

# **ADR in Business**

Practice and Issues across Countries and Cultures

Volume II

Edited by

**Arnold Ingen-Housz**



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## Chapter 26

# Amicable Dispute Resolution in South Africa

*John Brand\**

### 1. INTRODUCTION

Amicable dispute resolution (ADR) has a long history in South Africa. In traditional African communities a sanction was seldom invoked for a breach of customary law because agreed corrective mechanisms were the primary means of conflict resolution.<sup>1</sup> At the core of traditional African dispute resolution is the concept of ‘*Ubuntu*’ in Xhosa and Zulu. In Sotho it is called ‘*Botho*’ and in Venda, ‘*Ubuthu*’. In essence it means ‘People are people through other people’ and it emphasizes community building, respect, sharing, empathy, tolerance, the

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\* Director and ADR Specialist at Bowman Gilfillan Attorneys. Director of Conflict Dynamics cc, member of the Advisory Board of the African Centre for Dispute Settlement, member of the Executive Committee of the National Dispute Resolution Practitioners Council, member of the International Mediation Institute’s Independent Standards Commission and Centre for Effective Dispute Resolution accredited mediator.

1. Nomonde Masina in *Traditional Cures for Modern Conflicts: African Conflict ‘Medicine’*, ed. I. William Zartman, at 169–181. See also South African Law Commission Project 94 Report on Domestic Arbitration (2001), at 9

common good, acts of kindness<sup>2</sup> and the 'C's' – communication, consultation, compromise, cooperation, camaraderie, conscientiousness and compassion.<sup>3</sup>

Colonialism disrupted this tradition because Western dispute resolution of the time preferred adjudicative outcomes to consensual ones. Koopman<sup>4</sup> said:

whites, by and large, are individualistic exclusivists. When managing conflict, therefore, we prefer to apply win/lose tactics, clear cut and defined structures and procedures. Mostly we alienate ourselves within conflict situations leading us to enter into 'negotiations' in order to control an outcome of 'rightness' and 'wrongness'. Africans by and large, are communal inclusivists. Managing conflict becomes an 'open' sum process involving immediate family, supervisors, elders, etc. within the framework of morals. This necessitates entering into a 'dialogue' from which a sense of 'fairness' and 'unfairness' towards other members in society can emerge.

As a consequence of colonialism, adjudication before courts and arbitrators became the dominant method of dispute resolution in the civil justice system. The tradition of ADR did, however, live on and was promoted by famous South Africans such as Mahatma Gandhi and Nelson Mandela. This is epitomized in the words of Mahatma Gandhi:

Whenever you are confronted with an opponent, conquer him with love.

and by Nelson Mandela:

If you want to make peace with your enemy, you have to work with your enemy. Then he becomes your partner.

Fortunately, in recent times the tide has begun to turn away from adjudication in favour of ADR in the civil justice system and in the employment arena in particular. This renaissance was largely attributable to the establishment in 1984 of the Independent Mediation Service of South Africa (IMSSA). It was established by a group of trade unionists, employers, academics and lawyers who wanted a credible dispute resolution organization to provide mediation, arbitration and facilitation of employment disputes in South Africa. At that time the statutory institutions of the apartheid state lacked credibility and effectiveness, and IMSSA was formed as a substitute for those institutions. By the end of the 1980s, IMSSA had branched out into community mediation because of its success in handling employment disputes and it played a very important role, together with a range of other organizations, in the mediation of community disputes during the late 1980s and the 1990s.<sup>5</sup>

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2. Susan Collin Marks, *Watching the Wind – Conflict Resolution During South Africa's Transition to Democracy*, at 182–186

3. See reference to Khaba Mkize by Susan Collin Marks, *supra*.

4. A. Koopman (1993) 'Transcultural Management: In Search of Pragmatic Humanism', in *African Management: Philosophies, Concepts and Applications*, Randburg, SA: Knowledge Resources (Pty) Ltd, ed. P. Christie, R Lessen and Mbigi.

5. See Felicity Steadman in *Dispute Resolution*, ed. Paul Pretorius, at 124–144.

The National Peace Accord, which helped peacefully deliver a democratic South Africa, also played an important role in re-establishing the African tradition of ADR in South Africa.<sup>6</sup> Mediation also became well entrenched in the area of family and divorce disputes<sup>7</sup> and in the environmental area.<sup>8</sup> By the end of the 1990s, many organizations were providing amicable dispute resolution services in the employment, community, family and environmental areas.<sup>9</sup> From 1995 onward the movement toward amicable dispute settlement has increasingly received statutory support, and there are now more than forty Statutes in South Africa providing for mediation of one kind or another.<sup>10</sup>

Mediation is not the only ADR process to gain currency in South Africa. Processes such as conciliation-arbitration (con-arb), arbitration-conciliation, fact finding, advisory arbitration, facilitation and con-opinion are now regularly used in South Africa.<sup>11</sup>

The expertise of South African mediators has been recognized internationally and has been exported and put to use in places such as Northern Ireland, the Basque Country and Zimbabwe.<sup>12</sup> South African mediator trainers have also been used

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6. See Susan Collin Marks at 15–37, *supra* n. 2.

7. See Charles H. Cohen, in *Dispute Resolution*, ed. Paul Pretorius, at 73–92.

8. See Rosemary Syster, in *Dispute Resolution*, ed. Paul Pretorius, at 145–162.

9. For a comprehensive list of ADR organizations active at the time, see Felicity Steadman, *supra* n. 5, at 207–218.

10. Pension Funds Act No. 24 of 1956/Post Office Act No. 44 of 1958/Health Professions Act, No. 56 of 1974/Estate Agency Affairs Act No. 112 of 1976/Short Process Courts and Mediation in Certain Civil Cases Act No. 103 of 1991/Restitution of Land Rights Act No. 22 of 1994/ Human Rights Commission Act No. 54 of 1994/Kwazulu-Natal Ingonyama Trust Act No. 3 of 1994/Restitution of Land Rights Act No. 22 of 1994/Development Facilitation Act, 1995/Pan South African Language Board Act no. 59 of 1995/Labour Relations Act No.66 Of 1995/ Constitution Of The Republic Of South Africa, 1996/Land Reform (Labour Tenants) Act No. 3 of 1996/Antarctic Treaties Act No. 60 of 1996/Telecommunications Act No. 103 of 1996/Extension of Security of Tenure Act No. 62 of 1997/Higher Education Act 101 Of 1997/Skills Development Act No. 97 of 1998/National Water Act No. 36 of 1998/National Payment System Act No. 78 of 1998/State Information Technology Agency Act No. 88 of 1998/ National Environmental Management Act No. 107 of 1998/Prevention of Illegal Eviction From and Unlawful Occupation of Land Act No. 19 of 1998/Recognition of Customary Marriages Act No. 120 of 1998/Rental Housing Act No. 50 of 1999/National Land Transport Transition Act No. 22 of 2000/Local Government: Municipal Systems Act No. 32 of 2000/Gas Act No. 48 of 2001/Petroleum Pipelines Act No. 60 of 2003/Local Government: Municipal Finance Management Act No. 56 of 2003/National Ports Act No. 12 of 2005/National Credit Act No. 34 of 2005/ Children's Act No. 38 of 2005/Further Education And Training Colleges Act No. 16 of 2006/ Electricity Regulation Act No. 4 of 2006/Companies Act, No. 71 of 2008/Consumer Protection Act No. 68 of 2008/Child Justice Act No. 75 of 2008/National Land Transport Act No. 5 of 2009.

11. See Brand et al., *Labour Dispute Resolution*, at 42–44.

12. For example, Brian Currin has played a major role in both the Northern Ireland and Basque conflicts and Charles Nupen has done important tri-partite facilitation work in the Zimbabwean normalization process.

very extensively throughout the developing world in training commercial and employment mediators in particular.<sup>13</sup>

## 2. PRIMARY AREAS OF ADR IN SOUTH AFRICA

The primary area of ADR in South Africa is without doubt in employment. This is largely due to the pioneering work done by IMSSA during the 1980s described earlier.

One of the first pieces of legislation that the post-apartheid parliament passed in South Africa was the Labour Relations Act (LRA) of 1995.<sup>14</sup> The centrepiece of the LRA is the Commission for Conciliation, Mediation and Arbitration (the CCMA). It is an independent tripartite body funded by the State whose primary functions are to conduct conciliation,<sup>15</sup> arbitration and facilitation of employment disputes. The work of the CCMA is performed by Commissioners who are appointed by the tripartite governing body.

The LRA also facilitates establishment of bargaining and statutory councils, which are given wide powers to conciliate, arbitrate and facilitate certain employment disputes. In addition, the LRA contemplates that private dispute resolution agencies should play a complementary role in the employment dispute resolution system. All disputes may be referred to private agencies, and the Act specifically requires that parties to collective agreements must provide for private conciliation and arbitration of all disputes about the interpretation or application of those agreements.<sup>16</sup>

In essence the LRA forces parties to refer all employment disputes to conciliation as a precursor to industrial action or before being adjudicated by the CCMA, a bargaining council, a statutory council or by private arbitration or the courts.<sup>17</sup>

The consequence of this is that a large number of employment disputes are conciliated in South Africa. For example, the CCMA conducted 101,769 conciliations between April 2008 and March 2009, of which 45,796<sup>18</sup> were con-arb proceedings.<sup>19</sup> A private agency, Tokiso Dispute Settlement (Pty) Ltd, conducted 4,600 conciliations for the Metal Industry Bargaining Council alone between July 2009 and June 2010, of which 194 were con-arbs.<sup>20</sup>

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13. A group of international mediators including Charles Nupen, Felicity Steadman, Claire Hocke and John Brand from South Africa were commissioned by the International Labour Organisation to develop mediator training material and to train mediators across the developing world.

14. Act No. 65 of 1995.

15. In terms of the LRA, conciliation embraces mediation as well.

16. See s. 24.

17. See Brand et al., *supra* at 29–38.

18. See CCMA Annual Report 2008/2009.

19. Con-arb is a hybrid process in which a dispute is first conciliated and if not resolved is immediately thereafter arbitrated by another third party or, with the consent of the parties by the person who conciliated the dispute, see Brand et al., at 42.

20. For a comprehensive survey of recent employment dispute resolution in South Africa, see The Annual Tokiso Review 2009–2010.

Rather surprisingly, disputants in the commercial arena have been slow to recognize and put to use the power of amicable dispute resolution.<sup>21</sup> There are a range of possible reasons for this. They probably include the inherent conservatism of commercial lawyers, a perception that mediation is a ‘soft’ process that reflects weakness or indecisiveness on the part of disputants and vested interests in slow and expensive adjudication processes. For these (and perhaps other) reasons, mediation has been slow to take off in commercial disputes, but decisive steps are now being taken that are changing this.

In the case of *Port Elizabeth Municipality v. Various Occupiers*<sup>22</sup> the Constitutional Court said that:

One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances, the courts themselves order that mediation be tried.

In 2007 in another eviction case<sup>23</sup> the Constitutional Court urged the parties to mediate their dispute and it endorsed the agreement reached in mediation in its ultimate judgment.

Commercial mediation received important encouragement in August 2009 when the High Court in Johannesburg held in the case of *MB v. NB*<sup>24</sup> that the failure by attorneys in that case to advise their clients to go to mediation at an early stage should be visited by the court’s displeasure. The court limited the costs that the attorneys could recover from their clients to those that they could tax on the party and party scale and thereby deprived them of their full attorney and client fees.<sup>25</sup> The case was one that involved the dissolution of a marriage, parental rights, maintenance and the division of a joint estate but its rationale applies to all civil cases.

In his judgment the Judge said:

Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisors, 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

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21. For a full examination of the development of commercial mediation in South Africa, see Ronan Feehily – The development of commercial mediation in South Africa in view of the experience in Europe, North America and Australia – Doctoral thesis submitted to the University of Cape Town.

22. 2005(1) SA217(CC).

23. *Occupiers of 41 Olivia Road, Berea Township, and Others v City of Johannesburg and Others*, Case CCT24/07(2008)ZACC1.

24. *MB v. NB* 2010 (3) SA 220.

25. For a full examination of the role of costs sanctions see Ronan Feehily, ‘Cost Sanctions: The Critical Instrument in the Development of Commercial Mediation in South Africa’, *South Africa Law Journal* (2009), 129–315.

drawing on his or 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.

The Court relied on the rules of the High Court that require that one of the matters that must be considered at a pre-trial conference is whether a dispute should be referred to mediation.<sup>26</sup> The attorneys in the case had simply dismissed this possibility without any serious thought, and they paid a heavy price for this misplaced advice.

Thereafter, in the unreported case of *Gluckman v. Chiort and Another*, the High Court in Johannesburg directed the parties to enter mediation regarding all of the issues in dispute between them. The court nominated a mediator and prescribed time limits for the mediation and that the costs of the mediation should be born equally by the parties. The dispute concerned seven swamp cypress trees situated along the common boundary between the parties' property. The dispute was successfully mediated and litigation avoided.

At present the High Court rules require only that mediation must be considered by the parties at a pre-trial conference.<sup>27</sup> The rules do not yet provide for the kind of active case management that exists in other countries<sup>28</sup> and Judges are not expressly given the power to require pre-hearing mediation. Interestingly, it was in the lower court in Bellville in the Western Cape that the Senior Magistrate made the first move toward Court rule-directed mediation. On 10 November 2009 she issued a practice direction notifying parties of the *MB v. NB* decision<sup>29</sup> and informing them that in the future cases would not automatically be set down for hearing in the Court unless the parties file a certificate from a mediation service provider proving attendance at mediation.

Another important encouragement to commercial mediation has come from recent corporate governance directives in South Africa. The Institute of Directors in Southern Africa enacted its updated Code on Corporate Governance on 1 March 2010.<sup>30</sup> Paragraph 81 of the Code states the following:

It is incumbent upon directors and executives, in carrying out their duty of care to a company, to ensure that disputes are resolved effectively, expeditiously and efficiently. This means that the needs, interests and rights of the disputants must be taken into account. Further, dispute resolution should be cost effective and not be a drain on the finances and resources of the company.

The Code goes on to state at paragraph 84 that:

External disputes may be referred to arbitration or a court. However these are not always the appropriate or most effective means of resolving such disputes.

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26. See Rule 37(6) of the High Court Rules.

27. See Rule 37(6) of the High Court Rules.

28. For example, the Civil Procedure Rules and Practice Directions for civil litigation in England.

29. See fn. 24.

30. See <[www.iodsa.co.za/products\\_reports.asp?catID=150](http://www.iodsa.co.za/products_reports.asp?catID=150)>.

Mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.

This is the first time that ADR and mediation in particular have been expressly endorsed in a code on corporate governance in South Africa. This endorsement, together with the provisions of the new South African Companies Act<sup>31</sup> referred to below are likely to provide a major impetus to the amicable resolution of disputes within companies and between companies and other entities.

A new Companies Act is due to come into force in South Africa in 2010 or early 2011. The Act provides that, as an alternative to applying to the Court or filing a complaint with the Companies Commission, a person may refer a matter to either the Companies Tribunal or an agency or person for resolution of the dispute by mediation, conciliation or arbitration.<sup>32</sup> The Companies Tribunal is a statutory body established by the Act to resolve disputes and agencies or persons are private dispute resolution providers.

The provisions of the Act and the requirements of the Corporate Governance Code referred to earlier, together with the risk for an adverse costs order in the High Court, will make it difficult in the future for any party to resist an attempt at ADR resolution in the corporate arena.

### 3. MEDIATION PROCEDURAL LAW

Unlike for arbitration,<sup>33</sup> there is no general mediation statute regulating mediation procedure in South Africa. South Africa has not adopted the 2002 UNCITRAL Model Law on International Commercial Conciliation, nor does it have its own statute to provide for procedural aspects of mediation such as the appointment of a mediator, the mediation process, communication between mediators and other parties, confidentiality and admissibility of evidence in other proceedings, the mediator acting as arbitrator and the enforceability of mediation agreements. Accordingly, parties who agree to go to mediation in South Africa have to be careful to regulate these matters fully for themselves because there are no residual legislative provisions to assist them.

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31. Act 71 of 2008.

32. See s. 166 of Act 71 of 2008.

33. The Arbitration Act 42 of 1965. Although this Act is outdated and does not specifically deal with international arbitration, it still serves a useful purpose for the regulation of arbitration in South Africa. In 1998 the South African Law Commission recommended that South Africa adopt the UNCITRAL Model Law on arbitration and it drafted both an International and Domestic Arbitration Statute to give effect to this but the Government has so far failed to implement its recommendations.

#### 4. MEDIATOR TRAINING

In recent years, South Africa recognized a need for mediators to be trained and accredited to world standards. To this end Conflict Dynamics<sup>34</sup> in association with the Centre for Effective Dispute Resolution<sup>35</sup> in the United Kingdom has trained and accredited eighty-two South African commercial mediators in the past four years.

The African Centre for Dispute Settlement<sup>36</sup> in association with the ADR Group in the United Kingdom<sup>37</sup> has trained and accredited one hundred seventeen mediators to international standards.

#### 5. MEDIATION STANDARDS

South Africa does not yet have a national system of mediation standards, but on 5 March 2010 the National Dispute Settlement Practitioners Council was launched.<sup>38</sup> The objectives of the Council are to define and publish national accreditation standards for dispute practitioners, including mediators and arbitrators, as well as for trainers, courses and assessors. The standards will be based on those of the International Mediation Institute.<sup>39</sup> The Council also intends to maintain and publish a national register of affiliated service providers, accredited settlement practitioners, trainers, courses and assessors.

The Council is housed at the African Centre for Dispute Settlement at the University of Stellenbosch Business School.<sup>40</sup>

#### 6. SERVICE PROVIDERS

South Africa has a number of mediation service providers. The most prominent of these are Tokiso Dispute Settlement (Pty) Ltd,<sup>41</sup> Equillore Group,<sup>42</sup> the Association of Arbitrators of Southern Africa<sup>43</sup> and the Arbitration Foundation of South Africa.<sup>44</sup>

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34. See <[www.conflictdynamics.co.za](http://www.conflictdynamics.co.za)>.

35. See <[www.cedr.com](http://www.cedr.com)>.

36. See <[www.usb.ac.za/disputesettlement](http://www.usb.ac.za/disputesettlement)>.

37. See <[www.adrgroup.co.uk](http://www.adrgroup.co.uk)>.

38. Its founding members are the Arbitration Association of Southern Africa, Tokiso Dispute Settlement (Pty) Ltd, Equillore Group, Conflict Dynamics cc and the African Centre for Dispute Settlement.

39. See <[www.imimmediation.org](http://www.imimmediation.org)>.

40. See fn. 36

41. See <[www.tokiso.co.za](http://www.tokiso.co.za)> – Tokiso administers a panel of mediators with CEDR accreditation. A full list of potential mediators can be found at <[www.tokiso.com/view.php?sid=1623](http://www.tokiso.com/view.php?sid=1623)>.

42. See <[www.equillore.com](http://www.equillore.com)> – Equillore has extensive experience in managing higher volume commercial mediations.

43. See <[www.arbitrators.co.za](http://www.arbitrators.co.za)>.

44. See <[www.arbitration.co.za](http://www.arbitration.co.za)>.

7. CONCLUSION

From the discussion in this chapter it can be seen that amicable dispute resolution has a long and rich pedigree in South Africa. Mediation is used extensively for the resolution of employment disputes and to a lesser extent for the resolution of family, environmental and community disputes. Although mediation has been slow to gain currency for the resolution of corporate and commercial disputes, important steps are being taken to accelerate this and it should not be long before mediation is as much used in this area as it is in others.

