.⁵⁸⁸ Additionally, this Act grants the court the authority to recommend conciliation or mediation in situations where it would be in the best interests of minor children.⁵⁸⁹

⁵⁸⁴ <https://www.justice.gov.za/mediation/mediation.html> accessed on 13 November 2023.

⁵⁸⁵ De Jong (n582 above) 310.

⁵⁸⁶ De Jong (n585 above).

⁵⁸⁷ Act 24 of 1987.

⁵⁸⁸ Act 38 of 2005.

⁵⁸⁹ Act 38 of 2005.

Unlike Australia's family justice system, which has comprehensive and obligatory legislation governing mediation, South Africa does not have such specific and thorough laws.⁵⁹⁰ Some legal counsel continues to use an adversarial strategy to conflict resolution, even when there are minor children involved and mediation would be more appropriate. This is largely due to the fact that South African law does not impose an obligation to mediate all types of family law disputes, as Australia does through the Family Law Act.

It is also possible to draw key lessons from the Australian approach, which is less adversarial, with regard to the mandatory duty imposed on legal professionals to fully educate and inform parties about alternative and constructive means to resolve their family disputes. South African courts are in the process of gradually creating key legal precedents that, in the long run, will encourage legal counsel to adopt mediation techniques rather than turning to litigation as a first resort in family law cases.⁵⁹¹ This study examined the *Brownlee v. Brownlee* case⁵⁹², in which the role of lawyers in advocating for or rejecting mediation was analysed. As an expression of his displeasure with the failure of the legal representation to adopt a mediatory stance in the case, Judge Brassey issued an order restricting the recoverable fees from their clients to costs on a party and party scale.⁵⁹³

⁵⁹⁰ De Jong (n586 above) 607.

⁵⁹¹ De Jong (n590 above).

⁵⁹² *Brownlee v Brownlee*: 2008/25274.

⁵⁹³ A Rycroft 'Settlement and the law.' (2013) 130.1 *South African Law Journal* 187-209.

Overall, what South Africa requires now is the establishment of practical structures such as those adopted by the Australian Family law courts to facilitate compliance with the requirement to mediate. This is feasible due to the substantial legislation enacted in South Africa that promotes dispute resolution. Presently, around forty-nine statutes across different sectors in the country either mandate or encourage mediation or conciliation of disputes.⁵⁹⁴ It is worth noting that legislation is only a declaration of intent, and in order to enjoy the positive outcomes of mediation in the South African legal system to the extent that Australia has, there is an urgent need to address the serious systemic problems associated with the institutionalisation of formal mediation processes.⁵⁹⁵

In facilitating adherence to statutory requirements for mediation in the Family Court, the Australian legal system emphasises the critical role of judges. Therefore, the implementation of court-initiated or court-ordered mediation in South African family courts will substantially promote greater adherence to the mandatory pre-litigation mediation requirement.⁵⁹⁶ It is noteworthy that Judges in the High Court of South Africa hold the jurisdiction to guide parties towards effective dispute settlement, which may entail engaging in roundtable talks or mediation.⁵⁹⁷ However, greater dedication to utilising these procedures is required to increase the number of children and divorcing parties who have access to effective justice.

⁵⁹⁴ Rycroft (n593 above) 197.

⁵⁹⁵ Rycroft (n594 above) 197.

⁵⁹⁶ Rycroft (n595 above) 200.

⁵⁹⁷ Rycroft (n596 above).

There is an urgent need for legislative, judicial, and legal entities in South Africa to work together in order to encourage the adoption of mediation practices in family court proceedings. In addition to promoting mediation as a means of resolving disputes, the settlement process must operate within a legislative framework that penalises parties who reject it, thereby squandering court resources on the matter.⁵⁹⁸ The current Professional Conduct Rules in South Africa uphold the legal practitioner's right to defend and assert the client's rights through the unrestricted and open presentation of all pertinent facts, along with the use of any argument and observation that is permissible under legal principles and practices.⁵⁹⁹ This inevitably promotes adversarial legal counseling.

There is therefore an urgent need to strengthen the Legal Practice Council's regulations to oversee the conduct of legal practitioners and establish ethical standards that advocate for alternative methods of dispute resolution, such as negotiation and mediation.⁶⁰⁰ This chapter presents a discussion of the Australian Family Law Act, which highlights the beneficial effects of enacting legislation to regulate legal procedure and the behavior of family law practitioners inside family courts. There is a need for more detailed legislation to regulate the family dispute resolution procedure and structures in South Africa. The Australian system also highlights the importance of providing specific training and certification for legal counselors in South Africa to empower them to take on a more active role in advancing justice through the utilisation of less confrontational mediation methods.

⁵⁹⁸ Rycroft (n597 above) 200.

⁵⁹⁹ Rycroft (n598 above) 203.

⁶⁰⁰ Rycroft (n599 above) 203.

Consequently, this is most likely to result in improved efficacy and positive consequences for all affected parties, including minor children. Compulsory training programs will significantly improve the readiness of family law practitioners in South Africa to successfully engage in the mediation process.⁶⁰¹ One of the notable developments in South Africa thus far has been the implementation of mediation within the court process, as elaborated upon in Chapter 2. Furthermore, the operation of the Family Court has commenced in various regions, including the High Court of South Africa, Gauteng Division, Johannesburg, starting from the 18th of July 2022.⁶⁰² The South African Family Court has substantial need for improvement when juxtaposed with its Australian counterpart.

This study proposes that one potential improvement of the Family Court in South Africa is the incorporation of compulsory mediation in divorce cases even where there are no children involved, facilitated by the court annexed mediators who were accredited by the Minister of justice in terms of rule 86 (2) of the Court-Annexed Mediation Rules in 2019.⁶⁰³ The court-annexed mediators in South Africa mostly consist of legal practitioners who have undergone comprehensive training and have extensive expertise in the family mediation field. Most of them are attorneys and advocates who are well-versed in the laws and procedures of the High Court.⁶⁰⁴

⁶⁰¹ Rycroft (n600 above) 203.

⁶⁰² <https://www.lssa.org.za/wp-content/uploads/2022/06/The-Family-Court-Directive-of-6-June-2022.pdf> accessed on 24 October 2023.

⁶⁰³ <https://www.justice.gov.za/mediation/MediatorsList-20190213.pdf> accessed on 24 October 2023.

⁶⁰⁴ <https://www.justice.gov.za/mediation/MediatorsList-20190213.pdf> accessed on 24 October 2023.

This would undoubtedly facilitate the faster and constructive resolution of family conflicts within the newly established Family Courts in the High Court, particularly when the office of the Family Advocate is engaged in cases dealing with minor children. This alternative will also provide societal benefits, since the services provided by the Family Advocate's office are offered free of charge, and court-appointed mediators charge costs that are set at a minimal level as stipulated in the official gazette, making them quite cheap.⁶⁰⁵ The court annexed mediators can also be incorporated in the Divorce Courts in the Regional Magistrates Courts to assist the Magistrates through providing prelitigation mediation services.⁶⁰⁶

In contrast to the Family Courts in Australia, the Family Court in Johannesburg was founded with the intention of convening on a weekly basis throughout the term in order to improve the efficient resolution of Family Law cases in the High Court.⁶⁰⁷ In the Family Court, two judges regularly preside over *pendete lite* cases, as outlined in Rule 43. These applications pertain to matters such as interdicts, access and care of minor children, and support obligations towards children or spouses.

⁶⁰⁵ <https://www.lssa.org.za/wp-content/uploads/2022/06/The-Family-Court-Directive-of-6-June-2022.pdf> accessed on 24 October 2023.

⁶⁰⁶ <https://www.gawielerox.co.za/blog/establishment-specialised-family-court-johannesburg> accessed on 24 October 2023.

⁶⁰⁷ <https://www.gawielerox.co.za/blog/establishment-specialised-family-court-johannesburg> accessed on 24 October 2023.

The Family Court in South Africa also handles urgent applications related to family law cases. This includes matters such as the exchange of relevant financial disclosures and any other supplementary applications pertaining to family law.⁶⁰⁸ While these advancements are in their early phases, it is anticipated that they will undergo significant growth and be implemented in all High Courts in South Africa, similar to what has been observed in the Australian jurisdiction.⁶⁰⁹

4.4 Conclusion

The efficacy of the Family Court in both Australia and South Africa relies on the conscientious endeavors of court officials to effectively advance the court's objectives. The prompt resolution of family law disputes also largely depends on the legal counseling process. The establishment, regulation, funding, and provision of sufficient resources to the Family Courts in Australia has largely facilitated a more equitable access to a just and efficient legal system for family-related disputes for Australians.

⁶⁰⁸ Directive For The Family Court In The Johannesburg High Court <https://www.lssa.org.za/wp-content/uploads/2022/06/The-Family-Court-Directive-of-6-June-2022.pdf> accessed on 24 October 2023.

⁶⁰⁹ *Women's Legal Centre Trust* (n441 above) para 1.

South Africa should implement more steps to guarantee rigorous adherence to the mandate of mediation before resorting to litigation, particularly in family-related issues. Furthermore, it is imperative to create Family Courts in each High Court across the nation. There is a need to spread more information about the advantages of mediation among legal professionals and the general public. There is an urgent need for legal practitioners to acquire new counseling skills to empower them to effectively adjust their dispute resolution strategies in order to effectively support the goals set out by the Family Court. South Africa can improve the family dispute resolution system by adopting the organisational framework of the family courts in Australia, particularly in terms of enhancing regulations with respect to mandatory mediation in family law cases.⁶¹⁰

⁶¹⁰ Watson (n549 above).

CHAPTER 5.

CONCLUSION AND RECOMMENDATIONS

5 Introduction

South Africa has implemented significant legislative initiatives with the objective of enhancing societal access to justice especially in family law matters involving minor children, guided by constitutional provisions such as Section 28 and 34 of the South African Constitution⁶¹¹. The objective of this research endeavor was to analyze the impact of legal counseling on the progression of successful family law dispute resolution through mediation. Additionally, the practical implementation of existing legislation and judicial processes aimed at reducing the incidence of avoidable litigation in the South African courts was evaluated in this study. An essential component of this research was a comparative examination of the family dispute resolution systems in South African courts versus the family dispute resolution process in Australian family law courts.⁶¹²

⁶¹¹ Act 108 of 1996.

⁶¹² Australian Legal System. In *Wikipedia*
https://en.wikipedia.org/wiki/Australian_legal_system accessed on 10 November 2023.

5.1 Summary of the study

This research examined the impact of legal counseling in the dispute resolution process and explored the necessity for efficient and amicable dispute resolution in family law proceedings to avoid abrasive long drawn adversarial litigation. Further this study sought to explore how legal counseling and the law can be applied to restore or improve the often complicated and enduring emotional bonds between the involved parties. To advance the research objective, the first chapter provided a definition of legal counseling and examined fundamental components of efficient legal counseling.

This chapter examined the potential for constructive or destructive dispute resolution resulting from the quality of legal counseling. It also investigated the lawyer autonomy model, which posits that the legal counselor possesses control over the dispute resolution process and can thus facilitate or impede the adoption of alternative dispute resolution methods like mediation. Additionally, this chapter examined fundamental components of proficient legal counseling that successfully advances constructive alternative dispute resolution procedures.

Chapter 2 of the research paper offers a thorough analysis of the mediation process, focusing on its practical application within the South African justice system. As this chapter has illustrated, legislation enactment and the establishment of legal procedures alone are not adequate to promote mediation as an alternative dispute resolution method. Chapter 3 of the research paper shifted its attention to family law cases and investigated the effectiveness of legal counseling in facilitating divorce resolutions and mitigating negative outcomes, including psychological distress among minor children and litigants, in the South African context.

This chapter examined the incorporation of counseling into the legal practitioner training curriculum in South Africa with the intention of equipping them with the necessary competencies in alternative dispute resolution with respect to family cases. The historical progression of the family law systems in Australia and South Africa is succinctly summarized in Chapter 4. This chapter undertakes a comprehensive examination of the functioning of family courts in Australia, with a specific emphasis on the legislative and judicial processes that regulate them. Following this, a comparative analysis of the family law systems in South Africa and Australia is undertaken, with particular emphasis on the legal provisions outlined in the Family Law Act of Australia⁶¹³.

⁶¹³ Family Law Act of 1975.

These regulations mandate the utilisation of mandatory mediation and promote a non-confrontational procedure for resolving family law disputes. Subsequently, this chapter assesses the effects of the aforementioned legislation on the competence of legal counseling in family law practice. In conclusion, this research considers critical components of the Australian Family Courts which advance more constructive family dispute resolution which consequently promote the maintenance of harmonious familial connections subsequent to the case's resolution, specifically in situations involving minor children and the ongoing co-parenting responsibilities of the involved parties. Finally, the research study offers recommendations for enhancing family dispute resolution protocols and legal counseling competencies in order to foster mediation and prevent avoidable litigation in South Africa.

5.2 Conclusion

The case of *Kalagadi Manganese (Pty) Ltd and Others v. Industrial Development Corporation of South Africa Ltd and Others* discussed in this study serves as an example of how the success of mediation is entirely dependent on the parties' sincerity and commitment to participate in the proceedings under the direction of their respective legal representatives. It is imperative that South Africa needs to implement more stringent regulations and guidelines regarding legal counseling in matters involving family law.

For the purpose of successfully reducing the prevalence of lawsuits that might have been avoided, immediate reforms to the family justice system are essential. The gravity of this issue has been brought to light by recent judicial rulings, notably with relation to divorce cases and custody disputes with respect to minor children. Inadequate legal counseling skills and the use of legal strategies that are excessively adversarial undermines the efficacy of constructive dispute resolution methods, such as mediation. In some instances, this also has the effect of undermining institutions that are designed to shield minor children from the distress that is frequently associated with divorce, such as the office of the Family Advocate.

Adverse consequences can arise as a result of irresponsible legal advice and inadequate client education, guidance, and management, which can ultimately result in significant instances of abuse of court processes. The subsequent legal precedent provides a comprehensive enlightenment of the practical challenges that the judicial system faces. This study submits that legal counselors are expected to demonstrate a higher degree of expertise and adherence to ethical standards in family law practice as opposed to other areas of legal practice. This study reveals the real negative effects of poor legal counseling in our South African courts. As can be gleaned therein, the parties involved may suffer from permanent psychological anguish due to the outcomes of incompetent or careless legal representation as illustrated in the legal precedent below.

5.2.1 Analysis of the most recent legal precedent

During 2023, the South Gauteng High Court heard the case of *D.D.K v. R.M.B.D.K & Van Aswegen N O*,⁶¹⁴ relating to divorced parties who were involved in a dispute relating to the parenting of the minor child who was just 11 years old. This was a high conflict case where the parties took each other to court several times with the assistance of their legal counsel.

Judge van Liebenberg particularly noted that over a period of 7 years the parties had instituted multiple court actions against each other regarding the minor child.⁶¹⁵ The judge expounded on the impact this excessive litigation had on the minor, S, who as a result of this adversary between her parents, was subjected to a series of assessments and had to testify in both the South Gauteng High Court as well as in the Children's Court. In a bid to prove their cases against each other, the parties caused the minor child to be subjected to a forensic evaluation, many interviews, and therapy for about two years.⁶¹⁶ The judge was also concerned that it was evident that even more litigation was pending thus continuing to expose this minor child to what the court deemed to be traumatic long drawn litigation.⁶¹⁷

⁶¹⁴ (2023) ZAGPJHC 382.

⁶¹⁵ *DDK* (n614 above) para 2.

⁶¹⁶ *DDK* (n615 above) para 2.

⁶¹⁷ *DDK* (n616 above) para 1-3.

The court observed that legal counsel and judges often encounter cases involving families embroiled in intense conflicts. In such instances the parents are mostly consumed by their own emotional distress to such an extent that they fail to prioritize their children's wellbeing.⁶¹⁸ The utilisation of an adversarial technique in cases like this as well as protracted litigation not constructive. The court was particularly frustrated by the fact that the particular litigation was baseless and unnecessary, thereby dismissing the lawsuit.⁶¹⁹ It is trite that thus litigation could have been avoided if the legal counsel had managed their clients more prudently. Overall, this case effectively illustrates the submission that the quality of legal representation does really directly influence dispute resolution processes and outcomes.

In April 2023, the Free State High Court was inundated with yet another protracted case involving a minor child in which both parents were duly represented by legal counsel.⁶²⁰ The cause of action in this case of *H.C.J v N.J and Another*⁶²¹ was the minor child's primary residence. Section 28 of the Constitution⁶²² guarantees minors the right to childhood and to live in a secure and nurturing environment free from violence, fear, deprivation, and preventable trauma to the extent possible.⁶²³ In a lengthy statement, the court underscored this right.

⁶¹⁸ *DDK* (n617 above) para 52.

⁶¹⁹ *DDK* (n618 above) para 52.

⁶²⁰ (2023) ZAFSHC 182.

⁶²¹ *HCJ* (n620 above) 182.

⁶²² Act 108 of 1996.

⁶²³ *HCJ* (n621 above) 182.

This research has established that legislation serves as a mere declaration of intention and that legal counsel is required to advocate for the rights guaranteed therein so that society may benefit from the positive outcomes that result from any legal system. Judge Gusha, also in this case reiterated the sentiments expressed in the case of *M v The State and Centre for Child Law*,⁶²⁴ that a constitutional provision alone cannot protect children from the dangers and disruptions of severe family and community environments.

However, the law has the capacity to establish circumstances that safeguard children from maltreatment and optimize their prospects for leading fruitful and contented lives.⁶²⁵ Notably, the judge decided that both parents in this instance had poor parenting skills owing to their past where the applicant battled alcoholism and the Respondent battled suicidal tendencies and depression.⁶²⁶ Despite the involvement of the Family Advocate, the parties persisted with an adversarial approach which resulted in the current application where the Family Advocate`s report was challenged.⁶²⁷

⁶²⁴ 2008 (3) SA 232 (CC).

⁶²⁵ *HCJ* case (n623 above) para 1.

⁶²⁶ *HCJ* case (n625 above) para 23.

⁶²⁷ *HCJ* case (n626 above) para 23.

An evaluation of the circumstances surrounding this case leads to the conclusion that a less adversarial approach to legal counseling would have been advantageous for both parties. The legal representation could have enlisted the aid of trained counselors to assist the parties in resolving their emotional concerns and underlying issues. In this particular instance, it is crucial to note that a more collaborative mediation approach would have effectively protected the minor child's best interests and fostered improved relations between the parties concerning the child's upbringing.⁶²⁸

Client management is also key to the discussion of this case. It is also concerning that, the Court found that there was no valid basis to bring this application and that the Family Advocate's recommendations were in order.⁶²⁹ In this case, the court determined that a fundamental shift in the parental responsibilities and priorities of the minor children's guardians was essential.⁶³⁰ Judge Gusha's remarks further validates the results of this research, which indicate that legal representation is obligated to oversee the client's expectations and the legal proceedings so as to establish protocols that protect minor children and the parties involved from unnecessarily lengthy disputes that exacerbate the animosity between them.⁶³¹

⁶²⁸ *The State and Centre for Child Law* (n624 above) para 23.

⁶²⁹ *The State and Centre for Child Law* (n629 above) para 23.

⁶³⁰ *he State and Centre for Child Law* (n630 above) para-29.

⁶³¹ *The State and Centre for Child Law* (n631 above) para 29.

An additional case of significance is *N K and Others v B B*⁶³², which the South Gauteng High Court decided in August 2023. In this case, the involved parties had been embroiled in numerous court proceedings, including urgent High Court applications and proceedings before the Benoni Children's Court since April 2018.⁶³³ Furthermore, the respondent initiated a substantial number of criminal proceedings against the first and second respondents.⁶³⁴ Throughout the week in which this case was being heard by the High Court, additional proceedings involving the same parties were being conducted in the Magistrate court.⁶³⁵

The court in this case again questioned the parents' parenting abilities and highlighted that the minor children have been subjected to significant legal strain throughout the proceedings.⁶³⁶ Another crucial result of this research was brought to light by Judge Benson in the case of *NK v. BB* discussed above. This conclusion pertains to the function of legal counsel in fueling protracted drawn-out litigation by aggressive and confrontational techniques in family law cases. Directly criticizing the tendency of certain divorced parties, frequently with the assistance of legal counsel, to continue contentious behavior after the dissolution of their marriage, Judge Benson stated that this behavior causes significant psychological and financial damage to the former spouse, minor children, and extended family members.⁶³⁷

⁶³² (2023) ZAGPJHC 1025.

⁶³³ *NK* (n632 above) para 4.

⁶³⁴ *NK* (n633 above) para 4.

⁶³⁵ *NK* (n634 above) para 4.

⁶³⁶ *NK* (n635 above) para 4.

⁶³⁷ *NK* (n636 above) para 5.

Judge Benson also conveyed his dissatisfaction with the limited compliance of legal counsel in fulfilling their clear duty to offer suitable assistance to their clients, with the aim of discouraging contemptuous and abusive behavior.⁶³⁸ The present study addresses this problem and concludes that it emanates largely from a lack of sufficient training offered to professionals practicing in the field of family law. The absence of sufficient training hampers the capacity of legal counsel to adequately embrace and execute strategies that address human values and promote constructive dispute settlement.

This particular case serves as a demonstration of the necessity for sensitivity training in order to augment the efficacy of legal counseling services in family dispute resolution to promote the adoption of a mediatory legal counseling method as a strategy to mitigate the frequency of such occurrences.⁶³⁹ Judge Benson further observed that the judiciary has exhibited a sluggish response in imposing penalties on legal practitioners who have occasionally taken advantage of the right to court access and engaged in substantial misconduct within the legal framework.⁶⁴⁰

⁶³⁸ *NK* (n637 above) para 5.

⁶³⁹ *NK* (n638 above) para 5.

⁶⁴⁰ *NK* (n639 above) para 5.

In certain cases, there exists a remarkable extent of abuse in the utilisation of the legal process, wherein litigants involved in family law matters exploit their entitlement to access the judicial system.⁶⁴¹ In order to address this form of misconduct, the court in this case found that the Respondent met the criteria of a vexatious litigant as outlined in Section 2(1)(b) of the Vexatious Proceedings Act⁶⁴². The purpose of this legislation is to aid the party who continues to experience harassment and incurring costs associated with legal proceedings.⁶⁴³ Judge Benson determined that the application of this legislative provision extends to circumstances involving the welfare of minor children. This is particularly important in cases when previous cost orders fail to dissuade litigants from engaging in such behavior.⁶⁴⁴

The recent legal case of *S.F.S v A.J.S*⁶⁴⁵, which was adjudicated in the South Gauteng High Court on the 11th of October 2023, further highlights the issue of negligent legal advice and its role in perpetuating prolonged litigation that burdens the judicial system.⁶⁴⁶ The parties concerned in this case were married in community of property and were embroiled in a contentious divorce. In accordance with Rule 43, the Respondent was ordered to pay interim maintenance to the Applicant and her two children.⁶⁴⁷

⁶⁴¹ *NK* (n640 above) para 5.

⁶⁴² Act 3 of 1956.

⁶⁴³ *NK* (n641 above) para 16.

⁶⁴⁴ *NK* (n643 above) para 16.

⁶⁴⁵ (2018) ZAGPJHC 1142.

⁶⁴⁶ *SFS* (n645 above) para 2.

⁶⁴⁷ *SFS* (n3646 above) para 2.

Despite having legal representation, Judge Nkutha-Nkontwana found that the Respondent was in contempt of the Rule 43 order and attempted to evade his maintenance obligations by pleading poverty.⁶⁴⁸ Moreover, it was disconcerting to observe from this case that the Applicant was experiencing financial difficulties and was unable to afford this protracted litigation. To attempt a resolution and circumvent litigation, she submitted the necessary documentation to the legal counsel for the respondent for review. Legal counsel confessed in court that he had received the correspondence but was unable to reply because he was either away on travels or preoccupied with other matters.⁶⁴⁹

The reckless disregard of the woman's suffering by the Legal counsel is a cause for significant worry, especially given the fact that the case pertains to the provision of necessary support for minor children, which is a matter of pressing importance. Regrettably, the prevalence of such incidents serves as a disheartening testament to the caliber of legal representation authorized to handle matters pertaining to Family law. Overall, it is clear that further efforts are required to educate legal counsel on how to effectively utilize mediation platforms to enhance access to justice, streamline dispute resolution, and alleviate the backlog of protracted proceedings.

⁶⁴⁸ *SFS* (n647 above) para 4.

⁶⁴⁹ *SFS* (n648 above) para 8.

Collaboration across legislative, judicial, and legal authorities in South Africa is crucial in order to facilitate the adoption of mediation processes in family court cases. When promoting the use of mediation to resolve conflicts, it is essential to ensure that the settlement process operates within a legal framework that enforces sanctions on parties who refuse it. This will effectively reduce the unnecessary waste of court resources through the hearing of unnecessarily long drawn cases. This study concludes that the Legal Practice Council's regulations governing the conduct of legal practitioners must be strengthened immediately in order to establish ethical standards that support alternative dispute resolution methods, including mediation and negotiation.

5.3 Recommendations

The subsequent proposals aim to offer resolutions to the legal counseling issue examined in this paper and demonstrated by the aforementioned caselaw. In order to address the issues identified, it is imperative to enact prompt changes as outlined below:

5.3.1 Stricter oversight and regulation of judicial referrals of family cases

The findings of this study show the urgent need for enhanced control of the issue of litigation which is considered to be frivolous within the context of family law. As a result, it is of the utmost importance that further constraints be put into place in order to successfully combat the incidence of vexatious litigation within the specific domain of family law as has been done in the Family Law Act of Australia.⁶⁵⁰ Establishing a clear definition for vexatious and abuse of process within the area of family litigation is something that should be considered in the subject of family law.

It is proposed that abuse of process and vexatious litigation be defined as legal action or process devoid of rationale and has the potential to inflict an excessive amount of emotional and financial hardship on a minor or dependent child or any other party to the proceedings.⁶⁵¹ The inclusion of particular conduct, such as the submission of applications in opposition to one another on several occasions, ought to be integrated into this regulation.

In addition, it is essential to incorporate into the concept of vexatious proceedings, the failure to go through mediation prior to filing each family law application, as well as the

⁶⁵⁰ Explanatory Memorandum (n491 above) 158-175.

⁶⁵¹ Family Law Act Amendment section 102 QAA.

commencement of legal procedures without sufficient grounds, and the institution or continuation of legal actions with the intention of causing financial or emotional harm.⁶⁵² Sanctions for such vexatious conduct must include cost orders against the parties and legal counsel. An additional provision to disqualify legal counsel who participate in such conduct from representing people in the Family court must also be incorporated into this regulation.

5.3.2 Establishment of specialist family law practitioners

The addition of supplementary provisions to enhance the Attorneys Act⁶⁵³, a legislative framework that regulates the admission of attorneys and the practice of law, is worthy of consideration.⁶⁵⁴ The current primary objective of the Attorneys Act⁶⁵⁵ is to *inter alia* consolidate the legislation pertaining to the admission and professional practice of attorneys, notaries, and conveyancers.⁶⁵⁶ It is recommended that an additional category of Family Law Practitioners (FLPs) be created and incorporated into the Attorneys Act.

It is recommended that the Attorneys Act must further be amended to include specific requirements for one to be qualified and admitted as a Family Law Practitioner in South Africa. In addition to fulfilling the general prerequisites for admission as an attorney, it is

⁶⁵² Family Law Act section 102QAA.

⁶⁵³ Act 53 of 1979.

⁶⁵⁴ Act 53 of 1979.

⁶⁵⁵ Act 53 of 1979.

⁶⁵⁶ Act 53 of 1979

recommended that those who are interested in practicing family law be subjected to an additional Practical Family Practice course. Upon successful completion of this course, they must then be subjected to a separate family law practice board examination. This examination must be structured to verify that the candidate is knowledgeable and competent in Family law practice.

The examiners must evaluate the candidate's comprehension of family law as well as their capacity to recognise the major human repercussions that are present in specific case scenarios. Prospective candidates must be able to demonstrate a satisfactory level of proficiency in composing a diverse range of legal documents pertaining to constructive family dispute resolution and family law. As a further requirement, candidates must be able to effectively communicate to the examiners their thorough understanding of the key concepts that serve as the foundation for the practice of family law.⁶⁵⁷

It is further recommended that the Attorneys Act be amended to incorporate a provision stating that individuals seeking to undergo an examination pertaining to Family Law practitioners must prove that they have completed an Alternative dispute resolution course. In addition they must demonstrate that they obtained practical experience under the guidance of a qualified Family Law practitioner for a duration of 12 months.⁶⁵⁸ The

⁶⁵⁷ <https://www.lssa.org.za/wp-content/uploads/2019/12/NOTARIAL-PRACTICE-2019.pdf> accessed on 26 November 2023.

⁶⁵⁸ Act 53 of 1979.

Attorneys Act needs a section similar to Section 18 to allow the Family Court to admit and enroll any person as a Family Practitioner, provided they are an attorney admitted by the high court, in good standing, and have received additional alternative dispute resolution training.

In relation to Advocates who engage in the practice of family law, it is recommended that they be mandated to be registered with the Legal Practice Council as family law practitioners. It is suggested that a methodology comparable to that which has been implemented by the Legal Practice Council regarding tax law practitioners be adopted.⁶⁵⁹ It is also recommended that with respect to Family Law Practitioners, the Legal Practice Council must work in conjunction with an accreditation body such as The South African Dispute Settlement Accreditation Council (DISAC).⁶⁶⁰ DISAC accreditation involves verifying that the practitioner has completed approved mediation training and has undertaken an independent assessment to determine their competence.⁶⁶¹

Furthermore, the practitioner must consent to engage in supervised practice, subject to the oversight of an Accredited Service Provider such as the Justice College of the Department of Justice, Conflict Dynamics and Africa Dispute Resolution.⁶⁶² The Practitioner must also comply with the DISAC Code of Conduct. Most importantly the

⁶⁵⁹ <https://lpc.org.za/tax-practitioners-registration/> accessed on 20 November 2023.

⁶⁶⁰ http://disac.co.za/?page_id=3361 accessed on 22 November 2023.

⁶⁶¹ http://disac.co.za/?page_id=3513 accessed on 22 November 2023.

⁶⁶² http://disac.co.za/?page_id=3513 accessed on 22 November 2023.

practitioner is obligated to fulfill ongoing professional development obligations.⁶⁶³ In addition to being registered with DISAC, it is also recommended that Advocates who wish to be family law practitioners must demonstrate that they are properly accredited with DISAC and have undergone the requisite training and competency tests⁶⁶⁴.

The primary objective of this recommendation is to ensure that all Legal counsel are properly trained to engage in constructive family dispute resolution even in the courts.⁶⁶⁵ Currently it is a requirement for tax practitioners to be registered with the legal Practice Council as well as the South African Revenue Service for them to properly represent a client in tax matters.⁶⁶⁶ It is submitted that it will be effective if the same format were to be applied to Advocates who intend to practice in Family law.

Finally, it is also recommended that candidates demonstrate that they have at least six months of family law -related professional experience.⁶⁶⁷ The above recommended screening and training of Family law practitioners will certainly facilitate a better value add

⁶⁶³ http://disac.co.za/?page_id=3513 accessed on 22 November 2023.

⁶⁶⁴ http://disac.co.za/?page_id=3361 accessed on 22 November 2023.

⁶⁶⁵ <https://lpc.org.za/tax-practitioners-registration/> accessed on 20 November 2023.

⁶⁶⁶ <https://lpc.org.za/tax-practitioners-registration/> accessed on 20 November 2023.

⁶⁶⁷ <https://lpc.org.za/tax-practitioners-registration/> accessed on 20 November 2023.

for legal counseling in family law cases and consequently reduce the incidence of avoidable litigation and improve general access to family law justice in South Africa.

5.3.3 The establishment and implementation of a family practitioner division under the Legal Practice Council to oversee and regulate family law practitioners.

Legislation, court rules, and legal precedent in South Africa collectively attest to the advancement towards establishing a formal legal framework that endorses mediation as an alternative to litigation in family cases. However, additional endeavors are necessary to persuade legal counsel to proficiently employ mediation platforms with the aim of augmenting access to justice, streamlining dispute resolution, and mitigating the backlog of protracted proceedings.⁶⁶⁸

The importance of judges in ensuring compliance with statutory obligations for mediation in the Family Court is underscored by the case study of the Australian legal system. Substantial promotion of increased compliance with the mandatory pre-litigation mediation requirement in South African family courts can be promoted by the strict

⁶⁶⁸ DW Sue 'Barriers to effective cross-cultural counseling.' (1977) 24.5 *Journal of Counseling Psychology* 1495.

implementation of court-initiated or court-ordered mediation.⁶⁶⁹ It is important to highlight that the Judges in the High Court of South Africa have the authority to direct the resolution of disputes by providing guidance to the involved parties. This process may involve the utilisation of roundtable discussions or mediation as means of achieving efficient settlement.

Nevertheless, a heightened level of commitment to mediation by these judges is necessary in order to enhance the utilisation of these processes, so as to expand the accessibility of effective justice to a larger population of children and individuals going through divorce. The Family Law Practitioners' Best Practice Guidelines were instituted in the Australian jurisdiction with the aim of fostering a constructive methodology for resolving family disputes.⁶⁷⁰ These guidelines assist Family law practitioners to facilitate more constructive family dispute resolution by paying attention to the safety of children and separating couples, prohibiting arguments in the presence of minor children and minimizing the entanglement of children in the conflict between the parties.⁶⁷¹

These guidelines also assist practitioners to prevent unreasonable expenditures while promoting the safety of children, fostering enduring familial connections, and facilitating effective dispute resolution.⁶⁷² It is recommended that similar Guidelines be established by the Legal Practice Council in South Africa and published so that legal counsel can be

⁶⁶⁹ Rycroft (n601 above).

⁶⁷⁰ <https://janofamilylaw.com.au/blog/best-practice-guidelines/> accessed on 20 November 2023.

⁶⁷¹ <https://janofamilylaw.com.au/blog/best-practice-guidelines/> accessed on 20 November 2023.

⁶⁷² <https://janofamilylaw.com.au/blog/best-practice-guidelines/> accessed on 20 November 2023.

guided. These guidelines can then be published on the Legal Practice Council for easy access by legal counsel as well as members of the public.⁶⁷³

Family Lawyers in Australia are also regulated *inter alia*, by the Family Law Council and the Family Law Section of the Law Council.⁶⁷⁴ The Family Law Section of the Law Council of Australia is the largest professional association for family law practitioners from various Australian states.⁶⁷⁵ It operates under board-approved by-laws and follows a carefully constructed strategic plan.⁶⁷⁶ The Family Law Section, established under Clause 50.2 of the Law Council of Australia's Constitution⁶⁷⁷, aims to advance the interests and objectives of family law and family lawyers in Australia. It also develops and executes programs that benefit lawyers, implement programs that benefit the public, and support the Law Council in its endeavors concerning subjects within its jurisdictional authority.⁶⁷⁸

It is recommended that in line with the above Australian example, the Legal Practice Council in South Africa could establish a family law section. Similar to the *de rebus*, a publication currently distributed to all registered legal practitioners, the Family Law unit could also utilize electronic publications to disseminate information and keep its members

⁶⁷³ <https://janofamilylaw.com.au/blog/best-practice-guidelines/> accessed on 20 November 2023.

⁶⁷⁴ Council, Family Law 'Best practice guidelines for lawyers doing family law work.' (2004) accessed at <https://www.legislation.gov.au/Details/F2003B00392/Explanatory%20Statement/Text>.

⁶⁷⁵ <https://www.familylawsection.org.au/about-fls.html> accessed on November 20, 2023.

⁶⁷⁶ <https://www.familylawsection.org.au/about-fls.html> accessed on November 20, 2023.

⁶⁷⁷ Constitution of Law Council of Australia Limited-As amended 1 December 2018.

<https://lawcouncil.au/publicassets/b5943f99-1528-e911-93fc-005056be13b5/LCA%20Constitution%20-%201%20December%202018.pdf> accessed on 22 November 2023.

⁶⁷⁸ https://www.familylawsection.org.au/images/fls/FLS_Documents/2015_02_13_FLS_strategic_plan_2015-16.pdf, accessed on November 20, 2023.

well-informed about the latest advancements in family law practice. This would serve to enhance the legal counselors' knowledge and understanding of family law practice.⁶⁷⁹

5.3.4 Enhancement of the case management process

It is recommended that the Rules of Court be amended to incorporate a compulsory provision, wherein legal counsel is required to submit an affidavit affirming the fulfillment of obligations to properly inform their clients about the availability of mediation and other alternative resolution approaches such as counseling. Further, Legal counsel must undertake that a full summary of the merits of the case have been explained to the client and that the client confirmed understanding. The legal counsel must also state in terms of that Affidavit that it is their opinion that the case bears good merits. It is recommended that this compliance Affidavit must be filed together with the initiating documents of any divorce or ancillary action.

A similar approach has been adopted in the Australian courts in accordance with part 111 of the Family Law Act. Section 12A of Australia's Family Law Act mandates that couples considering separation or divorce should be informed about available resources and assistance for reconciliation. It also emphasises the importance of providing information

⁶⁷⁹ <https://www.derebus.org.za/category/issues/september-2023/> accessed on 20 November 2023.

on resources and legal orders for those affected by separation or divorce. It also highlights the need for those affected to be aware of alternative conflict resolution methods beyond legal remedies.⁶⁸⁰

Section 12B of the Family Law Act stipulates that individuals considering litigation must be duly apprised of various aspects, including but not limited to the legal and potential societal ramifications of the proposed proceedings.⁶⁸¹ This incorporates the impact on children whose well-being, care, and development may be influenced by said proceedings, as well as the availability of services offered by family counsellors and family dispute resolution practitioners to assist individuals affected by separation or divorce. Additionally, individuals must be informed of the procedural steps involved in the proposed proceedings.⁶⁸²

The above obligation to inform clients fully, is very important because it allows the parties to properly conduct a cost benefit analysis of their actions especially with respect to consequences on the minor children. In South Africa in general, legal counsel are not qualified psychologists or counselors. As such where it is evident that the parties are suffering considerable emotional distress, the legal counsel must first refer the clients for

⁶⁸⁰ Family Law Act 1975.

⁶⁸¹ S12B Family Law Act.

⁶⁸² S12B Family Law Act.

counseling before proceeding to court. The legal counselor must be knowledgeable about the availability of resources such as the office of the Family Advocate and other private organization which provide counseling services. It is thus mandatory for Legal counsel to supply the information that was indicated above to their client in accordance with the Australian Family Law Act.⁶⁸³ The incorporation of the abovementioned mandatory obligation into the Uniform court Rules, in conjunction with the requirements of Rule 41, in South Africa is something that is strongly recommended. It is submitted that the impact of legal advice will be positively improved as a result of this. This will also help to minimize the number of lengthy court disputes that result from an aggressive attitude to divorces and ancillary actions by legal counsel. On the whole legal counseling is key to ensuring that access to justice in family law cases is enhanced through constructive application of the law. It is trite that there is a burden on legal counsel to ensure that clients are properly educated with respect to the law as well as consequences of their actions. Mediation alone does not suffice to eliminate the scourge of unnecessary litigation.

5.3.5 Integration of court-annexed mediators into the South African family court

It is further suggested that, in order to facilitate the effective implementation of Uniform Court Rule 41⁶⁸⁴ and promote the efficiency of the adjudication of matters by judges in

⁶⁸³ Family Law Act 1975.

⁶⁸⁴ Superior Courts Act 10 of 2013.

the Family Court in South Africa, the inclusion of Court-Annexed Mediators who are accredited under Rule 86 (2) of the Court-Annexed Mediation Rules⁶⁸⁵ in the Family Court should be considered. The integration of court annexed mediators into the Family courts would undoubtedly necessitate additional financial resources. It is recommended that a requirement be implemented for all parties involved in divorce proceedings to submit a nominal fee upon filing their initial court paperwork. This cost would serve to finance the management of court-annexed mediation in the Family Court of South Africa. Furthermore, it is recommended that legal practitioners who do not adhere to the need to engage in mediation should be subjected to punitive cost orders. These amounts collected should be payable to the Department of Justice for the purpose of financing the administration of the court-annexed mediation within the Family Court. It is proposed that this will eventually curtail the incidence of irresponsible legal counseling practices in family cases in South Africa.

⁶⁸⁵ Rules of Court: Amendment: Mediation Chapter 2, G 37448 RG 10151 GoN 183, 18 Mar 2014.

BIBLIOGRAPHY

Books

Adams, BN & J Trost, J Handbook of world families (Sage Publications 2004)

Alberti, R & Emmons, M 'Your Perfect Right' 110 (6th ed. 1984)

Anstey, M Managing Change: Negotiating Conflict (3rd ed. Juta Academic Ebooks 2006)

Baron, ATDD Lord Denning: The due Process of Law (London: Butterworths: LexisNexis 1980)

Dunbar-Brunton, J The Law and The Individual (Mc Millan Press LTD, London 1973)

Andrews, N On Civil Processes, vol. I: Court Proceedings; vol. II: Arbitration & Mediation (Revue internationale de droit comparé 2013)

Fisher, R & Ury, W Getting to Yes: Negotiating Agreement Without Giving In (3rd ed. New York, Penguin Books 2011)

Herbs, A & Reitsma, G Trauma Counselling: Principles and Practice in South Africa today (Cape Town: Juta 2016)

Herman, GN & Cary, JM Client Interviewing, Counseling, and Decision-Making: A Practical Approach (2nd ed. Lexis Nexis 2021)

Krieger, S, Neumann RK & Hutchins, RM Essential Lawyering Skills: Interviewing, Counseling, Negotiation and Persuasive Fact Analysis' (6th ed. New York: Wolters Kluwer 2020)

Lavi, D Alternative Dispute Resolution and Domestic Violence: Women, Divorce and Alternative Justice (Routledge 2018)

Marnewick, CG Mediation Practice in the Magistrates Courts (Lexis Nexis 2015)

Mantle, M Mediation: A practical guide for Lawyers (2nd ed. Edinburgh: Edinburgh University Press Ltd 2017)

Shafer, T & Elkins, J Legal Interviewing and Counseling in a Nutshell (4th ed. *USA West Publishing 2005*)

Wieser, T Alternative Dispute Resolution in South Africa: Negotiation, mediation, arbitration and ombudsmen (1st ed. Cape Town: Juta 2016)

Zitrin, R, Cole, LR & Casey, T Legal Ethics in The Practice of Law (5th ed. California Academic Press, LCC 2019)

Cases

Brownlee v. Brownlee 2008/25274

D.D.K v. R.M.B.D.K & Van Aswegen N O (2023) ZAGPJHC 382

C W v G T (2023) ZASCA 23

Clemson v Clemson (2001) 1 All SA 622 W

Dawood and Another v Minister of Home Affairs and Others 2000 (3) SA 936

Del Fuoco v. Wells, 8:03-cv-161-T-23TGW (M.D. Fla. Jan. 4, 2007)

Egan v. Motor Services (Bath) Ltd (2007)

H.C.J v N.J and Another (2023) ZAFSHC 182

Hurst v Leeming [2001] EWHC 1051 (Ch)

Kalagadi Manganese (Pty) Ltd (Kalagadi) and others v Industrial Development Corporation (IDC) (2021) ZAGPJHC

Koetsioe and Others v Minister of Defence and Military Veterans and Others (2021)
ZAGPPHC 203

Kowaliw & Kowaliw (1981) FLC 91-092

Legal Services Commissioner v Mullins [2006] LPT 012

M v The State and Centre for Child Law (2023) ZAFSHC 182

Mmamphsika v Mmamphsika 2018 (33) ZAGPPHC 628

Mabo v. Queensland (1992) 175 Commonwealth Law Report 1

MB v NB (2010) (3) SA 220

Mgenge v Mokoena and Another (2023) 2 All SA 513 (GJ)

NK v. BB (2023) ZAGPJHC 1025

RH v DE 2014 (6) SA 436 (SCA)

S v S (2019) (6) SA 1 (CC)

S.F.S v A.J.S (2018) ZAGPJHC 1142

Outar v Greno Industries 2005 WL 238740(ND NY.Sep.27,2005)

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

Townsend-Turner and Another v Morrow (2003) ZAWCHC 53

Tyibilika v MEC for Health, Eastern Cape Province (2021) ZAECBHC

University of South Africa v Socikwa and Others (2023) 8 BLLR 836 (LC)

Women's Legal Centre Trust v. President of the Republic of South Africa and Others
2022 (5) SA 323 (CC)

Journals

Alberti, R & Emmons, M 'Your Perfect Right' 110 (6th ed. 1984) (citing L Berkowitz 'The concept of aggressive drive: Some additional considerations.' (1965) 2 *Advances in experimental social psychology* 301-329

Baggett, E 'Cross-Cultural Legal Counseling.' (1984) 18 *Creighton Law. Review* 1475

Bakker, P 'Chaos in family law: a model for the recognition of intimate relationships in South Africa.' (2013) 16.3 *Potchefstroom Electronic Law Journal* 115-150.

Bala, N, Birnbaum, R & Martinson, D 'One Judge for One Family: Differentiated case management for families in continuing conflict' (2010) 26 *Canadian Journal of Family Law* 396

Black, A 'Cultural Expertise in Australia: Colonial Laws, Customs, and Emergent Legal Pluralism' (2019) 78 *Cultural Expertise and Socio-Legal Studies* 133-155

Barratt, A, Snyman, A & Lutchman, S 'Researching South African Law.' (2007) 26.3 *Law Library Resource Exchange (LLRX)*

Carbonneau, T 'A Consideration of Alternatives to Divorce Litigation.' (1986) 4 *University of Illinois Law Review* 1124

Ching, J 'Favourable Variations': Towards a Refreshed Approach for the Interviewing Classroom' (2015) 25 *Legal Education Review*

Cooper, D & Field, F 'The family dispute resolution of parenting matters in Australia: An analysis of the notion of an independent practitioner.' (2008) 8.1 *Law and Justice Journal* 158-17

De Jong, M 'Divorce mediation in Australia – valuable lessons for family law reform in South Africa' 2007 (40) *Comparative and International Law Journal of Southern Africa* 281

Dinovitzer, R, Gunz, HP & Gunz, SP 'Reconsidering lawyer autonomy: The nexus between firm, lawyer, and client in large commercial practice.' (2014) 51.3 *American Business Law Journal* 667

DiPippa, J 'How prospect theory can improve legal counseling.' (2001) 24 *University of Arkansas at Little Rock Law Review* 83

Dohoon, L & McLanahan, S 'Family structure transitions and child development: Instability, selection, and population heterogeneity.' (2015) 80.4 *American sociological review* 738-763

D'Onofrio, B & Emery, R 'Parental divorce or separation and children's mental health.' (2019) 18.1 *World Psychiatry* 100

Dykes, G & Ward, M 'Parents and adolescents in the post-divorce period: the effects on adolescent psychosocial development.' (2022) 58.3 *Social Work* 366-381

Edward, D 'The Lawyer as Counselor and the Prevention of Litigation' (1982) 31 *Catholic University Law Review* 685

Federle, KH 'The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client' (1995) 64 *Fordham Law Review* 1659

Field, R 'The use of litigation and mediation for the resolution of custody and access disputes: some issues for women' (1996) *Australian Dispute Resolution Journal* 15

Goodpaster, GS 'Human Arts of Lawyering: Interviewing and Counseling, The.' (1975) 27 *Journal of Legal Education* 5

Hausman, M 'The Ethics of Lawyering in the Public Interest: Using Client and Lawyer Autonomy as a Guidepost' (1990) 4 *Georgetown Journal of Legal Ethics* 383-402

Harrison, M 'Australia's Family Law Act: The First Twenty-Five Years.' (2002) 16.1 *International Journal of law, Policy, and the Family* 1-21.

Hutchison, A & Porter-Wright, M 'Private ordering and dispute resolution.' (2018) 135.2 *South African Law Journal* 338

Jayakumar, S 'Client Counselling for tomorrow`s Lawyers' (2011) *All India High Court Cases Journal* 13

Joubert, JJ 'Mediation Rule 41A of the High Court' (2020) *Lexis Nexis South Africa*

Karels, M 'The triumvirate role of legal counsel for child offenders: representative, intercessor or agent?' (2013) 26.3 *South African Journal of Criminal Justice* 276-301.

Lande, J & Mosten, FS 'Family lawyering: past, present, and future.' (2013) 51.1 *Family Court Review* 24.

Levin, A & Golash, D 'Alternative Dispute Resolution in Federal District Courts.' (1985) 37.1 *University of Florida Law Review* 32

Marumoagae, C 'Does collaborative divorce have a place in South African divorce law?' (2016) 49.1 *De Jure Law Journal* 41-57

McDonald, NR 'Marriage and Divorce Laws in South Africa.' (1974) *Washington, D.C., Law Library of Congress* 1

McQuoid-Mason, D 'Access to Justice in South Africa.' (1999) 17 *Windsor Yearbook of Access to Justice* 234

Mussehl, RC 'From advocate to counselor: The emerging role of the family law practitioner.' (1976) 12 *Gonzaga. Law. Review* 444

Nagan, WP 'Law and Post -Apartheid South Africa' (1988) 12 *Fordham International Law Journal* 5.

Oliver, E & Oliver, W 'The Colonisation of South Africa: A unique case.' (2017) 73.3 *HTS Theological Studies* 1-8

Oppermann, B 'The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States.' (2006) 17.1 *Hastings Women's Law Journal* 74

Rappaport, SR 'Deconstructing the Impact of Divorce on Children' (2013) 47.3 *Family Law Quarterly* 353–77

Reay, M 'Aboriginal and white Australian family structure: An enquiry into assimilation trends.' (1963) 11.1 *The Sociological Review* 19-47

Redmount, RS 'An inquiry into legal counseling.' (1979) 4 *Journal of the Legal Profession* 181

Rubinson, R 'Realizing dispute resolution: Meeting the challenges of legal realism through mediation' (2017) 18 *Nevada Law Journal* 834

Rycroft, A 'Settlement and the law.' (2013) 130.1 *South African Law Journal* 187-209

Simpson, B 'Changing families: An ethnographic approach to divorce and separation.' (2020) *Routledge New York* 5

Sinclair, J 'South Africa: Children, Race, Divorce.' (1989) 28.3 *Journal of Family Law* 608

Smyth, B et al 'Certifying mediation: a study of section 60I certificates' (2017) 2 *Center for Social Research and Methods Working Paper* 1

Spencer, D 'Costs sanctions against parties refusing to mediate.' (2005) 43.4 *Law Society Journal* 62-64.

Sue, DW & Sue, D 'Barriers to effective cross-cultural counseling.' (1977) 24.5 *Journal of Counseling Psychology* 1495

Sue, DW 'Barriers to effective cross-cultural counseling.' (1977) 24.5 *Journal of Counseling Psychology* 1495

Wiese, TG 'Alternative dispute resolution in South Africa: Negotiation, mediation, arbitration and ombudsmen' (2016) Juta (Pty) Limited

Taskinen, TKJ 'Some Thoughts on Proactive Counselling and Legal Mentality', *Scandinavian Law* (226) 230

Pepper, SL 'Counseling at the Limits of the Law: An Exercise in the Jurisprudence and ethics of Lawyering' (1995) *Yale Law Journal* 1546

Uwazie, EE 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' (2011) 16 *Washington, DC: Africa Center for Strategic Studies*.

Watson, R 'Family Court of Australia, The.' (1974) 1 *Legal Service Bull* 298.

Winlock, W 'The Fundamental Right of Access to Justice.' (2005) 3 *East African Court of Justice`s Human Rights & Democracy* 43

Webb, D 'Hopeless Cases: In Defence of Compensating Litigants at the Advocate`s Expense.' (1999) 30 (1) *Victoria University of Wellington Law Review* 299

Wylie, M "Enhancing Legal Counselling in Cross-Cultural Settings." (1996) 15 *Windsor Yearbook Access Justice* 47.

Zacharias, F 'Limits on Client Autonomy in Legal Ethics Regulation' (2001) 81.1 *Boston University Law Review* 214

Websites

<https://www.gov.za/services-residents/relationships/marriage/how-get-divorce#:~:text=It%20can%20be%20finalised%20within,to%20an%20uncontested%20unopposed%20divorce> (accessed on 19 January 2023)

<https://www.justice.gov.za/mediation/mediation.html> (accessed on 20 January 2023)

Alternative dispute resolution in Family matters – SA Law Reform Commission 16
<https://www.justice.gov.za/salrc> (accessed on 11 May 2023)

Alternative Dispute Resolution in Family Matters - SA Law Reform Commission Discussion Paper 148, June 2019 21 <https://www.justice.gov.za/salrc> (accessed 11 May 2023)

Polygamy in Australia in Wikipedia. https://en.wikipedia.org/wiki/Polygamy_in_Australia (accessed 17 September 2023)

<https://www.lssalead.org.za/course/civil-mediation-online-course/> (accessed 13 October 2023)

https://www.judiciary.org.za/images/news/2019/amendment_of_uniform_rules_of_court_with_the_insertion_of_case_management_rules (accessed 12 October 2023)

General Council of the Bar of South Africa: Uniform rules of professional conduct.
<https://gcbasa.co.za/wpcontent/uploads/2020/03/GCB%20Uniform%20Rules%20of%20Ethics%20updated%202017%20AGM.pdf> (accessed 19 October 2023)

Council, Family Law 'Best practice guidelines for lawyers doing family law work.' (2004)
<https://www.legislation.gov.au/Details/F2003B00392/Explanatory%20Statement/Text>
(accessed 19 October 2023)

A Catto 'Family Law in South Africa: Overview'
[https://content.next.westlaw.com/practical-law/document/l63cd7e63e68b11e398db8b09b4f043e0/Family-law-in-South-Africa-overview?viewType=FullText&transitionType=Default&contextData=\(sc.Default\)](https://content.next.westlaw.com/practical-law/document/l63cd7e63e68b11e398db8b09b4f043e0/Family-law-in-South-Africa-overview?viewType=FullText&transitionType=Default&contextData=(sc.Default))
(accessed 20 October 2023)

https://www.justice.gov.za/fmadv/f_main.htm (accessed 20 October 2023)

<https://aifs.gov.au/sites/default/files/publicationdocuments/familylawandmarriagebreakdowninaustralia> (accessed 23 October 2023)

Accredited specialist solicitor (Australia). (2022, August 24). In *Wikipedia*.

[https://en.wikipedia.org/wiki/Accredited_specialist_solicitor_\(Australia\)](https://en.wikipedia.org/wiki/Accredited_specialist_solicitor_(Australia)) (accessed 24 October 2023)

<https://www.lssa.org.za/wp-content/uploads/2022/06/The-Family-Court-Directive-of-6-June-2022.pdf> (accessed 24 October 2023)

Directive For The Family Court In The Johannesburg High Court

<https://www.lssa.org.za/wp-content/uploads/2022/06/The-Family-Court-Directive-of-6-June-2022.pdf> (accessed 24 October 2023)

Family Law Council - Report - Family Mediation, June 1992

https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2FHSTP07529_1990-92%22;src1=sm1 (accessed 25 October 2023)

SA Law Reform Commission Project 142 'Investigation into legal fees -including access to justice and other interventions' <https://www.saflii.org/za/other/ZALRC/2022/3.pdf> (accessed on 31 October 2023)

SA Law Commission Project 94, Issue paper 8 'Alternative dispute resolution'
https://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf (accessed on 31 October 2023)

<https://www.justice.gov.za/mediation/mediation.html> (accessed 1 November 2023)

E Cubillo 'Legal Pluralism Treaty – Making in Australia'
<https://law.unimelb.edu.au/iljh/research/research-projects/current-projects/legal-pluralism-and-treaty-making-in> (accessed on 10 November 2023)

Australian Legal System. In *Wikipedia*.

https://en.wikipedia.org/wiki/Australian_legal_system (accessed on 10 November 2023)

<https://lpc.org.za/tax-practitioners-registration/> (accessed 20 November 2023)

<https://janofamilylaw.com.au/blog/best-practice-guidelines/> (accessed 20 November 2023)

<https://www.lssa.org.za/wp-content/uploads/2019/12/NOTARIAL-PRACTICE-2019.pdf>
(accessed on 26 November 2023)

South African Divorce Statistics accessed at <https://www.divorcelaws.co.za/divorce-statistics.html> (accessed 27 November 2023)

Family Court of Australia accessed at Annual Report 2007-08 (accessed 27 November 2023)

"Media Release - The Courts to receive \$100 million in Government funding announced in the 2021-22 Budget". *Family Court of Australia*. 12 May 2021. Archived from the original on 29 July 2021. Retrieved 29 July 2021 (accessed 27 November 2023)

Department of Home Affairs: White paper on marriages in South Africa (March 2022)
<http://www.dha.gov.za/images/PDFs/White-Paper-on-Marriage-in-SA-5-May2022.pdf>
(accessed 27 November 2023)

Legislation

The Constitution of the Republic of South Africa, 1996

The Commonwealth of Australia Constitution Act 1900

The Civil Union Act 17 of 2006

The Children's Act 38 of 2005

The Divorce Act 70 of 1979

The Family Law Act 53 of 1975

The Legal Aid South Africa Act 39 of 2014

The Marriage Act 25 of 1961

The Mediation of Certain Divorce Cases Act 24 of 1987

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act *19 of 1998*

The Recognition of Customary Marriages Act 120 of 1998

The Rules Board for Courts Law Act 107 of 1985

The Rules of Court: Amendment: Mediation Chapter 2, G 37448 RG 10151 GoN 183, 18
March 2014

The South African Law Reform Commission Act 19 of 1973

The South African Legal Council Code of Conduct Act 28 of 2014

The Supreme Court Act 59 of 1959

The Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991

Uniform Rules of Court Act 59 of 1959

The 2014 amendment of rules regulating the conduct of the proceedings of the
Magistrates Court of South Africa