

**The Role of Mandatory Mediation in the Transformation of the South African
Civil Justice System**

by

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I. DECLARATION OF ORIGINALITY

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III. ABSTRACT

This study highlights the complexities associated with South Africa's adversarial civil justice system, and analyses how mediation as an alternative dispute resolution procedure can play a role in remedying issues relating to high costs, delays and overburdened court rolls. The research outlines the historical development of mediation in South Africa and investigates whether the mandatory mediation models found in South African family law and labour law have effectively transformed South Africa's civil justice system.

The study assesses the mediation rules contained in the Magistrates' Court Rules and Uniform Rules of Court, and determines the potential the rules have in reforming the South African civil justice system. This research also investigates the benefits and shortcomings of the mandatory mediation models that have been adopted in Canada and Australia. A comparative analysis with South Africa's civil justice system is conducted, and recommendations are made for instances that are applicable to the South African context. The research critically discusses the constitutionality of mandatory mediation, and the advantages and disadvantages associated with the procedure.

This mini dissertation argues that non-adversarial procedures such as, mandatory mediation are effective in remedying some of the challenges faced by South Africa's civil justice system. However, the research also determines that mandatory mediation is not appropriate for all civil disputes, and the benefits attached to an adversarial justice system should not be lost in the pursuit of applying non-adversarial procedures.

IV. LIST OF ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
AJCR	African Journal on Conflict Resolution
ALR	Alberta Law Review
AQ	Advocate's Quarterly
BAA	Black Administration Act 38 of 1927
CBA	Canadian Bar Association
CCMA	Commission for Conciliation Mediation and Arbitration
CDRA	Civil Dispute Resolution Act 17 of 2011 (Cth)
CPA	Civil Procedure Act 28 of 2005 (NSW)
DPRU	Development Policy Research Unit
ELR	Erasmus Law Review
IMSSA	Independent Mediation Service of South Africa
James Cook U.L. Rev	James Cook University Law Review
JDR	Judicial Dispute Resolution
JSAS	Journal of Southern African Studies
LAC	Labour Appeal Court
LRA	Labour Relations Act 66 of 1995
MDMA	Mediation in Certain Divorces Act 24 of 1987
MULR	Monash University Law Review
NADRAC	National Alternative Dispute Resolution Advisory Committee
N.C.J. Int'l L. & Com. Reg.	North Carolina Journal of International Law and Commercial Regulation
OHLJ	Osgoode Hall Law Journal
PELJ	Potchefstroom Electronic Law Journal
QUTLawJI	Queensland University of Technology Law Journal
RCMA	Recognition of Customary Marriages Act 120 of 1998
SALJ	South African Law Journal
SCLR	Southern California Law Review
TSAR	Tydskrif vir die Suid Afrikaanse Reg
UNSW Law Journal	University of New South Wales Law Journal

CHAPTER 1: OVERVIEW OF THE TOPIC

1.1. Background and Overview of Literature

The main question of the proposed research is: Should Mandatory Mediation have a role to play in the transformation of the South African Civil Justice System?

The three main dispute resolution mechanisms in South Africa are formal litigation before the Courts, mediation and arbitration.¹ South African civil litigation procedure is adversarial in nature, and the litigation process can be described as antagonistic, where one party to the dispute will succeed in the proceedings at a cost to the other.² The adversarial nature of litigation does not foster a culture of reconciliation.³ Civil litigation usually takes an extended period of time to conclude and is very costly, which inevitably makes it difficult for the ordinary South African to approach the Courts.⁴ South Africa has taken some steps, *albeit* limited ones to move towards alternate dispute resolution processes.⁵ Arguably, these alternate dispute resolution (ADR) processes are cost-effective and less time consuming.⁶ This research will primarily focus on mediation as an alternate dispute (ADR) process.

The underlying purpose of civil procedure is to move disputes between parties forward, up to a point of finalisation and also to reflect shifting societal needs.⁷ It is therefore important to, determine if mediation has the potential to move disputes forward and cater to the current societal needs in South Africa. Section 34 of the Constitution states: “Anyone has the right to have any dispute resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent impartial tribunal or forum.”⁸ Section 34 of the Constitution is a fundamental right in South Africa, and as such the introduction of a mandatory civil procedural step should not unjustifiably limit this right. Changing mediation from being

¹ Broodryk T in Esplugues C and Marquis E (eds) (2015) 667.

² Theophilopoulos (2016) 1 *JSAL* 68 at 69.

³ *Ibid.*

⁴ Broodryk T in Esplugues C and Marquis E (eds) (2015) 667.

⁵ *Ibid.*

⁶ Theophilopoulos (2016) 1 *JSAL* 68 at 78.

⁷ Van Loggerenberg (2016) 3 *BRICS Law Journal* 125 at 126.

⁸ Constitution of the Republic of South Africa, 1996.

a voluntary process must therefore be viewed with great caution in order not to limit litigants' right to access the courts. Under this theme of upholding the right to access the courts, the proposed research will broadly discuss what the advantages and disadvantages of mandatory mediation are; and if it is an effective mechanism in reforming civil procedure in South Africa.

When discussing mediation Brassey AJ states that:⁹

[T]he success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground, and by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.

Despite the benefits of mediation as outlined by Brassey AJ, South Africa's Magistrates' Court Rules and Uniform Rules of Court do not mandate mediation.¹⁰ Theophilopoulos has advocated for a shift in this position, and has argued that compulsory pre-action protocols should be adopted in order to allow certain cases to be diverted towards mediation, or settlement before summons are issued.¹¹ Examples of mandatory mediation models in South Africa can be seen through legislation relating to family law and labour law.¹²

This research will be conducted under the premise that mediation has the potential of curing some of the ailments in the civil justice system, and promoting the right to access the Courts. The research is also based on the premise that mandatory mediation has the potential to play a positive role in transforming the South African civil justice system.

⁹ *Brownlee v Brownlee* 2010 3 SA 220 para 50.

¹⁰ Magistrates' Court Rules; Uniform Rules of Court.

¹¹ Theophilopoulos (2016) 1 *JSA* 68 at 78.

¹² Children's Act 38 of 2005; Mediation of Certain Divorce Matters Act 24 of 1987; Labour Relations Act 66 of 1995.

1.2. Motivation

This study seeks to explore the effects of introducing mediation as a mandatory civil procedural step in South Africa, and it will reflect on the practicality and constitutionality of introducing such a procedural step.

The objectives of this research are to:

- a) Understand the mediation procedure as an alternative form of dispute resolution;
- b) Identify the current problems that the South African civil justice system is facing;
- c) Assess what role mediation can play in resolving the identified challenges and;
- d) Reflect on the impact mandatory mediation has had in other jurisdictions, namely in Canada and Australia.

These objectives will be achieved through addressing the following sub-questions:

- a) What direction is South Africa going with mediation?
- b) Could mandatory mediation be a solution to the challenges in the South African civil justice system?
- c) What are the constitutional implications of introducing mandatory mediation in South Africa?

The study aims to highlight the experiences of mediation in South Africa, and compare these experiences to Canada and Australia. This comparative analysis has been proposed in order to, share recommendations and reflect on lessons learned by other jurisdictions. The findings of the comparative analysis will be utilised to make recommendations on what the future of the South African civil procedure landscape should look like. This research has also been proposed in order to, advocate for the further advancement of litigants' right to access Court.

1.3. Methodology and Structure Outline

In order to decide if mandated mediation has a role to play in the transformation of the civil justice system in South Africa, it is imperative that an understanding of mediation and its current status in the country is established. This will be done by adopting a historical approach; where an assessment of how mediation has evolved in South Africa will be made.

Once the current status of mediation in South Africa has been identified, the research paper intends to investigate the effects and impact of mandated mediation in Australia and Canada. Following this, a comparative analysis with the South African civil justice system will be conducted.

Thereafter, the research paper intends to identify challenges faced by the South African civil justice system. The research paper will then proceed to interrogate and discuss if mandated mediation is a possible solution to the identified challenges. In addition to this the research paper will assess the constitutionality of mandated mediation. Lastly, the research paper will make some final reflections and a conclusion shall be drawn.

The proposed chapter outline is as follows:

Chapter 1: Overview of the Topic

Chapter 2: Historical Background: How Mediation has evolved in South Africa

Chapter 3: Analysis of South Africa's Mediation Court Rules

Chapter 4: Analysis of Mandated Mediation in Australia and Canada

Chapter 5: The Advantages and Disadvantages of Mandatory Mediation

Chapter 6: Final Reflections and Conclusion

1.4. Importance and Benefits of the Study

The face of mediation and the role it has been playing in South Africa is something that is continuously changing and developing. It has also been developed in other jurisdictions. It is therefore an important subject that requires continuous engagement

and research. It is submitted that the findings of the proposed research can be utilised as tools of engagement, and persuasive mechanisms to legal scholars, academics and professionals when assessing the future of mandated mediation in South Africa. This research is intended to contribute to the reformation of the civil justice system.

CHAPTER 2: HISTORICAL BACKGROUND: HOW MEDIATION HAS EVOLVED IN SOUTH AFRICA

2.1. Introduction

This chapter seeks to provide a historical overview on how mediation has evolved in South Africa, with a specific focus on mediation in the context of family law and labour law. This chapter will assess the role mandatory mediation has played in South Africa, and determine what impact the procedure has had on the South African civil justice system.

2.2. Brief Legal History of Apartheid South Africa

Prior to 1994, the South African legal system and law reform was designed to cater to the white minority population.¹³ As a result, many laws discriminated against the non-white majority, and the rule of law was compromised.¹⁴ In addition to the above, there were several restrictions that prevented litigants from accessing the civil justice system. Restrictions included *inter alia* the state's use of ouster clauses to eliminate the jurisdiction of courts; court rules that enforced restrictive time limits and notice periods; and laws that prohibited legal proceedings against the state.¹⁵

2.3 Post-Apartheid South Africa

The dismantling of the Apartheid system in 1994 led to the formation of a constitutional dispensation founded on principles of democracy and the respect for human rights and fundamental freedom.¹⁶ The introduction of the Constitution resulted in the repealing and replacement of unjust laws that were enacted by the Apartheid government. The Constitution also introduced a Bill of Rights that includes *inter alia* the right to dignity, equality and most notably for purposes of this discussion, the right

¹³ Madala (2000) 26 no.3 *NCJ Int'l & Com. Reg.* 743 at 744.

¹⁴ *Ibid* at 748.

¹⁵ Nyenti (2013) 44 *De Jure* 901 at 910.

¹⁶ Endoh (2015) 7(1) *Africa Review* 67 at 71.

to access Court.¹⁷ South Africa's Constitution has been described as a forward-looking document that allows the state to transform the South African society with the passing of time.¹⁸ It is important to keep sight of this when discussing the reformation of South Africa's civil justice system.

Given South Africa's discriminatory history in denying people of colour the right to access Court, it is of utmost importance to approach the subject of transforming the civil justice system with the mentality of ensuring that changes in legal procedure are effectively decolonizing the system, and are constitutionally sound. It is submitted that effective legal transformation can only be achieved with this in mind.

2.4 South African Civil Procedural Law

South African law differentiates between substantive and procedural law.¹⁹ Procedural law focuses on the enforcement of rights, obligations and remedies, whereas substantive law refers to the content of an individual's rights, obligations and remedies.²⁰ The sources of civil procedure in South Africa are: the Constitution, The Superior Courts Act²¹; The Magistrates Court Act²²; The Small Claims Court Act²³; The Rules of Court, The Magistrates' Court Rules, the common law, case law and the inherent jurisdiction of the Superior Courts derived from section 173 of the Constitution.²⁴ South Africa's courts are independent bodies that are subject to the Constitution and the law.²⁵ The structure of the courts system is outlined in section 165 of the Constitution²⁶, which provides that the courts in South Africa consist of the Magistrates' Courts, the High Courts, the Supreme Court of Appeal, the Constitutional Court and any other court established in terms of an Act of Parliament.²⁷

¹⁷ Constitution of the Republic of South Africa, 1996.

¹⁸ Himonga (2013) 16(5) *PELJ* 372 at 373.

¹⁹ Van Loggerenberg (2016) 3 *BRICS Law Journal* 125 at 126.

²⁰ *Ibid.*

²¹ Superior Courts Act 10 of 2013.

²² Magistrates Court Act 32 of 1944.

²³ Small Claims Court Act 61 of 1984.

²⁴ Van Loggerenberg (2016) 3 *BRICS Law Journal* 125 at 126.

²⁵ *Ibid.*

²⁶ Constitution of the Republic of South Africa, 1996 s166.

²⁷ Van Loggerenberg (2016) 3 *BRICS Law Journal* 125 at 126.

Despite the shift to a democratic state, there are deep inequalities that still exist in South Africa.²⁸ South Africa faces challenges with regards to low standards of socio-economic empowerment, and poor access to basic facilities such as healthcare.²⁹ The socio-economic challenges that exist amongst the population play a role in individuals' ability to access the civil justice system.³⁰ Most South Africans cannot afford to approach a court and remain discouraged by the lengthy court processes and high litigation costs of the system.³¹

2.5. Defining Mediation

Mediation may be described as a negotiation process which is achieved through the assistance of a neutral third party referred to as a mediator.³² The mediator's role is to ensure that parties negotiate in an orderly and respectful manner. The mediator is also responsible for assisting disputants to reach a "mutually satisfactory resolution to their dispute".³³ Decisions made by a mediator are not binding. There are two approaches to mediation which focus on the interests and rights of the parties. The first approach may be described as "interests based or facilitative mediation."³⁴ Facilitative mediation aims to assist disputants to reach a resolution through encouraging them to consider the desires, worries and concerns that are linked to each party's position.³⁵ The theory underlying this method of mediation is that, considering parties' interests may result in a settlement agreement the parties had not considered, even in instances where the legal positions of the parties cannot be resolved.³⁶ The second method of mediation is "rights-based or evaluative mediation".³⁷ Evaluative mediation requires the mediator to study each party's case, and provide an evaluation of the dispute's strengths, weaknesses and likely outcome if the matter was to proceed to Court.³⁸

²⁸ Endoh (2015) 7(1) *Africa Review* 67 at 73.

²⁹ *Ibid.*

³⁰ Van Loggerenberg (2016) 3 *BRICS Law Journal* 125 at 146.

³¹ *Ibid.*

³² Goldberg & Brett et al (2017) 8.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid* at 9.

³⁷ *Ibid.*

³⁸ *Ibid.*

There are five basic principles that underpin the practice of mediation. These principles were identified by Ruth Charlton and are “confidentiality, voluntariness, empowerment, neutrality and a unique solution.”³⁹ These principles shall be briefly discussed below.

2.5.1 Confidentiality

Parties to a mediation process are not allowed to share any information that may have been disclosed during mediation.⁴⁰ The mediator is also barred from repeating any findings or information shared by the parties. The information presented in a mediation session cannot be submitted as evidence in court. This protection of privacy encourages parties to fully engage with the process, with the confidence of knowing that any information they share cannot be used against them.

2.5.2 Voluntariness

Parties to a mediation session are present because they want to be there. The voluntariness rationale is premised on the fact that parties willingly opt to engage in mediation and are not compelled to attend.⁴¹

2.5.3 Empowerment

Mediation is empowering because parties are able to negotiate for themselves and reach their own decision.

2.5.4 Neutrality

The mediator is required to play a facilitative role and be neutral throughout the process. The mediator is not permitted to play the role of a judge, to decide who is wrong or right, to provide advice, and to impose or suggest a solution.⁴²

³⁹ Spencer & Brogan (2007) 83-84.

⁴⁰ Ibid at 84.

⁴¹ Ibid.

⁴² Ibid.

2.5.5 A Unique Solution

Parties are entitled to come up with creative solutions that are suitable to their needs, provided that the resolution is not illegal, and the resolution does not need to conform to community norms and legal precedents.⁴³

2.6. African Group Mediation

As a result of colonialism, South African procedural law bares its roots from English and Roman Dutch procedural law.⁴⁴ It is important to note that legal pluralism dictates that there are many sources of law that can be “unwritten, unofficial and normative orders of society”.⁴⁵ Classical legal pluralism studies state that, prior to colonialism there were indigenous forms of law, and these laws continued to exist during the colonial era.⁴⁶ This notion is supported by the fact that African Group mediation existed during Apartheid.⁴⁷ South Africa formally became a legal pluralist state after the introduction of the Constitution which recognised customary law.⁴⁸ According to section 211 (3) of the Constitution “courts must apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”⁴⁹ South Africa therefore has a pluralist system of dispute resolution forums that, are both state and customary forums, where people living according to customary law can approach state and customary law forums for relief.⁵⁰

African mediation is conducted in the form of family or neighbourhood group mediation.⁵¹ This form of traditional mediation is mandatory, particularly in the case of family disputes. The procedure is carried out by the *Lekgotla/Inkundla* which can be described as a public mediation forum.⁵² Traditional mediation involves the community and not just the disputants. Family members, witnesses and general members of the

⁴³ Ibid.

⁴⁴ Van Loggerenberg (2016) 3 *BRICS Law Journal* 125 at 126.

⁴⁵ Veitch, Christodoulidis & Farmer (2007) 207.

⁴⁶ Ibid at 208.

⁴⁷ Wilcocks (2017) 24(2) *Acta Structilia* 146 at 149.

⁴⁸ Button (2016) 42(2) *JSAS* 299.

⁴⁹ Constitution of the Republic of South Africa, 1996 s211(3).

⁵⁰ Button (2016) 42(2) *JSAS* 299.

⁵¹ Boniface (2012) 15(5) *PELJ* 378 at 381.

⁵² Ibid.

public are required to be present. The mediation is conducted by the elders, the headmen or chief.⁵³ The nature of the proceedings is informal and is aimed at restoring relationships.⁵⁴

It may be argued that African mediation is favourable because, it provides disputants with an opportunity to mend their relationships with the support of their community, whilst expressing themselves in accordance with their cultural practices. However, it is important to note that African mediation is lacking with regards to the confidentiality principle of mediation, and could result in disputants' private matters being unwillingly exposed to the community. Furthermore, African mediation may have the result of imposing a solution that is favourable to the community and/or family rather than a solution that is favourable to the individual disputants. This has the effect of diminishing the empowerment principle of classical mediation.

The main value that underlies African mediation is the principle of ubuntu, which refers to an attitude of togetherness.⁵⁵ In the seminal Constitutional Court judgment of *S v Makwanyane*⁵⁶ where the death penalty was held to be unconstitutional Mokgoro J highlighted that:⁵⁷

[U]buntu envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation".

The South African Judiciary has continuously referred to the value of ubuntu in civil cases, and has highlighted that it is one of the values that underpins the Constitution.⁵⁸ This can be seen through the *Afri-Forum and Another v Malema and Others*⁵⁹ case, where Judge Lamont stated that ubuntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities, as it assists in providing solutions which

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ *S v Makwanyane* 1995 (3) SA 391.

⁵⁷ Ibid par 308.

⁵⁸ *Hoffmann v South African Airways* 2001 (1) SA (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

⁵⁹ *Afri-Forum and Another v Malema and Others* 2011 (6) SA 240 (Eqc).

contribute towards achieving more mutually acceptable remedies for parties.⁶⁰ He further stated that:⁶¹

[U]buntu is a concept which, inter alia dictates a shift from confrontation to mediation and conciliation, favours the re-establishment of harmony between the parties and favours face to face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful.

It is therefore submitted that, it is imperative to consider the value of ubuntu in determining whether compulsory mediation should play a role in reforming the South African civil justice system.

2.7. Mediation in Labour Law

South Africa's first comprehensive labour legislation was the Industrial Conciliation Act⁶² which introduced collective bargaining but, explicitly excluded black people in the definition of an employee.⁶³ In 1977, the Apartheid government was compelled to appoint the Wiehahn Commission of Inquiry as an attempt to, normalise the volatile labour market.⁶⁴ One of the key outcomes from the Inquiry was the introduction of equal labour rights between black and white employees. A specialist labour tribunal called the Industrial Court was also formed. The result was that black workers managed to find a voice *albeit* limited through participating in stay away actions.⁶⁵

A further development in the realm of labour relations during Apartheid South Africa was achieved in 1984, through the establishment of the Independent Mediation Service of South Africa (IMSSA).⁶⁶ IMSSA was a not for profit organisation that was separate to the Apartheid government.⁶⁷ IMSSA's role was to provide mediation and arbitration services to companies and unions.⁶⁸ It was one of the first organisations to utilise mediation and conciliation processes in the context of labour matters in South Africa.⁶⁹ Mediators were drawn from a panel of mediators the organisation had

⁶⁰ Ibid par 18.

⁶¹ Ibid.

⁶² Industrial Conciliation Act 11 of 1924.

⁶³ Fenwick & Novitz (eds) (2010) 261.

⁶⁴ Ibid at 262.

⁶⁵ Ibid.

⁶⁶ Nupen (2013) 13(3) *AJCR* 85 at 87.

⁶⁷ Ibid at 88.

⁶⁸ Bendeman (2006) 7(1) *AJCR* 137 at 138.

⁶⁹ Ibid.

established. The organisation was considerably effective and had a 70% settlement rate.⁷⁰

One of the main issues that law makers grappled with in relation to labour litigation at the beginning of South Africa's democracy was that the system was too expensive for most employees and labour matters were subject to extensive delays.⁷¹ In an attempt to make the system more accessible and less adversarial alternative dispute resolution mechanisms were established, which included a compulsory form of conciliation.⁷² This was done through the amendment of the Labour Relations Act⁷³ and the introduction of the Commission for Conciliation, Mediation and Arbitration (CCMA).

The CCMA is mandated to attempt to resolve disputes through conciliation.⁷⁴ When a dispute remains unresolved after conciliation the CCMA is required to arbitrate the dispute if: the LRA requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or if all parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the CCMA.⁷⁵

When a dispute is referred for conciliation, the CCMA must appoint a commissioner to attempt to resolve the dispute through conciliation within thirty days of the date the Commission received the referral.⁷⁶ The Commissioner is required to determine a process to attempt to resolve the dispute. This process may include mediating the dispute, conducting a fact finding exercise, and making a recommendation to the parties.⁷⁷ Commissioners are therefore not compelled to mediate in every dispute. It remains within the discretion of the Commissioner to determine if mediation is the appropriate process for the dispute that is before him/her. The Commissioner is permitted to call any expert to give evidence, and issue subpoenas for questioning any person who may be able to give information. It is submitted that the LRA allows the Commissioner to play an evaluative role and grants him/her a wide range of powers

⁷⁰ Ibid.

⁷¹ Bendeman (2006) 6(1) *AJCR* at 81 at 84.

⁷² Ibid.

⁷³ Labour Relations Act 66 of 1995.

⁷⁴ Ibid at s115(1)(a).

⁷⁵ Ibid at s115(b).

⁷⁶ Ibid at s 135(2).

⁷⁷ Ibid.

that exceed the scope of a mediator; who is supposed to facilitate discussions between disputants. A shortcoming of the LRA is that it does not state what process should be followed when disputants wish to proceed with mediation, and the Commissioner wishes to implement another method.

It is noteworthy to mention that the Labour Appeal Court (LAC) has addressed the issues relating to mandatory conciliation being a prelitigation procedure that could possibly infringe on disputants' right to access court. In the *Intervale (Pty) Ltd and Others v National Union of Metal Workers of South Africa*⁷⁸ case the LAC pronounced that there is nothing unconstitutional about the pre litigation procedural steps outlined in the LRA. The Court further stated that disputants cannot fail to comply with the steps that are required to be followed to enforce a right, and subsequently complain that these steps which they failed to comply with impinge on their constitutional right to access Court.⁷⁹ This position was confirmed by the Constitutional Court in the *National Union of Metal Workers of South Africa v Intervale (Pty) Ltd and Others*⁸⁰ case.

It may be argued that the CCMA created a system where anybody could raise a labour dispute without any costs involved and without necessity for legal representation. However, despite the potential the CCMA had at the beginning of South Africa's democracy its efficacy has come into question.⁸¹ The CCMA has been criticised for becoming a very sophisticated system.⁸² The presence of legal representation during conciliation has resulted in the process being made up of technical arguments and procedures.⁸³ This shows that adversarial practices by legal professionals can "spill over" into the mediation process, and detract from the potential benefits of mediation.⁸⁴ It is therefore important for legal professionals to be adequately trained on differentiating between the appropriate conduct for ADR and adversarial processes.⁸⁵ A significant number of employees lack the capacity to effectively utilise the CCMA because, they do not have the practical skills or training in labour law and labour

⁷⁸ *Intervale (Pty) Ltd & Others v NUMSA* JA24/2012 (LAC) 23

⁷⁹ *Ibid.*

⁸⁰ *Numsa v Intervale (Pty) Ltd* 2015 (2) BCLR 182 CC.

⁸¹ Bendeman (2006) 6(1) *AJCR* 81 at 84.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Baron (2014) 40(2) *MULR* 283 at 285.

⁸⁵ *Ibid.*

relations.⁸⁶ The CCMA is considered to be under strain due to its legalistic approach, extended delays and decreasing settlement rates.⁸⁷

In 2002, the LRA was amended and introduced a new process called conciliation-arbitration (con-arb).⁸⁸ Con-arb is a process where a third party attempts to get a settlement through conciliation but, if not successful proceeds immediately with arbitration.⁸⁹

In 2009, Borhat, Pauw and Mncube conducted a study that looked at the efficiency of the con-arb process for the financial years of 2004/2005 and 2005/2006.⁹⁰ Some of the findings were that the CCMA's settlement rate at the conciliation stage of con arb were notably higher than the settlement rates of conciliation that was conducted separately.⁹¹ The authors also noted that despite the statutory changes that were made to improve the efficacy of the labour relations system, the CCMA was generally struggling to meet the efficiency targets that it had set up for itself.⁹² This was specifically noted in relation to the CCMA's settlement rates, rate of postponements and turnaround time for conciliations.⁹³

To date, the CCMA is currently facing the same challenges that were noted by Borhat, Pauw and Mncube. This is can be seen through the 2018/2019 CCMA Annual Report which notes a high referral rate, and increase in cases from the previous financial year.⁹⁴ For the 2018/19 financial year, a total of 193 732 cases were referred to the CCMA, compared to the 186 902 cases in 2017/2018 financial year.⁹⁵ It was noted that a reason for this four per cent increase could be because of the volatile state of the South African labour market.⁹⁶ The continuous annual increase in the CCMA's case load inevitably places strain on the statutory body's ability to deliver its targets, and poses a risk to its efficacy. The increased caseload has resulted in the CCMA

⁸⁶ *Ibid.*

⁸⁷ Bendeman (2006) 7(1) *AJCR* 137 at 138.

⁸⁸ Labour Relations Act 66 of 1995 at s191(5) A.

⁸⁹ Bendeman (2006) 7(1) *AJCR* 137 at 152.

⁹⁰ Borhat et al (2009) 09/137 *DPRU* 26.

⁹¹ *Ibid.*

⁹² *Ibid* at 29.

⁹³ *Ibid.*

⁹⁴ Commission for Conciliation Mediation and Arbitration Annual Report (2018/19) 25.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

reviewing its utilisation of resources and capacity to ensure strategic allocation. The CCMA is also in the process of reviewing the current dispute resolution model it is using and determining how technology can be incorporated in making the system more efficient.⁹⁷ Despite the above mentioned challenges the CCMA recorded that it achieved the majority of its targets and noted a 95% performance rate.⁹⁸ The above shows that although the introduction of the CCMA has had a positive impact in increasing accessibility for employees in South Africa, it is evident that the system consists of many flaws and the right to access court is still under threat as a result of continuous delays and increased turn-around times.

This paper has established that the introduction of a conciliation process in labour litigation did not result in the dispute resolution system becoming less antagonistic. The CCMA still faces challenges with delays and accessibility. The labour needs of the South African society are evolving over time, and the CCMA is continuously faced with the challenge of meeting the shifting demands. Meeting new demands will require increased resources and capacity and usage of technology. It is further submitted, that it may be of use for law makers to consider amending the LRA to clearly outline what role mediation plays during conciliation, and the applicable rules thereto.

2.8. Mediation in Family Law

During the Apartheid era the Black Administration Act⁹⁹ (BAA) governed customary marriages. The BAA differentiated between civil marriages and customary marriages, and civil marriages were recognised, protected and regulated under the common law whilst customary marriages were not.¹⁰⁰ The lack of formal legal recognition of customary marriages resulted in customary wives being unable to access financial support from their husbands through common law maintenance, and other support remedies upon the dissolution of their marriage.¹⁰¹ In addition to this, the BAA stated that customary wives were considered to have permanent minority status.¹⁰² Permanent minority status resulted in these women being barred from accessing state

⁹⁷ Ibid.

⁹⁸ Ibid at 15.

⁹⁹ Black Administration Act 38 of 1927.

¹⁰⁰ Button (2016) 42(2) JSAS 299 at 303.

¹⁰¹ Ibid.

¹⁰² Black Administration Act 38 of 1927.

courts because a minor could not litigate without the consent of a guardian.¹⁰³ The only dispute resolution forums customary wives had access to were, customary dispute resolution forums which included ward, headmen and chief's courts.¹⁰⁴ Customary wives' access to these traditional court systems was also limited because they could only approach these forums if they were represented by a male person.¹⁰⁵ Arguably, this may have resulted in many women's rights issues falling to the way side during the dispute resolution process.¹⁰⁶

After independence, there was a major shift in these processes. The introduction of the Constitution in 1996 resulted in the prohibition of all forms of unfair discrimination, and in 1998, South Africa enacted the Recognition of Marriages Act¹⁰⁷ (RCMA) which had the effect of formally recognising customary marriages. It is significant to note that since the enactment of the RCMA, traditional courts (such as the chiefs' and headmen's courts) ceased to have jurisdiction to hear matters on customary marriages, including divorce.¹⁰⁸ These traditional courts' jurisdiction is now limited to mediation before divorce.¹⁰⁹

There was a sharp increase in divorce cases in South Africa in the 1970's.¹¹⁰ This had the effect of prompting discussions of establishing a Family Court.¹¹¹ As a result of political and legal reasons the idea of establishing such a court was accepted in 1983 by the Hoexter Commission of Inquiry into the Structuring and Functioning of the Courts (Hoexter Commission).¹¹²

One of the key outcomes of the Hoexter Commission was, the introduction of the Mediation in Certain Divorce Matters Act¹¹³ (MCDMA) which introduced the Family Advocate.¹¹⁴ This MCDMA created a mediatory role for a Family Advocate to play in

¹⁰³ Button (2016) 42(2) *JSAS* 299 at 303.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Recognition of Customary Marriages Act 120 of 1998.

¹⁰⁸ Hall, Richter, Makomane & Lake (eds) (2018) 67.

¹⁰⁹ *Ibid.*

¹¹⁰ Dewar & Parker (eds) (2003) 117.

¹¹¹ *Ibid* at 118.

¹¹² *Ibid.*

¹¹³ Mediation Certain Divorces Act 24 of 1987.

¹¹⁴ Dewar & Parker (eds) (2003) 118.

divorce matters.¹¹⁵ Section 4 of the MCDMA provided a court annexed form of mediation where parties may be compelled by a judicial officer to attend mediation with the Family Advocate.¹¹⁶ The Family Advocate is tasked with settling disputes of guardianship, custody and access of children.¹¹⁷ The Family Advocate is appointed by the Department of Justice and must be a qualified advocate in South Africa.¹¹⁸

It is noteworthy to mention that the Children's Act¹¹⁹ has introduced several mediation processes and broadened the scope of the Family Advocate's mandate.¹²⁰ The Children's Act compels parties to attend mediation in instances where, there is a dispute between the biological father and the biological mother of a child with regard to the biological father's fulfilment of certain parental conditions, outlined in the Children's Act.¹²¹ The matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.¹²²

In addition to this the Children's Act also directs that the co-holders of parental responsibilities and rights in respect of a child, must seek the assistance of a family advocate, social worker or psychologist or mediation through a social worker or other suitably qualified person in preparing the co-parenting plan.¹²³ There is evidence of South African Judges viewing mediation as a preferable dispute resolution mechanism in family matters, particularly those that refer to children. This can be seen through the *Townsend-Turner and Another v Morrow*¹²⁴ judgment which directed parties to mediate a matter that related to access of a minor. In this judgment Knoll J encouraged the parties engage in mediation, and reflected that the adversarial nature of court actions, and their costs tend to deepen the divide between disputants.¹²⁵ As a result of the above, it may be argued that introducing the MCDMA was a cost-effective step

¹¹⁵ De Jong (2010) 3 TSAR 515 at 527.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Mediation Certain Divorces Act 24 of 1987 s2.

¹¹⁹ Children's Act 38 of 2005.

¹²⁰ De Jong (2010) 3 TSAR 515 at 527.

¹²¹ Children's Act 38 of 2005 21(3)(a).

¹²² Ibid.

¹²³ Ibid at s33(1) & s33(5).

¹²⁴ *Townsend-Turner and Another v Morrow* (2004) 1 All SA 235 (C).

¹²⁵ Ibid.

to moving family litigation to a system with a more humanistic approach that, catered for the preservation of family relations, and centred on the needs of the children.¹²⁶

However, this model of mediation poses certain challenges. It is not suitable for all divorce matters where children are involved. This is the case where there is a risk of child abuse, drug and mental health problems.¹²⁷ In addition to this, parties who are compelled to attend mediation may accumulate legal fees at the mediation stage, and subsequently fail to afford legal representation at the trial stage.¹²⁸

Furthermore, in as much as it is favourable for the family advocate to focus his/her attention on the best interests of the child, it creates the risk of ignoring the disputants' interests. There is a risk that a family advocate may disregard possible women's rights issues or, issues relating to a party bargaining away their property just to ensure they retain custody of their child.¹²⁹ It is therefore evident that mediation does not necessarily give a win-win outcome for parties, and there is usually some form of compromise that the parties make in reaching a resolution during mediation.¹³⁰

2.9. Conclusion

This chapter has provided a historical overview on how mediation has evolved in South Africa, with a specific focus on mediation in the context of family law and labour law. This chapter has shown that mandatory mediation in South Africa has been introduced through legislation such as the Children's Act, Labour Relations Act and the MCMDA, and has determined that mediation has played a critical role in reforming family and labour law litigation, by making courts more accessible and less antagonistic. The chapter has also determined that it is not appropriate to mediate in every matter, and there are many shortcomings with South Africa's mediation models which have in certain instances resulted in litigants being subjected to increased costs, and unfavourably technical mediation processes.

¹²⁶ De Jong (2010) 3 *TSAR* 510 at 517.

¹²⁷ Burman (1990) 107(2) *SALJ* 251 at 252.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ De Jong (2010) 3 *TSAR* 510 at 522.

CHAPTER 3: ANALYSIS OF SOUTH AFRICA'S MEDIATION COURT RULES

3.1. Introduction

This chapter seeks to provide an overview and an analysis of the mediation procedures that have been adopted in South Africa's Magistrates' Court Rules and Uniform Rules of Court. This chapter will also discuss the constitutional implications of introducing mandatory mediation in South Africa.

3.2. Magistrates' Court Rules: Court Annexed Mediation

During the 2011 Access to Justice Conference former Chief Justice Ngcobo described South Africa's justice system as "expensive, slow, complex and fragmented and overly adversarial."¹³¹ Chief Justice Ngcobo noted that the three main challenges that South Africa faced were equipping courts with properly trained administrative personnel who could competently handle the increasing volume of litigation; developing a system that is just, fair and inexpensive and lastly, addressing the issues of costs and delays in the justice system.¹³²

One of the ways in which the government has attempted to alleviate the burden on the civil justice system and further access to justice in the country is through the introduction of mediation found in Chapter 2 of the Magistrates Court Rules. Rule 75(1) stipulates that parties may refer a matter to mediation before the commencement of litigation proceedings or during legal proceedings as long as it is before the delivery of judgment and with the Court's consent.¹³³ The word "may" in this section reflects how this mediation process is voluntary, and is completely up to the litigants to determine if they wish to explore mediation.

The Magistrates' Court Rules also state that a judicial officer may, after the commencement of proceedings suggest mediation as an option for the litigants to

¹³¹ Ngcobo CJ, Opening Remarks Access to Justice Conference (15 April 2011). Towards Delivering Accessible Quality Justice for All, April 2011. *Proceedings*. South Africa at 15.

¹³² *Ibid* at 11.

¹³³ Magistrates' Court Rules, Chapter 2, 75(1).

consider.¹³⁴ Again, in this instance the discretion lies with the litigants on whether to proceed to mediate or not. Litigants who agree to proceed with mediation are required to nominate a mediator.¹³⁵ If litigants are unable to choose a mediator the registrar of the Court will nominate one.¹³⁶ The Court has a schedule of mediators that are appointed after attending a forty hours mediation accreditation course. Unlike the Family Advocate or Commissioner at the CCMA, a mediator in this instance does not need to have a legal qualification in order to be appointed.¹³⁷ The current schedule of mediators reflects that some mediators vary from being attorneys, quantity surveyors, social workers, accountants and estate agents.¹³⁸ It may be argued that parties may perceive a mediator who does not possess a legal qualification with scepticism, especially in cases where they approached the justice system with the intention of having their matter heard by a judicial officer.

In order to institute mediation proceedings, a party claiming relief is required to submit a statement of facts outlining the nature of the dispute with the registrar and serve this on the Respondent/Defendant.¹³⁹ The Respondent/Defendant has ten days to respond to this statement of facts in the form of a statement of defence.¹⁴⁰

Both parties are required to share the costs of the mediator equally, unless one party agrees to pay in full.¹⁴¹ This contrasts with the Family Advocate and CCMA processes, which do not require the parties to share the costs of the mediator. It therefore may be argued that, mediation at the Magistrates' Court level may not be a cost-effective option for the parties, especially if the matter is not resolved through mediation and proceeds to trial. Parties are also entitled to legal representation at their own cost.¹⁴²

¹³⁴ Ibid at rule 75(2).

¹³⁵ Ibid at rule 75(4)(a).

¹³⁶ Ibid.

¹³⁷ Court Annexed Mediation <https://www.justice.gov.za/mediation/mediation.html> (accessed 20 April 2020).

¹³⁸ List of persons as mediators in terms of rule 86(2) of the Court Annexed Mediation rules <https://www.justice.gov.za/mediation/MediatorsList-20190213.pdf> (accessed 20 April 2020).

¹³⁹ Magistrates' Courts Rules rule 75(5).

¹⁴⁰ Ibid at rule 75(6).

¹⁴¹ Ibid at rule 85(2).

¹⁴² Ibid at rule 85(4).

The proceedings are confidential and information disclosed during the mediation process cannot be used as evidence in Court.¹⁴³

3.3. Uniform Rules of Courts: Mediation as a Pre-Action/Application Protocol

On 9 March 2020, Rule 41A of the Uniform Rules of Court came into effect and applies to all High Courts in South Africa.¹⁴⁴ Rule 41A requires that in every new action or application proceeding the Plaintiff or Applicant shall serve on each Defendant or Respondent a notice indicating whether such Plaintiff or Applicant agrees to or opposes referral of the dispute to mediation.¹⁴⁵ A Defendant or Respondent is required to deliver a notice of intention to defend or replying affidavit stating whether they are opposed to mediation.¹⁴⁶ These notices are considered to be without prejudice.¹⁴⁷ Parties must state the reasons why they believe matters should be mediated or not.¹⁴⁸ The rule also makes provision for parties to refer a dispute to mediation at any stage prior to judgment.¹⁴⁹ The rule also states that a judge at the stage of making cost orders may take into account the reasons why parties opted not to engage in mediation.¹⁵⁰ During the mediation process, the parties have to enter into an agreement to mediate, file a minute recording the decision to mediate, and file a joint minute indicating whether a settlement was reached.¹⁵¹ Parties are equally liable for the fees of the mediator unless they agree otherwise.¹⁵² Attending the mediation session does not negate a party's right to have the matter proceed to trial.¹⁵³ If there are still outstanding issues after the mediation, the parties are entitled to proceed trial.¹⁵⁴ The rule applies to matters where there are multiple parties and does not

¹⁴³ Ibid at rule 80(1)(e).

¹⁴⁴ South Africa (2020) Rules Board for Courts of Law Act, 1985 (act no. 107 of 1985) Amendment of the Rules Regulating the Conduct of Proceedings of the several Provincial and Local Divisions of the High Court of South Africa. *Government Gazette* 656, February 7 (Regulation Gazette No. 43000).

¹⁴⁵ Uniform Rules of Court, rule 41A(2)(a).

¹⁴⁶ Ibid at rule 41A(2)(b).

¹⁴⁷ Ibid rule 41(A)(2)(d).

¹⁴⁸ Ibid at rule 41A(2)(c).

¹⁴⁹ Ibid at rule 41A(3)(a).

¹⁵⁰ Ibid at rule 41A(9)(b).

¹⁵¹ Ibid at rule 41A (4).

¹⁵² Ibid at rule 41(A)(9)(a).

¹⁵³ Ibid at rule 41A (5)(d).

¹⁵⁴ Ibid at rule 41A(5)(d).

require all parties to be present for mediation to proceed in such a matter.¹⁵⁵ Mediation will be deemed to be complete within thirty days from the signing of the joint minute.¹⁵⁶

It is submitted that Rule 41A does not mandate mediation, instead it compels parties to consider mediation. The rule does not provide clear directions on what would prove that a party satisfactorily considered mediation. This remains unclear. Rule 41A states that a Judge may consider mediation notices, tenders and offers made by parties when making an order of costs.¹⁵⁷ It may be argued that this means parties could be subject to adverse cost orders if they cannot satisfactorily prove that they considered mediation. English courts have applied cost orders in instances where parties did not prove that they contemplated mediation. This can be seen in the *Dunnett v Railtrack*¹⁵⁸ judgment where the Court refused to grant a party legal costs on the ground that party's refusal to mediate was unreasonable. Parties may therefore feel pressured to attend mediation in order to avoid being issued with an adverse cost order.

Another shortcoming of this rule is that it applies to all legal proceedings, and does not provide exceptions.¹⁵⁹ Mediation is not suitable for all proceedings.¹⁶⁰ Examples of civil proceedings that have been identified as being inappropriate for mediation are high level conflicts and conflicts where very complicated legal issues are involved.¹⁶¹ It is significant to note that, a research study of the Saskatchewan justice system in Canada showed that many lawyers acknowledged the difficulty of predicting whether mediation would be useful or not.¹⁶² The research also showed that even in circumstances that did not seem conducive to mediation, lawyers have been surprised with what was achieved through participating in the process.¹⁶³ It is therefore submitted that leaving the decision to consider mediating completely in the hands of the parties is unfavourable because, parties and their legal representatives may be ill equipped to identify the benefits of mediating for their particular disputes. Furthermore, the rule should not permit mediation to happen where multiple parties are involved due

¹⁵⁵ Ibid at rule 41A(5)(a).

¹⁵⁶ Ibid at rule 41A(8)(a).

¹⁵⁷ Ibid at rule 41A(9)(b).

¹⁵⁸ *Dunnett v Railtrack* (2002) EWCA (Civ) 2003 (Eng).

¹⁵⁹ Ibid at rule 41A(5)(a).

¹⁶⁰ *De Jong* (2010) 3 *TSAR* 510 at 522.

¹⁶¹ Ibid.

¹⁶² *McFarlane* (2005) 42(3) *ALR* 677 at 688.

¹⁶³ Ibid.

to the complexities that arise with that.¹⁶⁴ This notion is supported by Lon Fuller who has identified that mediation by its very nature is generally unsuitable when more than two parties are involved.¹⁶⁵

3.4. Constitutional Implications of Mandatory Mediation

It may be argued that the creation of a pre litigation procedure that requires parties to mediate before approaching a court could violate litigants' right to access a court. This is because the process prevents litigants from directly approaching a court, which could impact on the fairness of the hearing.¹⁶⁶

It is important to note that courts must have rules that govern their proceedings.¹⁶⁷ These rules require parties to follow certain steps prior to proceeding with a claim or defence. The Constitutional Court in the matter of *Mukaddam v Pioneer Foods (Pty) Ltd & Others*¹⁶⁸ held that litigants are required to follow certain procedural steps to enable courts to effectively adjudicate their dispute.¹⁶⁹ The *Mukaddam* case further stated that the rules of court are used as tools to facilitate access to court rather than hindering it.¹⁷⁰ A limitation to the right to access court that is created from these rules must therefore be compliant with the Constitution, and should be justifiable in accordance with section 36 of Constitution. If the introduction of a pre-litigation step that mandates mediation is a justifiable limitation in terms of section 36 of the Constitution, it cannot be argued that the procedure is unconstitutional.

It is submitted that the assertion of the authors Brand and Todd, that mandatory mediation in the South African context is not unconstitutional is correct. This is because compelling parties to attend mediation does not force them to reach an agreement or, prohibit them from subsequently referring the dispute to a court if the disputants do not reach an agreement.¹⁷¹ The mediation process itself remains

¹⁶⁴ Fuller (1971) 44(2) *SCLR* 305 at 330.

¹⁶⁵ *Ibid.*

¹⁶⁶ Tokiso Dispute Resolution (eds) (2015) 49.

¹⁶⁷ *Ibid* at 50.

¹⁶⁸ *Mukaddam v Pioneer Foods (Pty) Ltd & Others* SA 89 (CC) 2013 par 31.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Tokiso Dispute Resolution (eds) (2015) 49.

voluntary and within the control of the parties.¹⁷² If the compulsion ends at the stage of entering a process, the litigants' rights are not unjustifiably denied.¹⁷³ However, if the compulsion extends to forcing parties into a settlement then, it could be successfully argued that justice in that instance would be denied, and that the process would amount to an unjustifiable limitation to the right to access court.¹⁷⁴

3.5. Conclusion

This chapter has provided an overview of the mediation rules contained in the Magistrates' Court Rules and the Uniforms Rules of Court. The chapter has determined that the Court Rules outline voluntary mediation procedures and litigants are not compelled to mediate. The chapter has identified certain deficiencies within the Court Rules, namely that the rules provide for multiple party mediation which has proven to be ineffective; the rules apply to all legal proceedings and do not state any exceptions, and Rule 41A of the Uniform rules of Court is vague because it does not provide clear directions on what would prove that a party has satisfactorily considered mediation. It is therefore submitted that the rules should be amended in order to cure these deficiencies. Lastly, the chapter has concluded that mandatory mediation is a constitutionally compliant procedure because, it does not force disputants to settle nor does it bar them from approaching a court if mediation does not yield a solution.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Vettori (2015) 15 *AHRJ* 355 at 359.

CHAPTER 4: ANALYSIS OF MANDATED MEDIATION IN CANADA AND AUSTRALIA

4.1. Introduction

This chapter seeks to analyse the mandatory mediation procedures that have been adopted in Canada and Australia and compare them to the South African mediation procedures. This chapter also seeks to ascertain the impact that mandatory mediation has had in Canada and Australia and determine which experiences can be recommended for consideration in South Africa.

4.2. Analysis of Mandated Mediation in Canada

4.2.1 *Brief Background of the Canadian Civil Justice System*

Canada is a federal monarchy with provincial governments and a federal government that are constitutionally empowered.¹⁷⁵ The administration of civil justice and civil courts in Canada is divided between, the provincial and federal governments.¹⁷⁶ All Canadian provinces follow common law tradition with the exception of Quebec which originates from civil law.¹⁷⁷ Provincial governments in Canada have legislative authority over the administration of justice and procedures relating to civil matters in provincial courts.¹⁷⁸ Civil procedure is therefore not applied uniformly across the provinces. Civil matters in Canada are usually heard in provincial Superior Courts.¹⁷⁹ These provincial courts are considered to be courts of “inherent jurisdiction”, and have broad jurisdiction to hear most matters.¹⁸⁰ The federal and provincial governments share responsibility for the superior courts.¹⁸¹ The Supreme Court of Canada, is the highest court in the country and has jurisdiction to hear appeals on all matters from

¹⁷⁵ Silver (2015) 4 *ELR* 232 at 233.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

the provincial appellate courts, and its decisions are binding nationwide, even if a decision is made in the context of legislation that is only applicable to one province.¹⁸²

4.2.2 Challenges with Canada's Civil Justice System

The Canadian judiciary has been critical of its civil justice system.¹⁸³ Many members of the judiciary have described the system as being in crisis, and failing to provide access to knowledge, resources and services that enable people to adequately deal with civil and family legal matters.¹⁸⁴ These remarks echo some of the reflections that have been made about the South African civil justice system.¹⁸⁵ This shows that dissatisfaction with the adversarial system is a global phenomenon. However, it is significant to note that despite its challenges the adversarial system has many strengths which are key to ensuring the right to access court is realised.¹⁸⁶ These strengths are “judicial impartiality and independence, pursuit of truth, consistency, flexibility and the democratic nature of its process.”¹⁸⁷

In 1996, the Canadian Bar Association (CBA) conducted a nationwide review of the Canadian civil justice system.¹⁸⁸ The findings were captured in the Canadian Bar Association's Systems of Civil Justice Task Force Report (CBA Report) that was released in 1996.¹⁸⁹ The CBA report, identified cost and delay as major barriers to accessing justice in Canada.¹⁹⁰ The CBA also highlighted the challenges that Canadians had accessing justice, and recommended that ADR mechanisms be built into the Canadian civil justice system.¹⁹¹ The report advocated for Canada to develop a multi optional civil justice system where, lawyers shifted their focus from rights-based thinking towards a wider problem-solving approach that could make justice more accessible and efficient.¹⁹² One of the key outcomes that stemmed from the report

¹⁸² Ibid.

¹⁸³ Farrow (2014) 51(3) *OHLJ* 957 at 962.

¹⁸⁴ Ibid at 962-963.

¹⁸⁵ See note 4.

¹⁸⁶ Baron (2014) 40(2) *MULR* 283 at 287.

¹⁸⁷ Ibid.

¹⁸⁸ Farrow (2014) 89.

¹⁸⁹ Ibid.

¹⁹⁰ Billingsley (2016) 45(2-3) *CLWR* 186 at 191.

¹⁹¹ Farrow (2014) 90.

¹⁹² Ibid.

was the recommendation for ADR to be formally incorporated as a mandatory step at early and later stages of the litigation process, in order to facilitate the settlement of claims.¹⁹³

4.2.3 Mandatory Mediation in Canada

Determining the extent that mandatory mediation has been adopted in Canada is a difficult task because, of the numerous jurisdictions and court systems that exist within the country. Some provinces permit the Court on a case by case basis to order parties to mediate.¹⁹⁴ In certain jurisdictions mediation is a compulsory prelitigation process for small claims proceedings.¹⁹⁵ In British Columbia, a quasi-mandatory process exists whereby a litigant can force other parties into mediation by serving a notice to mediate.¹⁹⁶ There are three provinces that compel ADR participation as a pre litigation requirement in standard cases. These provinces are Ontario, Alberta and Saskatchewan.¹⁹⁷

4.2.4 Brief Overview of Mandatory Mediation in the Ontario Civil Justice System

In Ontario, disputants are compelled to participate in mediation “within 180 days after the first defence has been filed”.¹⁹⁸ This rule applies, with some exceptions, to most civil litigation matters and applies only to the City of Toronto, the City of Ottawa and the County of Essex.¹⁹⁹

Rule 24.1.02 of the Ontario rules of civil procedure (Ontario rules) defines mediation as, “a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution.”²⁰⁰ The South African and Ontario definitions both refer to the neutrality of the mediator. However, the South African definition of mediation in the Uniform Rules of Court provides a wider

¹⁹³ Billingsley (2016) 45(2-3) CLWR 186 at 191.

¹⁹⁴ Ibid at 192.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid at 193.

¹⁹⁹ Ibid.

²⁰⁰ Rules of Civil Procedure, RRO 1990, Reg 194, (Ontario Rules) rule 24.1.02.

description of the role of the mediator than the Ontario definition. The South African definition, is extensive in that it states that:²⁰¹

[T]he mediator assists the parties to either resolve the dispute between them or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.

In Ontario, mandatory mediation has been described as a “predominantly evaluative or adjudicative process.”²⁰² This contrasts with South Africa, where mediation is described as a facilitative process.²⁰³ It may be argued that the adjudicative model of mediation that exists in Ontario contradicts the classical principles of mediation which describe mediation as a facilitative process.²⁰⁴

Rule 75.1 of the Ontario rules, directs that “contested estates, trusts and substituted decisions” must be referred to mandatory mediation.²⁰⁵ Interestingly, family law matters are not required to go through mandatory mediation.²⁰⁶ This contrasts with the South African civil justice system where there is a form of mandatory mediation that exists in divorce matters that involve children which is conducted through the services of the Family Advocate.²⁰⁷

Rule 24.1.14 of the Ontario Rules guarantees confidentiality during the mediation process.²⁰⁸ However, in the matter of *Rogacki v Belz*²⁰⁹, the Ontario Court of Appeal stated that there is no enforceable guarantee of confidentiality in the Ontario rules.²¹⁰ The Ontario Court of Appeal stated that mandatory mediation was protected but the protection is limited to only being an extension of the law without prejudice, and it is

²⁰¹ Uniform Rules of Court rule 41A (1).

²⁰² Kirkwood P “Ontario’s Mandatory Mediation Program”

<https://www.margaretmitchell.org.uk/sites/www.margaretmitchell.org.uk/files/2019-08/Appendix%203%20PK%20-%20Research%20-%20Ontario%27s%20Mandatory%20Mediation%20Program%20for%20Paul%20Kirkwood%20%28002%29.pdf> August 2019 (accessed 20 April 2020).

²⁰³ Magistrates’ Court Rules rule 73; Uniform Rules of Court rule 41A.

²⁰⁴ Spencer & Brogan (2007) 84.

²⁰⁵ Rules of Civil Procedure, RRO 1990, Reg 194, (Ontario Rules) rule 75.1.

²⁰⁶ Rules of Civil Procedure, RRO 1990, Reg 194, (Ontario Rules) rules 24 & 75.

²⁰⁷ Mediation in Certain Divorces Act 24 of 1987.

²⁰⁸ Rules of Civil Procedure, RRO 1990, Reg 194, (Ontario Rules) rule 24.1.14.

²⁰⁹ *Rogacki v Belz* (2003) 67 O.R. (3d) 330.

²¹⁰ *Dollak* (2004) 29 AQ 125 at 127.

not an absolute guarantee stemming from the mediation process.²¹¹ South Africa provides a similar limited guarantee of confidentiality.²¹² This can be seen through the Uniform Rules of Court which state that notices, offers or tenders made in relation to the mediation process shall be without prejudice.²¹³ The above highlights that although confidentiality is a cornerstone principle of mediation, the reality in practice is that it is not an absolute guarantee.²¹⁴

It is therefore important for mediators to ensure that parties are aware of the instances where information shared during the mediation process may be disclosed.²¹⁵ It is submitted that the lack of absolute confidentiality may deter litigants from openly and fully engaging with the mediation process.²¹⁶ It could result in parties deliberately limiting the information they share as a result of fearing their private communications may be repeated elsewhere.²¹⁷ This results in parties losing confidence in the mediation process, which ultimately defeats the purpose of mediation.²¹⁸

A study conducted in 2001 after the introduction of the mandatory mediation program in Ontario showed that, mediation had reduced the costs of eighty five per cent of the cases and fifty seven per cent of users of the system claimed that it had a significant positive impact.²¹⁹ In subsequent years, research found that in 2016 approximately sixty per cent of the matters were settling as a result of mandatory mediation.²²⁰ The data appears to indicate that mandatory mediation works in Ontario, and has contributed positively to the efficiency of the civil justice system.²²¹

²¹¹ Ibid.

²¹² Uniform Rules of Court rule 41A.

²¹³ Ibid.

²¹⁴ Dollak (2004) 29 AQ 125 at 127.

²¹⁵ Ibid at 135.

²¹⁶ Ibid at 129.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Kirkwood P “Ontario’s Mandatory Mediation Program”

<https://www.margaretmitchell.org.uk/sites/www.margaretmitchell.org.uk/files/2019-08/Appendix%203%20PK%20-%20Research%20-%20Ontario%27s%20Mandatory%20Mediation%20Program%20for%20Paul%20Kirkwood%20%28002%29.pdf> August 2019 (accessed 20 April 2020).

²²⁰ Ibid.

²²¹ Ibid.

4.2.5 Brief Overview of Mandatory Mediation in the Alberta Civil Justice System

The Alberta Court Rules provide a list of dispute resolution processes which litigants are mandated to engage in, failing which the dispute cannot proceed to go to trial.²²² One of the dispute resolution processes that exist in Alberta is a process that mandates mediation where parties are required to participate in good faith.²²³ There are certain exceptions to the mandatory mediation rule.²²⁴ Some of the exceptions are: instances where the parties have already engaged in a dispute resolution process, and the parties together with the Court feel that it would be unnecessary to engage in an additional process; instances where there are persuasive reasons why the dispute resolution process should not be used by the parties; and instances where the nature of the claim is such that a decision by a court is necessary or desirable.²²⁵ This contrasts with South Africa where the Court Rules do not provide a list of matters which would be considered exceptions to the mediation rules that are outlined in the Magistrates' Court Rules and Uniform Rules of Court.²²⁶ It is submitted that for the purposes of clarity, it may be beneficial for South Africa to consider adding a list of exceptions to its mediation rules.

It is significant to note that, Alberta has a system of judicial dispute resolution (JDR), with a few exceptions, whereby “a judge actively facilitates a process where parties resolve all or part of the dispute by agreement”.²²⁷ This is similar to the South African civil justice system, which has a system of case management through judicial intervention.²²⁸ According to Rule 37(A) (1) of the Uniform Rules of Court:²²⁹

[A] judicial case management system shall apply at any stage after a notice of intention to defend is filed to the categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive; and to any other proceedings in which judicial case management is determined by the Judge President, or upon the request of a party.

²²² Billingsley (2016) 45(2-3) CLWR 186 at 193.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Magistrates' Court Rules; Uniform Rules of Court.

²²⁷ Billingsley (2016) 45(2-3) CLWR 186 at 193.

²²⁸ Uniform Rules of Court rule 37A.

²²⁹ Ibid at rule 37A (1).

The purpose of the case management system in South Africa is to relieve congested trial rolls and resolve the problems which cause delays in the finalisation of cases.²³⁰ There has been research that shows that JDR has been an overall success in Alberta.²³¹ Between 1 July 2007 and 30 June 2008, Alberta recorded a ninety per cent settlement rate for parts or all cases that were referred for JDR.²³² In addition to this, the Alberta judiciary has lamented positively on the impact of JDR, stating that lawyers and clients have generally been satisfied with the process.²³³ This highlights that mediation should not be seen as the only ADR process in transforming a civil justice system, and other methods such as judicial case management have proven to be effective tools in the reformation process. This assertion is supported by Legg and Boniface who contend that a “bespoke approach” should be adopted and pre action protocols should not be used on all cases with the belief that “one size fits all”.²³⁴

It is noteworthy to mention that, Alberta’s mandatory mediation rule was suspended in 2013 through a notice to the profession which stated that the notice would “remain in effect until such a time as the judicial complement of the Court and other resources permit reinstatement.”²³⁵ It can be assumed from the way the notice was written that the reason for the suspension related to the resources and capacity required to enforce such a rule.²³⁶ The rule was reinforced in September 2019, on a one year pilot project basis.²³⁷ It is therefore submitted that mandatory mediation can only effectively reform a civil justice system, if there are sufficient resources, and personnel to adequately implement the dispute resolution process.

²³⁰ Ibid at 37A (2)(a).

²³¹ Farrow (2014) 99.

²³² Ibid.

²³³ Ibid.

²³⁴ Legg & Boniface, Pre-action Protocols (May 4-7, 2010). Non-Adversarial Justice: Implications for the Legal System and Society Conference, May 2010. *Proceedings*. Australia.

²³⁵ Billingsley (2016) 45(2-3) CLWR 186 at 194.

²³⁶ Ibid.

²³⁷ Koshan J, Mosher J & Wieggers W “Mandatory Dispute Resolution coming back to Alberta, But what about Domestic Violence?”

<https://ablawg.ca/2019/08/30/mandatory-dispute-resolution-coming-back-to-alberta-but-what-about-domestic-violence-cases/> 30 August 2019 (accessed 31/01/2020).

4.2.6 Brief Overview of Mandatory Mediation in the Saskatchewan Civil Justice System

Civil cases in Saskatchewan that are filed in the Queen's Bench are required to proceed to a mediation session unless an exemption is formally granted.²³⁸ The Saskatchewan mediation system is flexible and operates within a limited framework of procedural rules.²³⁹ Mediation sessions begin with "two individual caucuses" which are usually followed by a joint session.²⁴⁰ The mediator is required to file a certificate of completion once the mediation sessions are complete.²⁴¹ The mediator's costs for the initial session are paid by the Department of Justice, with parties only paying for an increased filing fee.²⁴² The costs of additional sessions are shared between the parties.²⁴³ It is submitted that this system is cost effective for litigants, as mediation will not result in them being out of pocket. This is important, particularly for instances where the matter is not settled through mediation and ends up proceeding to trial after mediation is complete. This highlights a shortcoming of the South African civil justice system where the Department of Justice does not pay for the costs of mediators, and parties are required to share the costs of the mediator or split the costs in a manner they agree upon.²⁴⁴ It is submitted that, it may not be an effective reformative step to compel parties in South Africa to attend mediation, and further compel them to pay for the mediator's costs. It may be argued that placing litigants in such a financially unfavourable position may impact on their right to a fair hearing.

If a party fails to attend mediation in Saskatchewan, the Court may strike the pleadings of the party or compel the party to attend mediation.²⁴⁵ This is in contrast to the South African Court Rules, which do not give judicial officers the power to strike the pleadings of a party or force a party to attend mediation in the event they refuse to mediate.²⁴⁶ Similar to South Africa, Saskatchewan does not have a requirement for parties to

²³⁸ McFarlane (2005) 42(3) *ALR* 677 at 682.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ Magistrates' Court Rules rule 84; Uniform Rules of Court rule 41A9(a).

²⁴⁵ McFarlane (2005) 42(3) *ALR* 677 at 683.

²⁴⁶ Magistrates' Court Rules; Uniform Rules of Court.

engage in good faith during mediation.²⁴⁷ Research has shown that this has presented some challenges during mediation sessions. Parties sometimes attend mediation sessions unprepared and do not engage openly and genuinely.²⁴⁸ A good faith participation rule may alleviate these challenges.²⁴⁹ However, research has also shown that the introduction of a good faith participation requirement is controversial, and many lawyers are reluctant in having such a rule added to the Saskatchewan rules.²⁵⁰ The South African legal profession may therefore also not be so welcoming to the idea of introducing a good faith participation rule for mediation. Research would have to be conducted to determine, what the South African legal profession's perception is on how far the Court Rules should go in determining how parties should participate during mediation.

4.3. Analysis of Mandated Mediation in Australia

4.3.1 *Brief Background of the Australian Civil Justice System*

Australia consists of eight states and territories, with each state and territory having its own arms of government and individual court system in which the highest court is the Supreme Court of that state or territory.²⁵¹ The Supreme Courts have both trial and appellate functions.²⁵² There is also a Federal Parliament that legislates for the whole country on matters prescribed by the Australian Constitution.²⁵³ As a result of Australia having an eight-state based court system, the Australian civil justice system has been described as “complex” and “highly fragmented”.²⁵⁴ The fragmented nature of the Australian civil justice system mirrors the nature of the Canadian civil justice system. Australia also has the Federal Court of Australia, the Family Court of Australia, the Federal Circuit Court and the High Court.²⁵⁵ The Federal system means that legislative and court initiatives are different in each state.²⁵⁶ The High Court of

²⁴⁷ McFarlane (2005) 42(3) *ALR* 677 at 682.

²⁴⁸ *Ibid* at 689.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid*.

²⁵¹ Waye (2016) 45(2-3) *CLWR* 214 at 215.

²⁵² *Ibid*.

²⁵³ *Ibid*.

²⁵⁴ *Ibid*.

²⁵⁵ Waye (2016) 45(2-3) *CLWR* 214 at 215.

²⁵⁶ *Ibid*.

Australia is the final court of appeal for Australian cases.²⁵⁷ It may serve as a Court of first instance for certain cases but, its main purpose is to hear appeals from the appellate decisions of state and territory Supreme Courts, and the Full Courts of the Federal Court of Australia and the Family Court of Australia.²⁵⁸

4.3.2 Development of Mediation in Australia

A widely accepted definition of mediation in Australia is:²⁵⁹

[A] problem-solving facilitative method, in which the mediator's intervention is centred on providing the parties with a series of formal steps to assist their communication and to steer them towards a self-determined and mutually agreeable resolution of the issues in dispute.

This definition is similar to the definition provided in South Africa where the mediator also plays a facilitative role. In 1980, Community Justice Centres were established in New South Wales, Australia.²⁶⁰ These Justice Centres were part of a pilot program that provided voluntary mediation services for certain disputes.²⁶¹ The mediation program was made permanent in 1983 after positive results were noted from the pilot which resulted in an increase in the number of organisations offering mediation.²⁶²

The rise in mediation in Australia can also be attributed to the increase in private mediation between 1991 and 1993.²⁶³ During this period in time, a new initiative was adopted which involved the Law Societies of Queensland, New South Wales and Victoria partnering with Superior Courts to conduct what is known as "Settlement Week and Spring Offensive".²⁶⁴ Through these initiatives lawyers who had received mediation training attended an induction workshop, and were subsequently allocated mediations that were directly referred from the judiciary.²⁶⁵ This resulted in high

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Field (2012) 19 *James Cook U.L. Rev* 41.

²⁶⁰ Hanks (2012) 35(3) *UNSW Law Journal* 929 at 945.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Rooney G, The Australian Experience of Legislated Pre-Action ADR Requirements: Specificities, Acceptation, and Keys to Success (November 4, 2015). 6th Symposium of the Institut de médiation et d'arbitrage du Québec in Montréal, November 2015. *Proceedings*. Canada.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

settlement rates. There is now an active culture of private based mediation in Australia because of these initiatives.²⁶⁶

Another reason for the development in mediation practice in Australia has been termed as the “Sir Lawrence Effect”.²⁶⁷ This refers to the influence the former Chief Justice of New South Wales had in developing mediation practice in the country, and creating an appetite for such practice amongst legal professionals and members of the bench. Subsequent to his retirement in 1988, Justice Sir Lawrence started a mediation practice where the work he engaged in brought legitimacy to the mediation practice in Australia, and aided in shifting negative opinions and attitudes amongst legal professionals and presiding officers around mediation.²⁶⁸ His mediation work had a domino effect and resulted in many legal professionals going into mediation practice. As a result of the above, mediation has now been embraced as an integral part of Australian litigation. The South African experience contrasts to this because, South Africa’s mediation Court Rules are new, and the country does not have such an advanced mediation culture.

The adoption and transformation of mediation in Australia was also partly due to the establishment of the National Alternative Dispute Resolution Advisory Committee (NADRAC).²⁶⁹ This initiative was brought by the Federal Attorney General, and it was done in order to create a platform where experienced mediators could advise on policy issues with respect to alternative dispute resolution within a legislation framework.²⁷⁰ Two key outcomes that stemmed from NADRAC were that they developed a broad set of national mediation standards and accreditation in Australia and they developed pre-action litigation requirements.²⁷¹ NADRAC also drafted an internal report within the Federal Attorney General’s Department which subsequently led to the enactment of the Federal Civil Dispute Resolution Act²⁷². NADRAC has played a similar role in facilitating the enactment of similar legislation in various states within Australia.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Civil Dispute Resolution Act 17 of 2011 (Cth).

4.3.3 Mandatory Mediation in Australia

Mandatory mediation has been part of the Australian civil justice system for over twenty years.²⁷³ The two main reasons behind the widespread adoption of mandatory mediation in Australia are, attempts to broaden access to justice and improve efficient delivery of justice.²⁷⁴

Australia has established various mandatory mediation schemes.²⁷⁵ The schemes include court powers that permit judges to compel parties to mediate, court annexed mediation, and legislation that compels parties to mediate.²⁷⁶ These processes of fostering mediation have also been adopted in South Africa, save for the mode which permits judges to refer parties to mediation without their consent.²⁷⁷

It is significant to note that the majority of the Supreme Courts in Australia, provide mediations that are conducted by officers of the Court.²⁷⁸ In territories such as New South Wales, Western Australia and Tasmania, the registrars act as mediators, whereas other territories such as the Northern territory and Victoria both the registrars and judicial officers can act as mediators.²⁷⁹ It may be argued that mediation by judicial officers presents certain problems in the justice system.²⁸⁰ Judges' impartiality and independence may be perceived as being compromised through mediating personal matters in an informal setting with litigants and lawyers, who appear before them regularly.²⁸¹ An additional challenge with judicial officers mediating cases, is that litigants may take advantage of the process, and use it as a way to test the strengths and weaknesses of their cases.²⁸² However, despite the abovementioned challenges judicial officers such as Justice Dubelle have highlighted that judicial mediation saves

²⁷³ Waye (2016) 45(2-3) *CLWR* 214 at 215.

²⁷⁴ *Ibid.*

²⁷⁵ Hanks (2012) 35(3) *UNSW Law Journal* 929 at 945.

²⁷⁶ *Ibid.*

²⁷⁷ Magistrates' Court Rules; Uniform Rules of Court.

²⁷⁸ Justice Bergin, Judicial Mediation Australia 25-28 April 2011. *Proceedings*. Beijing: National Judicial College.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

court time, and is an appropriate utilisation of limited resources.²⁸³ Justice Dubelle also states that the risk of coercion is no greater than the risk that applies to non-judge mediators; and that fears relating to the negative impact on the independence, and impartiality of Judges is addressed through the understanding that mediation is different from adjudicating.²⁸⁴

The South African Court Rules do not permit judges and registrars to play a mediatory role.²⁸⁵ It is submitted that it may be worthwhile for South Africa to consider transforming its system through permitting judges to play such a non-adjudicative role. The benefits of judicial mediation can be seen through the settlement rates recorded at the Federal Court of Australia and Victoria Supreme Court.²⁸⁶ Between 2005 and 2008, masters/ associate judges at the Victoria Supreme Court mediated two hundred and five cases, which one hundred and forty-five were settled.²⁸⁷ This is indicative of a seventy one percent settlement rate.²⁸⁸ Furthermore, the Federal Court recorded a settlement rate of fifty-seven per cent in 2008.²⁸⁹ These statistics show that matters that undergo judicial mediation are more likely to be resolved, and will not proceed to the trial stage.

4.3.4 Mandatory Mediation at the Federal Court of Australia and Federal Circuit Court of Australia

Australia introduced mandatory mediation at the Federal Court and Federal Circuit of Australia through the Civil Dispute Resolution Act (CDRA).²⁹⁰ The purpose of the CDRA is to ensure that people take “genuine steps” to resolve disputes before certain civil proceedings are instituted.²⁹¹ The CDRA provides a list of what would constitute as genuine steps.²⁹² These steps include *inter alia* notifying the other party of what the

²⁸³ Justice Warren, Should Judges be Mediators? The Supreme & Federal Court Judges’ Conference 27 January 2010. *Proceedings*. Canberra.

²⁸⁴ *Ibid.*

²⁸⁵ Magistrates’ Court Rules; Uniform Rules of Court.

²⁸⁶ Justice Warren, Should Judges be Mediators? The Supreme & Federal Court Judges’ Conference 27 January 2010. *Proceedings*. Canberra.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ Civil Dispute Resolution Act 17 of 2011 (Cth).

²⁹¹ Waye (2016) 45(2-3) *CLWR* 214 at 217.

²⁹² *Ibid.*

issues are, offering to discuss issues, providing relevant information and documents and considering whether the dispute could be resolved by a process facilitated by a third party.²⁹³ If the Applicant has not taken any steps to resolve the dispute, then reasons for such failure have to be provided.²⁹⁴ The CDRA does not prescribe timelines on the duration of mediation, the documentation of mediation, and there is no duty to formulate conciliation proposals.²⁹⁵ This contrasts with the South Africa Court Rules which provides a series of timelines for the implementation of the mediation procedure.²⁹⁶ It may be argued that the lack of prescribed timelines for the mediation process at the Federal Court, has the potential to cause delays, and could possibly lead to uncertainty during the mediation process.

4.3.5 Mandatory Mediation at the Family Court of Australia

Mandatory mediation became part of Australian family law through, the introduction of the Family Law Amendment Act (Shared Parental Responsibilities) Act²⁹⁷ which, introduced a compulsory form of family dispute resolution.²⁹⁸ Schedule 1 of the Family Law Rules outline the pre action procedures parties are required to follow.²⁹⁹ Parties wishing to approach the Family Court of Australia are required to make a genuine effort to resolve their dispute prior to the commencement of a case by “participating in dispute resolution, such as negotiation, conciliation, arbitration and counselling.”³⁰⁰

Non-compliance with this rule may occasion an adverse cost order.³⁰¹ There are certain instances where the Court may accept noncompliance with pre action procedures.³⁰² These instances include:³⁰³

[U]rgent matters, matters involving allegations of child abuse or risk of child abuse; matters involving allegations of family violence or risk of family violence; matters in which there is a

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Magistrates' Court Rules; Uniform Rules of Court.

²⁹⁷ Family Law Amendment Act (Shared Parental Responsibilities) Act 46 of 2006 (Cth).

²⁹⁸ Waye (2016) 45(2-3) *CLWR* 214 at 222.

²⁹⁹ Family Law Rules 2004 (Cth), sch 1.

³⁰⁰ Ibid at 1(1)(a).

³⁰¹ Ibid at 1(3).

³⁰² Ibid at 1(4).

³⁰³ Ibid.

genuinely intractable dispute and in which a person would be unduly prejudiced or adversely affected if another person to the dispute is given notice of an intention to start a case.

The purpose of the pre-action protocols is to encourage more involvement by both parents in their children's lives; reduce financial and emotional costs linked to family breakdown, and assist parents to determine what is in the best interests of their children.³⁰⁴ This family dispute resolution process has been described as "a holistic reform package designed to strengthen family relationships".³⁰⁵ This mirrors the family dispute resolution procedure in South Africa, where a family advocate plays a mediatory role between parents in order to facilitate a decision that is in the best interests of the children.³⁰⁶

4.3.6 Mandatory Mediation at the New South Wales Supreme Court

Section 25 of the Civil Procedure Act³⁰⁷ (CPA) outlines the mandatory mediation procedure that is applicable to the New South Wales Supreme Court. The CPA provides an extensive procedure relating to mediation that refers to costs, timelines and confidentiality. The CPA states that judges can refer matters for mediation with or without the parties' consent in circumstances they deem to be appropriate, and that mediation should be done by a mediator the parties have agreed upon or alternatively a mediator that is appointed by the court.³⁰⁸ The mediator does not need to be a listed mediator.³⁰⁹ Parties have the legal duty to participate in mediation proceedings in good faith, and may apply to the Court to have an agreement or arrangement that was concluded through the mediation process made an order of Court.³¹⁰ As previously indicated in this Chapter, the requirement to participate in good faith is a controversial requirement but, could yield many positive results, and should therefore be carefully considered for adoption in the South African civil justice system.³¹¹

³⁰⁴ Waye (2016) 45(2-3) *CLWR* 214 at 222.

³⁰⁵ *Ibid.*

³⁰⁶ Mediation in Certain Divorces Act 24 of 1987.

³⁰⁷ Civil Procedure Act 28 of 2005 (NSW) s25.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ See note 248-250.

4.3.7 Aboriginal Mediation Services

In certain Australian territories such as Western Australia, aboriginal mediation services are offered in order to provide culturally appropriate dispute resolution services to Aboriginal and Torres Strait Islander people.³¹² South Africa's civil Court Rules do not provide mediation services that cater for the specific cultural needs of indigenous people.³¹³ There is discourse around the definition of indigenous people.³¹⁴ In one instance, it may be used to refer to all South Africans of African descent, and in another instance it may be used to refer to the "nondominant groups of aboriginal people with specific territorial and cultural needs".³¹⁵ For the purpose of this discussion, this chapter is referring to the latter definition of indigenous people.³¹⁶ South Africa has a minority population of indigenous people who belong to the San, Nama and Griqua communities, and collectively are referred to as the Khoe San.³¹⁷ For many years the Khoe San were not formally recognised and were eventually granted legal recognition through the introduction of the Traditional Leadership and Khoi-San Act³¹⁸ in 2019. It is submitted that as South Africa's civil justice system evolves, the cultural needs of the Khoe San should be considered, and adopting similar processes such as the aboriginal mediation processes that exist in Australia is highly recommended. However, it is important to keep in mind that the classical model of mediation may not always be culturally appropriate for mediating matters relating to indigenous people.³¹⁹

4.4. Conclusion

This chapter has provided an overview and an analysis of the approaches to mandatory mediation in Canada and Australia. The chapter has identified that the mandatory mediation procedures in Canada and Australia do not compel parties to

³¹² Aboriginal Services https://department.justice.wa.gov.au/A/aboriginal_services.aspx?uid=3050-2010-1245-8643 (accessed 20 April 2020).

³¹³ Magistrates' Court Rules; Uniform Rules of Court.

³¹⁴ Hitchcock & Vinding (eds) (2004) 98.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Traditional and Khoi-San Leadership Act 3 of 2019.

³¹⁹ Kelly (2002) 5(14) *Indigenous Law Bulletin* 7.

settle. However, some jurisdictions such as Alberta require parties to participate in good faith during mediation. Through analysing data on settlement rates, and client satisfaction it has been determined that mandatory mediation in Canada and Australia has played a positive role in addressing some of the challenges their civil justice systems are facing, and has turned out to be an overall successful procedure.

Some significant lessons from the Canadian and Australian mandatory mediation experiences that are pertinent to consider in the South African context are that: it is useful for Court Rules to list disputes that are not suitable for mediation and make provision for exceptions; confidentiality is not an absolute guarantee during mediation and an extensive list of exceptions to the confidentiality guarantee is useful to have outlined in Court Rules for the sake of clarity; there are potential costs and efficacy benefits in judges and registrars playing a mediatory role and; mandatory mediation will only be effective if there are sufficient personnel and resources to support the implementation of the procedure.

CHAPTER 5: ADVANTAGES AND DISADVANTAGES OF MANDATORY MEDIATION

5.1. Introduction

Through utilising the findings of the research conducted for the civil justice systems in South Africa, Canada and Australia this chapter will determine the benefits and shortcomings of mandatory mediation. This exercise is crucial in making a final determination on whether mandatory mediation should have a role to play in the transformation of the South African civil justice system.

5.2. Advantages of Mandatory Mediation

The advantages of mandatory mediation that this paper has identified are that:

a) **Mandatory Mediation offers a speedy and less Costly Resolution to Disputes**

Mediation has the potential to resolve disputes in a timely manner.³²⁰ Compelling disputants to explore mediation prior to litigation can result in the reduction of a court's case load, reduction in delays in resolving disputes and less costs.³²¹

b) **Mandatory Mediation is a Voluntary Process**

Mandatory mediation being voluntary may sound paradoxical but in practice it is voluntary in nature.³²² This is because parties are not forced to share information that they do not wish to share, and they are not compelled to settle. They are simply required to engage in the process, and will always have the right to approach a court to resolve their dispute if mediation is unsuccessful.

c) **Mandatory Mediation Forces Parties to Explore the Benefits of Mediation**

³²⁰ Clarke (1991)6 *QUTLawJnl* 81 at 84-85.

³²¹ Ibid.

³²² Tokiso Dispute Resolution (eds) (2015) 49.

Chief Justice Spigelman of the New South Wales Supreme Court, has stated that “individuals are reluctant to admit to the shortcomings of their cases and therefore do not offer to mediate.”³²³ However, if they are forced into mediation, they soon shift from being reluctant participants to active ones.³²⁴ This highlights that when parties are compelled to attend mediation, they are undeniably left with no option but to partake in the process. Mandatory mediation therefore has the potential to raise awareness and encourage the wide use of mediation amongst litigants and legal professionals. This notion is supported by Genn who states that compulsion would quickly expose a significant number of individuals, to the benefits of mediation which would ultimately result in the “take-off” of the process.³²⁵

d) Mandatory Mediation is less antagonistic and encourages reconciliation

The mediation process aims at preserving the relationships of the parties and provides an opportunity to avoid the permanent destruction of relationships.³²⁶ This is of importance in matters that relate to interpersonal relationships such as family matters. Mediation can be described as a therapeutic process that preserves future relationships.³²⁷

e) Mandatory Mediation is Empowering

The mediation process allows parties to express themselves and tell their story.³²⁸ People value the opportunity to engage directly with their disputes.³²⁹ This direct engagement is linked to self-determination and empowerment.³³⁰ The process is flexible and free from the technicalities of Court Rules.³³¹

³²³ Hanks (2012) 35(3) *UNSW Law Journal* 929 at 946.

³²⁴ *Ibid.*

³²⁵ Genn (2012) 24(1) *Yale Journal of Law and Humanities* 397 at 408.

³²⁶ Clarke (1991) 6 *QUTLawJI* 81 at 87.

³²⁷ *Ibid.*

³²⁸ Douglas (2017) 29(1) *BLR* 69 at 75.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ Clarke (1991) *QUTLawJI* 81 at 85.

f) Mandatory Mediation has a Positive impact in Divorce Matters where Children are Involved

The mediation procedure teaches divorced spouses how to improve their relationship.³³² It also increases the likelihood of a child maintaining a meaningful relationship with both parents, which in turn limits the potential psychological harm of parental separation on the child.³³³

g) Mandatory Mediation can result in Job Creation

Mandatory mediation results in the increased need for mediators.³³⁴ As seen in jurisdictions like Australia, the evolution of mediation as an engrained process in the country has resulted in an increased number of legal practitioners opting to become accredited mediators who very often run their own mediation practices.³³⁵

h) Mandatory Mediation can be done Remotely

Virtual access to court processes such as mediation have become fundamental in 2020, after the outbreak of the global pandemic Coronavirus (Co-vid 19) which has resulted in lockdowns and social distancing measures.³³⁶ Mediation is an advantageous procedure because it is a court process that does not revolve around physical meetings.³³⁷

³³² De Jong (2010) 3 *TSAR* 515 at 522.

³³³ *Ibid.*

³³⁴ Rooney G, The Australian Experience of Legislated Pre-Action ADR Requirements: Specificities, Acceptation, and Keys to Success (November 4, 2015). 6th Symposium of the Institut de médiation et d'arbitrage du Québec in Montréal, November 2015. *Proceedings*. Canada

³³⁵ *Ibid.*

³³⁶ Rab S "COVID-19 & Virtual Mediation" <https://www.newlawjournal.co.uk/content/covid-19-virtual-mediation> 16 April 2020 (accessed 30 April 2020).

³³⁷ *Ibid.*

5.3. Disadvantages of Mandatory Mediation

The disadvantages of mandatory mediation that this paper has identified are:

a) The Imposition of Mediation threatens parties' self determination

Mandatory mediation by its very nature goes against the voluntariness principle of mediation.³³⁸ Compelling parties to mediate may disempower parties, and prevent them from taking ownership of their dispute.³³⁹ This could result in user dissatisfaction with the procedure.³⁴⁰ Parties may also feel compelled to settle especially in instances where judges can impose adverse cost orders, after having due regard to the parties' conduct before and during the mediation.³⁴¹

b) Mandatory Mediation is not always Cost Effective

Mandatory mediation does not always result in a settlement, and disputant may be unable to afford legal representation at the trial stage as a result of having already spent money on legal representation at the mediation stage.³⁴² This shows that mediation can result in a disputant incurring additional costs.

c) Mandatory Mediation is not Appropriate in all Civil Litigation Cases

This paper has identified that there are disputes that are not suitable for mediation, and has determined that examples of disputes that should be exceptions to mediation are *inter alia* cases where there is domestic violence, drug and alcohol abuse involved and cases where there is a complicated legal matter that needs to be determined.³⁴³ It is also important to note that compelling mediation may undermine the public good linked to the doctrine of precedent.³⁴⁴ Legal precedents are necessary for the adoption and maintenance of civil values, norms and legal certainty.³⁴⁵

³³⁸ Baron (2014) 40(2) *MULR* 283 at 293.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ Vettori (2015) 15 *AHRJ* 355 at 361.

³⁴² Burman (1990) 107(2) *SALJ* 251 at 252.

³⁴³ De Jong (2010) 3 *TSAR* 515 at 522.

³⁴⁴ Baron (2014) 40(2) *MULR* 283 at 293.

³⁴⁵ Vettori (2015) 15 *AHRJ* 355 at 360.

d) Mandatory Mediation may be Perceived as a Secondary form of Justice

Critics of mediation have described the process as a secondary form of justice, and stated that only a court can provide “first class justice”.³⁴⁶ This is based on an assumption that only a resolution based on law, sufficiently addresses the needs of disputants.³⁴⁷

e) Mandatory Mediation forces Parties to Engage in a Process where there is no Public Scrutiny

Mediation is a private process between the disputants and the mediator.³⁴⁸ The process lacks the necessary checks and balances because justice is not seen to be done.³⁴⁹

f) Confidentiality is not guaranteed during Mandatory Mediation

As seen in the Canadian case of *Rogacki v Belz*, confidentiality is not always guaranteed during mediation.³⁵⁰ This goes against one of the basic principles of mediation, and may result in parties not fully and openly engaging in the process due to the fact that their privacy is not guaranteed.³⁵¹

g) Mandatory Mediation Results in parties being Subject to a Process where there are issues with Neutrality

Some of the challenges relating to a mediator’s neutrality during mediation are that a mediator cannot be completely neutral because he/she is influenced by his/her own personal worldview which will inform the mediation process.³⁵² Furthermore, neutrality is not appropriate in instances where there is a power imbalance between the parties, because, a failure to intervene may further the imbalance.³⁵³ Mediation does not take into account socio economic factors.³⁵⁴ It operates under the guise that parties are

³⁴⁶ Clarke (1991) 6 *QUTLawJnl* 81 at 89.

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid* at 88.

³⁴⁹ *Ibid.*

³⁵⁰ *Rogacki v Belz* (2003) 67 O.R. (3d) 330.

³⁵¹ *Spencer & Brogan* (2007) 84.

³⁵² *Douglas* (2017) 29(1) *BLR* 69 at 77.

³⁵³ *Ibid.*

³⁵⁴ *Burman* (1990) 107(2) *SALJ* 251 at 252.

equal, operate reasonably, and have equal access to the courts and are equally informed of their rights.³⁵⁵ Compelling weaker and indigent parties to litigate may result in them feeling intimidated or bullied into settling on undesirable terms.³⁵⁶

h) Mandatory Mediation has the Potential to be Abused

It may be argued that mandatory mediation has the potential to be abused by courts which may want parties to settle “at all costs”, which may result in justice taking a back seat in the process.³⁵⁷ Furthermore, parties may abuse the process by using it as a method to trial-run their cases.³⁵⁸

5.4. Conclusion

This chapter has provided an overview on some of the advantages and disadvantages associated with mandatory mediation. The chapter has shown that mandatory mediation models have many benefits, and play a significant role in fostering therapeutic justice. However, the chapter has also identified that mandatory mediation poses many challenges because, the process raises concerns relating to procedural justice. It is therefore important for mandatory mediation to be adopted cautiously, and applied only to matters that are appropriate for mediation.

³⁵⁵ Ibid.

³⁵⁶ Tokiso Dispute Resolution (eds) (2015) 48.

³⁵⁷ Baron (2014) 40(2) *MULR* 283 at 296.

³⁵⁸ Ibid.

CHAPTER 6: FINAL REFLECTIONS AND CONCLUSION

6.1. Final Reflections

This paper has provided an overview of the approaches to mandatory mediation in South Africa, Canada and Australia. The study has made some key findings that have aided in determining if mandatory mediation should play a role in transforming the South African civil justice system. The first key finding is that mandatory mediation cannot be deemed to be unconstitutional. Second, mandatory mediation requires adequate resources and personnel in order to ensure effective results. Third, mandatory mediation is not appropriate for all cases, and court rules should make provision for exceptions. Fourth, mandatory mediation forces parties and legal representatives to shift from a position of reluctance to a position of active participation. Fifth, mandatory mediation raises issues relating to procedural justice, particularly in instances where parties are forced to pay for the mediator. Sixth, for mandatory mediation to effectively work, legal professionals need to receive adequate training on the mediation process in order to avoid adversarial methods of argument being applied during mediation. Lastly, there is evidence that mandatory mediation has contributed to reduced costs, less delays and increased user satisfaction.

This paper has noted that a shortcoming of the South African civil justice system is that the Department of Justice does not pay for the costs of mediators, and parties are required to share the costs of the mediator or split the costs in a manner they agree upon. The paper has concluded that reforming the South African civil justice system to incorporate mandatory mediation where parties are forced to pay for the mediator's costs would not be effective. This is because it could place litigants in a financially unfavourable position, and could impact on their right to a fair hearing. Implementing a system of mandatory mediation without addressing the issues of the mediators' costs as outlined above could result in the system becoming too expensive and inaccessible.

It is therefore important for South Africa to consider creating a system where the Department of Justice remunerates mediators and/or identifies mediators who are willing to work on a voluntarily basis. A shortcoming of this proposal is that it is dependent on the willingness of qualified individuals to volunteer their time to facilitate

mediation sessions. It is also dependent on the Department of Justice's capacity to take on increased personnel costs.

Another solution could be to introduce a system of judicial mediation. This research has discussed the benefits of judicial mediation and noted the positive impact it has had in Australia. It has been noted that the South African Court Rules do not permit judges and registrars to play a mediatory role. It is submitted that it may be worthwhile for South Africa to consider transforming its system through amending the rules so that judges or registrars can play a mediatory role. A challenge with implementing this proposal is that the judiciary's independence may come in to question, and judges could possibly become compromised when engaging in a non-adjudicative role.

In order to develop and further build the legitimacy of mediation practice in South Africa there needs to be an increase in training activities and awareness initiatives. As observed in Canada and Australia, this can be done through the law society partnering with the judiciary. Legal professionals could be further exposed to mediation through attending civil mediation training courses offered by the Law Society of South Africa (Law Society). It is also proposed for the Law Society in partnership with the judiciary to facilitate a mediation referral process to legal practitioners and retired judges. This may have the effect of exposing more legal professionals to the benefits of mediation, and increasing the legal profession's awareness and interest in the practice. It may also increase the public's confidence in the procedure. It is significant to note that it may be difficult to implement this proposal because of the resources required to implement such an initiative.

If mandatory mediation is adopted in South Africa it is important for legislation and Court Rules to clearly indicate that there are exceptions to the mediation procedure because, it is not an appropriate procedure for all cases. It would be useful for litigants to be provided with a list of issues that should be exempt from mediation. Furthermore, a procedure should be developed for litigants who have cases that are not listed in the list of exemptions but still wish to apply to be exempt from mediation. Legislation and Court Rules must also clearly outline the consequences for failing to attend a mediation session. This can range from giving presiding officers the power to strike out pleadings, compel parties to attend mediation, and impose adverse cost orders.

This paper has noted that it is important to ensure that the changes in legal procedure are effectively decolonizing the civil justice system. It is therefore important to ensure that mediation is a culturally appropriate dispute resolution procedure. In certain instances the mediator may be required to incorporate an African style of mediation to effectively facilitate the process. Mediators should therefore receive training on cultural sensitivity and awareness. South Africa's civil Court Rules do not provide mediation services that cater for the specific cultural needs of traditional groups in South Africa. It is submitted that as South Africa's civil justice system evolves, the cultural needs of traditional groups should be considered, and this should be reflected in the Court Rules. This may result in the court system becoming more accessible to individuals of various traditional backgrounds. Similar processes have been successfully adopted in Australia where aboriginal mediation services have been developed to cater for the cultural needs of Aboriginal and Torres Strait Islander people.

6.2. Conclusion

The positive experiences noted in Canada and Australia reflect the potential impact mandatory mediation could have in transforming South Africa's civil justice system. This paper has noted that research shows that disputants and their legal representatives are most likely not going to voluntarily opt for mediation. It is therefore important for South Africa to consider adopting mandatory models of mediation in order to expose litigants to the benefits of the process. However, mediation should not be seen as a "one size fits all" procedure. It is imperative that a "bespoke approach" is adopted. Furthermore, non-adversarial procedures should not be seen as a complete replacement for the adversarial justice system. There are many benefits that are attached to the adversarial justice system that should not be lost. It is therefore concluded that, mandatory mediation should have a role to play in the transformation of the South African civil justice system, provided that the necessary resources are available; the required training for the legal profession is provided; and necessary limitations are applied by the Courts and reflected in the Court Rules and legislation.

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