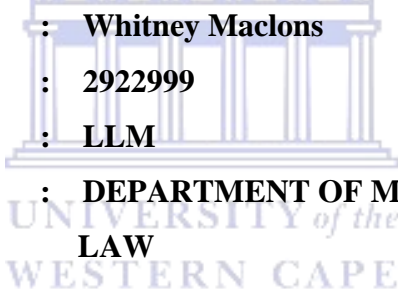


UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**A FULL-THESIS TO BE SUBMITTED IN FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE MAGISTER LEGUM (LABOUR LAW)
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DECLARATION

I declare that *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Whitney Erin Maclons

26 November 2014

Signed



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KEYWORDS AND PHRASES

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settlement

conciliation



ABSTRACT

Civil litigation is the primary method of dispute resolution in the South African civil justice system. This process is characterised by a number of shortcomings which include the adversarial nature of the process which often creates further conflict between disputing parties and often results in permanently destroyed relationships between them. Further shortcomings include the highly complex, costly and time-consuming nature of civil litigation. These shortcomings infringe on the constitutional imperative of access to justice for South Africans, particularly for the indigent members of society. In addition, court rolls have become overburdened due to the rapidly increasing volume of litigation at court. This often results in extensive waiting periods before matters are heard at court and further infringes the attainment of access to justice.

While progress has been made in enhancing the civil justice system over the years, the aforementioned shortcomings prevail. In recent years the South African government has introduced the concept of mandatory court based mediation to the civil justice system with the view of promoting access to justice and enhancing the civil justice system. In a nutshell, mandatory court based mediation refers a civil dispute to mediation once an appearance to defend is entered at court, in order to attempt the settlement of the matter. In the event of the dispute not being resolved, the matter is then referred back to the conventional litigation process for resolution.

Mandatory court based mediation, while controversial and bearing valid criticism; aims to promote access to justice and reconciliation between aggrieved parties and remedies a number of the shortcomings currently plaguing the South African civil justice system. In

answering the research question of whether this ADR process is suitable to implement in South Africa in order to remedy the shortcomings of its civil justice system, the following aspects are considered in this thesis: the benefits, advantages, and the constitutionality of mandatory court based mediation, as well as the criticisms and challenges of the process.

South Africa may have an adversarial civil justice system, but is no stranger to the practice of mediation. Within South African civil law a number of fields have mentioned mediation as the preferred method of dispute resolution over years. These areas of law will be highlighted in this thesis. Internationally, the jurisdiction of the Australian states of New South Wales and Victoria will also be highlighted. This analysis is done in order to assess the implementation and function of a mediation system, as a preferred method of dispute resolution, across all areas of civil law within an adversarial civil justice system.

The current civil justice system in South Africa needs to be remedied due to its negative impact on civil disputants and the nation of South Africa in a broader sense. This thesis does not suggest that mandatory court based mediation is a panacea for all ills plaguing the country's civil justice system. However, this ADR process may suit South Africa and its implementation may make a considerable remedial contribution and possibly significantly enhance its civil justice system.

LIST OF ABBREVIATIONS AND ACRONYMS

ADR	ALTERNATIVE DISPUTE RESOLUTION
CCMA	COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION
CJRP	CIVIL JUSTICE REFORM PROJECT
CPA	CIVIL PROCEDURE ACT
FCC	THE FEDERAL CIRCUIT COURT OF AUSTRALIA
JSE	JOHANNESBURG STOCK EXCHANGE
LRA	LABOUR RELATIONS ACT
MDMA	MEDIATION IN CERTAIN DIVORCE MATTERS ACT
NA	NATIONAL ASSEMBLY
NCOP	NATIONAL COUNCIL OF PROVINCES
NSW	NEW SOUTH WALES
SALRC	SOUTH AFRICAN LAW REFORM COMMISSION
SARS	SOUTH AFRICAN REVENUE SERVICE

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

South Africa, through the influence of the English common law,¹ has inherited an adversarial² civil justice system with litigation as the primary method of civil dispute resolution.³ As a result of the practice of litigation, a number of shortcomings such as the highly complex, costly and time-consuming nature of the process,⁴ have prevailed over decades in the country's civil justice system.⁵ Overburdened court rolls that adversely affect the timely resolution of civil disputes are added to these problems. These shortcomings exclude the middle class to poorer communities in South Africa from acquiring access to justice.⁶ Further pertinent shortcomings include the fact that the adversarial nature of civil litigation⁷ adds to the conflict between disputing parties and often results in permanently destroyed relationships between disputants.⁸

¹ South Africa has a hybrid legal system, with its primary sources law being the South African common law (constituting Roman-Dutch law and English law, see 2.2.1.1 and 2.2.1.2 for discussions on these influences on the South African legal system), customary law, statutes, judicial precedent and, fundamentally, the Constitution of the Republic of South Africa, 1996. Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 26, 135.

² 'English common law is traditionally adversarial or accusatorial.' Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 135; Hurter E 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 242.

³ In terms of English common law, the primary method of dispute resolution is litigation. Campbell-Tiech A 'Woolf, the adversarial system and the concept of blame' (2001) 113 *British Journal of Haematology* 263; Jolowicz JA 'Adversarial and inquisitorial models of civil procedure' (2003) 52 *International and Comparative Law Quarterly* 285. Therefore as a result of English Common law, South Africa is considered a 'case-law' and 'litigation-dependant' country'. Davis DM & Klare K 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 415.

⁴ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) para 2.8. Paleker M 'Court connected ADR in civil litigation: The key to access to justice in South Africa' (2003) 6 *ADR Bulletin* 48; Chief Justice Ngcobo 'Enhancing access to justice: The search for better justice' *Access to Justice Conference* 6 July 2011 15 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014).

⁵ See 2.5 for a detailed discussion on the prevailing shortcomings in the South African civil justice system as a result of litigation.

⁶ See 1.6.1 below for a definition of access to justice.

⁷ The adversarial nature of civil litigation entails 'that court proceedings are seen as a battle between two parties' with the presiding officer acting as a passive referee' Meintjies-Van der Walt L, Singh P & du Preez M

The South African legislature, judiciary and executive, have attempted to remedy the aforementioned shortcomings through the implementation of various initiatives over the years.⁹ Although these initiatives have been helpful, the aforementioned shortcomings have prevailed to date. In recent years, however, the South African government introduced the concept of mandatory court based mediation,¹⁰ through the Civil Justice Reform Project (CJRP), with the view of promoting access to justice and enhancing the civil justice system.¹¹

Mandatory court based mediation was initially introduced to South Africa in the form of court rules.¹² These court rules were subsequently rejected on the basis that there exists no enabling legislation in South Africa sanctioning these court rules and were therefore

et al *Introduction to South African Law* (2008) 135. The adversarial nature of litigation can also be defined as warfare between disputants, which ultimately produces a winning and losing party. ‘Warfare, as I have characterised it, is at the heart of litigation...’ Campbell-Tiech A ‘Woolf, the adversarial system and the concept of blame’ (2001) 113 *British Journal of Haematology* 263; English Lord Denning remarks: ‘In litigation as in war. If one side makes a mistake, the other can take advantage of it. No holds are barred’ *Burmah Oil Co v Bank of England* 1979 (1) WLR 473, 484.

⁸ See 2.5 below regarding a discussion on the negative impact which the adversarial system has on disputants’ relationships in particular.

⁹ Such as the building of additional court structures, Department of Justice and Constitutional Development *Annual Report 2012/2013* (2013) 8; the institution of case management projects, Hodes P ‘Case Management: Bar Initiatives’ (1997) 10 *Consultus* 34; the harmonisation and amendments to the court rules and legislation for the High Court and Magistrates’ Court, the institution of Legal Aid South Africa, established through the Legal Aid Act 22 of 1969; the establishment of the South African Law Reform Commission (SALRC), established through the South African Law Reform Commission Act 19 of 1973; the Rules Board for Courts of Law in South Africa, established in terms of the Rules Board for Courts of Law Act 107 of 1985. See 2.5 below for further discussions on these initiatives.

¹⁰ Mandatory court based mediation provides that whenever an appearance to defend is entered into at court, the matter is referred to mediation in an attempt to settle and resolve the dispute. In the event of the disputants being unable to settle their dispute the matter is then referred back to the conventional litigation process to be adjudicated at court. Mandatory court based mediation is premised on the ADR process of mediation, see 1.6.2 below for a discussion on mediation. Also see 5.2 below for a discussion on the concept of mandatory court based mediation.

¹¹ The objective of the CJRP was the alignment of the South African civil justice system with the constitutional values, and the simplification and harmonisation of laws and rules to make justice easily and equally accessible to all, in particular the vulnerable and poor members of society. Department of Justice and Constitutional Development *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* (hereafter *Discussion Document*) (2012) 20. This reform initiative sought to address the shortcomings, such as the cost of litigation, the turnaround time, the complexity, the fragmentation and the overly adversarial nature of its current civil justice system. Department of Justice and Constitutional Development *Discussion Document* (2012) 25.

¹² The mandatory court based mediation rules were developed by the Rules Board for Courts of Law in 2011. Department of Justice and Constitutional Development *Discussion Document* (2012) 20. The rules were titled ‘Mandatory Mediation Rules of the High Courts and the Magistrates’ Courts’ (hereafter ‘the 2011 Draft Set of Rules’). Law Society of South Africa ‘Draft mediation rules’ available at <http://www.lssa.org.za/upload/DRAFT%20MEDIATION%20RULES%20APPROVED%20BY%20BOARD%2019%202011.pdf> (accessed 15 November 2014).

subsequently redrafted into a set of voluntary court based mediation rules.¹³ The Minister of Justice and Constitutional Development (Minister of Justice),¹⁴ however, still seeks to be advised on whether mandatory court based mediation should be implemented in South Africa's civil justice system in future and whether appropriate legislation should be promulgated in this regard.¹⁵ The suitability of mandatory court based mediation to the South African civil justice system, with specific focus, on remedying the persistent shortcomings therein, is investigated in this thesis.¹⁶

1.2 RESEARCH QUESTION

The title of the thesis is 'Mandatory court based mediation as an alternative dispute resolution process in the South African civil justice system'. This thesis is based on the following research question:

'Is mandatory court based mediation a suitable ADR process to implement in South Africa in order to reduce significantly the shortcomings within its civil justice system?'

The shortcomings of the South African civil justice system identified in this thesis emanate from the practice of the primary method of dispute resolution, being litigation. Due the impact of these shortcomings on the disputants involved and, in a broader sense, the nation of South Africa, there exists a crucial need to remedy these issues.

¹³ The decision to reject the mandatory rules was based on a legal opinion sought by the Minister of Justice. Department of Justice and Constitutional Development *Strategic Plan 2013-2018*(2013) 17.

¹⁴ Minister Jefferey Radebe.

¹⁵ Radebe J 'The Inaugural African Alternative Dispute Resolution and Arbitration Conference' Cape Chamber of Commerce and Industry 28 November 2013 available at <http://capetownchamber.com/wp-content/uploads/2013/12/Mnisters-speech.pdf> (accessed on 14 March 2014); Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates' Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2. For further discussions on the Minister of Justice's proposal regarding the possible future implementation of mandatory court based mediation, see 5.4 below.

¹⁶ In this regard the thesis draws a distinction between the mandatory court based mediation rules and the concept of mandatory court based mediation. See the research objectives of the thesis at 1.3 below.

The benefits and advantages of mandatory court based mediation appear to remedy the shortcomings identified in this thesis. However, the overall suitability of this ADR process will still need to be investigated. In view hereof, the remedial benefits, the constitutionality as well as the criticisms and perceived challenges of this ADR process will be discussed in this thesis.

In view of the above, a possible side question of how mandatory court based mediation may be implemented in South Africa's civil justice system, may arise and is briefly addressed in this thesis. However, addressing this ancillary question will not be the focus of this thesis and will simply be answered in the form of a suggestion.

1.3 THE RESEARCH OBJECTIVES

The overall aim of this thesis is to establish whether mandatory court based mediation is a suitable ADR process to implement in South Africa in order to make a substantial contribution to remedying the shortcomings of its civil justice system. To this end the secondary aims listed below flow from this principal aim.

The shortcomings associated with South Africa's adversarial civil justice system and primary method of dispute resolution, litigation, will be discussed.¹⁷ In this regard, the impact that these shortcomings have on civil disputants and the nation of South Africa, at large will also be discussed. This will establish the need for South Africa to implement an alternative primary method of civil dispute resolution, in order to remedy these shortcomings associated with civil litigation, and the need to improve the civil justice system.

¹⁷ At 2.5 below.

The aim of the thesis is also to prove that although South Africa's civil justice system is adversarial in nature, it is no stranger to the practice of mediation as a preferred method of dispute resolution in certain areas of civil law.

Furthermore the aims are to investigate the jurisdiction of Australia,¹⁸ where the practice of mediation as a primary method of dispute resolution is practised within an adversarial civil justice system. This is in order to assess the implementation of such an ADR process, which was implemented with the view to remedy the shortcomings of an adversarial civil justice system.

A further aim of this thesis is to prove the benefits and advantages flowing from mandatory court based mediation as a primary method of civil dispute resolution. These benefits reflect how the process remedies the shortcomings in South Africa's civil justice system and the positive impact the process has on civil disputants as well as the nation of South Africa, in a broader sense.

In addition, the aim of this thesis is to assess the constitutionality as well as the criticisms of this ADR process. In view hereof, the thesis aims to prove that mandatory court based mediation lines up with the Constitution of the Republic of South Africa, 1996 (the Constitution, 1996) and does not contravene the constitutional right of access to courts. Furthermore, that although this ADR process does face valid criticism; it remains suitable and beneficial to South Africa's civil justice system.

¹⁸ The states of NSW and Victoria specifically.

The latest developments in South Africa's civil justice system will also be a relevant point of consideration in this thesis, in order to assess the direction in which this the country is headed with regards to court based mediation.¹⁹

1.4 RESEARCH METHODS

The thesis is conducted by reviewing the literature published through secondary sources which includes articles in journals, academic books, newspapers and web publications. Primary sources such as applicable case law,²⁰ policies, and legislation using mediation processes are also considered. Furthermore, original narratives by independent researchers and academic scholars are also referred to in this thesis.

In view of the difficulties related to South Africa's civil litigation process and the role that mediation can play in resolving civil disputes, various pieces of South African legislation that provide for mediation are discussed in this thesis. Legislation and related authority specifically in the fields of family law, labour law and commercial law are considered. Such statutes and reports include the Labour Relations Act²¹ (LRA), the Mediation in Certain Divorce Matters Act²² (MDMA), the Children's Act²³ (the Children's Act), the Companies Act²⁴ ('the new Companies Act'), the King Report on Corporate Governance for South Africa 2009 ('the King III Report'), and the Code on Corporate Governance for South Africa 2009 (the Code). A number of other South African legislative measures are also briefly discussed,

¹⁹ This relates to the implementation of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa coming into operation on pilot project basis on 1 December 2014.

²⁰ Due to the nature and novelty of the topic of this thesis, not many cases were found in support of the aims herein. However, where necessary and appropriate, judgments discussing mediation, ADR and related matters were discussed.

²¹ Act 66 of 1995.

²² Act 24 of 1987.

²³ Act 38 of 2005.

²⁴ Act 71 of 2008.

highlighting the practice of mediation on a mandatory as well as a voluntary basis. The Constitution, 1996 is also focussed on throughout the thesis.

Comparisons are drawn to the jurisdiction of the Australian states of New South Wales (NSW) and Victoria.²⁵ This is done in order to assess the practice of an established mediation system, as a preferred method of dispute resolution, in an adversarial civil justice system.²⁶ In addition, such comparisons are made in order to learn possible lessons from these jurisdictions regarding the implementation of such a mediation system. The reason for selecting the jurisdiction of Australia is due to the fact that this country is an international forerunner in the practice of mediation²⁷ and is known for maintaining one of the oldest and most successful mediation systems in the world.²⁸ The reason for selecting the states of NSW and Victoria is due to the fact the these states both have a measure of English common law influence in their civil justice systems.²⁹ These states have also practiced litigation as their primary method of civil dispute resolution and therefore have similar adversarial natured civil justice systems to South Africa.³⁰ These two states' civil justice systems have further experienced similar shortcomings to the South African civil justice system in this regard.³¹

²⁵ The length requirements for the thesis do not allow for an analysis of the civil justice systems in all six states and two territories of Australia (see 4.2 below for an explanation on the states and territories in Australia). The two states selected serve as examples of the growth, development and success of mediation programmes in an adversarial civil justice system. Reasons for selecting NSW and Victoria specifically are discussed below.

²⁶ See discussion below regarding adversarial nature of NSW's and Victoria's civil justice systems.

²⁷ Clark K 'The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn' (2002) *PEPP. DISP. RESOL.L.J* 118; World Arbitration and Mediation Report 272 – *Global Trends in Mediation* (2002) 40-41; Hilmer S.E 'Mandatory mediation in Hong Kong: A workable solution based on Australian experiences'(2012) 1 *China-EU Law J* 62; 'Mediation has grown rapidly in many Anglophone jurisdictions such as USA, Australia, Canada, New Zealand and England... Mediation is practised in the private sector as well as in a wide range of court-referred programs. In many common law jurisdictions mediation is no longer a form of alternative dispute resolution, it has become *primary* dispute resolution.' Alexander N 'Mediating in the shadow of Australian law: Structural influences on adr' (2006) 9 *Yearbook of New Zealand Jurisdiction* 332.

²⁸ Hilmer S.E 'Mandatory mediation in Hong Kong: A workable solution based on Australian experiences' (2012) 1 *China-EU Law J* 62.

²⁹ South Africa's civil justice system is also influenced by the English common law, see 1.1 above. See 4.2.2 and 4.2.3 for further discussions on NSW and Victoria's civil justice system respectively.

³⁰ NSW and Victoria have practiced litigation as their primary method of dispute resolution prior to implementing court-referred mediation in their civil justice systems, at 4.2 below.

³¹ See 4.3.1 and 4.3.2 below.

Reference will be made to specific Australian legislation which provides the framework for mediation and the development of court-referred mediation programmes.

In view of the research question, the suitability of mandatory court based mediation to the South African civil justice is the focus of this thesis, and not necessarily how the implementation of the process is to take place. However, the implementation of this ADR process may be a related question arising out of this thesis and is therefore briefly addressed. Although not principally investigated, a suggestion on how the process could be implemented in the county's civil justice system is made. The suggestion is based on the developments in South Africa's civil justice system regarding court based mediation.³²

1.5 SIGNIFICANCE OF RESEARCH

This thesis is significant as no thesis concerning mandatory court based mediation as an ADR process in the South African civil justice system could be identified, nationally and internationally, during researching this topic. This thesis is therefore novel and unique in its execution.

Further premises on the significance of this thesis are that South Africa's civil justice system may be on the brink of significant change with the implementation of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa³³ ('the Amended Magistrates' Court Rules')³⁴ soon to be ushering court based mediation into

³² The reason for mandatory court based mediation court rules being developed into voluntary court based mediation rules and now being implemented into South Africa's civil justice system on a pilot project basis on 1 December 2014.

³³ Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014.

³⁴ Discussed in further detail at 5.3.1 below.

South Africa's civil justice system.³⁵ These court rules will be rolled out on a pilot project basis on 1 December 2014.³⁶ Although these rules will be introduced on a voluntary and pilot project basis, it remains one of the most significant developments made to South Africa's civil justice system in recent years. 1 December 2014 may mark the commencement of a gradual historic change to South Africa's civil justice system, conventional litigation, and court procedure known today.

The Amended Magistrates' Court Rules may have been the preferred system to implement in South Africa; however, all is not lost for the possible future implementation of mandatory court based mediation into South Africa. The Department of Justice and Constitutional Development (Department of Justice)³⁷ seeks to be convinced on whether mandatory court based mediation should be implemented in South Africa's civil justice system³⁸ and, in the current absence of enabling legislation, whether promulgating legislation in support of this ADR process is desirable.³⁹ This thesis may therefore hold some persuasive value in

³⁵ 'We are also mindful of the fundamental changes that the rules [court based mediation rules] will bring into our legal system and the capacity that will be required to give full effect to these rules at court level. It is for these reasons that we will adopt an incremental approach to the implementation of these rules.' Radebe J 'The Inaugural African alternative dispute resolution and arbitration conference' Cape Chamber of Commerce and Industry 28 November 2013 available at <http://capetownchamber.com/wp-content/uploads/2013/12/Mnisters-speech.pdf> (accessed on 14 March 2014).; '...It [the Amended Magistrates' Court Rules] gives mediation a foot in the door of the civil justice system, despite the voluntary or autonomy-sensitive nature of the rules. It is unthinkable that mediation will not in the near future also be institutionalised at the higher courts...' Joubert J 'Court-annexed mediation opens doors to exciting opportunities' *Legalbrief Today* 23 September 2014 available at <http://www.legalbrief.co.za/article.php?story=20140923130558982> (accessed 18 October 2014); 'In creating opportunities for parties in conflict to talk to each other, whether successfully or not, the court-annexed mediation initiative of the Department of Justice [the Amended Magistrates' Court Rules] is breaking new ground. It deserves the full support of everyone concerned... including the legal profession in South Africa.' Joubert J 'Mediation will get its foot in a South African door' (2014) *Mediation.com* available at <http://www.mediate.com/articles/JoubertJ9.cfm> (accessed 9 November 2014).

³⁶ Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Amendment of Rules Regulating the Conduct of Proceedings of Magistrates' Courts of South Africa in GN 571 GG 37848 of 18 July 2014.

³⁷ As from May 2014 referred to as the 'Department of Justice and Correctional Services.' Manyathi-Jele N, 'New Justice Ministry Announced' (2014) 543 *De Rebus* 6.

³⁸ Radebe J 'The Inaugural African Alternative Dispute Resolution and Arbitration Conference' Cape Chamber of Commerce and Industry 28 November 2013 available at <http://capetownchamber.com/wp-content/uploads/2013/12/Mnisters-speech.pdf> (accessed on 14 March 2014).

³⁹ Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates' Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014)2.

convincing the Department of Justice that mandatory court based mediation is suitable to the South African civil justice system.

The former Minister of Justice⁴⁰ has also advised that there are precedents in other comparable jurisdictions from which South Africa may draw lessons and best practices from in developing possible legislation in support of mandatory court based mediation.⁴¹ In this regard, this thesis may be of further significance by observing the legislation and implementation of the court-referred mediation programmes in Australia. Therefore, by investigating the states of NSW and Victoria to this end, lessons and best practices may be drawn from these jurisdictions. This could aid the Department of Justice in some way in possibly developing mandatory court based legislation in future.

1.6 TERMINOLOGY AND CONCEPTS

A number of chosen terms and concepts have been used throughout this thesis. In order to simplify the text, unless the context requires otherwise, certain terms will be used consistently throughout. Some of these terms and concepts are explained below.

1.6.1 The Concept of Alternative Dispute Resolution (ADR)

‘ADR’ is the generally accepted acronym for alternative dispute resolution.⁴² ADR refers to a range of dispute resolution methods that provide an alternative to public court litigation

⁴⁰ Minister of Justice and Constitutional Development, Jeffery Radebe.

⁴¹ In this regard he has requested the Department of Justice to prepare a draft bill accordingly and appointed a Mediation Advisory Committee, currently in operation, who is responsible for inter alia assisting the Department in investigating the desirability and possibility of legislation regarding mandatory court based mediation. Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates’ Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014)2.

⁴² South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 2.1.

through the formal court system.⁴³ ADR covers a broad range of mechanisms and processes designed to assist parties in resolving disputes creatively and effectively.⁴⁴ In so far as this may involve alternative processes to formal litigation, these processes are not intended to replace court adjudication, but rather to supplement it.⁴⁵

The aims of ADR are to:

- 'a) relieve court congestion, as well as prevent undue cost and delay;
- b) enhance community involvement in the dispute resolution process;
- c) facilitate access to justice; and
- d) provide more effective dispute resolution.'⁴⁶

The most common methods of ADR include inter alia facilitation, conciliation, negotiation, arbitration and mediation.⁴⁷

1.6.2 The Concept of Mediation

The concept of mediation is discussed extensively in this section, as it forms the basis of mandatory court based mediation.

Mediation is a process in which the parties to a dispute endeavour to reach a settlement through negotiations⁴⁸ facilitated by an independent third party (the 'mediator').⁴⁹ Through these facilitated negotiations, the mediator assists the parties in identifying the issues in dispute and assists them in developing resolution options in reaching a final mutually

⁴³ Yarn D *Dictionary of Conflict Resolution* (1999) 17; E Martin A *Dictionary of Law* (1997) 23; Burgess H & Burgess G *Encyclopaedia of Conflict Resolution* (1997) 8; 'Most simply put, ADR denotes all forms of dispute resolution other than litigation or adjudication through the courts.' South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 2.1.

⁴⁴ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 2.3.

⁴⁵ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 2.3.

⁴⁶ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 2.19.

⁴⁷ Ramsden P *The Law of Arbitration: South African and International Arbitration* (2009) 1. A definition of each of these forms of ADR will not be necessary, except for mediation which is explained at 1.6.2 below.

⁴⁸ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 20.

⁴⁹ Also known as the 'neutral'. The mediator should be an independent, mutually acceptable third party who will listen to both sides of the dispute and make proposals or recommendations on how the dispute could be resolved. Ramsden P *The Law of Arbitration: South African and International Arbitration* (2009) 2.

acceptable agreement.⁵⁰ Therefore, there exists no winning or losing party in this process.⁵¹ In other words, either the parties agree on an outcome of mutual benefit, or there is no result.⁵² If mediation does not succeed, disputants may resort to formal litigation proceedings.⁵³

The mediator's role is aimed at facilitating a settlement between the disputing parties.⁵⁴ Therefore he or she cannot make any decisions of fact or law, neither can he or she reach a final decision nor determine the credibility of any party participating in the mediation process.⁵⁵

The characteristics of the mediation process include that sessions are conducted in private and without prejudice.⁵⁶ This is central to the process of mediation.⁵⁷ Furthermore, the process is speedy,⁵⁸ flexible, informal,⁵⁹ and cost-saving.⁶⁰ Mediation is also said to be characterised by its reconciliatory nature particularly in instances where personal or business

⁵⁰ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 20.

⁵¹ Ramsden P *The Law of Arbitration: South African and International Arbitration* (2009) 3.

⁵² Ramsden P *The Law of Arbitration: South African and International Arbitration* (2009) 3.

⁵³ Therefore parties have nothing to lose in attempting to resolve their dispute through mediation. Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 205.

⁵⁴ Rule 80 (1)(a) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; 'Specifically a mediator encourages candour, highlights common and competing party interests, sets agenda[s] for discussion, assist parties [to] explore options for settlement...' Alexander N *International and Comparative Mediation: Legal Perspectives* (2009) 30.

⁵⁵ Rule 80 (1)(b) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 20; Ramsden P *The Law of Arbitration: South African and International Arbitration* (2009) 2.

⁵⁶ Schneider C 'Mediation in the Children's Act 38 of 2005' available at <http://www.famac.co.za/mediation/in-the-childrens-act> (accessed 21 November 2013).

⁵⁷ Spencer D and Brogan M *Mediation Law and Practice 2007* 85-87; Boule L and Nesic M 2001 *Mediation: Principles Process Practice* 41-42.

⁵⁸ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 28.

⁵⁹ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 24.

⁶⁰ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 27.

relationships have broken down.⁶¹ Mediation also bridges poor communication or mistrust between disputants,⁶² and thus re-orientates parties towards each other.⁶³

1.6.3 The Concept of Access to Justice

The concept of access to justice does not only relate to one's constitutional right of access to courts.⁶⁴ It is believed that the concept is fulfilled when dispute resolution procedures are simple to understand,⁶⁵ affordable,⁶⁶ speedy and effective when used by the public.⁶⁷

In encapsulating the above, Justice Ngcobo states that,

‘access to justice suffers... when the costs of litigation are prohibitive; when the procedures and processes are unduly complicated or burdensome; and when delays are too long for the average person.’⁶⁸

Based on the above, access to justice within a civil justice system may therefore be deemed to include the right of access to courts together with the affordable, procedurally simple, and expedient methods of civil dispute resolution.

⁶¹ Alexander N *International and Comparative Mediation: Legal Perspectives* (2009) 12.

⁶² Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 29.

⁶³ Schneider C ‘Mediation in the Children's Act 38 of 2005’ available at <http://www.famac.co.za/mediation/in-the-childrens-act> (accessed 21 November 2013).

⁶⁴ Section 34 of the Constitution, 1996. Hurter E ‘Access to justice: To dream the impossible dream?’ (2011) 44 *Comparative and International Law Journal of Southern Africa* 408.

⁶⁵ Chief Justice Ngcobo ‘Enhancing access to justice: The search for better justice’ Access to Justice Conference 6 July 2011 19 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014).

⁶⁶ Heywood M & Hassim A ‘Remedying the maladies of 'lesser men or women': The personal, political and constitutional imperatives for improved access to justice.’ 2008 *SAJHR* 263; Holeness D ‘The constitutional justification for free legal services in civil matters in South Africa’ (2013) 27 *Speculum Juris* 5-6.

⁶⁷ President JG Zuma ‘Access to justice in a democratic South Africa’ Lecture by ANC President Jacob Zuma to the Platform for Public Deliberation, University of Johannesburg 9 September 2008 available at <http://www.anc.org.za/show.php?id=3815> (accessed on 27 September 2014); ‘...the most quoted legal aphorism, namely that “justice delayed is justice denied”...’ Muvangua N & Cornell D *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 184.

⁶⁸ Justice Ngcobo goes on to provide that ‘in order to ensure access to justice in a civil justice system, the system should be just in the results it delivers; be fair in the way it treats litigants; offer appropriate procedures at a reasonable cost; deal with cases with reasonable speed; be understandable to those who use it; be responsive to the needs of those who use it; provide as much certainty as the nature of particular cases allows; and be effective that is, adequately resourced and organised’. Chief Justice Ngcobo ‘Enhancing access to justice: The search for better justice’ Access to Justice Conference 6 July 2011 18-19 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014).

In the context of South Africa's civil justice system, given the country's unjust and unequal past,⁶⁹ the concept of access to justice is held in high esteem and is deemed to be 'an inalienable constitutional right flowing from [its] constitutional democracy'.⁷⁰

1.7 CHAPTER OUTLINE

This thesis consists of six chapters. Chapter 1 is the introductory chapter, guiding the reading of this thesis. The background, research question and research objectives are also set out in this chapter. The research methods and significance of this thesis are also contained in Chapter 1, together with the definitions of certain terms used throughout. A brief chapter outline of all six chapters concludes Chapter 1.

The focus of Chapter 2 is the South African civil justice system and commences with a historical overview of its development. The structure as well as the adversarial nature of the country's civil justice system, as influenced by the English common law, is also discussed. The chapter also focuses on litigation as the primary method of civil dispute resolution and the shortcomings associated with this process. Chapter 2 further emphasises these shortcomings and the impact they have on the parties involved in civil disputes as well as the nation of South Africa in a broader sense. The chapter concludes with suggesting that the

⁶⁹ 'Before I give a cursory description of this fundamental value [access to justice] that is founded on the rule of law, let me first give background to the political evolution that gave rise to the need for Access to justice to be an embodiment of our constitutional order. As you know, our country has seen a protracted struggle against colonialism and later apartheid which had persisted for more than 300 years. During this era the country was characterised by racial hatred and discrimination, deep inequality, poverty and strife which were rooted in, and enforced through the laws and policies of the colonialists and erstwhile apartheid Government. Apartheid was entrenched in every fabric of society and was manifestly inherent in the political life, economy, religion, sports, business, employment, residence, education including access to institution such as universities. The fruits of colonialism and apartheid were the denial of justice. Justice was a commodity which was accessible only to the privileged, the powerful and the rich, to the detriment of poor, the marginalised and the weak.' Radebe J 'Challenges facing access to justice in S.A' The Department of Justice and Constitutional Development 16 October 2012 available at http://www.justice.gov.za/m_speeches/2012/20121016_min-uct.html (accessed on 15 February 2014).

⁷⁰ Radebe J 'Challenges facing access to justice in S.A'.

primary method of civil dispute resolution be changed in order to remedy these shortcomings and in order to enhance South Africa's civil justice system

Chapter 3 provides that South Africa, although possessing an inherently adversarial civil justice system, is no stranger to the practice of mediation as an alternative method of dispute resolution in certain areas of its civil law. To this end, the practice of mediation in many areas of civil law will be discussed in this chapter. However, the fields of family law, labour law and commercial law will be observed in greater detail. These particular fields of civil law are discussed with specific focus on how mediation, as the preferred method of dispute resolution, operates in these areas of law and the support which this ADR tool has in these fields.

Discussions in Chapter 4 relate to the practice of mediation as a preferred method of dispute resolution in the jurisdictions of the Australian states of NSW and Victoria. These states are discussed focusing on the role and operation of mandatory court-referred mediation as the primary method of dispute resolution in these states' adversarial civil justice systems. The similar shortcomings experienced in the South African, NSW and Victorian civil justice systems are also highlighted in this chapter. How court-referred mediation was implemented in order to remedy these shortcomings is also discussed, together with possible lessons for South Africa regarding its implementation.

In Chapter 5 the focus is on the concept of mandatory court based mediation, as introduced by the South African government in recent years. Discussions in this chapter include the shortcomings that this ADR process remedies in South Africa's civil justice system. In view hereof the benefits and advantages of this ADR process towards the disputants involved, the

legal profession and the nation (in a broader sense) will be assessed. Practical issues, such as the costs relating to mandatory court based mediation is also highlighted in this chapter. Further discussions in Chapter 5 focus on the constitutionality as well as the arguments against this ADR process. This chapter also discusses the latest developments in South Africa's civil justice system regarding court based mediation and the possible future implementation of mandatory court based mediation.

Chapter 6 is the concluding chapter of this thesis. This chapter will therefore aim to answer the research question of whether mandatory court based mediation is a suitable ADR process to implement in South Africa in order to reduce significantly the shortcomings within its civil justice system. Emphasis will therefore be placed on the suitability of mandatory court based mediation to the South African civil justice system. Chapter 6 concludes with suggestions on how mandatory court based mediation may be implemented in South Africa's civil justice system, in future, and the way forward for court based mediation in the country.

CHAPTER 2

THE SOUTH AFRICAN CIVIL JUSTICE SYSTEM

2.1 INTRODUCTION

South Africa's primary method of dispute resolution within its civil justice system is litigation, as a result of its English inheritance.⁷¹ The South African civil justice system is therefore adversarial in nature.⁷²

The research question of this thesis is whether mandatory court based mediation is a suitable ADR process to implement in South Africa in order to reduce significantly the shortcomings within the civil justice system.⁷³ In view hereof, Chapter 2 investigates the South African civil justice system with particular focus on this system's adversarial nature and shortcomings.

Chapter 2 commences with a discussion on South Africa's legal system in order to contextualise its civil justice system. Thereafter the country's judicial system and the role it plays in the civil justice system are discussed. This is followed by an assessment of the South African civil justice system and its litigation procedures. The aforementioned are discussed in order to view holistically and contextualise South Africa's civil justice system. Thereafter the shortcomings of the civil justice system are analysed.

2.2 THE SOUTH AFRICAN LEGAL SYSTEM

This section briefly discusses the South African legal system in order to contextualise the origins and principles of its civil justice system. The history of the country's legal system is

⁷¹ See 1.1 above.

⁷² See 1.1 below.

⁷³ See discussions at 1.2 above.

therefore divided into two separate sub-sections below, being the eras of colonisation and South Africa's transition into constitutionalism.⁷⁴ This is in order to extract the fundamental developments of the country's legal system that are relevant to this chapter.

2.2.1 A Brief History of the South African Legal System

In 1652, the Dutch settlers established themselves in the Cape and introduced to South Africa the Roman-Dutch legal system.⁷⁵ Thereafter the English invaded the territory, through colonisation in 1806. The English rulers at the time, however, decided to retain the practice of Roman-Dutch Law.⁷⁶ English legal principles gradually began to influence the development of the country's Roman-Dutch legal system.⁷⁷ This resulted in a general movement towards English law and English institutions.⁷⁸ The English law influence was characterised by inter alia the courts of the Roman-Dutch lay officials being abolished and replaced by courts of resident English magistrates. Further characteristics include the implementation of English rules of procedure and evidence, the jury system, as well as appeal to the Privy Council. Nevertheless, substantive Roman-Dutch law was left largely untouched.⁷⁹

Throughout the development of South Africa's legal history, the traditional South African customary law of its indigenous people continued to survive alongside this hybrid legal

⁷⁴ Due to the vast history of South African law only selected aspects thereof, which are deemed necessary for this thesis, will be discussed.

⁷⁵ Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteenth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 71.

⁷⁶ Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteenth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 74.

⁷⁷ Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteenth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 71.

⁷⁸ Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteenth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 74.

⁷⁹ Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteenth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 74.

system.⁸⁰ South Africa at the time thus inherited its legal system from two main legal traditions: Roman-Dutch law and English common law, in addition to its customary law practices.⁸¹

2.2.1.1 The Nature of Roman-Dutch Law

Roman-Dutch law, as the initial basis of South Africa's legal system, is based on the European *ius commune* originating from Roman academic institutional writers.⁸² Thus Roman-Dutch law is based on a legal science.⁸³ The legal systems of most European *ius commune* countries (such as France, Spain, Italy and Germany) are codified and their codes of civil procedure are inquisitorial in nature, as opposed to adversarial.⁸⁴ An inquisitorial system provides that the presiding officer in court proceedings plays an active role in fact-finding and actively participates in the court proceedings.⁸⁵ Furthermore, traditionally, the presiding officer uses a dossier on investigation as means of decision-making and no judicial precedent is used, only reference to commentaries on the code by legal writers.⁸⁶

Although Roman-Dutch law remained the basis of the South African legal system, the civil justice system became predominantly adversarial in nature as a result of the English common law influence, as discussed below.⁸⁷

⁸⁰ Davis DM & Klare K 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 502.

⁸¹ For the purposes of this chapter, being the South African civil justice system, only Roman-Dutch Law and English common law will be expounded upon below.

⁸² Schulze WG 'A conspectus of South African legal periodicals: Past to present' (2013) 19 *Fundamina: A Journal of Legal History* 62.

⁸³ Schulze WG 'A conspectus of South African legal periodicals: Past to present' (2013) 19 *Fundamina: A Journal of Legal History* 62.

⁸⁴ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 135.

⁸⁵ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 136.

⁸⁶ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 135.

⁸⁷ Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteenth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 84.

2.2.1.2 The Nature and Influence of the English Common Law

The English common law has influenced the legal systems of many countries as a result of colonisation. In addition to South Africa, these countries include Australia,⁸⁸ Canada, New Zealand and the United States.⁸⁹

The foundation of English common law⁹⁰ is based on English practitioners who developed the English legal system by means of their arguments used during court proceedings, as well as the decisions made by judicial officers at the conclusion of the court proceedings. Therefore, this system of law is founded on judicial precedent and is uncodified.⁹¹ The distinctive features of the English common law include the fundamental importance of the court system in dispute resolution, judicial precedent, as well as the extremely adversarial (or accusatorial) nature of its legal system.⁹²

In the English common law legal system, litigation is the primary method of dispute resolution.⁹³ The adversarial nature of this system is therefore premised on this dispute resolution process.⁹⁴ The following characteristics define the nature of the traditional English adversarial legal system: court processes that are seen as warfare⁹⁵ between two parties, with the presiding officer acting as a passive referee and not actively engaging in the court process.⁹⁶ Further characteristics include legal practitioners who conduct court proceedings in

See discussions regarding the jurisdiction of the Australia in Chapter 4.

⁸⁹ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 135.

⁹⁰ The system of law which does not originate from statute and has been generally practised in the country for centuries. Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 26.

⁹¹ Davis DM & Klare K 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 404.

⁹² Hurter E 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 242.

⁹³ See 1.1 above.

⁹⁴ See 1.1 above.

⁹⁵ See 1.1 above.

⁹⁶ See 1.1 above.

a confrontational or hostile manner,⁹⁷ before the judicial officer, who then determines the winning and losing party to the case in dispute.⁹⁸ In addition, court proceedings are conducted via rigid court rules and procedures that are complex and stringent in nature.⁹⁹ Moreover, leading up to these formalistic court procedures are compulsory pre-court litigation processes that are time-consuming and detailed, and usually require lay people to approach legal practitioners for their assistance to conduct these proceedings.¹⁰⁰

Furthermore, through the British colonial influence, the Charter of Justice of 1827 introduced a more English kind of civil justice system to South Africa. It introduced the Supreme Court of the Colony of the Cape of Good Hope, modelled on the English courts and further employed professional judges to rule in this court and the additional court structures established in South Africa thereafter.¹⁰¹ As these court systems grew, all judges as well as legal practitioners in South Africa (particularly in the Cape) were trained according to English law.¹⁰²

As time progressed South Africa developed its own unique common law, as that part of its legal system which did not originate from statute and has been generally practised in the country for decades.¹⁰³ The South African common law thus comprised Roman-Dutch law

⁹⁷ Campbell-Tiech A 'Woolf, the adversarial system and the concept of blame' (2001) 113 *British Journal of Haematology* 263.

⁹⁸ Jolowicz JA 'Adversarial and inquisitorial models of civil procedure' (2003) 52 *International and Comparative Law Quarterly* 281.

⁹⁹ Campbell-Tiech A 'Woolf, the adversarial system and the concept of blame' (2001) 113 *British Journal of Haematology* 263.

¹⁰⁰ Campbell-Tiech A 'Woolf, the adversarial system and the concept of blame' (2001) 113 *British Journal of Haematology* 263; Jolowicz JA 'Adversarial and inquisitorial models of civil procedure' (2003) 52 *International and Comparative Law Quarterly* 285.

¹⁰¹ Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteenth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 84.

¹⁰² Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteenth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 84.

¹⁰³ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 26.

and English law.¹⁰⁴ Over time South Africa law further developed its legal system and included additional sources of law such as statutes and its own judicial precedent (as influenced by the traditional English common law).¹⁰⁵

Presently South Africa's legal system remains uncodified as many sources of law contribute to its functioning. Thus the primary sources of the South African legal system are the South African common law (Roman-Dutch law and English law), customary law, statutes, judicial precedent and, fundamentally, the Constitution of the Republic of South Africa, 1996 (the Constitution, 1996).¹⁰⁶

South Africa may comprise various sources of law; however, its civil justice system is strongly influenced by the English common law.¹⁰⁷ Therefore some of the characteristics that define the nature of the English adversarial legal system, discussed above, can be identified in the current South African civil justice system.¹⁰⁸ These characteristics include the emphasis which is placed on the South African court system and judicial precedent,¹⁰⁹ the adversarial nature of its civil justice system and the emphasis placed on litigation as the primary method dispute resolution to date.¹¹⁰

¹⁰⁴ Van den Bergh R 'The remarkable survival of Roman-Dutch law in nineteenth-century South Africa' (2012) 18 *Fundamina: A Journal of Legal History* 71.

¹⁰⁵ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 26.

¹⁰⁶ See 1.1 above.

¹⁰⁷ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 135.

¹⁰⁸ For a further discussion on the South African civil justice system, see 2.4 (including the sub-sections) below.

¹⁰⁹ Davis DM & Klare K 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 415. For a discussion of the South African court system see 2.3 (including the sub-sections) below.

¹¹⁰ See discussions at 2.4.2 below.

2.2.2 Recent Developments in the South African Legal System

2.2.2.1 The Transition from Apartheid to Constitutional Democracy

South Africa was governed by the apartheid legal system since 1948.¹¹¹ This system was premised on inequality and injustice as a result of the legal segregation of racial groups.¹¹² By 1989/90 violence and hostility had become rife in the country as a result of this legal system.¹¹³ By 1994 political parties, via lengthy negotiation procedures since 1991,¹¹⁴ agreed to hold the first democratic elections, which put an end to the apartheid era and later promulgated the final Constitution, 1996.¹¹⁵ The Constitution became the supreme law of the country and was designed against the backdrop of apartheid and colonisation.¹¹⁶ The Constitution was thus premised on moving the country towards restoration and unity, as encapsulated by the preamble as follows:

‘We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [i]mprove the quality of life of all citizens and free the potential of each person; and [b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.’

¹¹¹ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 7.

¹¹² Apartheid legislation legally classified citizens into racial groups and provided separate rights with respect to each group. Such legislation included the Population Registration Act 30 of 1950, the Groups Areas Act 41 of 1950, the Black Homeland Citizenship Act 26 of 1970 and the Immorality Act 5 of 1927. Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 7-8

¹¹³ The Apartheid Museum *Understanding Apartheid: Learner's Book* (2006) 90-91.

¹¹⁴ The following comprises some of the issues that were negotiated during this time, that is: the unbanning of political organisations, apartheid legislation repealed, the ceasing of the armed struggle, and future negotiations on the drafting of the country's constitution. The Apartheid Museum *Understanding Apartheid: Learner's Book* (2006) 90-91.

¹¹⁵ Kotze' D 'Mediation during the Transition in South Africa' available at <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=14555> (accessed 19 September 2014); Kotze' D 'Consolidation of Democracy in South Africa' (2007) 4 *African Renaissance* 21.

¹¹⁶ Radebe J 'Challenges facing access to justice in S.A' The Department of Justice and Constitutional Development 16 October 2012 available at http://www.justice.gov.za/m_speeches/2012/20121016_min-uct.html (accessed on 15 February 2014).

The Constitution is also premised on the spirit of Ubuntu¹¹⁷ which inter alia entails caring for each other's well-being; acknowledging the social well-being of all; promoting humanity and relationship among individuals; and may be translated as 'I am, because you are'.¹¹⁸ The Constitution maintains its supremacy in the South African legal system with section 2 expressly providing that any law inconsistent with the Constitution, 1996 is invalid.

Furthermore Chapter 2, sections 7 to 39, of the Constitution contains the Bill of Rights.¹¹⁹ These rights are the cornerstone of democracy in the country, which enshrines the rights of all persons and affirms the democratic values of human dignity, equality and freedom.¹²⁰

In providing for the execution of the aforementioned constitutional ideals, the Constitution, 1996 outlines all state structures and powers in order to ensure the state's efficiency.¹²¹ The authority of the South African state is divided into and shared by three branches of state, namely the legislature (also known as Parliament), executive (President and national cabinet members, also known as the government, which includes all government departments) and judicial authority (also known as the judiciary).¹²² The legislature has the authority to make, amend and repeal laws.¹²³ The executive has the authority to execute and enforce rules of

¹¹⁷ 'The spirit of Ubuntu... suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.' *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) 29-30 para 37.

¹¹⁸ Ubuntu is a uniquely African/South African concept which forms an integral part of the Interim Constitution of South Africa (Act 300 of 1993). Cilliers J 'In search of meaning between ubuntu and into: perspectives on preaching in post-apartheid South Africa' available at http://academic.sun.ac.za/tsv/Profiles/Profile_documents/Johan_Cilliers_IN_SEARCH_OF_MEANING_BETWEEN_UBUNTU_AND_INTO.pdf (accessed 14 March 2013).

¹¹⁹ Certain sections are further discussed at 5.5.2 below.

¹²⁰ Section 8 of the Constitution of the Republic of South Africa, 1996.

¹²¹ Chapters 4, 5 and 8 of the Constitution, 1996.

¹²² Rautenbach I & Malherbe E *Constitutional Law* 5ed (2009) 85.Chapters 4, 5 and 8 of the Constitution, 1996.

¹²³ Section 43 of the Constitution provides that the national legislative authority vests in Parliament, the provincial legislative authority vests in provincial legislatures and local legislative authority vests in the Municipal Councils.

law;¹²⁴ and the judiciary has the power, through court structures to determine what the law is and how it should be applied in legal disputes.¹²⁵

The judiciary, since the colonial era, maintains a fundamental role, not only in the civil justice arena, but also in the shaping and developing of the country's legal system through duties placed on it, such as to develop the common law in order to give effect to any right contained in the Bill of Rights.¹²⁶

2.3 SOUTH AFRICAN COURTS AND JUDICIAL JURISDICTIONS

Section 31 of the Superior Courts Act¹²⁷ provides that every superior court is a court of record, which sets precedent for lower courts, therefore applying the doctrine of *stare decisis*.¹²⁸ Judicial decisions are one of the fundamental sources of South African law and without accessible records of court decisions and an established hierarchy of courts, the doctrine of *stare decisis* would not function effectively, if at all. This doctrine is premised on *inter alia* legal certainty, uniformity and equality in the application of legal principles.¹²⁹

The Constitution, 1996 grants the judiciary certain powers to operate and function within South Africa's justice system. The Constitutional Court, the Supreme Court of Appeal and the High Court are given the inherent power to protect and regulate their own processes, and

¹²⁴ Section 85 of the Constitution provides that the executive authority of the country vests in the President. The President exercises his authority together with the other members of Cabinet by implementing national legislation; developing and implementing national policy; co-ordinating the functions of state departments and administrators; and preparing and initiating legislation.

¹²⁵ Chapter 8 of the Constitution, 1996.

¹²⁶ Section 39(2) of the Constitution, 1996.

¹²⁷ Act 10 of 2013.

¹²⁸ Van Niekerk JP 'An introduction to South African law reports and reporters, 1828 to 1910' (2013) 19 *Fundamina: A Journal of Legal History* 106.

¹²⁹ Van Niekerk JP 'An introduction to South African law reports and reporters, 1828 to 1910' (2013) 19 *Fundamina: A Journal of Legal History* 106.

to develop the common law, while taking into account the interests of justice.¹³⁰ Section 165 of the Constitution provides that the judicial authority of the country vests in the courts.

Section 166¹³¹ goes on to provide for the judicial system and hierarchy of courts, from the most superior to the least superior; that is, the Constitutional Court (being the most superior), followed by the Supreme Court of Appeal, followed by the High Court and followed by the Magistrates' Court. A number of specialised courts and tribunals also exist and are created through legislation.¹³² These specialised courts and tribunals have been established over the years, on a superior court level as well as a lower court level in order to assist with the case load of civil disputes in South Africa.¹³³

The South African court structure and duties, as set out in the Constitution, are briefly discussed in the section below. The legislation with regards to court procedures is also mentioned, as well as legislatively created civil specialised courts, in order to further contextualise the South African judicial system, prior to discussing its civil justice system and shortcomings later in this chapter.

¹³⁰ Section 173 of the Constitution, 1996.

¹³¹ Read with section 2 of Constitution Seventeenth Amendment Act 72 of 2012.

¹³² Section 166 of the Constitution, 1996 read with section 2(b) of Constitution Seventeenth Amendment Act 72 of 2012. Such legislatively created civil courts include the Admiralty Courts, Tax Courts, the Special Investigating Units and Tribunals, the Equality Courts, the Children's Courts, the Maintenance Courts, the Courts of Chiefs and Headmen, the Competition Tribunal and Appeal Court, the Labour Court, and the Land Claims Court. Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) 36.

¹³³ Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) 36. See 2.3 below.

2.3.1 Superior Court Level

2.3.1.1 The Constitutional Court

Together with its power to develop to common law,¹³⁴ the Constitutional Court is the highest judicial authority in South Africa, in all civil (as well as criminal) disputes.¹³⁵ In addition to constitutional matters, this court may hear an appeal on any other matter if it grants leave to appeal the decision of the lower court, ‘on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that court’.¹³⁶ This court further makes the final decision whether a matter is within its jurisdiction to adjudicate.

Section 167 and Schedule 6 of the Constitution, 1996 governs the operation and jurisdiction of the Constitutional Court. In addition, related legislation is the Constitutional Court Complementary Act 13 of 1995, pertaining to matters incidental to the establishment of the Court, and the Superior Courts Act 10 of 2013 (Superior Courts Act).¹³⁷

2.3.1.2 The Supreme Court of Appeal

The Supreme Court of Appeal may decide appeals in any matter arising from the High Court or a court of similar status, ‘except in respect of labour or competition matters to such an extent as may be determined by an Act of Parliament’.¹³⁸ Further this court ‘may only decide appeals, issues connected with appeals, and any other matter that may be referred to it in circumstances

¹³⁴ Section 173 of the Constitution, 1996 as substituted by section 8 of the Constitution Seventeenth Amendment Act 72 of 2012.

¹³⁵ Section 167 of the Constitution, 1996, as substituted by section 3(a) of the Constitution Seventeenth Amendment Act 72 of 2012.

¹³⁶ Section 167 of the Constitution, 1996, as substituted by section 3(a) of the Constitution Seventeenth Amendment Act 72 of 2012.

¹³⁷ According to its preamble, the Superior Courts Act rationalises and consolidates the laws governing the superior courts in South Africa (superior courts comprises the Constitutional Court, the Supreme Court of Appeal and the High Court).

¹³⁸ Section 168(3)(a) of the Constitution, 1996, as substituted by section 4 of the Constitution Seventeenth Amendment Act 72 of 2012.

defined by an Act of Parliament.¹³⁹ In addition, this court also has the power to develop the common law.¹⁴⁰

Section 168 and schedule 6 of the Constitution, 1996 as well as the Superior Courts Act,¹⁴¹ governs the operation and jurisdiction of the Supreme Court of Appeal.

2.3.1.3 The High Court

The High Court presides over any matter not assigned to another court by statute¹⁴² and, in the case of civil matters, usually decides claims outside the financial jurisdiction of the Magistrates' Court.¹⁴³ Further, this Court may decide any constitutional matter, except a matter that the Constitutional Court has agreed to hear directly or is assigned by an Act of Parliament to another court of similar status to that of the High Court.¹⁴⁴ In addition, this court acts as an appeal court for matters from the Magistrates' Court and reviews decisions from both High and Magistrates' Courts.¹⁴⁵ The High Court also has the power to develop the common law.¹⁴⁶

According to section 6 of the Superior Courts Act, the High Court consists of nine provincial divisions,¹⁴⁷ with the Minister and Judicial Service Commission, at their discretion,

¹³⁹ Section 168(3) of the Constitution, 1996, as substituted by section 4 of the Constitution Seventeenth Amendment Act 72 of 2012.

¹⁴⁰ Section 173 of the Constitution, 1996 as substituted by section 8 of the Constitution Seventeenth Amendment Act 72 of 2012.

¹⁴¹ Act 10 of 2013.

¹⁴² Section 169(1)(b) of the Constitution, 1996 as substituted by section 5 of the Constitution Seventeenth Amendment Act 72 of 2012.

¹⁴³ Magistrates' Courts Act 32 of 1994, the determination of monetary jurisdiction for causes of action in respect of courts for districts in GN 217 in *GG 37477* of 17 March 2014. See 2.3.2.1 below.

¹⁴⁴ Section 169(1)(a) of the Constitution, 1996 read with section 5 of the Constitution Seventeenth Amendment Act 72 of 2012.

¹⁴⁵ Sections 21(1) and 22 of the Superior Courts Act 10 of 2013.

¹⁴⁶ Section 173 of the Constitution, 1996 as substituted by section 8 of the Constitution Seventeenth Amendment Act 72 of 2012.

¹⁴⁷ Eastern Cape Division with its main seat in Grahamstown, Free State Division with its main seat in Bloemfontein, KwaZulu-Natal Division with its main seat in Pietermaritzburg in the, Gauteng Division with its

establishing one or more added local seats for certain divisions.¹⁴⁸ Each local seat exercises concurrent jurisdiction with a particular main seat of a particular provincial division of the High Court.¹⁴⁹

The basic operation and jurisdiction of the High Court is set out in section 169 and Schedule 6 of the Constitution, 1996. In addition, the procedures followed in the High Court are set out in the Superior Courts Act, which are read with the Uniform Rules of Court 2009.¹⁵⁰

2.3.1.4 Other Specialised Superior Courts

A number of civil specialised courts, created through statute, share a similar status to that of the High Court and may also be referred to as a 'Superior Court'.¹⁵¹ Specialised courts, whether on a superior or lower courts level, are created with purpose of providing a forum for the enforcement of rights and responsibilities within the ambit of that specific legislation.¹⁵² However the most important motivation for the establishment of these specialised courts is that it would facilitate the efficiency of the administration of justice and ease the burden of the general High, as well as Magistrates', Courts.¹⁵³

main seat in Pretoria, Limpopo Division with its main seat in Polokwane, Mpumalanga Division with its main seat in Nelspruit, Northern Cape Division with its main seat in Kimberly, North West Division with its main seat in Mafikeng and Western Cape Division with its main seat in Cape Town.

¹⁴⁸ In this regard it has been decided that Bhisho, Mthatha and Port Elizabeth are local seats to the High Court in the Eastern Cape Division; Durban is a local seat to the High Court in the KwaZulu-Natal Division; and Thohoyandou is a local seat to the High Court in the Limpopo Division. Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) xxxix.

¹⁴⁹ Section 6(4)(a) of the Supreme Court Act 10 of 2013.

¹⁵⁰ These Rules regulate the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa.

¹⁵¹ Section 1 of the Superior Courts Act 10 of 2013.

¹⁵² Judge President Bam 'Towards delivering accessible quality for justice for all: Specialised courts: the equality court, the labour court, the land claims court and the sexual offences court' Access to Justice Conference, 8-10 July 2011 2 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110709_ajc_bam-speech.pdf (accessed 24 September 2014).

¹⁵³ Judge President Bam 'Towards delivering accessible quality for justice for all: Specialised courts: the equality court, the labour court, the land claims court and the sexual offences court'.

These specialised courts include the Labour Court and the Labour Appeal Court.¹⁵⁴ The Labour Court and Labour Appeal Court only have jurisdiction in labour law matters and are established in terms of section 151¹⁵⁵ and section 167 of the Labour Relations Act 66 of 1995 (LRA) respectively.

Another specialised civil court is the Special Income Tax Court, created in terms of section 83 of the Income Tax 58 of 1962, which deals exclusively with disputes between taxpayers and the South African Revenue Service (SARS) for income tax assessments of more than R100 000.

In addition, the Land Claims Court originates out of section 22 of the Restitution of Land Rights Act 22 of 1994 and specialises in dealing with land claims disputes. The Competition Appeal Court deals with matters pertaining to competition disputes and deals specifically with appeals and reviews from the Competition Tribunal. This Court is established in terms of section 36 of the Competition Act 89 of 1998.

2.3.1.5 Related Civil Tribunals Created in terms of Legislation

A number of specialised civil tribunals have also been created in terms of statute to assist with civil cases, such as the abovementioned Competition Tribunal, which is established in terms of the section 26 of the Competition Act and adjudicates specifically on competition matters. In addition, the Water Tribunal, which is an independent body with jurisdiction over all water disputes in each province in South Africa, was created in terms of section 146 of the National Water Act 36 of 1998.

¹⁵⁴ Section 151 of the Labour Relations Act 55 of 1995 as amended by section 55(1)(b) of the Superior Courts Act 10 of 2013. The Labour Court shares concurrent jurisdiction with the High Court with regards to violations of fundamental rights relating to labour matters, while the Labour Appeal Court has exclusive jurisdiction to appeals from the Labour Court.

¹⁵⁵ Amended by section 55(1)(b) of the Superior Courts Act 10 of 2013.

Lastly with respect to labour law disputes, as mentioned above,¹⁵⁶ section 112 as well as the Preamble of the LRA makes provision for the Commission for Conciliation, Mediation and Arbitration (CCMA) in order to assist with the resolution of labour disputes in South Africa.¹⁵⁷ The Commission provides for resolution of labour disputes through means of conciliation and arbitration, as opposed to litigation.¹⁵⁸

2.3.2 Lower Court Level

2.3.2.1 The Magistrates' Court

The Magistrates' Court exists at two levels: Regional Magistrates' Court level¹⁵⁹ and District Magistrates' Court level.

The Magistrates' Court presides over general matters and its jurisdiction, with regards to civil proceedings, is dependent on the value of the claim to the dispute.¹⁶⁰ A claim for R200 000 or less will be heard by the District Magistrates' Court,¹⁶¹ while a claim above R200 000 but less than R400 000 will be heard by the Regional Magistrates' Court.¹⁶²

The number of Magistrates' Courts has increased over the years in an attempt to alleviate and manage the case load of South African courts.¹⁶³ Thus approximately nine Regional

¹⁵⁶ At 2.3.1.4.

¹⁵⁷ The CCMA is discussed at 3.2.2.1 below.

¹⁵⁸ Section 115 of the Labour Relations Act 66 of 1995.

¹⁵⁹ Jurisdiction of Regional Courts Amendment Act 31 of 2008.

¹⁶⁰ Theophilopoulos C, van Heerden C & Boraine A *Fundamental Principles of Civil Procedure* 2 ed (2012) 52.

¹⁶¹ Section 29 of the Magistrates' Court Act 32 of 1944. See footnote 76.

¹⁶² New monetary thresholds for civil actions in the regional divisions of the Magistrates' Courts commenced on 1 June 2014 increasing the threshold to a value of R 200 000 and above, up to a maximum value of R 400 000 (the previous limit was above R100 000 up to R300 000). Changes have also been introduced with respect to the monetary threshold at the District Court level, by increasing the limit that can be claimed for movable or immovable property and actions of ejectment against the occupier of any premises within the district, to a value of R200 000 (previously R 100 000). Magistrates' Courts Act 32 of 1994, the determination of monetary jurisdiction for causes of action in respect of courts for districts in GN 217 GG 37477 of 17 March 2014.

¹⁶³ Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) xxxvii.

Magistrates' Courts have been established across the country, one in each province,¹⁶⁴ in addition to approximately five hundred District Magistrates' Court across the country.¹⁶⁵

The Magistrates' Courts gain their authority from sections 166 and 170 of the Constitution, 1996. Furthermore the Regional and District Magistrates' Courts follow the operations and procedures provided for in the in the Magistrates' Court Act 32 of 1944¹⁶⁶ as amended by Jurisdiction of Regional Courts Amendment Act 31 of 2008 respectively, read together with the Magistrates' Courts Rules 2010.¹⁶⁷

2.3.2.2 Other Specialised Lower Courts

A number of specialised lower courts have also been established through legislation in order to address specific disputes within the ambit of that legislation. The purpose of these lower level specialised courts is to relieve the case load burden of the general lower courts as well as promote the efficiency of the administration of justice.¹⁶⁸

Civil specialised courts include the Small Claims Court established in terms of the Small Claims Act 61 of 1984. This court was created with view of assisting the general public by providing inexpensive, informal and speedy resolution of less-serious civil disputes.¹⁶⁹

¹⁶⁴ Regional Magistrates' Courts are in the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West and the Western Cape. Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) xxxvii.

¹⁶⁵ Law Society of South Africa *Jurisdiction of South African Courts and Tribunals: A Guide for the Legal Practitioner* (2011) 16.

¹⁶⁶ As amended by Magistrates' Court Act 90 of 1993.

¹⁶⁷ Formally referred to as the "Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa 2010" however, throughout this chapter will be referred to as the "Magistrates' Court Rules 2010".

¹⁶⁸ Judge President Bam 'Towards delivering accessible quality for justice for all: Specialised courts: the equality court, the labour court, the land claims court and the sexual offences court' Access to Justice Conference, 8-10 July 2011 2 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110709_ajc_bam-speech.pdf (accessed 24 September 2014).

¹⁶⁹ Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) 429. The general public is able to obtain legal redress for claims up to R 12 000 in this court. Due to its popularity and increasing case load, the total number of Small Claims Courts established to date, across South Africa, is 263 with the last

Further specialised courts include the Short Process Court established in terms of the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991 (Short Process Act) and created to provide expedient and inexpensive resolution of civil claims which could not be resolved in terms of the Short Process Act.¹⁷⁰

Finally, another type of specialised court is the Equality Court¹⁷¹ established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Promotion of Equality Act), created to deal with complaints regarding unfair discrimination, harassment or hate speech and matters covered by the Promotion of Equality Act.

The court system of South Africa is well organised in terms of hierarchy and jurisdiction. However the Magistrates' Courts and High Courts have the highest civil litigation case load amongst all the court structures discussed above and are two of the most prevalent types of courts found in the country.¹⁷² In this regard, these courts suffer most from the over-burdened court roll dilemma.¹⁷³ Therefore despite the state establishing additional superior and lower specialised courts, delays in administration of justice continue as a result of over-burdened court rolls in South Africa.¹⁷⁴

16 courts being established during the 2013 financial year. Department of Justice and Constitutional Development *Annual Report 2012/2013* (2013) 8.

¹⁷⁰ Act 103 of 1991. .

¹⁷¹ The number of Equality Courts established in South Africa amount to 383 courts. Department of Justice and Correctional Services 'The lower courts list' available at <http://www.justice.gov.za/contact/lowercourts-sheet.pdf> (accessed on 24 September 2014).

¹⁷² Paleker M 'Mediation in South Africa: Here But Not All There' in Alexander N (ed) *Global Trends in Mediation* 2 ed (2006) 340. The case load continues to increase annually. Department of Justice and Constitutional Development *Annual Report 2012/2013* (2013) 24–26.

¹⁷³ Paleker M 'Mediation in South Africa: Here But Not All There' in Alexander N (ed) *Global Trends in Mediation* 2 ed (2006) 340. See 2.5 below.

¹⁷⁴ Department of Justice and Constitutional Development *Annual Report 2012/2013* (2013) 24, 25, 43. For further discussions see 2.5 below.

2.4 THE SOUTH AFRICAN CIVIL JUSTICE SYSTEM

The South African court system plays a pivotal role in the administration of justice.¹⁷⁵ In the civil justice system it is also of fundamental importance as civil disputes are commonly entered into with the view of being resolved at court.¹⁷⁶ This is premised on the fact that South Africans have a vested right in this regard, as section 34 of the Constitution¹⁷⁷ provides access to the adjudicated resolution of their disputes before a court of law.¹⁷⁸

Section 171 of the Constitution provides that courts may only function in terms of statutes and within the ambit of rules and procedures provided for in national legislation. The principle sources of law governing court procedures as well as the civil justice system include the Constitution, 1996;¹⁷⁹ the Superior Courts Act¹⁸⁰ and the Uniform Rules of Court 2009; the Magistrates' Court Act¹⁸¹ and Magistrates' Court Rules 2010; and other legislation which prescribes the use of a specific court.¹⁸² Therefore in order to effectively resolve any civil dispute at court certain legislative procedures and processes need to be followed.

As previously mentioned, the High Court and Magistrates' Courts are principally the most over-burdened courts in South Africa as all general civil litigation proceedings are administered through these courts (and in a similar procedural manner). Therefore an overview of South Africa's civil litigation procedures at High Court and Magistrates' Court

¹⁷⁵ Department of Justice and Constitutional Development *Annual Report 2012/2013* (2013) 8.

¹⁷⁶ Pete S, Hulme C & du Plessis D et al *Civil Procedure: A Practical Guide* 2 ed (2011) xxxiii.

¹⁷⁷ Section 34 of the Constitution, 1996: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' For further discussions on section 34 see 5.5.4 below.

¹⁷⁸ 'The constitutional guarantee of the right of access to courts provides a vehicle for our people to vindicate [their] rights'. Chief Justice Ngcobo 'Enhancing access to justice: The search for better justice' *Access to Justice Conference* 6 July 2011 16 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014); Hawkey K 'Mandatory Mediation Rules to Shake Up Justice System' (2011) 515 *De Rebus* 21. See 5.5.4.1 below.

¹⁷⁹ Read with the Constitution Seventeenth Amendment Act 72 of 2012.

¹⁸⁰ Act 10 of 2013.

¹⁸¹ Act 32 of 1944 as amended by Magistrates' Court Act 90 of 1993.

¹⁸² Pete S, Hulme C & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) xlv.

levels follows below, from the institution of the civil dispute until its arrival at court for resolution.

2.4.1 The Civil Litigation Procedure in South Africa

The two principal civil procedures in South Africa's civil justice system¹⁸³ are action proceedings (where there is a material dispute of fact between the parties) and application proceedings (where there is no material dispute of fact between the disputants).¹⁸⁴ The proceedings leading up to and including the final court process are also known as civil litigation.¹⁸⁵ Prior to the resolution of a civil dispute at court, certain pre-court litigation procedures are followed which could take an extensive period of time to complete, depending on the nature of the civil dispute and the legal practitioners involved.¹⁸⁶

2.4.1.1 The Litigation Process for Action Proceedings

Prior to court proceedings with regards to an action procedure, pleadings are exchanged between the plaintiff and defendant during the litigation process. Throughout this process, intervals of 10 to 20 court days are commonly provided for between the service of each pleading or notice in preparation for trial.¹⁸⁷ The plaintiff commences the litigation process by serving his or her combined summons (summons with an annexed particulars of claim) upon the defendant, who then responds with the service of his or her notice of intention to

¹⁸³ Due to the complex and detailed nature of the civil litigation process in South Africa and the many different civil proceedings that exist in Civil Procedural Law, only the principle processes which are followed in civil disputes will be discussed in this section.

¹⁸⁴ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1168.

¹⁸⁵ Pete S, Hulme C & du Plessis D et al *Civil Procedure: A Practical Guide* 2 ed (2011) xlvi.

¹⁸⁶ It should be noted that prior to the commencing of these civil proceedings, consultation between a chosen legal representative and disputant are conducted and possible negotiations between the opposing party and claimant's representative may initially be attempted before instituting action or application proceedings. Pete S, Hulme C & du Plessis D et al *Civil Procedure: A Practical Guide* 2 ed (2011) 92-116.

¹⁸⁷ Rules 5 to 17 of the Magistrates' Court Rules 2010 and rules 17 to 22 Uniform Rules of Court 2009; *Rosslee v Rosslee* 1971 (4) SA 48 (O) 49.

defend the matter.¹⁸⁸ 20 days later, the defendant serves his or her plea, contesting the plaintiff's averments, upon the plaintiff.¹⁸⁹ These documents comprise the three fundamental pleadings for action procedure.¹⁹⁰ In his or her plea, the defendant may raise new averments to which the plaintiff will respond with his or her replication thereto.¹⁹¹ This opens up further exchanges of pleadings between disputants.¹⁹² The further exchange of pleadings would lengthen the litigation process even further¹⁹³ through the service of the defendant's rejoinder, the plaintiff's surrejoinder, the defendant's rebutter and plaintiff's surrebutter, after the service of the plaintiff's replication.¹⁹⁴

Throughout the litigation process, any amendments that are made to the initial pleadings would lengthen the process by serving notices of these amendments and later filing these amended pleadings at court 10 to 20 days after the notice of amendment.¹⁹⁵ Further processes which may lengthen the litigation process would be where either party does not comply with court rules, the opposing party may institute additional procedures, which include applications to compel the opposing party to submit their plea,¹⁹⁶ applications to strike out a defective pleading,¹⁹⁷ applications to set aside an irregular procedural step¹⁹⁸ or applications to raise an exception to a defective pleading.¹⁹⁹

¹⁸⁸ Rules 5 to 17 of the Magistrates' Court Rules 2010 and rules 17 to 22 Uniform Rules of Court 2009

¹⁸⁹ Rules 5 to 17 of the Magistrates' Court Rules 2010 and rules 17 to 22 Uniform Rules of Court 2009; *Palmer v Palmer Insurance Co Ltd* 1967 (1) SA 673 (O) 679A; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) 107 G-H.

¹⁹⁰ Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) 143.

¹⁹¹ Rule 21 of the Magistrates' Court Rules 2010 and rule 25 Uniform Rules of Court 2009.

¹⁹² Where the defendant raised new averments in his/her Plea. Rule 21 of the Magistrates' Court Rules 2010 and rule 25 Uniform Rules of Court 2009.

¹⁹³ Bearing in mind the 10 to 20 court day intervals between the service of each pleading and notice.

¹⁹⁴ Rules 20 and 21 of the Magistrates' Court Rules 2010 and rules 24 and 25 Uniform Rules of Court 2009.

¹⁹⁵ Rules 7 and 55A of the Magistrates' Court Rules 2010 and rule 28 of the Uniform Rules of Court 2009; *Brummund v Brummund's Estate* 1993 (2) SA 494 (Nm) 498; *Marias v Smith en 'n Ander* 2000 (2) SA 924 (W) 931; *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) 180D-181D.

¹⁹⁶ Rule 60 of the Magistrates' Court Rules 2010 and rules 26 and 30A of the Uniform Rules of Court 2009; *Absa Bank Ltd v The Farm Klippan* 490 CC 2000 (2) SA 211(W) 214-215; *Eikenhof Plastics Bottling Co (Pty) Ltd and Others v BOE Bank Ltd* 2000 (2) SA 211 (W) 215A-B.

¹⁹⁷ Rule 19 of the Magistrates' Court Rules 2010 and rule 23 of the Uniform Rules of Court 2009; *Klokow v Sullivan* [2005] JOL 16611 (SCA) 5, 15; *Telematrix (Pty)Ltd t/a Matrix Vehicle Tracking v Advertising*

Once the exchange of pleadings has ended,²⁰⁰ the pre-trial stage commences, where an application for the allocation of a trial date is made,²⁰¹ and where parties inter alia exchange discovered documents and evidence,²⁰² and conduct pre-trial conferences.²⁰³ Once an application is made for the trial date, a further extensive waiting period can be expected due to the full court rolls at High Court and Magistrates' court level.²⁰⁴ Furthermore the allocated trial date would commonly be dated far in advance, at the court's earliest available time slot, and thus a further protracted waiting period will ensue before the matter can finally be resolved at court.²⁰⁵

2.4.1.1.1. *The Pre-trial Conference*

In the High Court, pre-trial conferences are governed by rule 37 of the Uniform Rules of Court 2009. A pre-trial conference at the High Court must be held between disputants no less

Standards Authority 2006 (1) SA 461 (SCA) 465H; *Vaatz v Law Society of Namibia* [1991] 2 All SA 30 (Nm) 49.

¹⁹⁸ Rule 60A of the Magistrates' Court Rules 2010 and rule 30 of the Uniform Rules of Court 2009; *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grogor* 1984 (1) SA 152 (W) 153; *SA Instrumentation (Pty) Ltd v Smithchem* [1977] 4 All SA 48 (D) 49; *Santam Versekeringsmaatskappy Bpk v Leibrandt* [1969] 1 All SA 360 (C) 365-366; *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* [1967] 2 All SA 470 (E) 472.

¹⁹⁹ Rule 19 of the Magistrates' Court Rules 2010 and rule 23 of the Uniform Rules of Court 2009; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) 183D-F; *Trope v South African Reserve Bank* [1993] 2 All SA 278(A) 279-280; *Hudson v Hudson* 1927 AD 259 at 269; *Muller v Cook and Others* [1973] 2 All SA 42 (N) 44.

²⁰⁰ That is, close of pleadings stage. Rule 21A of the Magistrates' Court Rules 2010 and rule 29 of the Uniform Rules of Court 2009.

²⁰¹ Rule 22 of the Magistrates' Court Rules 2010 and rule 6(4) of the Uniform Rules of Court 2009.

²⁰² That is, discovery stage. Rules 23 and 24 of the Magistrates' Court Rules 2010 and rule 35 of the Uniform Rules of Court 2009; *Pelidis v Ndhlamuti* [1969] 3 All SA 563 (R) 154-155; *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) 108; *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) 445I-446D.

²⁰³ Section 54 of the Magistrates' Court Act 32 of 1994 read with rule 25 Magistrates' Court Rules 2010 and rule 37 of the Uniform Rules of Court 2009; *Bosman v AA Mutual Insurance Association Ltd* 1977 (2) SA 407 (C) 408F; *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) 614C; *Lekota v Editor, 'Tribute' Magazine and Another* 1995 (2) SA 706 (W) 707H.

²⁰⁴ Paleker M 'Mediation in South Africa: Here But Not All There' in Alexander N (ed) *Global Trends in Mediation* 2 ed (2006) 333.

²⁰⁵ Paleker M 'Court connected ADR in civil litigation: The key to access to justice in South Africa' (2003) 6 *ADR Bulletin* 48. Chief Justice Ngcobo 'Enhancing access to justice: The search for better justice' Access to Justice Conference 6 July 2011 16 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014).

than 6 weeks before the date of the trial.²⁰⁶ The purpose of the rule 37 conference is to curtail the duration of trials,²⁰⁷ narrow disputed issues,²⁰⁸ curb costs²⁰⁹ and possibly settle the matter.²¹⁰ A record of the conference must be documented and filed at court after the conference.²¹¹ The following compulsory points, in terms of rule 37(6), must be covered and documented at the pre-trial conference:

- (a) The place, date and duration of the conference and the names of the persons present;
- (b) if a party feels that he is prejudiced because another party has not complied with the rules of court, the nature of such non-compliance; and prejudice;
- (c) that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto;
- (d) whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred;
- (e) whether the case should be transferred to another court;
- (f) which issues should be decided separately in terms of rule 33 (4);
- (g) the admissions made by each party;
- (h) any dispute regarding the duty to begin or the onus of proof;
- (i) any agreement regarding the production of proof by way of an affidavit in terms of rule 38 (2);
- (j) which party will be responsible for the copying and other preparation of documents;
- (k) which documents or copies of documents will, without further proof, serve as evidence of what they purport to be, which extracts may be proved without proving the whole document or any other agreement regarding the proof of documents’.

The pre-trial conferences in the Magistrates’ courts will now be considered. These conferences are governed by section 54 of the Magistrates’ Courts Act,²¹² read with rule 25 of the ‘Magistrates’ Court Rules 2010’. The purpose of the conference is very similar to its High

²⁰⁶ The ‘rule 37 conference’ was instituted, initially on an experimental basis, as an initiative of the General Bar Council (‘the GCB’) in order to remedy the issues of cost, delay and complexity plaguing the South African civil justice system at the time. Hodes P ‘Case Management: Bar Initiatives’ (1997) 10 *Consultus* 34.

²⁰⁷ *Bosman v A A Mutual Insurance Association Limited* 1977 (2) SA 407 (C) 408F.

²⁰⁸ *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) 614C.

²⁰⁹ *Lekota v Editor, ‘Tribute’ Magazine and Another* 1995 (2) SA 706 (W) 707H.

²¹⁰ *Lekota v Editor, ‘Tribute’ Magazine and Another* 1995 (2) SA 706 (W) 707H.

²¹¹ With the pre-trial conference held no less than 6 weeks before the trial date, the pre-trial minute must be filed at court no less than 5 weeks before the date trial. Rule 37(7) of the Uniform Rules of Court 2009. The parties to the pre-trial conference agree on a date, time and place to conclude the pre-trial and a minute of the conference is then file with the judge. If the parties are unable to agree on the logistics of the conference, the matter is referred to the registrar of the court for his decision on the date, time and place. Rule 37(2) to (3) of the Uniform Rules of Court 2009.

²¹² Magistrates’ Court Act 32 of 1944.

Court counterpart.²¹³ However, a pre-trial conference will only be held if the court decides of its own accord to order it, or if one of the parties to the action makes a written request to this effect.²¹⁴ Furthermore, the conference may be ordered by the Magistrate or requested by the parties at any stage of the proceedings and not merely in preparation for trial.²¹⁵ Should the parties request to have a pre-trial conference, such request should be in writing and should include the issues to be considered at the conference.²¹⁶

In terms of section 54 the following issues may be considered at the conference:

- (a) the simplification of the issues;
- (b) the necessity or desirability of amendments to the pleadings;
- (c) the possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof;
- (d) the limitation of the number of expert witnesses;
- (e) such other matters as may aid in the disposal of the action in the most expeditious and least costly manner’.

Once the application for the allocation of trial date has been made and all the necessary pre-trial procedures have been complied with, all is in order for the anticipated trial proceedings at court.²¹⁷

The preceding discussions conclude the litigation procedures leading up to trial proceedings at court. The section below discusses the litigation procedures prior to the hearing of applications at court, before discussing the court procedures of both trials and applications thereafter.

²¹³ Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) 254.

²¹⁴ Section 54 of the Magistrates’ Court Act 32 of 1944.

²¹⁵ Section 54 of the Magistrates’ Court Act 32 of 1944. The section 54 conference is slightly different, procedurally, to the Rule 37 conference in the High Court (see 2.4.1.1.1 above) in that the section 54 conference is held in chambers and presided over by the magistrate and not concluded by the parties via agreement and at an agreed venue.

²¹⁶ Rule 25 of the Magistrates’ Court Rules 2010.

²¹⁷ Rule 25 the Magistrates’ Court Rules 2010 and rule 37 of the Uniform Rules of Court 2009.

2.4.1.2 The Litigation Process for Application Proceedings

Similarly to an action procedure, pre-court proceedings with respect to application procedures commence with three fundamental documents which are exchanged, with intervals of 10 to 20 court days between the services of these documents on each party.²¹⁸ The applicant commences the litigation process by serving a notice of motion and founding affidavit upon the respondent, who then responds with a notice of intention to oppose the matter as well as his or her answering affidavit.²¹⁹ Thereafter the applicant responds with a replying affidavit.²²⁰ What may lengthen this procedure, however, would be the further service of additional affidavits by each party;²²¹ alternatively the amendments to either party's initial affidavits would lengthen the litigation process.²²² In addition, what would prolong the litigation process would be when either party delays serving an affidavit upon the other party, which would result in additional procedures being instituted in order to compel the opposing party to submit their affidavit.²²³ Alternatively, similarly to action proceedings, applications to strike out a non-compliant affidavit may also be instituted.²²⁴

Once the exchange of affidavits has ended,²²⁵ the case is placed on the court roll by either party.²²⁶ The court then allocates a hearing date.²²⁷ As with action proceedings, a further

²¹⁸ Rule 55 of the Magistrates' Court Rules 2010 and rule 6 of the Uniform Rules of Court 2009.

²¹⁹ Rule 55 of the Magistrates' Court Rules 2010 and rules 17 to 22 Uniform Rules of Court 2009. All legal elements of the Applicant's case must be contained in the founding affidavit as the Applicant stands or falls by his/her founding affidavit.

²²⁰ Rule 55 of the Magistrates' Court Rules 2010 and rule 6 of the Uniform Rules of Court 2009. The replying affidavit only rebuts the Respondent's averments. New matter/issues may not be introduced at this stage and the court may strike such new information which was not contained in the Applicant's founding affidavit; *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) 635H-636B.

²²¹ Rule 55 of the Magistrates' Court Rules 2010 and rule 6 of the Uniform Rules of Court 2009. However further affidavits are filed at court upon sufficient motivation from the disputants and at the court's discretion; *South Peninsula Municipality v Evans* [2000] JOL 7117 (C) 12; *James Brown & Hamer (Pty) Ltd v Simmons* [1963] 4 All SA 524 (A) 526-527.

²²² Rule 55 of the Magistrates' Court Rules 2010 and rule 6 of the Uniform Rules of Court 2009.

²²³ Rule 60 of the Magistrates' Court Rules 2010 and rules 26 and 30A of the Uniform Rules of Court 2009.

²²⁴ Rule 55(9) of the Magistrates' Court Rules 2010 and rule 23 of the Uniform Rules of Court 2009.

²²⁵ That is, close of pleadings stage, rule 21A of the Magistrates' Court Rules 2010 and rule 29 of the Uniform Rules of Court 2009.

²²⁶ Rule 21A of the Magistrates' Court Rules 2010 and rule 29 of the Uniform Rules of Court 2009.

extensive waiting period can be expected due to the full court rolls.²²⁸ Furthermore, the allocated hearing date is often dated far in advance, resulting a further protracted waiting period before the matter can finally be resolved at court.²²⁹

2.4.1.3 The Trial and Hearing Process at Court

The actual trial and hearing processes are to be conducted in open courts,²³⁰ that is, the court processes are open to the general public as well as the press.²³¹ Furthermore, the trial or hearing process is often unpredictable and may take up to a few years before judgment in the matter is granted, depending on the nature of the dispute, the presiding officer, court procedures and various stages of litigation.²³² The stages at trial proceedings, for instance, include each witness's evidence in chief followed by cross-examination by the opposing counsel and re-examination by the counsel who called the witness and the arguing stages between legal practitioners before formal judgement is granted.²³³

Regarding hearing proceedings, depending on the contents of the affidavits exchanged, and if no dispute of fact arises, the court will rule either in favour of the claim set out in the applicant's affidavit or dismiss it based on the respondent's opposing documents.²³⁴

Alternatively, where a real dispute of fact arises, the court may either decide the matter on the

²²⁷ Rule 55 of the Magistrates' Court Rules 2010 and rule 6 of the Uniform Rules of Court 2009.

²²⁸ Paleker M 'Mediation in South Africa: Here But Not All There' in Alexander N (ed) *Global Trends in Mediation* 2 ed (2006) 333.

²²⁹ Paleker M 'Court connected ADR in civil litigation: The key to access to justice in South Africa' (2003) 6 *ADR Bulletin* 48. In addition, the court may also refer an application process to trial if the disputed facts cover a broad range of issues or are relatively complicated according to rule 6(5)(g) of the Uniform Rules of Court 2009. However in such circumstances at Magistrates' Court level, according to rule 55(1)(k) of the Magistrates' Court Rules 2010, the court may dismiss the application or make such order as it deems fit.

²³⁰ Section 34 of the Constitution, 1996. See 5.5.4 below.

²³¹ Section 32 of the Superior Courts Act 10 of 2013 and section 5 of the Magistrates' Court Act 32 of 1944. However, this is subject to the proper administration of justice, such as considering the sensitivity case or prejudice towards the witness.

²³² Pete, Hulme & du Plessis et al *Civil Procedure: A Practical Guide* 2 ed (2011) 99-100.

²³³ Rule 55(1) of the Magistrates' Court Rules 2010 and rule 38 of the Uniform Rules of Court 2009; *Standard Bank of SA Ltd v Neugarten and Others* 1987 (3) SA 695 (W) 699 D-E.

²³⁴ Rule 55 of the Magistrates' Court Rules 2010 and rule 6 of the Uniform Rules of Court 2009.

affidavits alone,²³⁵ or refer the matter to oral evidence²³⁶ or to trial, or dismiss the applicant's initial application where a real dispute of facts should have been foreseen.²³⁷

Either of these types of proceedings may be lengthened or postponed on numerous occasions, at the discretion of the court, which may do so due to procedural and/or material issues that may arise during the proceedings.²³⁸

Should the losing party be dissatisfied with the final judgment handed down or in disagreement with the procedure followed by the judicial officer in arriving at his or her decision, such party may proceed to lodge an appeal or review against such judgment which will result in additional time consuming proceedings before reaching the conclusion of the dispute.²³⁹

2.4.1.4 The Procedure after Judgment has been Granted

Civil proceedings do not come to an end in an action or application process once judgment is granted. It often occurs that the party against whom a judgment is granted (the judgment debtor) disregards or dishonours the judgment.²⁴⁰ It is then up to the judgment creditor to institute a debt collection procedure against the debtor in order to recover the debt owing to

²³⁵ If the Respondent's denial of a fact alleged by the Applicant does not result in a real, genuine or bona fide dispute of fact, the court may decide the disputed fact in the Applicant's favour without hearing oral evidence at the court proceedings; *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A) 634-635.

²³⁶ Rule 55 of the Magistrates' Court Rules 2010 and rule 6 of the Uniform Rules of Court 2009. When the court has doubts about the credibility of the witness, it may refer him or her for cross-examination; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* [1987] 4 All SA 147 (AD) 156-157.

²³⁷ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162; *Conradie v Kleingeld* [1950] 3 All SA 1 (O) 597; *Winsor v Dove* [1951] 4 All SA 74 (N) 80; *Blend and Another v Peri-Urban Areas Health Board* 1952 (2) SA 287 (T) 291H-292B.

²³⁸ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 508, 511.

²³⁹ Rule 51 of the Magistrates' Court Rules 2010 and rule 9 of the Uniform Rules of Court 2009; *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* 2003 (3) SA 313 (SCA) *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) 661E-663D; and *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) 587.

²⁴⁰ Pete, Hulme & du Plessis et al *Civil Procedure: A Practical Guide* 2 ed (2011) li.

him or her.²⁴¹ Such common debt collection procedure would be to issue a writ or warrant of execution. After having the writ or warrant issued at court, the sheriff of the court proceeds to attach the property of the judgement debtor.²⁴² Should the debtor still not effect payment of the debt owing to the creditor, the attached property is then sold in a sale in execution process, where the proceeds are then used to pay the judgment creditor.²⁴³

The chapter thus far has canvassed the roots and functioning of South Africa's civil justice system, with its civil litigation procedures discussed above. The country's principal methods of civil dispute resolution, although formalistic,²⁴⁴ complex, and time-consuming,²⁴⁵ are compulsory to follow in order for South Africans to obtain justice in their civil disputes in the courts. In view of the discussion of South Africa's civil litigation procedures, a cause for concern is the negative impact which these complex procedures have on accessing civil justice in South Africa.

2.5 SHORTCOMINGS OF SOUTH AFRICA'S CIVIL JUSTICE SYSTEM

As early as three decades ago, a report from the Hoexter Commission of Inquiry²⁴⁶ published the following concerns about the South African Civil Justice System in 1983:

‘Civil litigation in provincial and local divisions of the Supreme Court [now High Court] is characterised by cumbersome, complex and time-consuming pre-trial procedures; overloaded case rolls which necessitate postponements

²⁴¹ Pete, Hulme & du Plessis et al *Civil Procedure: A Practical Guide* 2 ed (2011) li. *Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 (1) SA 224 (T) 227.

²⁴² Pete, Hulme & du Plessis et al *Civil Procedure: A Practical Guide* 2 ed (2011) li. Rule 45 and 46 of the Uniform Rules of Court 2009. Rule 41, 42 and 43 of the Magistrates' Court Rules 2010.

²⁴³ Pete, Hulme & du Plessis et al *Civil Procedure: A Practical Guide* 2 ed (2011) li.

²⁴⁴ Pillay-Shaik P & Mkiva C 'Practical law: Multi-jurisdictional guide 2013/14' (2014) 1 *Dispute Resolution* 1.

²⁴⁵ Hurter E 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 248.

²⁴⁶ The Hoexter Commission of Inquiry into the Structure and Functioning of Courts, 1983 (hereafter, 'Hoexter Commission (1983)'), a commission that in the past identified various problems within South Africa's judicial system and spurred the Department of Justice and Constitutional into acknowledging these discrepancies. Abader M.I *An Investigation into the Application of Judicial Case Management in the South African Civil Court System to Enhance Quality and Access to Justice* (unpublished LLM thesis, University of Johannesburg, 2003) 100.

[and] delay the actual process of trial...; protracted trials; and high costs of litigation. The abovementioned facts all conspire to create a situation in which the Supreme Court as a forum for the adjudication of contested matters is no longer accessible to the average citizen'.²⁴⁷

Over the years and to date, the following concerns about the South African civil justice system can be identified.²⁴⁸ These concerns include overburdened court rolls,²⁴⁹ due to the rapidly increasing volume of litigation at courts.²⁵⁰ This results in significant backlogs at court with civil matters only being resolved approximately two to three years after the application for an available trial or hearing date at court is made.²⁵¹ Thus, the unreasonable delay and time consuming nature of civil procedure are recognised as shortcomings in South Africa's civil justice system, as disputants would want their matters resolved speedily and effectively.²⁵²

Another contributing factor to the significant delay in having disputants' matters resolved, from the time they have instituted a claim against their opponents, is legal practitioners who do not cooperate with one another or who deliberately engage in delaying tactics throughout

²⁴⁷ Hoexter Commission (1983) 20.

²⁴⁸ Over the years South Africa's civil justice system has come under constant scrutiny and criticism from various interest groups in the country. South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) para 2.8.

²⁴⁹ Fundamentally at the High Courts and Magistrates' Courts, see 2.3 above.

²⁵⁰ Hurter E 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 240.

²⁵¹ Department of Justice and Constitutional Development *Annual Report 2012/2013* (2013) 24, 25, 43. 'No one will deny that congested court roles escalate costs and imperil the constitutional right of South Africans to have their disputes disposed of by a court within a reasonable time. After all, justice delayed is justice denied. Yet in some Divisions, plaintiffs have to wait more than 2 years for their cases to be heard after the close of pleadings. The suffering of seriously injured, especially indigent plaintiffs, who have to wait years for compensation from the Road Accident Fund, make a compelling case for judicial activism to address the problem of our congested court roles.' Joubert J and Jacobs Y 'The debate - A case for mandatory mediation in South Africa' *Legalbrief Today* 6 October 2009 available at <http://www.legalbrief.co.za/article.php?story=20091006103426675> (accessed 26 September 2014).

²⁵² '...we must address the twin problem of cost and delays in our justice system... These challenges require us to probe for fundamental changes to the administration of justice that can easily conspire to make our justice system inefficient, ineffective and inaccessible.' Chief Justice Ngcobo 'Enhancing access to justice: The search for better justice' Access to Justice Conference 6 July 2011 11 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014); Paleker M 'Court connected ADR in civil litigation: The key to access to justice in South Africa' (2003) 6 *ADR Bulletin* 48.

the litigation process.²⁵³ Further extensions to the final resolution of civil disputes, are the actual court procedures at the trial or hearing of the matter, which remain unpredictable with respect to the time it may take to finalise the dispute.²⁵⁴

Furthermore these litigation and court procedures are of such a technical and complex nature that they are often perplexing or not understandable to disputants.²⁵⁵ Therefore the assistance of a legal practitioner is commonly a necessity.²⁵⁶ In this regard, disputants may feel excluded from their matters and may feel that they have no control over the resolution of their own disputes as well as the costs and time-frames associated herewith.²⁵⁷ This may add to the frustration and disempowerment on their part.²⁵⁸

Further shortcomings include the fact that the court's final judgment in the resolution of a dispute is unpredictable, and may even be unsatisfactory for both parties.²⁵⁹ Furthermore, such final judgment may not even address the full extent of the dispute and may take so long to be passed down, that it no longer has any practical effect at the conclusion of the litigation proceedings.²⁶⁰ Although appeal and review mechanisms are at the disposal of the losing party, there is no guarantee that such application will be met with success.²⁶¹ Moreover, this type of further appeal and review procedures will lengthen the dispute resolution process

²⁵³ Chief Justice Ngcobo 'Enhancing access to justice: The search for better justice' *Access to Justice Conference* 6 July 2011 16 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014);

²⁵⁴ Paleker M 'Court connected ADR in civil litigation: The key to access to justice in South Africa' (2003) 6 *ADR Bulletin* 48.

²⁵⁵ Hurter E 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 248.

²⁵⁶ Holeness D 'The constitutional justification for free legal services in civil matters in South Africa' (2013) 27 *Speculum Juris* 11.

²⁵⁷ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 18.

²⁵⁸ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 5.

²⁵⁹ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 18.

²⁶⁰ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 202.

²⁶¹ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 202.

extensively and lead to exorbitant costs being expended,²⁶² with an outcome which remains unpredictable.²⁶³

Additional challenges facing South Africa's civil justice system include the general complaint that the cost of litigation is prohibitive.²⁶⁴ The high costs of legal representation often exceed the value of the civil claim instituted by a disputant, as the costs of the litigation process (as well as related costs)²⁶⁵ accrue from the commencement until the final resolution of the matter, having an adverse effect on the individual seeking justice.²⁶⁶ The costs relating to litigation cannot be specifically forecasted due to the unpredictability of the civil litigation process and its time-frames. In this regard, additional fees would be charged for any additional procedures that may need to be instituted as well as the disbursement costs attached thereto and the costs for the time spent at the actual court proceedings. The unpredictability of the legal costs involved as well as the unpredictability of the final outcome of the matter may add to the frustration and anxiety of the disputants.²⁶⁷

²⁶² 'Litigation, including the right to appeal and review decisions often creates frozen conflicts that can last up to 10 years before legal finality is reached. Frozen conflicts are costly, in fact far more costly than the legal fees paid to resolve them.' Joubert J 'Court-annexed mediation opens doors to exciting opportunities' *Legalbrief Today* 23 September 2014 available at <http://www.legalbrief.co.za/article.php?story=20140923130558982> (accessed 26 September 2014).

²⁶³ Joubert J 'Lawyers Discover Value of Mediation'..

²⁶⁴ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 5.

²⁶⁵ It should also be taken into account that legal costs start accruing even before the institution of a civil claim via summons or notice of motion, as consultation and possible prior negotiations with the opposing party, through the means of a legal practitioner, also carry cost. Other related costs, excluding the standard legal fees, may include, for example, the sheriff's fees for the service of the summons and other requisite documents, counsel's fees for his or her appearance at court on behalf of the litigant, all petrol and travelling costs of the attorney as well as advocate throughout the litigation process, all photocopies and printing of documents necessary for the litigation process as well as for the actual trial or hearing at court etc.

²⁶⁶ '[W]e must address the twin problem of cost and delays in our justice system... These challenges require us to probe for fundamental changes to the administration of justice that can easily conspire to make our justice system inefficient, ineffective and inaccessible.' Chief Justice Ngcobo 'Enhancing access to justice: The search for better justice' Access to Justice Conference (6 July 2011) 11 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014); Fick C 'Litigation rarely provides best service at best price' *Legalbrief Today* 16 January 2013.

²⁶⁷ Paleker M 'Court connected ADR in civil litigation: The key to access to justice in South Africa' (2003) 6 *ADR Bulletin* 48.

On the basis of high costs and complexity, the civil justice system commonly excludes the middle-class to poorer communities in South Africa from acquiring access to justice.²⁶⁸ This results in certain wealthier groups in society having easier access to the use of litigation to defend their rights and advance their interests, while others do not.²⁶⁹ Although state-funded legal aid programmes, such as Legal Aid South Africa,²⁷⁰ may assist these groups in acquiring adequate access to justice, the largest difficulty regarding legal aid is that available funds are altogether inadequate to help all those in poorer communities with free legal assistance.²⁷¹

Further shortcomings from the parties' perspective include the fact that civil disputes are conducted in courts that are open to the public, where there is little to no privacy for the parties involved, which may be detrimental to the reputations of juristic as well as natural persons.²⁷²

Adding to the above shortcomings is the adversarial nature of civil litigation, which is viewed as warfare or a fight between disgruntled opponents.²⁷³ This adversarial method of dispute resolution is therefore commonly characterised by hostile behaviour and communications between the disputants' representatives, prior to and during the court process which

²⁶⁸ Joubert J 'Embedding Mediation in South African Justice' available at <http://www.jacques-joubert.co.za/articles> (accessed 17 December 2013). See 1.6.3 above.

²⁶⁹ Justice Nkabinde is of the view that the challenge in South Africa is that its adversarial civil justice system is dominated by those whose services are not equally available to all segments of society. She goes on to state that, 'despite our [South Africa's] glorified Constitution, certain interest groups have easier access to use litigation to defend their rights and advance their interests, while others cannot', as quoted by Sedutla M 'Launch of court-based mediation pilot project' (2012) 516 *De Rebus* 8.

²⁷⁰ Established through the Legal Aid Act 22 of 1969.

²⁷¹ Paleker M 'Court connected ADR in civil litigation: The key to access to justice in South Africa' (2003) 6 *ADR Bulletin* 48.

²⁷² Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 202.

²⁷³ Meintjies-Van der Walt L, Singh P & du Preez M et al *Introduction to South African Law* (2008) 135; Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) xxxv.

ultimately results in a winning and losing party.²⁷⁴ Due to the adversarial nature of the entire litigation process, acrimony and often further conflict between the disputing parties arises, ultimately resulting in permanently destroying their relationships.²⁷⁵ This would also be a point of concern to commercial entities that have entered into a civil dispute, where their current or future business relationships may be permanently destroyed or negatively impacted through this adversarial process.²⁷⁶

As a result of the overwhelming shortcomings identified in South Africa's civil justice system, its government (together with the assistance of the legislature and judiciary) has attempted to remedy these injustices through the institution of numerous initiatives over the years. Examples of these initiatives include: additional court structures being built over the years with the view of alleviating over-burdened court rolls; the establishment of a number of specialist courts,²⁷⁷ in an attempt to alleviate congested court roles for superior and lower level courts and reduce judicial inefficiency;²⁷⁸ the institution of case management projects,²⁷⁹ to address the issues of cost, delay and complexity of civil procedure, which introduced the system of the rule 37 pre-trial conferences at the High Court²⁸⁰ (which later

²⁷⁴ Hurter E 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 246.

²⁷⁵ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 18.

²⁷⁶ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 18.

²⁷⁷ Such as the Small Claims Court introduced shortly after the Hoexter Commission (1983), through the Small Claims Court Act 61 of 1984, enacted with the purpose of not only alleviating the case load burden on lower courts, but also to enable lower income earning citizens access to courts. See 2.3 above for further specialist courts established over the years.

²⁷⁸ The Department of Justice and Constitutional Development *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* (2012) 2, 18. While introducing a number of specialist courts, particularly on High Court level, has partially alleviated the problem of inefficiency, it has not addressed the issue of costs. Road Accident Fund *Submission on Arbitration to the Satchwell Commission of Enquiry* (1998).

²⁷⁹ Hodes P 'Case Management: Bar Initiatives' (1997) 10 *Consultus* 34.

²⁸⁰ See 2.4.2 above. However, legal practitioners often perceive this process to be a mere formality which needs to be conducted speedily in order to progress to trial for the final resolution of the dispute and settlement at this stage is often not an option. Paleker M 'Mediation in South Africa: Here But Not All There' in Alexander N (ed) *Global Trends in Mediation* 2 ed (2006) 340-341; *MB v NB* 2010 (3) SA 220 (GSJ) para 59.

spread to the Magistrates' Court),²⁸¹ the harmonisation and amendments to the court rules and legislation for the High Court and Magistrates' Court, also aimed at addressing the issues of delay, cost and complexity of civil litigation processes;²⁸² and the institution of Legal Aid South Africa,²⁸³ in an attempt to enhance access to justice for the communities in South Africa who have difficulty affording legal assistance.²⁸⁴

Further state initiated legislative and institutional reforms include the establishment of organisations and programmes such as: the South African Law Reform Commission (SALRC), created with the objective of making recommendations for the development, improvement and modernisation of law in South Africa;²⁸⁵ the Rules Board for Courts of Law in South Africa,²⁸⁶ entrusted with the task of reforming laws and court rules in order to align them with the values underpinning the South African Constitution;²⁸⁷ the Judicial Service Commission, instituted to ensure the acceptance and legitimacy of courts, and the restoration of public confidence in the South African judicial system;²⁸⁸ and the Civil Justice Reform

²⁸¹ Through section 54 of the Magistrates' Court Act 32 of 1994 read with rule 25 Magistrates' Court Rules 2010, as recognised today.

²⁸² Through the Erasmus Report of 1999, who identified the usual problems in the South African civil justice system of delay, complexity and costs, and proposed a review of the civil justice system. Erasmus HJ 'Civil procedure reform - Modern trends' (1999) 10 *Stellenbosch Law Review* 2. In addition, the court rules which have assisted with these shortcomings over the years, include rule 10(2) of the Uniform Rules of Court 2010 and section 43 of the Magistrates' Court Act 32 of 1944, which allows several disputes between the same parties to be joined in one action, in order to avoid unnecessarily instituting separate actions. Further rule 10(1) of the Uniform Rules of Court 2010 and section 41 of the Magistrates' Court Act 32 of 1944, in order to avoid multiplicity of actions, which allows more than one plaintiff or more than one defendant may take part in a single action. Pete S, Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide* 2 ed (2011) 391 – 392.

²⁸³ Established through the Legal Aid Act 22 of 1969.

²⁸⁴ However, as previously discussed in this section, the state-funds available to assist all underprivileged and indigent persons with legal assistance is a challenge. Paleker M 'Court connected ADR in civil litigation: The key to access to justice in South Africa' (2003) 6 *ADR Bulletin* 48.

²⁸⁵ Established through the South African Law Reform Commission Act 19 of 1973.

²⁸⁶ Established in terms of the Rules Board for Courts of Law Act 107 of 1985.

²⁸⁷ The Department of Justice and Constitutional Development *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* (2012) 24.

²⁸⁸ The Department of Justice and Constitutional Development *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* (2012) 22.

Programme of 2010, which sought to overhaul the civil justice system in order to bring it in line with the Constitution, 1996.²⁸⁹

Three decades later, the fundamental shortcomings identified in the Hoexter Commission, 1983 appear to be no different to the shortcomings currently recognised in the South African civil justice system.²⁹⁰ Although certain helpful state initiatives may be noted, the above concerns persist.

2.6 CONCLUSION

Due to South Africa's English common law influence,²⁹¹ a range of shortcomings associated with its adversarial civil justice system have transcended the country's colonial history and its transition into a constitutional democracy as well as its attempts at state initiatives²⁹² to address these increasing shortcomings over the years. This appears to be a result of the primary method of dispute resolution, being civil litigation, remaining unaltered and in practice for decades.²⁹³

In recent years, in 2011, Justice Ngcobo, publically stated the following about South Africa's civil justice system and civil litigation:

‘Our civil justice system is still characterised by cumbersome, complex and time-consuming pre-[court] procedures, overloaded court rolls..., [and] delays in matters coming to trial... It is expensive, slow, complex, fragmented, and overly adversarial... While significant progress has been made in enhancing the accessibility of our courts, there are still persistent problems.’²⁹⁴

²⁸⁹ The Department of Justice and Constitutional Development *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* (2012) 20. The CJRP is further discussed at 5.2.1 below.

²⁹⁰ In fact there appears to be more shortcomings identified, see 2.5 above..

²⁹¹ See 2.2.1.2 above.

²⁹² See 2.5 above.

²⁹³ See 2.2.1.2 and 2.4.1 above.

²⁹⁴ Chief Justice Ngcobo ‘Enhancing access to justice: The search for better justice’ Access to Justice Conference (6 July 2011) 15-16 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014).

The persistent problems pertaining to cost, delay, over-burdened court roles and complexity, as identified by Justice Ngcobo, and earlier in this chapter,²⁹⁵ collectively hinder the constitutional and democratic imperative of access to justice²⁹⁶ for South Africans, particularly the indigent of its society.²⁹⁷ However, in addition to this injustice is the problem pertaining to the adversarial nature of civil litigation.

The adversarial nature of civil litigation is often characterised by hostile behaviour between litigants and the further conflict which arises between them as a result of the litigation process. Further characteristics include a winning and losing party as well as permanently destroyed or irreconcilable relationships at the conclusion of the litigation process.²⁹⁸ These shortcomings, specifically, appear to be in direct conflict with South Africa's current constitutional ethos.²⁹⁹ Instead of recognising the injustices of the past and promoting restoration³⁰⁰ and the spirit of Ubuntu,³⁰¹ the opposite effect may ensue.³⁰² While the Constitution's preamble encourages restoration and unity,³⁰³ the adversarial nature of civil litigation encourages hostility and division.³⁰⁴

²⁹⁵ See 2.5 above.

²⁹⁶ See 2.4.2 above.

²⁹⁷ See 2.4.2 and 2.5 above.

²⁹⁸ See 2.5 above.

²⁹⁹ As provided for in the Constitution's Preamble. See 2.2.2.1 below.

³⁰⁰ As provided for in the Constitution's Preamble. See 2.2.2.1 below.

³⁰¹ 'The spirit of Ubuntu... suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.' *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) 29-30 para 37. At 2.2.2.1. below and 5.5.3 below.

³⁰² At 2.6 below.

³⁰³ At 2.2.2.1 below.

³⁰⁴ At 2.6 below.

Therefore based on the discussions above, it would appear that South Africa's primary method of civil litigation needs to be changed, in order to remedy the transcending shortcomings of its civil justice system.

Furthermore, given the unique history of South Africa, the alternative primary method of civil dispute resolution needs to be suited to a nation striving towards unity in its diversity, healing the divisions of its past, improving the quality of life for all citizens and building a 'united and democratic' nation for all.³⁰⁵

In the next chapter, certain areas of South African law will be discussed, in order to assess how South Africa's civil justice system, although premised on litigation, makes provision for alternative methods of dispute resolution, particularly mediation.

³⁰⁵ The Preamble of the Constitution, 1996.

CHAPTER 3

AREAS OF CIVIL LAW THAT MAKE PROVISION FOR MEDIATION

3.1 INTRODUCTION

As evidenced in Chapter 2, litigation is the primary method of dispute resolution in South Africa's civil justice system. However, although adversarial in nature, the civil justice system is no stranger to the practice of mediation in resolution of civil disputes.

Chapter 3 therefore considers the fields of South African civil law within which mediation plays a significant role. While many areas of civil law will be discussed in this chapter, the areas of family law, labour law and commercial law will be assessed in greater detail. The greater detail in this regard will encompass the role which mediation plays in these areas of law as well as the benefits of, and support for this ADR process.

The fields of law within which mediation plays a significant role will commence the discussions of this chapter.

3.2 FIELDS OF LAW WITHIN WHICH MEDIATION PLAYS A SIGNIFICANT ROLE

3.2.1 Mediation in Family Law

3.2.1.1 Legislative Support of Mediation in Family Law

The compulsory practise of mediation within the field of family law is currently effected through statutes found within this area of law. The Mediation in Certain Divorce Matters Act 24 of 1987 (MDMA) is an example of this. This piece of legislation necessitates the compulsory process of mediation.

The purpose of the MDMA, according to its long title, is to protect the interests of children in the event of a divorce and to consider the recommendations and report of the Family Advocate before granting a decree of divorce. The MDMA creates the Office of the Family Advocate.³⁰⁶ The purpose of the Family Advocate is to institute an enquiry so as to be able to furnish the court with a report and possible recommendations to any matter concerning the welfare of the minor or dependent child of the marriage concerned.³⁰⁷ The enquiry in this context constitutes a mediation process which can be compulsory in nature.³⁰⁸

The legislature's rationale for incorporating the process of mediation into legislation stemmed from the critical problem that family-law legal practitioners in the past often viewed divorce solely as a legal event.³⁰⁹ The practitioners would often ignore the important non-legal issues pertaining to the litigation proceedings.³¹⁰ These non-legal issues inter alia comprise the break-down of families and the long term emotional and psychological effects of divorce which children may suffer from during and after the conclusion of the divorce.³¹¹

Furthermore the adversarial nature of litigation in divorce matters, encouraged bitterness and irreconcilability between divorcing parties and reaching a satisfactory settlement agreement in such an environment, was near impossible.³¹² This adversarial process prejudiced the

³⁰⁶ Section 2 of the MDMA.

³⁰⁷ Section 4 of the MDMA.

³⁰⁸ '... it would appear that in South Africa the idea of compulsory mediation is not a new one. In terms of section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 divorcing parties can be forced first to submit to an investigation by the office of the family advocate into matters concerning the custody of, access to and guardianship of children, before being granted a divorce order by the court' as quoted from De Jong M 'An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation' 2005 *Tydskrifvir die Suid-AfrikaanseReg* 39.

³⁰⁹ De Jong M 'An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation' 2005 *Tydskrifvir die Suid-AfrikaanseReg* 33.

³¹⁰ De Jong M 'An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation' 2005 *Tydskrifvir die Suid-AfrikaanseReg* 33.

³¹¹ De Jong M 'An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation' 2005 *Tydskrifvir die Suid-AfrikaanseReg* 33.

³¹² De Jong M 'An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation' 2005 *Tydskrifvir die Suid-AfrikaanseReg* 33.

divorcing parties as well as their children, which resulted in ongoing family problems which often required the intervention of social welfare institutions.³¹³

The Children's Act 38 of 2005 (the Children's Act)³¹⁴ extends the function of the Office of the Family Advocate, as created in the MDMA. The Children's Act further, through its purpose, gives effect to children's constitutional rights, such as upholding the best interests of the child in every matter concerning him or her as well as ensuring the well-being and protection of every child.³¹⁵ In addition, the Children's Act, importantly, makes provision for the compulsory use of mediation in certain circumstances.³¹⁶ The legislative incorporation of mandatory mediation into the Children's Act is premised on the best interests of the child,³¹⁷ as mentioned above. Thus for instance, in terms of the parental responsibilities and rights referred to in the Children's Act, an agreement is to be entered into between the parents regarding the relevant issues and decisions of the child's well-being.³¹⁸ The legislature therefore helps the parents reach such agreement and compels them to seek the assistance of a Family Advocate or alternative third party.³¹⁹ Thus with the aid of the mediator, parents will be able to work together towards reaching an agreement which best serves the interests of the child.³²⁰

³¹³ De Jong M 'An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation' 2005 *Tydskrifvir die Suid-Afrikaanse Reg* 33.

³¹⁴ Which came into operation on 1 July 2007.

³¹⁵ Section 2 of the Children's Act 38 of 2005.

³¹⁶ Section 21(3) of the Act makes it compulsory for parties to attend mediation through the Family Advocate (or any other suitably qualified persons) in parental responsibilities and rights matters over children born out of wedlock. Furthermore in section 33(5), when preparing a parenting plan, parties must either seek the assistance of the family advocate or mediation through a suitably qualified person.

³¹⁷ Mahlobogwane F 'Parenting plans in terms of the children's act: serving the best interests of the parent or the child?' (2013) 34 *Obiter* 228.

³¹⁸ Section 22 of the Children's Act.

³¹⁹ Mahlobogwane F 'Parenting plans in terms of the children's act: serving the best interests of the parent or the child?' (2013) 34 *Obiter* 228.

³²⁰ Mahlobogwane F 'Parenting plans in terms of the children's act: serving the best interests of the parent or the child?' (2013) 34 *Obiter* 228.

3.2.1.2 Judicial Support for Mediation in Family Law

Significant judicial support of mediation in family law will now be briefly discussed. The reported case *Van den Berg v Le Roux*³²¹ and the more recent case of *MB v NB*³²² are examples of how South African courts support mediation in the field of family law.

The case of *Van den Berg v Le Roux*³²³ involved a divorce and considered the guardianship and custody of a legitimate child. The court inter alia ordered the divorced parents to mediate any future dispute between them before approaching the courts.³²⁴ If mediation failed, a psychologist and/or clinical psychologist or any other competent person would be entitled to take a decision concerning the dispute.³²⁵ Only after the completion of the mediation process, would the parties be permitted to approach the court.³²⁶ The court further ordered the parties to split the costs of mediation, unless the mediator in the case determined otherwise.³²⁷

The rationale behind the court's decision includes the benefits and necessity of mediation in family disputes, especially those involving children. The court considered parts of Van Zyl's³²⁸ article in reaching its final decisions, which provided that:

‘mediation is seen as an alternative dispute resolution mechanism and in those cases where guardianship, custody or access are in dispute between the parties, mediation is the primary objective of the Family Advocate; mediation being a dynamic process whereby the Family Advocate in an atmosphere where conflict is reduced to a minimum, actively encourages the parties to participate in a discussion, seeking a mutually acceptable solution in regard to matters pertaining to the children. The

³²¹ 2003 (3) All SA 599 (NC).

³²² 2010 (3) SA 220 (GSJ).

³²³ 2003 (3) All SA 599 (NC) 614.

³²⁴ 2003 (3) All SA 599 (NC) 614.

³²⁵ 2003 (3) All SA 599 (NC) 614.

³²⁶ A similar order was granted in *Townsend-Turner v Morrow* [2004] 1 All SA 235 (C) relating to access of grandparents to their grandchild. The court in this matter ordered the parties to attend mediation to resolve the areas of conflict between them or to decide on the appropriate manner of dealing with those conflicts. Furthermore these conflicts were to be considered even before the parties attempted the mediation of the main dispute between them.

³²⁷ 2003 (3) All SA 599 (NC) 614.

³²⁸ Van Zyl GJ ‘The family advocate: 10 years later’ (2000) *Obiter* 377–378.

procedure allows for participation by the children depending on their ages as well as their intellectual and emotional maturity.³²⁹

In August 2009, the case of *MB v NB*³³⁰ further emphasised the importance and benefits of mediation.³³¹ This case concerned the dissolution of a marriage, parental rights, maintenance³³² and a claim based on the accrual system,³³³

The court held that mediation would have been the better alternative in the resolution of this matter and that it should have been tried instead of litigation.³³⁴ The rationale for the court's decision was its belief in the benefits and suitability of mediation.³³⁵ In this regard Brassey AJ held:

‘How much richer would this solution have been had it emerged out of a consensus-seeking process rather than in adversarial proceedings in which positions were taken up that gave every appearance of callousness and cruelty. This is but an instance of what mediation might have achieved. In fact, the benefits go well beyond it. In the process of mediation, the parties would have had ample scope for an informed but informal debate on the levels of their estates, the amount of their incomes and the extent of their living costs. Nudged by a facilitative intermediary, I have little doubt that they would have been able to solve most of the monetary disputes that stood between them. The saving in time and legal costs would have been significant and, once a few breakthroughs had been made, I have every reason to believe that an overall solution would have been reached.’³³⁶

In addition to the benefits and suitability of mediation, the court emphasised that there existed a positive duty of the disputants' attorneys to advise their clients to mediate their dispute

³²⁹ 2003 (3) All SA 599 (NC) 608.

³³⁰ 2010 (3) SA 220 (GSJ).

³³¹ *MB v NB* 2010 (3) SA 220 (GSJ) para 58 - 59.

³³² Brand J ‘South Africa high court obliges lawyers to recommend mediation’ (2009) 11 *ADR Bulletin* 100.

³³³ *MB v NB* 2010 (3) SA 220 (GSJ) paras 10-11 and 37-47.

³³⁴ *MB v NB* 2010 (3) SA 220 (GSJ) para 58.

³³⁵ *MB v NB* 2010 (3) SA 220 (GSJ) para 58 - 59.

³³⁶ *MB v NB* 2010 (3) SA 220 (GSJ) para 56-57.

prior to invoking litigation.³³⁷The court showed its displeasure of the attorneys' failure to do so by ordering that the fees that the attorneys could recover from their own clients be capped.³³⁸

The practice of mediation is not only recognised by the legislature but also supported by the judiciary within the field of family law. South African courts recognise the benefits and importance of the use of mediation in family disputes. In view of the legislative support of the practice of mediation, the mandatory incorporation of such ADR process not only provides a suitable method for resolving contentious family law issues, but also aids in fulfilling the purposes of the MDMA as well as the Children's Act as discussed in this section.

3.2.2 Mediation in Labour Law

3.2.2.1 Legislative Support for Mediation in Labour Law

One of the main objectives of the Labour Relations Act (LRA),³³⁹ as explained in the preamble of the LRA, is to 'provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration' through the Commission for Conciliation, Mediation and Arbitration (CCMA)³⁴⁰ or through accredited independent ADR services. The central objective of the LRA is promoting healthy industrial relations.³⁴¹ The

³³⁷ *MB v NB* 2010 (3) SA 220 (GSJ) para 59.

³³⁸ *MB v NB* 2010 (3) SA 220 (GSJ) para 59. Brassey AJ held that 'on the facts before me it is impossible to know whether the parties knew about the benefits of mediation, but I can see no reason why they would have turned their backs on the process, especially if they had been counselled on the matter by the attorneys. What is clear, however, is that the attorneys did not provide this counsel; in fact, in the course of the pre-trial conference they positively rejected the use of the process. For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients.'

³³⁹ Act 66 of 1995.

³⁴⁰ As mentioned in part 2.3.1.5 of Chapter 2.

³⁴¹ Steenkamp A & Bosch C 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' (2012) *Acta Juridica* 120.

CCMA plays a pivotal role in the overall dispute resolution system³⁴² and since its inception, has enjoyed a national settlement rate of 70% and greater.³⁴³

Prior to the promulgation of the LRA and CCMA,³⁴⁴ labour disputes were settled through formal procedures carried out in forums such as the Industrial Court, which did not make provision for any options of ADR methods.³⁴⁵ Other forums included conciliation boards³⁴⁶ and industrial councils.³⁴⁷ Their procedures were not user-friendly; they were ‘lengthy, complex and pitted with technicalities’.³⁴⁸ In 1995 the government undertook a ‘fundamental and dramatic overhaul’³⁴⁹ of the labour dispute resolution procedures.³⁵⁰ As a result the legislature repealed and replaced the 1956 LRA with the current 1995 LRA, making room for the CCMA.³⁵¹

The functions of the CCMA are inter alia that it

‘must-

(a) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;

³⁴² Brand J & Steadman F ‘The disputes and their processes’ in Brand, Lotter & Steadman et al *Labour Dispute Resolution* 2 ed (2011) 45-58; Grogan J *Workplace Law* 10 ed (2009) 426.

³⁴³ CCMA ‘About us’ available at <http://www.ccma.org.za/> (accessed 20 November 2013).

³⁴⁴ Act 66 of 1995.

³⁴⁵ Paleker M ‘Mediation in South Africa: Here but not all there’ in Alexander N *Global Trends in Mediation* 2ed(2006) 355.

³⁴⁶ Conciliation boards were appointed by the Department of Labour and by industrial councils. The appointment of a conciliation board was a precondition to referring an unfair labour practice dispute to the Industrial Court. The discretion of establishing conciliation boards rested with the Minister of Labour and this resulted in extensive review litigation, contesting the Minister’s refusal to appoint conciliation boards, as refusals frequently appeared to be politically motivated. Parties often regarded conciliation boards as ‘an unwelcome hurdle to litigation’, rather than a viable means of resolving disputes. Benjamin P *Dialogue: Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)* (2013) 4.

³⁴⁷ On average these conciliation boards resolved 20 per cent of matters referred to them and industrial councils 30 per cent. Paleker M ‘Mediation in South Africa: Here but not all there’ in Alexander N *Global Trends in Mediation* 2ed(2006) 355.

³⁴⁸ Paleker M ‘Mediation in South Africa: Here but not all there’ in Alexander N *Global Trends in Mediation* 2ed(2006) 355.

³⁴⁹ Van Niekerk A ‘Dispute Resolution, Practice and Procedure’ in Cheadle H *Current Labour Law* (1995) 40.

³⁵⁰ Paleker M ‘Mediation in South Africa: Here but not all there’ in Alexander N *Global Trends in Mediation* 2ed(2006) 355.

³⁵¹ Paleker M ‘Mediation in South Africa: Here but not all there’ in Alexander N *Global Trends in Mediation* 2ed(2006) 355.

- (b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if-
- (i) this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or
 - (ii) all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission...³⁵²

Generally, when a labour dispute is referred to the CCMA, a commissioner is appointed to attempt to resolve the matter through conciliation³⁵³ within 30 days.³⁵⁴ If the dispute is not resolved through conciliation, it proceeds to arbitration and the CCMA must appoint a different commissioner to arbitrate the dispute within 90 days.³⁵⁵

In view of the above, the objectives of labour dispute resolution through these alternative processes at the CCMA are:

‘speed, accessibility (in terms of geographical location, cost and relatively simple procedures) and legitimacy (which derives from representivity in the dispute resolution body, certainty and expertise).’³⁵⁶

The essential purpose for these objectives is that neither employers nor employees³⁵⁷ can afford delays and often neither of them possesses an intimate knowledge of usual civil litigation procedures.³⁵⁸ Further, the CCMA plays a vital role in maintaining a ‘balance

³⁵² Section 115(1)(a),(b) of the LRA; There is no definition for ‘conciliation’ in the LRA but, similar to the function of a mediator, the sole function of the conciliating commissioner is to assist the parties in reaching an agreement. Grogan J *Workplace Law* 10 ed (2009) 427; Paleker M ‘Mediation in South Africa: Here but not all there’ in Alexander N *Global Trends in Mediation* 2 ed (2006) 356. Although similar in nature, section 135 of the LRA states that the commissioner from the CCMA has 30 days to resolve a dispute through conciliation which includes mediation, fact-finding and providing recommendations. Although similar in concept for the purposes of the LRA there seems to be a distinction between conciliation and mediation.

³⁵³ Section 135(1) of the LRA.

³⁵⁴ Parties may however agree extend the time period. Section 135(2) of the LRA.

³⁵⁵ Section 136 of the LRA.

³⁵⁶ ‘It has been said that an effective dispute resolution system is one that is properly structured and functioning, and resolves disputes quickly and finally. I would add that effective dispute resolution processes resolve disputes fairly in addition to being accessible, speedy and inexpensive.’ Steenkamp A & Bosch C ‘Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential’ (2012) *Acta Juridica* 120.

³⁵⁷ Especially those recently dismissed. Steenkamp A & Bosch C ‘Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential’ (2012) *Acta Juridica* 120.

³⁵⁸ Steenkamp A & Bosch C ‘Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential’ (2012) *Acta Juridica* 120.

between the rights and interests of employers and employees while maintaining relatively healthy industrial relations with minimal resort to self-help'.³⁵⁹

3.2.2.2 Judicial Support for Conciliation and Arbitration in Labour Law

In some instances the Labour Courts have highlighted the benefits and functions of the conciliation and arbitration processes at the CCMA. These are briefly discussed below.

In *Kasipersad v Commission for Conciliation, Mediation & Arbitration & others*,³⁶⁰ the applicant sought inter alia to review and set aside the conciliation proceedings held at the CCMA as well as the certificate of outcome and the settlement agreement produced.³⁶¹ The court in this matter emphasised the benefit of confidentiality in the conciliation process.³⁶² The court held that by nature, conciliation is private and confidential and that conciliators are not expected to keep a record of conciliation proceedings.³⁶³ The court in this regard held that the approach to conciliation is underpinned by rule 7(3) and 7(4) of the Rules of the CCMA, which provides:

- '(3) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis so that no party may make reference to statements made at conciliation proceedings during any subsequent proceedings unless the parties have so agreed in writing.
- (4) Neither the Commissioner dealing with the conciliation nor anybody else attending the conciliation hearing may be called as a witness during any subsequent proceedings to give evidence about what transpired during the conciliation process.'³⁶⁴

³⁵⁹ Steenkamp A & Bosch C 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' (2012) *Acta Juridica* 120.

³⁶⁰ (2003) 24 ILJ 178 (LC)

³⁶¹ In *Kasipersad v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 178 (LC) 181.

³⁶² In *Kasipersad v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 178 (LC) 181.

³⁶³ In *Kasipersad v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 178 (LC) 181.

³⁶⁴ In *Kasipersad v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 178 (LC) 182. 'rules 7.3 and 7.4, which, in the subsequent re-formulation of those rules, but in exactly the same terms, are now rules 16(1) and (2) thereof' as quoted in *Hofmeyr v Network Healthcare Holdings (Pty) Ltd* [2004] 3 BLLR 232 (LC) para 5.

Arbitrators at the CCMA are obliged to conduct arbitrations in a manner which they deem appropriate to determine a labour dispute fairly and speedily and to deal with the substantial merits of the disputes ‘with the minimum of legal formalities’.³⁶⁵ In *Naraindath v Commission for Conciliation, Mediation & Arbitration & Others*,³⁶⁶ the applicant, employed as a prison warder, was found in possession of prohibited drugs and was dismissed.³⁶⁷ He referred the matter to the CCMA which was arbitrated by a commissioner, assigned for this purpose.³⁶⁸ The commissioner held that the employee's dismissal was substantively fair but procedurally unfair, and compensation was awarded.³⁶⁹ The applicant, however, was unhappy with the outcome of the arbitration and sought to review it in the Labour Court.³⁷⁰

In the above matter, the court highlighted section 138 of LRA³⁷¹ and the objects of labour dispute resolution.³⁷² The court held that in this instance, the rights of the parties conferred by section 138 of the LRA are always conferred subject to the overriding discretion of the

³⁶⁵ Section 138 (1) of the LRA.

³⁶⁶ (2000) 21 ILJ 1151 (LC).

³⁶⁷ *Naraindath v Commission for Conciliation, Mediation & Arbitration & Others* (2000) 21 ILJ 1151 (LC) para 1.

³⁶⁸ *Naraindath v Commission for Conciliation, Mediation & Arbitration & Others* (2000) 21 ILJ 1151 (LC) para 2.

³⁶⁹ *Naraindath v Commission for Conciliation, Mediation & Arbitration & Others* (2000) 21 ILJ 1151 (LC) para 2.

³⁷⁰ *Naraindath v Commission for Conciliation, Mediation & Arbitration & Others* (2000) 21 ILJ 1151 (LC) para 2.

³⁷¹ Section 138, ‘General provisions for arbitration proceedings [:]’

(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.

... (5) If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party –

(a) had referred the dispute to the Commission, the commissioner may dismiss the matter; or

(b) had not referred the dispute to the Commission, the commissioner may –

(i) continue with the arbitration proceedings in the absence of that party; or

(ii) adjourn the arbitration proceedings to a later date.’

³⁷² *Naraindath v Commission for Conciliation, Mediation & Arbitration & Others* (2000) 21 ILJ 1151 (LC) para 26.

commissioner as to the appropriate form of the proceedings.³⁷³ The application was accordingly dismissed.³⁷⁴ The court emphasised that the commissioner was justified in the manner in which he arbitrated the matter, in that his methods were sensible, practical and had expedited the proceedings.³⁷⁵

South African Labour Courts appear to support and promote the benefits and efficiency of ADR through the CCMA in resolution of labour disputes. In addition, based on the above discussions, ADR, particularly conciliation and arbitration, are the preferred methods of dispute resolution in the field of labour law. In this regard, the replacement of the Industrial Court by the CCMA through labour legislation evidences the shift from a highly adversarial model of dispute resolution to one based on promoting greater co-operation, industrial peace and social justice through ADR.³⁷⁶

3.2.3 Mediation in Corporate/Commercial Law

Mediation in corporate law is endorsed through its governance system³⁷⁷ which encompasses the Code on Corporate Governance for South Africa 2009 ('the Code'), the King Report on Governance for South Africa 2009 ('the King III Report') and the Companies Act 71 of 2008 ('the new Companies Act').³⁷⁸ The sections below discuss how this management system has been implemented in commercial practice.

³⁷³ *Naraindath v Commission for Conciliation, Mediation & Arbitration & Others* (2000) 21 ILJ 1151 (LC) para 44.

³⁷⁴ *Naraindath v Commission for Conciliation, Mediation & Arbitration & Others* (2000) 21 ILJ 1151 (LC) para 44.

³⁷⁵ *Naraindath v Commission for Conciliation, Mediation & Arbitration & Others* (2000) 21 ILJ 1151 (LC) para 42.

³⁷⁶ CCMA 'About us' available at <http://www.ccma.org.za/> (accessed 20 November 2013).

³⁷⁷ Cassim FHI (ed), Cassim MF & Cassim R *Contemporary Company Law* 2ed (2012) 473.

³⁷⁸ The new Companies Act came into effect on 1 May 2011 after substantial amendment to the old Companies Act 61 of 1973.

3.2.3.1 The Code on Corporate Governance

The Code³⁷⁹ has been updated on 1 March 2010 by the Institute of Directors in Southern Africa and now makes provision for the practice of mediation in commercial disputes. The Code, as well as the King III Report, applies to all entities incorporated in and resident in South Africa, regardless of the manner and form of incorporation or establishment.³⁸⁰ Compliance with the provisions of these documents is mandatory for all companies listed on the Johannesburg Stock Exchange (JSE); for all other entities there is no statutory obligation to comply.³⁸¹ Even though compliance with these documents may be voluntary to other entities, they are highly recommended and have considerable persuasive value.³⁸²

The Code places a duty upon directors and executives to ensure that disputes are resolved effectively, expeditiously and efficiently.³⁸³ Furthermore, the interests, needs and rights of the disputants must be taken into account and the resolution of the dispute should be cost effective and not drain the finances and resources of the company.³⁸⁴ Paragraph 84 of the Code goes on to support and emphasise the necessity of mediation in resolving disputes by stating that:

‘[e]xternal disputes may be referred to arbitration or a court. However these are not always the appropriate or most effective means of resolving such disputes. 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’.

³⁷⁹ Also known as ‘the King Code of Governance for South Africa 2009’. The Code on Corporate Governance is a system by which companies are directed and controlled. The Code regulates directors and their conduct not only with the aim of complying with the minimum statutory standard, but also to ensure that the best available practice relevant to the company is used appropriately in various circumstances.

³⁸⁰ Paragraph 17 of the King III Report.

³⁸¹ Cassim FHI (ed), Cassim MF & Cassim R *Contemporary Company Law* 2ed (2012) 474.

³⁸² Cassim FHI (ed), Cassim MF & Cassim R *Contemporary Company Law* 2ed (2012) 475.

³⁸³ Paragraph 81 of the Code of Corporate Governance.

³⁸⁴ Paragraph 81 of the Code of Corporate Governance.

3.2.3.2 The King III Report

The King III Report³⁸⁵ sets out vital corporate governance principles and must be read together with the Code, which sets out the best practice recommendations on how each principle is to be carried out.³⁸⁶ The King III Report was impelled by changes and reforms implemented by the new Companies Act as well as by the changes in international governance trends.³⁸⁷

According to Chapter 8, paragraph 39 of the King III Report, ADR is the most effective and efficient method of addressing the costly and time-consuming features associated with more formal litigation procedures. Further, according to the King III Report, consideration must be given to the preservation of business relationships as well as to the cost of dispute resolution, which must not drain the finances and resources of the company.³⁸⁸

The successful resolution of disputes entails choosing a particular dispute resolution method that best serves the interests of the company.³⁸⁹ The King III Report suggests³⁹⁰ that mediation may be a more appropriate mechanism to resolve disputes where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.³⁹¹ The King III Report defines ‘mediation’ as ‘a process where

³⁸⁵ The King Committee was established in South Africa in 1992 by the Institute of Directors in Southern Africa with the objective of making recommendations on the effective implementation of corporate governance in the country. The King III Report must be read together with the Code and was introduced due to the corporate law reform in South Africa (which also gave rise to the new Companies Act of 2008). The King III Report deals with the changes in governance trends and applies broadly to all corporate entities. ‘the King III Report is divided into nine chapters. Each of the principles contained in the King III Report is set out in the Code, together with the recommended practises relating to each principle’. Cassim FHI (ed), Cassim MF & Cassim R *Contemporary Company Law* 2ed (2012) 476.

³⁸⁶ Cassim FHI (ed), Cassim MF & Cassim R *Contemporary Company Law* 2ed (2012) 474.

³⁸⁷ Cassim FHI (ed), Cassim MF & Cassim R *Contemporary Company Law* 2ed (2012) 474.

³⁸⁸ Chapter 8, paragraph 38 of the King III Report.

³⁸⁹ Cassim FHI (ed), Cassim MF & Cassim R *Contemporary Company Law* 2ed (2012) 501.

³⁹⁰ Chapter 8, paragraph 43 of the King III Report.

³⁹¹ ‘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. Mediation is often more appropriate where interests of the

parties in dispute involve the services of an acceptable, impartial and neutral third party to assist them in negotiating a resolution to their dispute, by way of a settlement agreement’.³⁹²

The King III Report states that there are no prescribed rules that dictate which ADR method to use under a particular set of circumstances.³⁹³ However, the King III Report does make reference to six factors that should be taken into account during the selection process, together with a brief description for each of them.³⁹⁴ These factors and descriptions are:³⁹⁵

1. The time available to resolve the dispute.

‘Formal proceedings, and in particular court proceedings, often entail procedures lasting many years. By contrast, alternative dispute resolution (ADR) methods, and particularly mediation, can be concluded within a limited period of time, sometimes within a day’.³⁹⁶

2. Whether principle and precedent is necessary.

In circumstance where the issue in dispute relates to a matter of principle and where companies require a resolution that will be binding on similar disputes in future, ADR may not be suitable.³⁹⁷ In these circumstances court proceedings may be more appropriate.³⁹⁸

3. The business relationships involved in the dispute

‘Litigation and processes involving an outcome imposed on both parties can destroy business relationships. By contrast mediation, where the process is designed to

disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.’ Chapter 8, paragraph 43 of the King III Report.

³⁹² The mediator has no independent authority and does not render a decision. All decision-making powers in regard to the dispute remain with the parties. Mediation is a voluntary process both in its initiation, its continuation and its conclusion’. Chapter 8, paragraph 50 of the King III Report.

³⁹³ Chapter 8, paragraph 53 of the King III Report.

³⁹⁴ Chapter 8, paragraph 53.1 to 53.6 of the King III Report.

³⁹⁵ According to Chapter 8, paragraph 53 of the King III Report. The descriptions of the factors pertaining to mediation and conciliation, below, will be quoted directly from the King III Report (for purposes of emphasis and support for the aims of this section of the research), the others will be paraphrased.

³⁹⁶ Chapter 8, paragraph 53.1 of the King III Report.

³⁹⁷ Chapter 8, paragraph 53.2 of the King III Report.

³⁹⁸ Chapter 8, paragraph 53.2 of the King III Report.

produce a solution most satisfactory to both parties (a win-win resolution), relationships may be preserved. Where relationships and particularly continuing business relationships are concerned, therefore, mediation or conciliation may be preferable.³⁹⁹

4. Whether expert recommendation is required.

‘Where the parties wish to negotiate a settlement to their dispute but lack the technical or other expertise necessary to devise a solution, a recommendation from an expert who has assisted the parties in their negotiations may be appropriate. This process would be termed conciliation.’⁴⁰⁰

5. The Confidentiality of the dispute.

The proceedings of any private dispute resolution process may be conducted in confidence.⁴⁰¹

The new Companies Act also makes provision for alternative dispute resolution processes to be conducted in private.⁴⁰²

6. The rights and interests of the parties in dispute.

‘The adjudicative process involves the decision-maker imposing a resolution of the dispute on the parties after having considered the past conduct of the parties in relation to the legal principles and rights applicable to the dispute. This inevitably results in a narrow range of possible outcomes based on fundamental considerations of right and wrong. By contrast, mediation and conciliation allow the parties, in fashioning a settlement of their dispute, to consider their respective needs and interests, both current and future. Accordingly, where creative and forward-looking solutions are required in relation to a particular dispute and particularly where the dispute involves a continuing relationship between the parties, mediation and conciliation are to be preferred...’⁴⁰³

It appears that the King III Report in particular favours mediation as the ADR method of choice in resolving corporate disputes, as four out the six factors listed above encourage the use of mediation. In this regard, mediation would be better suited to these disputes as the

³⁹⁹ Chapter 8, paragraph 53.3 of the King III Report.

⁴⁰⁰ Chapter 8, paragraph 53.4 of the King III Report.

⁴⁰¹ Chapter 8, paragraph 53.5 of the King III Report.

⁴⁰² Chapter 8, paragraph 53.5 of the King III Report.

⁴⁰³ Chapter 8, paragraph 53.6 of the King III Report.

turnaround time in the resolution of a matter is short.⁴⁰⁴ The process of mediation would therefore save valuable business time and money. In addition, business relationships would be better preserved and the risk of destroying future business relationships would be considerably lessened through the use of mediation and amicable benefits of settlement. As previously mentioned,⁴⁰⁵ mediation proceedings are conducted privately; therefore the goodwill and private affairs of the disputing companies would be protected and safe-guarded. Businesses in this regard have the freedom to openly discuss and negotiate their affairs without fear of corporate defamation or having any statements made during the negotiation process used against them outside of the mediation arena. Through mediation a wide range of possible solutions to the dispute would be available to the parties. Through settlement discussions a creative and best-suited solution can be uniquely crafted to satisfy the specific needs of the businesses, as opposed to the narrow range of fixed solutions available through the adjudicative process of civil litigation.

On the other hand, in cases where a binding solution of a dispute is necessary for setting precedent for similar future corporate disputes, litigation may be more suitable. Therefore, understandably mediation may not be suitable to all corporate disputes. However, the use and implementation of such a convenient ADR tool will generally assist in considerably alleviating the burden of corporate dispute resolution.

According to paragraph 10 of the King III Report, entitled ‘Emerging governance trends incorporated in the King III Report: Alternative dispute resolution (ADR), the following is said about mediation and ADR. Mediation is being used as a dispute resolution mechanism as

⁴⁰⁴ Commonly within one day. See factor number 1 of the King III Report quoted above.

⁴⁰⁵ See 1.6.2 above; see factor number 5 of the King III Report above.

well as a management tool in the field of commercial law.⁴⁰⁶ Globally, ADR is not a reflection on a judicial system of a country, but has become an important element of good governance.⁴⁰⁷ Paragraph 10 goes on to state that directors should preserve their business relationships and exercise their duty of care, by endeavouring to resolve disputes expeditiously, efficiently and effectively.⁴⁰⁸ This paragraph also states that mediation enables novel solutions, which a court may not achieve, as it is constrained to enforce legal rights and obligations.⁴⁰⁹ Furthermore, in mediation, the parties' needs are considered, rather than their rights and obligations.⁴¹⁰ It is in this context that the Institute of Directors in South Africa advocates administered mediation and, if it fails, expedited arbitration.⁴¹¹

3.2.3.3 The New Companies Act

Having considered the Companies Act 61 of 1973 (the 'old Companies Act'), it can be said that hardly any reference to mediation nor ADR as a method for resolving corporate disputes was made in the old Companies Act.⁴¹² The new Companies Act, however, makes provision for and supports the growing concept of mediation (and ADR). The new Companies Act recognises the necessity of ADR and dedicates a portion of the Act to ADR (which includes the process of mediation)⁴¹³. Moreover, the long title of the new Companies Act expressly provides that the purpose of the Act is to inter alia establish a Companies Tribunal in order to facilitate ADR processes.⁴¹⁴

⁴⁰⁶ Paragraph 10 of the King III Report.

⁴⁰⁷ Paragraph 10 of the King III Report.

⁴⁰⁸ Paragraph 10 of the King III Report.

⁴⁰⁹ Paragraph 10 of the King III Report.

⁴¹⁰ Paragraph 10 of the King III Report.

⁴¹¹ Paragraph 10 of the King III Report; Institute of Directors in South Africa Practice Note (2009) 2.

⁴¹² Section 72 of the old Companies Act provided that companies had the capacity to refer any existing or future dispute between themselves and any other company or person to arbitration. However, this provision became irrelevant in the new Companies Act, as section 19(1)(b) now provides companies with the same powers and legal capacity as a natural person.

⁴¹³ Part C of the Companies Act 71 of 2008.

⁴¹⁴ The long title of the new Companies Act provides: "To provide for the incorporation, registration, organisation and management of companies, the capitalisation of profit companies, and the registration of

Section 156 of the new Companies Act provides a short list of options which disputants may choose from in order to resolve their corporate disputes.⁴¹⁵ The first option in this list is aimed at addressing a dispute through the process of ADR (mediation, conciliation or arbitration) among the options of conventional civil litigation and grievance procedures according to provisions in the Act.⁴¹⁶

Further, a portion of the new Companies Act is now reserved for ‘Voluntary Resolution of Disputes’ under Part C of the Act, comprising a lengthy section 166, entitled ‘Alternative Dispute Resolution’, and section 167, entitled ‘Dispute Resolution may Result in Consent Order’. Section 166(1) provides that as an alternative to applying for relief to court, a disputant is entitled to apply for relief by referring his or her matter for resolution through the process of mediation, conciliation or arbitration through the Companies Tribunal or an accredited entity or any other person.⁴¹⁷ If the Companies Tribunal or an accredited entity⁴¹⁸

offices of foreign companies carrying on business within the Republic; to define the relationships between companies and their respective shareholders or members and directors; to provide for equitable and efficient amalgamations, mergers and takeovers of companies; to provide for efficient rescue of financially distressed companies; to provide appropriate legal redress for investors and third parties with respect to companies; to establish a Companies and Intellectual Property Commission and a Takeover Regulation Panel to administer the requirements of the Act with respect to companies, to establish a Companies Tribunal *to facilitate alternative dispute resolution* and to review decisions of the Commission; to establish a Financial Reporting Standards Council to advise on requirements for financial record-keeping and reporting by companies; to repeal the Companies Act, 1973 (Act No. 61 of 1973), and make amendments to the Close Corporations Act, 1984 (Act No. 69 of 1984), as necessary to provide for a consistent and harmonious regime of business incorporation and regulation; and to provide for matters connected therewith.” My emphasis

⁴¹⁵Section 156: ‘Alternative procedures for addressing complaints or securing rights.

A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company’s Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company’s Memorandum of Incorporation or rules, by-

- (a) attempting to resolve any dispute with or within a company through alternative dispute resolution in accordance with Part C of this Chapter;

- (b) applying to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of this Act;

- (c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or

- (d) filing a complaint in accordance with Part D of this Chapter within the time permitted by section 219 with-

- (i) the Panel, if the complaint concerns a matter within its jurisdiction; or

- (ii) the Commission in respect of any matter arising in terms of this Act,

other than a matter contemplated in subparagraph (i).’

⁴¹⁶ADR for purposes of the Act means conciliation, mediation or arbitration, and is dealt with in Part C of Chapter 7 of the Act.

⁴¹⁷ This may leave the door open for private mediation and arbitration offered by private (and unaccredited) service providers.

facilitating the mediation, conciliation or arbitration concludes that either party to the dispute is not participating in good faith or that there is no reasonable probability of the parties resolving their dispute through that particular process, the facilitator must issue a certificate stating that the process has failed.⁴¹⁹ The option of court proceedings to resolve the parties' dispute may then be pursued.

Finally, section 167 provides that if the dispute in question has been resolved, the facilitator to the dispute may record the resolution in the form of an order and if the parties consent to that order, may submit it to court to be confirmed as a consent order. The courts after hearing an application for the consent order may make the order as agreed and proposed in the application or indicate changes therein before making it an order of the court or refuse to make the order completely. The consent order may include an award of damages and the benefit of confidentiality still applies during the court hearing as it does during the initial mediation or ADR process. It is evident that the process and outcomes of mediation is as legitimate as a complete court proceeding would have been and is thus an equally valid method for resolving commercial disputes.

The above provisions of the new Companies Act, the requirements of the Code of Corporate Governance together with the King III Report (and its paragraph 10), as well as the compelling advantages of saving costs and time, will make it challenging in future for any disputant to resist seeking mediation to resolve their disputes in the corporate arena.⁴²⁰

⁴¹⁸ Section 166(2) does not mention 'any other person' as per section 166(1) of the Companies Act, 2008.

⁴¹⁹ Section 166 (2) of the Companies Act 71 of 2008.

⁴²⁰ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 8.

The rationale behind the legislative and corporate bodies incorporating mediation into the above corporate statutes is premised on the fact that traditional litigation in commercial disputes have destroyed business relationships and wasted financial resources as well as valuable time.⁴²¹ Thus, by incorporating ADR processes into the corporate arena, the focus now shifts to resolving disputes in a way that would preserve corporate relationships, such as those with suppliers, competitors, employee bodies or customers.⁴²² Furthermore, ADR techniques, such as mediation, provide the benefit of innovative, quicker and less expensive processes of resolving commercial disputes.⁴²³ Moreover these ADR techniques preserve confidentiality, as the dispute resolution process does not take place in an open forum such as a court room.

Litigation focuses solely on legal issues, while mediation has the flexibility of considering the commercial and even emotional aspects of the disputants as well as their needs and interests. By resolving past differences, parties are able to take the opportunity to map their future relationships in a fair way and hopefully arrive at a win-win solution. This could be based on improved, joint profitability or some other arrangement from which both parties would benefit.⁴²⁴ Thus finally the ADR techniques applied in commercial law improves the prospects of a better outcome for organisations and their shareholders.⁴²⁵

⁴²¹ King M 'Civil litigation being replaced by cost-effective dispute resolution' 2008 *Occupational Risk Management* 19.

⁴²² King M 'Civil litigation being replaced by cost-effective dispute resolution' 2008 *Occupational Risk Management* 19.

⁴²³ King M 'Civil litigation being replaced by cost-effective dispute resolution' 2008 *Occupational Risk Management* 19.

⁴²⁴ King M 'Corporate governance and the Companies Act' 2009 *Management Today* 17.

⁴²⁵ King M 'Corporate governance and the Companies Act' 2009 *Management Today* 17.

3.3 THE CONSTITUTION AND FURTHER SELECTED SOUTH AFRICAN STATUTES PROVIDING FOR MEDIATION

South African law also makes provision for the practice and benefits of mediation outside of the abovementioned family, labour and commercial law arenas. Discussed below is South African legislation⁴²⁶ which refers to the compulsory⁴²⁷ or voluntary⁴²⁸ practise of mediation as a dispute resolution tool.

3.3.1 The Constitution, 1996

The Constitution, 1996 is also an example of the how mediation is provided for outside of the aforementioned areas of law. Section 76 deals with the national legislative processes in drafting bills affecting provinces. This section provides that ordinary bills must first be passed by the National Assembly (NA) and then referred to the National Council of Provinces (NCOP). If there is disagreement between the NA and the NCOP, that is, if the NCOP rejects any bill or if the NA refuses to pass an amended bill, the bill in question must be referred to the Mediation Committee,⁴²⁹ for negotiation and settlement. The same procedure applies in cases of schedule 4⁴³⁰ bills passed by the NCOP and referred to the NA.⁴³¹

⁴²⁶ Listed in Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 92. This study further discusses and divides the listed statutes into compulsory and voluntary use of mediation.

⁴²⁷ At 3.3.2 below.

⁴²⁸ At 3.3.3 below.

⁴²⁹ Section 76(1)(d) of the Constitution, 1996.

⁴³⁰ Schedule 4 of the Constitution contains a list of functional areas of concurrent national and provincial legislative competence.

⁴³¹ Section 76(3) of the Constitution, 1996.

3.3.2 Statutes that Make Mediation a Compulsory ADR Tool

- (i) The Commission on Gender Equality Act⁴³² provides that the Commission shall investigate any gender-related issue on receipt of a complaint and shall endeavour to resolve any dispute or rectify any omission through the process of mediation.⁴³³
- (ii) The Health Professions Act 56 of 1974 provides that minor transgressions must be referred to professional boards established by the Act for mediation.⁴³⁴
- (iii) The Higher Education Act 101 of 1997 lists a number of institutional statutes each of which provide that in each institution an institutional forum must advise the council on issues such as mediation and dispute resolution procedures.⁴³⁵
- (iv) The National Forests Act⁴³⁶ provides that a Community Forestry Agreement must provide for dispute resolution through informal mediation or arbitration methods.⁴³⁷ The powers and duties of the Minister⁴³⁸ include making regulations to deal with the processes of facilitation, mediation and arbitration held before a panel member who has been selected from a collective panel of facilitators, mediators and arbitrators.⁴³⁹ The Act further dedicates an entire portion of the Act (known as ‘Part 3’) to the establishment of this panel by the

⁴³² Act 39 of 1996.

⁴³³ The powers and functions of the Commission under section 11(1)(e) of the Act.

⁴³⁴ Section 42 of the Health Professions Act.

⁴³⁵ Section 31(1) of the Higher Education Act.

⁴³⁶ Act 84 of 1998.

⁴³⁷ Section 31(1) of the National Forests Act.

⁴³⁸ ‘Minister’ refers to the Minister to whom the President assigns the responsibility for forests in terms of section 91(2) of the Constitution, 1996, which states that the ‘President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.’ Section 2 (1) (xviii) of the National Forests Act.

⁴³⁹ Section 53(1)(h) of the National Forests Act.

Minister for the purposes of dispute resolution.⁴⁴⁰ This part of the Act lists the factors that must be taken into account upon establishment of such dispute resolution panel.

(v) The National Land Transport Act⁴⁴¹ states that where parties to existing contracting arrangements cannot agree on amendments or inclusions to the contract the matter must be referred to mediation.⁴⁴²

(vi) The National Land Transport Transition Act⁴⁴³ makes provision for pro forma founding agreements for transport authorities.⁴⁴⁴ A section on mediation is provided for in these agreements. For example, section 20 of the Pro Forma Founding Agreement for Transport Authorities.⁴⁴⁵ This section stipulate that where a dispute or disagreement arises between the parties in connection with the pro forma founding agreement, the parties concerned must make an effort to resolve the matter firstly through negotiation, and if unsuccessful at negotiation level, proceed to mediation for the settlement of the dispute in question.⁴⁴⁶ At mediation level, a mediation committee is set up by the parties consisting of the necessary officials stipulated in the agreement and the parties are to commit themselves in

⁴⁴⁰ Part 3 of Chapter 5 of the National Forests Act. Section 45(1) of the Act states that the Minister must establish a panel of persons from whom appointments of facilitators, mediators and arbitrators may be made for the purposes of resolving disputes.

⁴⁴¹ Act 5 of 2009.

⁴⁴² Section 46(2) of the National Land Transport Act.

⁴⁴³ Act 22 of 2000. In 2009, however, some sections were repealed by National Land Transport Act (NLT Act) 5 of 2009. At the same time the National Land Transport Regulations on Contracting for Public Transport Services (NLT Regulations), 2009 (GNR 877 in GG 32535 of 31 August 2009) were also promulgated, to provide further detail on arrangements for the procurement of public transport services under the NLT Act. The regulations provide that where a contracting authority and an operator cannot reach an agreement in terms of the NLT Act, the matter must be referred to mediation under regulation 7 (which provides for the mediation procedure). See regulations 6-7 of NLT Regulations.

⁴⁴⁴ Section 10(15) of the National Land Transport Transition Act.

⁴⁴⁵ Pro Forma Founding Agreement for Transport Authorities in GN 1331 GG 21856 of 6 December 2000.

⁴⁴⁶ Section 20 of the Pro Forma Founding Agreement for Transport Authorities in GN 1331 GG 21856 of 6 December 2000.

every respect to the speedy finalisation and solution of the dispute by the mediation committee.⁴⁴⁷

(vii) The Post Office Act⁴⁴⁸ places a great emphasis on the retirement of the postal employees by dedicating an entire chapter to this area, Chapter IB: Staff and Pension Matters. The Act makes specific provision for the postal pension fund established for its employees. In an additional piece of the legislation relating to the Act, the Rules of the Post Office Retirement Fund⁴⁴⁹ makes specific provision for disputes and mediation. The Rules state that if any dispute arises relating inter alia to the Rules or the Post Office Retirement Fund, the matter shall be referred to mediation for a recommendation.⁴⁵⁰

3.3.3 Statutes that Make Mediation a Voluntary ADR Tool

Although not explicitly making the process of mediation compulsory for the resolution of civil disputes, the following statutes recommend the use thereof.

(i) The Child Justice Act⁴⁵¹ provides for an informal procedure called ‘victim-offender mediation.’⁴⁵² This mediation procedure is intended to bring a child who is alleged to have committed an offence and the victim together at which point a plan is developed on how the child will redress the effects of the offence.⁴⁵³ This procedure may only take place if both parties consent thereto.⁴⁵⁴

⁴⁴⁷ Sections 20(2) and section 20(3) of the Pro Forma Founding Agreement for Transport Authorities in GN 1331 GG 21856 of 6 December 2000.

⁴⁴⁸ Act 44 of 1958.

⁴⁴⁹ Rules for the Post Office Retirement Fund in GN 1107 GG 28228 of 25 November 2005.

⁴⁵⁰ Section 12 (‘Disputes’) of the Rules for the Post Office Retirement Fund in GN 1107 GG 28228 of 25 November 2005.

⁴⁵¹ Act 75 of 2008.

⁴⁵² Section 53(7), section 62, section 73 of the Child Justice Act.

⁴⁵³ Section 62(1)(a) of the Child Justice Act.

⁴⁵⁴ Section 62(1)(b) of the Child Justice Act.

(ii) The Consumer Protection Act⁴⁵⁵ states that when a dispute arises, a consumer may seek resolution through an ADR agent providing mediation services, among other dispute resolution processes made available by the Act.⁴⁵⁶ The National Consumer Commission⁴⁵⁷ may co-operate with, facilitate or support activities carried out by a consumer protection group which include processes like mediation or conciliation.⁴⁵⁸ In addition, a provincial consumer protection authority⁴⁵⁹ has jurisdiction within its province to facilitate the mediation or conciliation of a dispute arising in terms of the Act between persons within that province.⁴⁶⁰

(iii) The Development Facilitation Act⁴⁶¹ states that an appropriate officer⁴⁶² and experts⁴⁶³ shall, before conducting a hearing or reaching a decision⁴⁶⁴, enquire into and consider the desirability of first referring any dispute in relation to land development to mediation and if they consider it appropriate, they shall refer the dispute to mediation.⁴⁶⁵ In dealing with any matter brought before it, a tribunal established under this Act,⁴⁶⁶ may refer any matter to mediation.⁴⁶⁷

⁴⁵⁵ Act 68 of 2008

⁴⁵⁶ Section 70 of the Consumer Protection Act.

⁴⁵⁷ Section 85 of The Consumer Protection Act.

⁴⁵⁸ Section 77 of the Consumer Protection Act.

⁴⁵⁹ A body established within the provincial sphere of government and appointed by the responsible Member of the Executive Council of a province, to have the general authority to deal with consumer protection matters in that province.’ Section 1 of the Consumer Protection Act.

⁴⁶⁰ Section 84(b) of the Consumer Protection Act.

⁴⁶¹ Act 67 of 1995. The Act deals with the development of land in South Africa. It inter alia puts measures in place to facilitate and expedite the implementation of reconstruction and development programmes and projects in relation to land.

⁴⁶² A designated officer is an appropriate office in a provincial administration or in the employ of a local government body, designated by the Member of Executive Council to serve as the designated officer for the Development Facilitation Act.

⁴⁶³ Experts in the field of agriculture, geology, mining, planning, environmental management, engineering, law, survey or such other fields as determined by the Premier. Section 2 of the Development Facilitation Act.

⁴⁶⁴ On any decision which a competent authority, that includes a tribunal, may make regarding any application to ‘allow land development, or in respect of land development which affects the rights, obligations or freedoms of any person or body’, whether the application is made in terms of the Act or in terms of any other law. Section 4(1)(a) of the Development Facilitation Act.

⁴⁶⁵ Section 4(2)(c)(i) of the Development Facilitation Act.

⁴⁶⁶ See section 15 of the Development Facilitation Act.

⁴⁶⁷ Section 16(b)(iii) of the Development Facilitation Act.

Section 22 (1) to (5) of the Act deals specifically and in detail with mediation. This section states that if any party to a dispute serving before a tribunal, applies to the tribunal for the appointment of a mediator, the tribunal will first determine whether the dispute in question should be mediated or not. Thereafter the tribunal will appoint a person acceptable to all parties to mediate their dispute should the parties be unable to find their own agreed upon mediator. The tribunal may appoint any person from the panel of mediators provided for in the Act to act as mediator in the dispute in question.⁴⁶⁸

The Premier⁴⁶⁹ shall appoint a panel of mediators by reason of their qualifications in and experience or knowledge of mediating land development or similar disputes, for a time period specified by him or her.⁴⁷⁰ A mediator, appointed under section 22 of this Act, shall confer with the parties to a dispute, conduct necessary enquiries, endeavour to bring about a settlement in the dispute and make a report to the tribunal as to the results of the mediation conducted.⁴⁷¹ All discussions taking place and all disclosures and submissions made during the mediation process shall be privileged, unless the parties agree to the contrary.⁴⁷²

(iv) The Electricity Regulation Act⁴⁷³ dedicates its fifth chapter to the ‘Resolution of Disputes and Remedies’. This chapter states that the National Energy Regulator⁴⁷⁴ must, in relation to any dispute arising out of the Act, act as a mediator if requested by the parties or appoint a suitable person to act as a mediator on his or her behalf to facilitate the settlement of their dispute.⁴⁷⁵ The Minister of Energy and Minerals must prescribe the procedure to be

⁴⁶⁸ Section 22(1) of the Development Facilitation Act.

⁴⁶⁹ The Premier of a province in South Africa, Section 1(xx) of the Development Facilitation Act..

⁴⁷⁰ Section 22(2) and (3) of the Development Facilitation Act.

⁴⁷¹ Section 22(4) of the Development Facilitation Act.

⁴⁷² Section 22(5) of the Development Facilitation Act.

⁴⁷³ Act 4 of 2006.

⁴⁷⁴ Established as the National Energy Regulator , as a juristic person under the National Energy Regulator Act 40 of 2004.

⁴⁷⁵ Section 42(1) and (2) of the Electricity Regulation Act.

followed in the mediation process as well as the fees to be paid.⁴⁷⁶ The mediation process in terms of this section is done at the request of the parties to the dispute.⁴⁷⁷

(v) The Extension of Security of Tenure Act.⁴⁷⁸ Section 21 of this Act states that a party may request the Director-General Department of Land Affairs to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of the Act.⁴⁷⁹ All discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged, unless the parties involved agree otherwise.⁴⁸⁰

(vi) The Financial Advisory and Intermediary Services Act⁴⁸¹ states that the Ombud for Financial Services Providers⁴⁸² (the ‘Ombud’) in investigating a complaint, may follow and implement any procedure, including mediation, and may allow any party the right of legal representation during this process.⁴⁸³

(vii) The Financial Services Ombud Schemes Act⁴⁸⁴ defines a ‘scheme’ as any scheme or arrangement established by a financial institution in order to resolve a client’s complaint by an ombud, including any arrangement in terms of which resolution of the complaint is to be attained through mediation.⁴⁸⁵

⁴⁷⁶ Section 42(3) of the Development Facilitation Act.

⁴⁷⁷ Section 42(4) of the Development Facilitation Act.

⁴⁷⁸ Act 62 of 1997.

⁴⁷⁹ Section 21(1) of the Extension of Security of Tenure Act.

⁴⁸⁰ Section 21(4) of the Extension of Security of Tenure Act.

⁴⁸¹ Act 37 of 2002.

⁴⁸² The Ombud as a person qualified in law or who possesses adequate knowledge of rendering financial services, appointed by the Financial Services Board established in terms of the Act. Section 21 (1) of the Financial Advisory and Intermediary Services Act.

⁴⁸³ Section 5(a) of the Financial Advisory and Intermediary Services Act.

⁴⁸⁴ Act 37 of 2004.

⁴⁸⁵ Section 1 of the Financial Services Ombud Schemes Act

(viii) The National Water Act⁴⁸⁶ includes a chapter on ‘Appeals and Dispute Resolution’ with specific reference to disputes being resolved through mediation. Section 150, ‘Mediation’, states that the Minister of Water Affairs and Forestry may at any time and in respect of any dispute between persons, direct that the parties concerned attempt to settle their dispute through a process of mediation and negotiation.⁴⁸⁷ Such directive must specify the time and place of the commencement for this process.⁴⁸⁸ The Minister must also appoint a mediator to the dispute, unless the parties have agreed, prior to an appointment by the Minister, on their own mediator.⁴⁸⁹ The contents of all discussions and submissions which took place during the mediation process are privileged in law.⁴⁹⁰

(ix) The Pan South African Language Board Act⁴⁹¹ provides for a section on the procedure of mediation by the Pan South African Language Board under this Act.⁴⁹² This section states that the Board shall endeavour to use mediation in order to resolve and settle any dispute or to rectify any act or omission arising from a contravention or infringement of legislation, language policy or language practice, or violation of any language right.⁴⁹³

(x) The Petroleum Pipelines Act 60 of 2003 states that the Petroleum Pipelines Regulatory Authority must act as a mediator in accordance with the provisions of the Act.⁴⁹⁴ However, the Authority may also voluntarily resolve disputes, with the approval of all parties to a

⁴⁸⁶ Act 36 of 1998.

⁴⁸⁷ Section 150(1) of the National Water Act.

⁴⁸⁸ Section 150(2) of the National Water Act.

⁴⁸⁹ Section 150(3) of the National Water Act.

⁴⁹⁰ Section 150(7) of the National Water Act.

⁴⁹¹ Act 59 of 1995.

⁴⁹² Section 2 of the Pan South African Language Board Act.

⁴⁹³ Section 11(5) of the Pan South African Language Board Act 59 of 1995

⁴⁹⁴ Section 4(d) of the Petroleum Pipelines Act.

dispute, and act as mediator in that regard.⁴⁹⁵ The parties to the dispute may request that the Authority appoint a suitable person acceptable to all parties to act as mediator on its behalf.⁴⁹⁶

(xi) The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 provides for a section on mediation. This section states that if the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land, the municipality may appoint a person with expertise in dispute resolution to facilitate the meeting and to attempt to mediate and settle any dispute in terms of the Act.⁴⁹⁷ If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province may appoint someone to mediate and settle any dispute in terms of the Act.⁴⁹⁸ All discussions, disclosures and submissions which take place during the mediation process shall be privileged.⁴⁹⁹

(xii) The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides for the powers and functions of the Equality Courts and states that such courts may, during or after an inquiry, refer any proceeding before them to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.⁵⁰⁰

(xiii) The Public Protector Act 23 of 1994 states that the Public Protector is competent at her sole discretion to attempt to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation.⁵⁰¹ The Public Protector is also able to, upon her own initiative or upon receipt of a complaint or upon a request relating to the operation or

⁴⁹⁵ Section 30(1) of the Petroleum Pipelines Act.

⁴⁹⁶ Section 30(2)(a) of the Petroleum Pipelines Act.

⁴⁹⁷ Section 7(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

⁴⁹⁸ Section 7(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

⁴⁹⁹ Section 7(5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

⁵⁰⁰ Section 21(4)(b) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁵⁰¹ Section 6(4)(b)(i) of the Public Protector Act.

administration of the Promotion of Access to Information Act 2 of 2000, endeavour, at her sole discretion, to resolve any dispute by mediation, conciliation or negotiation.⁵⁰²

(xiv) The Rental Housing Act⁵⁰³ states that any tenant or landlord may in the prescribed manner lodge a complaint with the Rental Housing Tribunal⁵⁰⁴ concerning an unfair practice.⁵⁰⁵ Where the Tribunal is of the view that the dispute in question may be resolved through mediation, the Tribunal may appoint a suitable mediator with a view of resolving the dispute.⁵⁰⁶

(xv) The Short Process Courts and Mediation in Certain Civil Cases Act⁵⁰⁷ states that the purpose of the Act is to provide for an alternative forum for the adjudication of certain civil cases, mediation in certain civil cases, and for matters connected therewith. The Minister of Justice and Correctional Services may appoint a mediator or mediators for a district for which a court has been established.⁵⁰⁸ At any time prior to or after the issuing of a summons for the institution of a civil action in a court, but before judgement, the parties or their legal representatives may in the case of an intended action in the court, give notice to the clerk of the court that the parties have agreed to submit their dispute to mediation proceedings.⁵⁰⁹ However in cases where an action has already been instituted in the court, the parties may give notice to the court concerned that the parties have agreed to submit their dispute to mediation proceedings and may request the court to adjourn the action for such mediation proceedings to take place.⁵¹⁰

⁵⁰² Section 6(4)(d)(i) of the Public Protector Act.

⁵⁰³ Act 50 of 1999.

⁵⁰⁴ Section 5 of the Rental Housing Act.

⁵⁰⁵ Section 13(1) of the Rental Housing Act.

⁵⁰⁶ Section 13(2)(c) of the Rental Housing Act.

⁵⁰⁷ Act 103 of 1991.

⁵⁰⁸ Section 2(1) of the Short Process Courts and Mediation in Certain Civil Cases Act.

⁵⁰⁹ Section 3(1) of the Short Process Courts and Mediation in Certain Civil Cases Act.

⁵¹⁰ Section 3(2) of the Short Process Courts and Mediation in Certain Civil Cases Act.

From the above discussion it can be seen that the Constitution, 1996 and many pieces of legislation from as early as 1956 until as recent as 2012, have provided for mediation in the resolution of civil disputes. Even though such a wide range of statutes expressly provide for ADR or mediation, mediation is yet to gain the popularity and support it needs to apply to all areas of law within the entire civil justice system.

3.4 CONCLUSION

It has been established that the nature of the South African civil justice system is adversarial.⁵¹¹ However, the many pieces of legislation and the Constitution, 1996 which make provision for mediation prove that this country is no stranger to this ADR tool.

Mediation is referred to in many pieces of South African legislation, but in the areas of family law, labour law and commercial law, this ADR process plays a more significant role.⁵¹² Due to some of the negative effects of practising civil litigation in these areas of law⁵¹³ and due to the beneficial qualities of mediation, this ADR process gained increasing support⁵¹⁴ and was implemented as the preferred method of dispute resolution in these areas of civil law.

The suitability, support and benefits regarding the implementation of mediation in the aforementioned three areas of civil law are exemplary.⁵¹⁵ Therefore, the question of whether such an ADR tool is suitable for being extended to all areas of civil law in South Africa's adversarial civil justice system, may arise. In order to investigate this possibility, it is

⁵¹¹ At 2.6 above.

⁵¹² See 3.2.1, 3.2.2 and 3.2.3 above.

⁵¹³ See 3.2.1, 3.2.2, 3.2.3.3 above.

⁵¹⁴ See 3.2.1, 3.2.1.1., 3.2.2, 3.2.2.1, 3.2.3.3 above.

necessary to assess how a mediation system, as a preferred method of dispute resolution, operates across all areas of civil law, within an adversarial civil justice system experiencing similar shortcomings to the South African civil justice system. In this regard, the jurisdiction of Australia will be analysed in the next chapter.

CHAPTER 4

MEDIATION AS A PRIMARY ALTERNATIVE DISPUTE RESOLUTION TOOL IN THE AUSTRALIAN CIVIL JUSTICE SYSTEM

4.1 INTRODUCTION

The shortcomings of South Africa's civil justice system and the success which mediation has experienced in certain areas of its civil law were considered in the preceding chapters.⁵¹⁶ An investigation of how mediation operates across all areas of civil law within an adversarial civil justice system, experiencing similar shortcomings to South Africa's civil justice system, is necessary.

Australia is known for maintaining one of the oldest and most successful mediation systems in the modern world.⁵¹⁷ Mediation in this country is practiced through court-referred programmes and is the primary method of civil dispute resolution in Australia.⁵¹⁸ Although Chapter 4 views the jurisdiction of Australia, a federal country with many state jurisdictions,⁵¹⁹ it principally focuses on two selected state jurisdictions, New South Wales (NSW) and Victoria.⁵²⁰

The similarities between the shortcomings in NSW and Victoria's initial civil justice systems⁵²¹ and South Africa's current civil justice system will be briefly highlighted in this chapter. However, the aim of Chapter 4 is to discuss the operation of mandatory court-

⁵¹⁶ As concluded in Chapters 2 and 3.

⁵¹⁷ Also an international forerunner in the practice of mediation, see 1.1.

⁵¹⁸ Alexander N 'Mediating in the shadow of Australian law: Structural influences on adr' (2006) 9 *Yearbook of New Zealand Jurisdiction* 332.

⁵¹⁹ Australia has nine legal systems, comprising eight state and territory systems and one federal system. Australian Department of Foreign Affairs and Trade 'About Australia: Legal systems' available at http://www.dfat.gov.au/facts/legal_system.html (accessed on 20 April 2014). See further discussions at 4.2 below.

⁵²⁰ See 1.4 above.

⁵²¹ NSW and Victoria civil justice system prior to the implementation of mediation programmes.

referred mediation as a remedy to these shortcomings in an adversarial civil justice system. This chapter will also briefly highlight the criticisms against mandatory court-referred mediation as well as possible lessons which South Africa can learn regarding the implementation of this ADR process.

The chapter commences with a brief discussion on relevant aspects of the Australian legal system and the history of the NSW and Victorian civil justice systems.⁵²² This is followed by a brief discussion on the states' court structures in order to contextualise the operation of their court-referred mediation systems through these court structures. Thereafter mandatory court-referred mediation in these two states will be discussed.

4.2 THE AUSTRALIAN LEGAL SYSTEM

The colonisation of Australia commenced in the 1780s allowing England to claim and rule the land of Australia.⁵²³ The country remained a collection of six self-governing British colonies, under the ultimate rule of the British Parliament, until 1901.⁵²⁴ In 1901, the Commonwealth of Australia Constitution Act 1900 (the Australian Constitution) was promulgated and the Commonwealth of Australia came into being.⁵²⁵ The six colonies then became the six states of Australia.⁵²⁶

Australia is traditionally referred to as 'the Commonwealth of Australia' and its power is distributed between the Federal Australian Government (referred to as the 'Australian

⁵²² The Australian legal system will be discussed in order to create an understanding of the federal country and its state jurisdictions. This is also to contextualise the discussions on NSW and Victoria's civil justice systems.

⁵²³ Australianhistory.Org 'Australian history: Colonisation (1788-1900)' (2014) available at <http://www.australianhistory.org/colonisation> (accessed 4 October 2014).

⁵²⁴ Attorney-General's Department *The Constitution* (2012) iv.

⁵²⁵ Attorney-General's Department *The Constitution* (2012) v.

⁵²⁶ Attorney-General's Department *The Constitution* (2012) v.

Government’ or ‘Commonwealth Government’)⁵²⁷ and the governments of its six states and two territories.⁵²⁸ The six states of Australia are New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania; and the two territories are the Australian Capital Territory and the Northern Territory.⁵²⁹

Australia maintains a constitutional state.⁵³⁰ Thus, the supreme and fundamental law of the country is the Australian Constitution, which binds the Commonwealth Parliament as well as the Parliament of each of state.⁵³¹ Any act passed by a state’s parliament is invalid if contrary to the Australian Constitution.⁵³²

As per the Australian Constitution, the Commonwealth and state legal systems comprise three separate branches of state, namely the legislature, executive and judiciary, known as the

⁵²⁷ The Australian Government ‘Australia.gov.au: Your connection with government’ available at <http://australia.gov.au> (accessed on 6 July 2014).

⁵²⁸ These two territories do not form part of nor are claimed by the six states and are able to be administered by the Federal Australian Government. The Australian Government ‘Australia.gov.au: Your connection with government’ available at <http://australia.gov.au> (accessed on 4 April 2014).

⁵²⁹ Reinhardt GJ *Civil Procedure in Australia* (2011) 13. Australia's six states represent the six British colonies which joined to form the Commonwealth of Australia. In forming the Commonwealth, the states in Australia approved a Constitution which provided the (then) new Commonwealth government with the right to pass laws on certain matters, and allowed the states to retain all other law-making rights. States thus have a constitutional right to convene a state parliament and pass certain laws. Any land within Australia's national border that is not claimed by one of the states is called a territory. Territories do not have the right to convene their own government or pass laws as the aforementioned states do. According to the Constitution, the Commonwealth Government makes the laws for the territories. The Northern Territory and the Australian Capital Territory however are often treated similarly to states. These two territories are self-governing territories as the then Commonwealth passed a law allowing each territory to convene a parliament and make their own laws in a similar manner to the states. Unlike the states, whose powers are defined through the Constitution, the powers of these two territories are defined in Commonwealth Government law which grants them the right of self-government. This further means that the Commonwealth Government can alter or revoke these powers at will. According to section 121 of the Australian Constitution, territories can become states with the approval of the Parliament of Australia. The Australian Government ‘Australia.gov.au: Your connection with government’ available at <http://australia.gov.au> (accessed on 7 July 2014). The Australian Constitution will be discussed further, below.

⁵³⁰ More specifically a constitutional monarchy. Australia is constitutional, due to the fact that the powers and procedures of the Australian Government are contained in the Australian Constitution Act, which is the supreme law of the country, and monarchic, as its head of state is Queen Elizabeth II. The Australian Government ‘Australia.gov.au: Your connection with government’ available at <http://australia.gov.au> (accessed on 4 April 2014).

⁵³¹ Section 5 of the Commonwealth of Australia Constitution Act 1900. Similar to the supremacy of the South African Constitution, 1996, see 2.2.2.1 above..

⁵³² Section 5 of the Commonwealth of Australia Constitution Act 1900.

‘Separation of Powers’.⁵³³ The legislative branches (Parliaments) are empowered to make laws,⁵³⁴ the executive branches are empowered to administer laws and carry out the business of government⁵³⁵ and the judiciary (court system) is empowered to determine legal disputes.⁵³⁶

Section 51 of the Australian Constitution limits the legislative power of the Australian Parliament to prescribed matters which include taxation, defence, marriage and divorce, external affairs and corporations law. Each state on the other hand has its own constitution which empowers its Legislatures to enact laws,⁵³⁷ its governments to exercise authority and its courts to rule over all disputes arising out of the state.⁵³⁸ However, these constitutions remain subject to the Australian Constitution.⁵³⁹ Thus, according to section 109 of the Australian Constitution, if a Commonwealth law is valid but inconsistent with a state law, then the Commonwealth law will prevail. However, states legislate on a much wider range of matters than the Commonwealth.⁵⁴⁰

Now that the legal framework for Australia has been explained, civil justice in the states of NSW and Victoria will be addressed. The sections below briefly discuss the history of the NSW and Victorian civil justice systems and determine the perceived shortcomings in these systems before the implementation of court-referred mediation programmes in these states.

⁵³³ Chapters I, II and III of the Commonwealth of Australia Constitution Act 1900. Similar to the separation of powers found in the South African Constitution, 1996 see 2.2.2.1 below.

⁵³⁴ Chapter I of the Commonwealth of Australia Constitution Act 1900.

⁵³⁵ Through bodies such as government departments, statutory authorities and defence forces. Chapter II of the Commonwealth of Australia Constitution Act 1900.

⁵³⁶ Chapter III of the Commonwealth of Australia Constitution Act 1900. Similar to the separation of powers found in the South African Constitution, 1996 see 2.2.2.1 below.

⁵³⁷ Section 108 of the Commonwealth of Australia Constitution Act 1900.

⁵³⁸ Section 107 of the Commonwealth of Australia Constitution Act 1900.

⁵³⁹ Section 106 of the Commonwealth of Australia Constitution Act 1900.

⁵⁴⁰ Reinhardt GJ *Civil Procedure in Australia* (2011) 14.

4.3 A BRIEF HISTORY OF THE NEW SOUTH WALES' AND VICTORIAN CIVIL JUSTICE SYSTEMS

4.3.1 The New South Wales' Civil Justice System

Before 1823 no parliament existed in NSW and the British governor at the time ruled the NSW colony.⁵⁴¹ From 1855 NSW was given the power by the British government to make its own laws through its own parliament.⁵⁴²

As a result of colonisation, the English common law has influenced the NSW civil justice system.⁵⁴³ These influences include the adversarial nature of the civil justice system, centred around litigation, court proceedings and judicial precedent.⁵⁴⁴ This was the traditional way of resolving all civil disputes⁵⁴⁵ prior to the introduction of mediation in the NSW civil justice system.

Over the years the state was faced with growing costs of litigation and excessive delays in court proceedings.⁵⁴⁶ In addition access to courts for the resolution of civil disputes became less attainable, especially for middle-income earners due to escalated legal costs and complex court procedures.⁵⁴⁷

⁵⁴¹ Muston L, Quin J & Rice S *The Law Handbook: Your Practical Guide to the Law in New South Wales* 12 ed (2012) 3.

⁵⁴² Muston L, Quin J & Rice S *The Law Handbook: Your Practical Guide to the Law in New South Wales* 12 ed (2012) 3.

⁵⁴³ 'NSW inherited the English common law, and from early in the 19th century judges in NSW have been developing the common law in Australia.' Muston L, Quin J & Rice S *The Law Handbook: Your Practical Guide to the Law in New South Wales* 12 ed (2012) 2.

⁵⁴⁴ Reinhardt GJ *Civil Procedure in Australia* (2011) 14. Similarly to South Africa, see 2.2.1 above.

⁵⁴⁵ Reinhardt GJ *Civil Procedure in Australia* (2011) 14.

⁵⁴⁶ Bathurst T.F 'The role of the courts in the changing dispute resolution landscape'(2012) 35(3) *University of New South Wales Law Journal* 870. Written by Chief Justice Bathurst of the New South Wales Supreme Court.

⁵⁴⁷ Bathurst T.F 'The role of the courts in the changing dispute resolution landscape'(2012) 35(3) *University of New South Wales Law Journal* 870.

4.3.2 The Victorian Civil Justice System

As in the case of NSW, due to Australia's colonial history, an adversarial civil justice system has also been inherited in Victoria.⁵⁴⁸ Thus, prior to the implementation of court-referred mediation, Victoria's civil justice system also experienced a number of difficulties as well as criticism from civil disputants and the legal fraternity.⁵⁴⁹ Such criticism was levelled at, inter alia, extensive court backlogs leading to frustrating delays in court proceedings, and litigation being time-consuming, anxiety-producing and costly.⁵⁵⁰

Furthermore, it was held that the reliance on litigation proceedings confined civil disputes to narrow procedures which often ignored the human element of civil disputes.⁵⁵¹ In this regard

‘layers of legal positions could be peeled back to reveal the disputants’ needs, wants, and concerns that could not necessarily fit into the confines of legally accepted categories of disputes’.⁵⁵²

Further criticism was premised on litigants, who by using of legal representation, often felt that they did not ‘own’⁵⁵³ their disputes and experienced feelings of ‘alienation and powerlessness’.⁵⁵⁴

South Africa, NSW and Victoria experienced similar shortcomings due to the practice of litigation in their adversarial civil justice systems.⁵⁵⁵ As shown in the discussion above, these similarities are the usual ones of excessive costs, overburdened court rolls, delay in the resolution of civil disputes, and the complex and time-consuming nature of court proceedings. Further similarities include the fact that disputants may feel excluded from the

⁵⁴⁸ Reinhardt GJ *Civil Procedure in Australia* (2011) 16. As discussed at 4.2 above. Similarly to South Africa, see 2.2.1 above.

⁵⁴⁹ Gutman J ‘The reality of non-adversarial justice: Principles and practice’ (2009) 14 *Deakin Law Review* 34.

⁵⁵⁰ Gutman J ‘The reality of non-adversarial justice: Principles and practice’ (2009) 14 *Deakin Law Review* 34.
2.

⁵⁵¹ Gutman J ‘The reality of non-adversarial justice: Principles and practice’ (2009) 14 *Deakin Law Review* 34.

⁵⁵² Gutman J ‘The reality of non-adversarial justice: Principles and practice’ (2009) 14 *Deakin Law Review* 34.

⁵⁵³ Gutman J ‘The reality of non-adversarial justice: Principles and practice’ (2009) 14 *Deakin Law Review* 34..

⁵⁵⁴ Gutman J ‘The reality of non-adversarial justice: Principles and practice’ (2009) 14 *Deakin Law Review* 34..

⁵⁵⁵ See 4.3.2 above.

dispute resolution process pertaining to their matters, as a result of legal practitioners who control the civil proceedings. In addition the outcome of the dispute may not fully satisfy the needs of the disputants.

Therefore due to the need to reform and respond to an inefficient⁵⁵⁶ litigation system (as the primary method of dispute resolution), NSW and Victoria implemented mediation in their civil justice systems.⁵⁵⁷

The sections below set out the basic court structures of NSW, Victoria and Federal Australia in order to further contextualise the civil justice systems of NSW and Victoria. The court structures are also discussed in order to contextualise how court-referred mediation operates within these structures.

4.4 BASIC COURT STRUCTURE IN NEW SOUTH WALES AND VICTORIA

4.4.1 The Federal Australian Courts

4.4.1.1 The High Court of Australia

The High Court of Australia is the highest court in Australia, as provided for in the Australian Constitution section 71. In terms of its jurisdiction, certain matters such as state matters may be heard in the High Court as the court of first instance in such matters. In addition appeals may be made to the High Court from any state Supreme Court, upon leave of the High Court. The High Court is the final court of appeal in Australia, and its decisions are binding on all courts and tribunals in the country.

⁵⁵⁶ Alexander N ‘Mediating in the shadow of Australian law: Structural influences on adr’ (2006) 9 *Yearbook of New Zealand Jurisdiction* 334.

⁵⁵⁷ Alexander N ‘Mediating in the shadow of Australian law: Structural influences on adr’ (2006) 9 *Yearbook of New Zealand Jurisdiction* 334; Bathurst T.F ‘The role of the courts in the changing dispute resolution landscape’ (2012) 35(3) *University of New South Wales Law Journal* 870; Gutman J ‘The reality of non-adversarial justice: Principles and practice’ (2009) 14 *Deakin Law Review* 34. See 4.4 and 4.5 below.

4.4.1.2 The Federal Court of Australia

Parliament may make laws defining the jurisdiction of the Federal Court of Australia, as provided for in section 77 of the Australian Constitution. However, the Court may hear actions under the federal 'Competition and Consumer Act 2010' as well as matters involving bankruptcy, taxation, judicial review of government decisions and appeals from federal tribunals. There is also a right of appeal from the decision of a single Federal Court judge to the "full" Federal Court, that is, three Federal Court judges, and, if leave is granted, a right of appeal from there to the High Court.

4.4.1.3 The Family Court of Australia

The Family Court, which is a specialist type of the Federal Court, deals with matters concerning property and children of a marriage. There is also right of appeal to the full Family Court (that is three Family Court judges) and from there to the above mentioned High Court.

4.4.1.4 The Federal Magistrates' Court of Australia

The Federal Magistrates' Court, now known as the Federal Circuit Court of Australia (FCC),⁵⁵⁸ was established to offer a lower level federal court that would ease the case load of the Federal Court and the Family Court. It thus shares in the jurisdiction of both aforementioned courts, but is independent of them.

⁵⁵⁸ The Federal Circuit Court of Australia (FCC), formerly the Federal Magistrates Court, commenced under its new name in April 2013 Fitzoy Legal Services Inc. 'The Law Handbook: Your Practical Guide to the Law in Victoria' available at <http://www.lawhandbook.org.au/handbook/ch01s02s01.ph> (accessed on 11 November 2014).

4.4.2 The New South Wales Courts

The three main courts in NSW are the Supreme Court, the District Court and the Local Court.⁵⁵⁹

4.4.2.1 The Supreme Court of New South Wales

The Supreme Court of NSW hears civil (and criminal) matters under state laws that are outside the jurisdiction of the Local and District Courts or specialist tribunals.⁵⁶⁰ The Supreme Court's civil jurisdiction includes claims that are above the value of \$750 000.⁵⁶¹ Furthermore the Supreme Court presides over appeals from the District Court and some tribunals.⁵⁶² Sitting as the Court of Appeal (with a panel of three judges), it presides over appeals from single judge decisions in the Supreme Court.⁵⁶³

4.4.2.2 The District Court of New South Wales

The District Court's civil jurisdiction comprises civil cases where the amount claimed is up to the value of \$750 000, or more if the parties agree, or matters relating to motor accident personal injury claims or work injury damages under the Workers Compensation Act 70 of 1987.⁵⁶⁴ Furthermore a single judge of the District Court decides appeals from the Local Court, and from some tribunals such as the Consumer, Trader and Tenancy Tribunal, and the Victims Compensation Tribunal.⁵⁶⁵

⁵⁵⁹ Muston L, Quin J & Rice S *The Law Handbook: Your Practical Guide to the Law in New South Wales* 12 ed (2012) 7.

⁵⁶⁰ Section 23 of the Supreme Court Act 52 of 1970.

⁵⁶¹ Section 23 of the Supreme Court Act 52 of 1970.

⁵⁶² Section 45 of the Supreme Court Act 52 of 1970.

⁵⁶³ Section 46 of the Supreme Court Act 52 of 1970.

⁵⁶⁴ Civil cases in the District Court are decided by one judge, except in defamation trials and special circumstances. Muston L, Quin J & Rice S *The Law Handbook: Your Practical Guide to the Law in New South Wales* 12 ed (2012) 8.

⁵⁶⁵ Muston L, Quin J & Rice S *The Law Handbook: Your Practical Guide to the Law in New South Wales* 12 ed (2012) 8.

4.4.2.3 The Local Court of New South Wales

The Local Court's civil jurisdiction extends to small civil claims where the amount claimed is up to the value of \$10 000; or other civil claims up to \$100 000 or, if the parties agree, up to \$120 000.⁵⁶⁶

4.4.3 The Victorian Courts

The hierarchy of courts in Victoria is as follows: the Supreme Court of Victoria (highest court in Victoria), the County Court (the intermediary court) and the Magistrates' Court of Victoria (the lowest court in Victoria).⁵⁶⁷

4.4.3.1 The Supreme Court of Victoria

The Supreme Court of Victoria has two parts: the Trial Division, known as the Supreme Court, and the Supreme Court of Appeal.⁵⁶⁸ The jurisdiction of the Supreme Court is unlimited in the case of the amount of money that may be claimed, as well as in the subject matter over which it presides.⁵⁶⁹ However, in the case of the Supreme Court of Appeal, an appeal may be taken from a lower ranked court to the Supreme Court on the basis of *inter alia* a question of law, error, insufficient jurisdiction or no jurisdiction.⁵⁷⁰

⁵⁶⁶ Other NSW courts at the same level of the hierarchy as the Local Court include the Coroner's Court, the Children's Court and the Chief Industrial Magistrate's Court. Muston L, Quin J & Rice S *The Law Handbook: Your Practical Guide to the Law in New South Wales* 12 ed (2012) 8.

⁵⁶⁷ Hilmer S.E 'Mandatory mediation in Hong Kong: A workable solution based on Australian experiences' (2012) 1 *China-EU Law J* 68.

⁵⁶⁸ Fitzoy Legal Services Inc. 'The Law Handbook: Your Practical Guide to the Law in Victoria' available at <http://www.lawhandbook.org.au/handbook/ch01s02s03.php> (accessed 18 April 2014).

⁵⁶⁹ Fitzoy Legal Services Inc. 'The Law Handbook: Your Practical Guide to the Law in Victoria' available at <http://www.lawhandbook.org.au/handbook/ch01s02s03.php> (accessed 18 April 2014).

⁵⁷⁰ Fitzoy Legal Services Inc. 'The Law Handbook: Your Practical Guide to the Law in Victoria' available at <http://www.lawhandbook.org.au/handbook/ch01s02s03.php> (accessed 18 April 2014).

4.4.3.2 The County Court of Victoria

The County Court's civil jurisdiction covers all claims in terms of any action where jurisdiction is specifically given to the County Court in terms of Part 2, sections 35 to 55 of the County Court Act.⁵⁷¹ No appeals are accepted from the Magistrates' Courts with respect to civil matters.⁵⁷²

4.4.3.3 The Magistrates' Court of Victoria

The Magistrates' Court deals with the vast majority of legal problems which the state faces⁵⁷³ and its jurisdiction for hearing matters is contained in sections 4, 100 and 101 of the Magistrates' Court Act⁵⁷⁴ specifically prescribing the Court's civil jurisdiction. Under section 101 of the Magistrates' Court Act,⁵⁷⁵ the court may amend the complaint for the purpose of bringing the proceeding within its jurisdiction, or stay the proceeding pending an application to transfer the proceeding to a higher court.

The above court structures of NSW and Victoria are similar in nature and hierarchy. Now that these court structures have been discussed, this chapter will assess how the court-referred mediation systems operate through these court structures within the NSW and Victorian civil justice systems.

⁵⁷¹ Act 6230 of 1958.

⁵⁷² Fitzoy Legal Services Inc. 'The Law Handbook: Your Practical Guide to the Law in Victoria' available at <http://www.lawhandbook.org.au/handbook/ch01s02s02.php> (accessed 18 April 2014).

⁵⁷³ Fitzoy Legal Services Inc. 'The Law Handbook: Your Practical Guide to the Law in Victoria' available at <http://www.lawhandbook.org.au/handbook/ch01s02s03.php> (accessed 18 April 2014).

⁵⁷⁴ Act 51 of 1989.

⁵⁷⁵ Act 51 of 1989.

4.5 MEDIATION IN THE AUSTRALIAN STATE OF NEW SOUTH WALES

4.5.1 Growth of Mediation in New South Wales

In 1988 a review of the NSW court system was initiated by the Premier and Attorney-General at the time, due to the increasing concern of delays and inefficiencies in the court system.⁵⁷⁶ Such review initiative *inter alia* recommended the development of alternative methods of resolving disputes in order to reduce the existing backlog of cases.⁵⁷⁷ Such ADR methods included the introduction of mandatory mediation schemes, however only in certain cases.⁵⁷⁸

In October 1991, the Law Society of NSW actively promoted “Settlement Week” within the NSW Supreme Court.⁵⁷⁹ The proposal for Settlement Week was modelled on an annual American (Washington DC) ADR scheme which involved the courts setting aside their usual court rolls for a week and devoting the entire period to attempting to settle their civil matters through the process of mediation while, making use of the physical court facilities.⁵⁸⁰ The rationale behind such initiative was that it would provide the disputing parties with an opportunity to settle their matter at an earlier stage in their dispute, instead of going through the expensive and possibly extended process of litigation. Furthermore the dispute would be potentially successfully resolved without either party appearing to admit to weakness by being the one to propose a settlement in their disputes.⁵⁸¹ From the courts’ perspective, it would assist in reducing the backlog of cases to manageable proportions.⁵⁸² A diverse variety of civil cases were dealt with during settlement week, such as matters pertaining to *inter alia*

⁵⁷⁶ Astor H & Chinkin CM *Dispute Resolution in Australia* (1992) 2.

⁵⁷⁷ Astor H & Chinkin CM *Dispute Resolution in Australia* (1992) 2.

⁵⁷⁸ Astor H & Chinkin CM *Dispute Resolution in Australia* (1992) 2.

⁵⁷⁹ Astor H & Chinkin CM *Dispute Resolution in Australia* (1992) 2.

⁵⁸⁰ Astor H & Chinkin CM *Dispute Resolution in Australia* (1992) 2.

⁵⁸¹ Astor H & Chinkin CM *Dispute Resolution in Australia* (1992) 2.

⁵⁸² Astor H & Chinkin CM *Dispute Resolution in Australia* (1992) 2.

personal injury, validation, real estate/ property, intellectual property, commercial disputes, partnerships, contracts, delictual claims and professional medical negligence.⁵⁸³

During the first settlement week approximately 235 cases that were scheduled for traditional court hearing were mediated instead.⁵⁸⁴ The tradition of settlement week successfully continued to be practised from 1991 until 2002.⁵⁸⁵

4.5.2 Growth of Mandatory Court-Referred Mediation in New South Wales

In addition to the practice of mediation, legislation for mandatory court-referred mediation also developed. In light of the legislative progression of court-referred mediation, section 110K of the Supreme Court Act 52 of 1970, which initially authorised the Supreme Court to refer civil matters to mediation upon the consent of disputing parties, was amended by the Supreme Court Amendment (Referral of Proceedings) Act.⁵⁸⁶ The amended section 110K now provides that the power of the court to refer cases to mediation can be exercised with or without the consent of the disputing parties in question.⁵⁸⁷

⁵⁸³ Hilmer S.E 'Mandatory mediation in Hong Kong: A workable solution based on Australian experiences' (2012) 1 *China-EU Law J* 65.

⁵⁸⁴ Hilmer S.E 'Mandatory mediation in Hong Kong: A workable solution based on Australian experiences' (2012) 1 *China-EU Law J* 65.

⁵⁸⁵ Sourdin T 'Mediation in Australia: Impacts on litigation' in Alexander N (ed) *Global Trends in Mediation 2* ed (2006) 53.

⁵⁸⁶ Act 36 of 2000. The long title of the Supreme Court Amendment (Referral of Proceedings) Act 36 of 2000 states that this Act 'is an Act to amend the Supreme Court Act 1970 with respect to the powers of the Supreme Court to refer matters for determination by alternative methods of dispute resolution.[Assented to 14 June 2000]'. The Act 52 of 1970 was also repealed and replaced by Part 4 of the Civil Procedure Act of 2005, as discussed at 4.5.2.4 below.

⁵⁸⁷ Section 110K states: 'Referral by Court: (1) If it considers the circumstances appropriate, the Court may, by order, refer any proceedings, or part of any proceedings, before it (other than any or part of any criminal proceedings) for mediation or neutral evaluation, and may do so either with or without the consent of the parties to the proceedings concerned. (2) The mediation or neutral evaluation is to be undertaken by a mediator or evaluator agreed to by the parties or, if the parties cannot agree, by a mediator or evaluator appointed by the Court, who (in either case) may, but need not, be a person whose name is on a list compiled under this Part.'

In addition, section 110L of the Supreme Court Act was also amended and currently provides that disputants have a duty to participate in the mediation process in good faith.⁵⁸⁸ With regards to the mediators conducting the mediation process through the Supreme Court, a list of these mediators is kept by the court.⁵⁸⁹ This list provides details about the mediators' fees, areas of expertise and occupations.⁵⁹⁰

4.5.2.1 Mediation at Supreme Court Level

The Supreme Court further has the authority to order parties to mediate their dispute, with or without their consent, from the Practice Notes of the Supreme Court of NSW. For instance, Practice Note No.SC Gen 6⁵⁹¹ sets out the Court's mediation procedures and its expectations of the parties in proceedings after they have been referred to mediation.⁵⁹² This Practice Note further makes specific mention of the Civil Procedure Act of 2005 (CPA), which permits the Court to refer any matter to mediation by order, where it is in the opinion of the Court to do so, without the consent of the disputing parties in question.⁵⁹³

⁵⁸⁸ Section 110L states: 'Duty of parties to participate: It is the duty of each party to the proceedings the subject of a referral under section 110K to participate, in good faith, in the mediation or neutral evaluation.'

⁵⁸⁹ Sourdin T 'Mediation in Australia: Impacts on litigation' in Alexander N (ed) *Global Trends in Mediation 2* ed (2006) 55.

⁵⁹⁰ Sourdin T 'Mediation in Australia: Impacts on litigation' in Alexander N (ed) *Global Trends in Mediation 2* ed (2006) 55.

⁵⁹¹ This practice note commenced on 17 August 2005. It was Chief Justice James J Spigelman, who was an advocate of court based mediation, who introduced the Mediation Practice Note No.SC Gen 6 to the Supreme Court of New South Wales at the time. He described successful mediation as measured in more than savings in money and time. He maintained that 'the opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation' (speech delivered at the 'LEADR Dinner' in Sydney Australia on 9 November 2000) as quoted in Bathurst T.F 'The role of the courts in the changing dispute resolution landscape' (2012) 35(3) *University of New South Wales Law Journal* 875. This practice note, however, has been replaced by its current version issued on 10 March 2010 and commenced on 15 March 2010.

⁵⁹² Practice Note 118, issued on 8 February 2001 (now repealed), also set out the basis on which the Supreme Court will consider ordering mediation in civil matters. The note stated that the court may, after hearing the parties make an order, according to (amended) section 110K of Act 52 of 1970, referring the disputants to mandatory mediation with or without their consent to settle their dispute.

⁵⁹³ Sections 5 and 18 of the Practice Note No.SC Gen 6.

4.5.2.2 Mediation at District Court Level

Similarly, on a District Court level, the District Court also proceeded to provide for mandatory court-referred mediation, through section 164A of the District Court Act 9 of 1973,⁵⁹⁴ which provides for the provisions identical to amended section 110K of the Supreme Court Act. According to section 164A, mediation is to be undertaken by a mediator or evaluator agreed upon by the parties or, failing agreement between the parties, by a mediator or evaluator appointed by the court.

4.5.2.3 Mediation at Local Court Level

On a Local Court level, mandatory court-referred mediation continues to develop as matters are increasingly being referred to mediators through statutory schemes such as Community Justice Centre programmes, which assist in resolving disputes that arise in the Local Court's jurisdiction.⁵⁹⁵

In 1970, the Local Courts (Civil Claims) Act 11 of 1970 was promulgated and according to section 21L, similar to the initial section 110K of the Supreme Court of 1970, the Local Court is able to send disputing parties to mediation, but subject to their consent to do so.⁵⁹⁶ This Act however was repealed by the Civil Procedure Act 28 of 2005⁵⁹⁷

⁵⁹⁴ This Act was repealed and replaced by Part 4 of the Civil Procedure Act of 2005, as discussed at 4.5.2.4 below.

⁵⁹⁵ Other specialist courts in NSW are also increasingly using mediation, such as the Land and Environment Court, which has been using mediation for many years. This court uses a registrar-based mediation system that has successfully resolved numerous civil disputes for the past decade. Sourdin T 'Mediation in Australia: Impacts on litigation' in Alexander N (ed) *Global Trends in Mediation* 2 ed (2006) 54.

⁵⁹⁶ Section 21L: 'Referral by Court:

(1) A court may, by order, refer a matter arising in proceedings before it (other than criminal proceedings) for mediation or neutral evaluation if:

(a) the court considers the circumstances appropriate, and
(b) the parties to the proceedings consent to the referral, and
(c) the parties to the proceedings agree as to who is to be the mediator or evaluator for the matter.

(2) The mediator or evaluator may, but need not be, a person whose name is on a list compiled under this Part.'

⁵⁹⁷ Schedule 4 of the Civil Procedure Act 28 of 2005, entitled 'Repeals', includes the Local Courts (Civil Claims) Act 11 of 1970 in the list of acts which are repealed. See 4.5.2.4 below.

4.5.2.4 The Civil Procedure Act 28 of 2005

The Civil Procedure Act 28 of 2005 (CPA) applies to all civil proceedings in the NSW Supreme, District and Local Courts.⁵⁹⁸ Part Four of the CPA⁵⁹⁹ deals specifically with the mediation and referral proceedings. Section 26, which specifically states that it encompasses amended section 110K of Act 52 of 1970, section 164A of Act 9 of 1973 and section 21L of Act 11 of 1970, provides that where the court considers the circumstances appropriate it is authorised to refer any matter to mediation with or without the consent of the disputing parties.

The CPA further places a duty upon the parties to assist the court in furthering its overriding purpose, to cooperate with the processes of the court and to participate in good faith.⁶⁰⁰ The prevailing purpose of the CPA is to facilitate the just, quick and cheap resolution of civil disputes.⁶⁰¹

The mediators to the above proceedings, according to the CPA, are the registrars and officers of the court who are qualified mediators and are appointed through agreement by the parties or appointed by the court.⁶⁰² The CPA further makes provision for the advantage of confidentiality during these proceedings. However, it provides for a few specific

⁵⁹⁸ Schedule 1 of the CPA states specifically where the Act finds application : in the ‘Supreme Court- all civil proceedings; Land and Environment Court- all civil proceedings in Class 1, 2, 3, 4 or 8 of the Court’s Jurisdiction; Industrial Relations; Commission (including the Commission in Court Session (the Industrial Court)- all civil proceedings; District Court- all civil proceedings; Dust Diseases Tribunal- all civil proceedings, Local Court- all civil proceedings under Part 3 of the Local Court Act2007; and all civil proceedings under the Property (Relationships) Act 1984.’

⁵⁹⁹ This part comprises sections 25 to 35 and repeals and replaces Act 52 of 1970, Act 1973 and Act 11 of 1970.

⁶⁰⁰ Section 56(3) of the CPA.

⁶⁰¹ Section 56(1), (3) of the CPA.

⁶⁰² Section 26(2), (3) of the CPA.

circumstances under which mediators may disclose certain information where deemed necessary.⁶⁰³

In terms of the CPA, the cost of the mediators and the mediation process is borne by the disputing parties in proportions agreed to between them.⁶⁰⁴ Alternatively, the court may make an order regarding the payment of these costs, by one or more of the disputing parties, in such a manner as the order specifies.⁶⁰⁵

4.5.3 The Impact of Mandatory Court-Referred Mediation on New South Wales' Civil Justice System

In Australia, NSW⁶⁰⁶ is one of the most advanced states in practicing court-referred mediation, on a mandatory basis, with its Supreme Court having experienced large numbers of mandatory mediation referrals over the last seventeen years.⁶⁰⁷

Benefits of mandatory court-referred mediation were recognised in as early as 1996, as is evidenced by Brennan CJ's speech, delivered at a judicial conference in September 1996, where he supports compulsory mediation in stating that:

⁶⁰³ Section 31: 'A mediator may disclose information obtained in connection with the administration or execution of this Part only in one or more of the following circumstances:

(a) with the consent of the person from whom the information was obtained,
(b) in connection with the administration or execution of this Part, including section 29 (2),
(c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,
(d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,
(e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.'

⁶⁰⁴ Section 28 (b) of the CPA.

⁶⁰⁵ Section 28 (a) of the CPA.

⁶⁰⁶ Due to the extensive history of ADR and mediation in NSW (Astor H & Chinkin CM *Dispute Resolution in Australia* (1992) 5), this section provides for only the major developments which led to the incorporation of mandatory court-referred mediation in NSW.

⁶⁰⁷ Hilmer S.E 'Mandatory mediation in Hong Kong: A workable solution based on Australian experiences' (2012) 1 *China-EU Law J* 65.

‘there is no reason why, in the vast majority of cases, mediation should not be compulsory in the sense of being a condition of the right of any party to have the dispute brought on for trial. But let it be court-attached mediation.’⁶⁰⁸

Statistics on the success rate of mandatory court-referred mediation in NSW indicate the benefits of this ADR process in that at least half of the cases referred to mediation successfully resulted in settlement, thereby significantly reducing the rest of the Courts’ case loads.⁶⁰⁹ Therefore the implementation of mandatory court-referred mediation has a beneficial and effective impact on the adversarial civil justice system of NSW.

Based on the above outline of mandatory court-referred mediation, possible lessons from NSW’s civil justice system can be identified. These lessons include possible factors which have contributed to the effectiveness of this ADR process. South Africa may learn from these possible lessons and factors which are briefly discussed below,

4.5.4 Possible Lessons for South Africa from Mandatory Court-Referred Mediation in New South Wales

Out of an adversarial natured civil justice system facing a number of shortcomings, came a fruitful and beneficial mandatory court-referred mediation system.⁶¹⁰ The successful implementation of mandatory court-referred mediation in NSW⁶¹¹ may be attributed to the support and initiative taken from institutions, such as the Law Society of NSW⁶¹² and state

⁶⁰⁸ As quoted in Bathurst T.F ‘The role of the courts in the changing dispute resolution landscape’(2012) 35(3) *University of New South Wales Law Journal* 876.

⁶⁰⁹ Bathurst T.F ‘The role of the courts in the changing dispute resolution landscape’(2012) 35(3) *University of New South Wales Law Journal* 876; Hilmer S.E ‘Mandatory mediation in Hong Kong: A workable solution based on Australian experiences’ (2012) 1 *China-EU Law J* 67; Supreme Court of NSW *2012 Annual Review* (2012) 61; The Supreme Court of NSW ‘Supreme Court of NSW provincial statistics’ available at http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/639 (accessed 12 April 2014).

⁶¹⁰ See 4.3.1 and 4.3.2 above.

⁶¹¹ See 4.5.3 above

⁶¹² At 4.5.1 below..

bodies such as the legislature⁶¹³ and judiciary.⁶¹⁴ In this regard the legislature, prior to enacting laws which support mandatory court-referred mediation, had the advantage of witnessing the success of the annual settlement week initiative, introduced by the Law Society.⁶¹⁵ The legislature thus progressively enacted court-referred mediation legislation,⁶¹⁶ including the CPA which applies collectively to all civil proceedings at all levels of court.⁶¹⁷ The judiciary executes the system of court-referred mediation through compelling parties to mediate their disputes through its legislated discretionary powers. The legislature however does not solely leave it up to the courts to ensure the efficiency of mandatory court-referred mediation, but obliges the good faith participation of the disputants to the mediation process, through legislation.⁶¹⁸ This obligation, as set up in the CPA, aids in fulfilling the ultimate purpose of the just, quick and cheap resolution of civil disputes.⁶¹⁹

Based on the above discussions, should a mandatory mediation system be implemented in South Africa, the following lessons, in a nutshell, may be learnt from NSW. The South African branches of state would need to work together and support the mediation system. The legislature would need to enact legislation regulating the mediation system and authorising the courts to compel parties to mediate their disputes. The courts would then apply these laws. A further contributing party to the possible successful implementation of such a mediation system would be the relevant law society in South Africa. The law society would encourage the support of the legal profession and work together with the legislature and the judiciary in ensuring the efficiency of the process. In view of the requirement of good faith participation by the parties to the dispute, the support of the disputants themselves would also

⁶¹³ At 4.5.1 below.

⁶¹⁴ At 4.5.1 and 4.5.2 below.

⁶¹⁵ At 4.5.1 below.

⁶¹⁶ At 4.5.1 below.

⁶¹⁷ At 4.5.2.4 below.

⁶¹⁸ At 4.5.2.4 below.

⁶¹⁹ At 4.6.2.4 below.

be necessary.⁶²⁰ Therefore support from the general public would also need to be factored into the successful implementation of the mediation process.

4.6 MEDIATION IN THE AUSTRALIAN STATE OF VICTORIA

4.6.1 Growth of Mediation in Victoria

In 1983 the state of Victoria introduced mediation for the first time, as a means of resolving construction disputes in addition to arbitration procedures in the Victorian County Court.⁶²¹

Subsequently, in 1992, due to a significant backlog in cases in the Supreme Court of Victoria, the then Chief Justice, John Harber Phillips, established an assembly of experienced attorneys and advocates to conduct mediation sessions on a pro bono basis in order to address the case load dilemma.⁶²² This initiative was titled the ‘Spring Offensive’ and reaped a measure of success⁶²³ which resulted in the initiative being repeated two years later through the 1994 ‘Autumn Offensive’, producing a success rate of almost 80 per cent in successfully mediated disputes.⁶²⁴

These mediation initiatives significantly reduced case backlogs and most importantly exposed the mediation process to a wider group within the legal profession and introduced the concept to the lay Victorian community at large.⁶²⁵

⁶²⁰ See 4.4.2 above.

⁶²¹ Hilmer S.E ‘Mandatory mediation in Hong Kong: A workable solution based on Australian experiences’ (2012) 1 *China-EU Law J* 68.

⁶²² Hilmer S.E ‘Mandatory mediation in Hong Kong: A workable solution based on Australian experiences’ (2012) 1 *China-EU Law J* 68.

⁶²³ Through this initiative 762 cases waiting for trial were reviewed by the judiciary who then referred 280 matters to mediation at the time, which subsequently resulted in a 54 % success rate. Hilmer S.E ‘Mandatory mediation in hong kong: a workable solution based on australian experiences’ (2012) 1 *China-EU Law J* 68.

⁶²⁴ A further 150 matters were referred to mediation producing a success rate of 79.35 per cent. Hilmer S.E ‘Mandatory mediation in hong kong: a workable solution based on australian experiences’ (2012) 1 *China-EU Law J* 68.

⁶²⁵ McFarlane T ‘Mediation comes of age in Victoria’ available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

4.6.2 Growth of Court-Referred Mediation in Victoria

As a result of the exposure of the mediation system, in 1994, developments took place through the Victorian State Attorney-General's Law Reform Advisory Council and the Victorian Law Foundation, as these institutions produced and published the "Standards for Court-Connected Mediation in Victoria".⁶²⁶ This development was also seen as significant, as it signified the level of support from the legal profession for the use and practise of mandatory court-referred mediation.^{627,}

The success of the abovementioned offensives and published standards, led to the development of Victoria's Supreme Court's 'Portals Protocol' in 1995,⁶²⁸ which promoted a more sophisticated mediation referral scheme.⁶²⁹ Subsequent to this development, the three tiers of Victorian courts (Supreme, County and Magistrates' Courts) became involved.⁶³⁰ In 1995, the then Chief Justice of the Supreme Court, Phillips CJ, supported this and held that 'the time has come for the organised involvement of mediation in all Victorian courts'.⁶³¹ He importantly added that

'it should be stressed that mediation is not an inferior type of justice. It is a different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements.'⁶³²

⁶²⁶ McFarlane T 'Mediation comes of age in Victoria' available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

⁶²⁷ McFarlane T 'Mediation comes of age in Victoria' available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

⁶²⁸ During this time, parallel to the early developments of mediation by the courts, the legal profession was also taking steps to embrace the mediation process and to encourage its development and acceptance by both the profession and the community. McFarlane T 'Mediation comes of age in Victoria' available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

⁶²⁹ Sourdin T 'Mediation in Australia: Impacts on litigation' in Alexander N (ed) *Global Trends in Mediation 2* ed (2006) 56.

⁶³⁰ Sourdin T 'Mediation in Australia: Impacts on litigation' in Alexander N (ed) *Global Trends in Mediation 2* ed (2006) 56.

⁶³¹ Sourdin T 'Mediation in Australia: Impacts on litigation' in Alexander N (ed) *Global Trends in Mediation 2* ed (2006) 56.

⁶³² Sourdin T 'Mediation in Australia: Impacts on litigation' in Alexander N (ed) *Global Trends in Mediation 2* ed (2006) 56.

4.6.2.1 Mediation at Supreme Court Level

The above developments and the practice of mediation processes was so well received over the years, that it led to the development of court empowered mandatory referral mediation schemes.⁶³³ The then Chief Justice of the Supreme Court of Victoria, Marilyn Warren AC stated in 2009, at a civil justice conference in Melbourne, that in the Supreme Court of Victoria no civil case except for Magistrates' Court and the Victorian Civil Administrative Tribunal appeals and judicial reviews goes to trial without at least one round of mediation.⁶³⁴

Mandatory mediation procedures have been authorised by Victorian courts through the application of various statutes and court rules. For instance, at the Supreme Court level, Rule 50.07 (1) of the Supreme Court (General Civil Procedure) Rules of Victoria 2005 finds application and it states that at any stage of a proceeding the Court 'may, with or without the consent of any party, order that the proceeding or any part of the proceeding be referred to a mediator.'

4.6.2.2 Mediation at County Court Level

At County Court level, the County Court Civil Procedure Rules of 2008⁶³⁵ finds application with regards to Rule 34A.21 which states that at a directions hearing,⁶³⁶ the Court may, with or without the consent of any party, refer the whole or any part of the proceeding to mediation in accordance with Rule 50.07 of the County Court Civil Procedure Rules, which prescribes the procedure and costs of referring matters to a mediator.

⁶³³ In 1990, during the early period of development, Justice de Jersey referred to mediation as a "remarkable phenomenon" and other judicial officers made comments along similar lines. Warren M, Chief Justice of the Supreme Court of Victoria *Law Institute of Victoria 'Serving Up Insights' Series* (2009)2.

⁶³⁴ Warren M, Chief Justice of the Supreme Court of Victoria *Law Institute of Victoria 'Serving Up Insights' Series* (2009)2.

⁶³⁵ County Court Civil Procedure Rules 148 of 2008

⁶³⁶ Which entails the court giving direction for the conduct of the proceedings which it deems conducive to the matters' 'effective, complete, prompt and economical determination'. Rule 34A.19 of the County Court Civil Procedure Rules 148 of 2008.

4.6.2.3 Mediation at Magistrates' Court Level

At Magistrates' Court level, section 108 of the Magistrates' Court Act 51 of 1989 deals with the courts' power to refer proceedings to mediation and states that

‘subject to and in accordance with the Rules⁶³⁷ or the Civil Procedure Act 2010⁶³⁸, the Court may, with or without the consent of the parties, refer the whole or any part of a civil proceeding to mediation’.

4.6.2.4 The Civil Procedure Act 47 of 2010

The Victorian Civil Procedure Act 47 of 2010 applies to all civil proceedings in the state of Victoria⁶³⁹ and authorises the Supreme, County and Magistrates' Courts to refer disputants to mediation, with or without their consent, at any stage in the civil proceedings.⁶⁴⁰ The overarching purpose of the Act is to facilitate the just, efficient, timely and cost-effective resolution of all civil disputes.⁶⁴¹ This overarching purpose may be achieved either through the determination of the proceedings by the court, an agreement between the disputing parties or any appropriate dispute resolution process⁶⁴² agreed to by the disputants or ordered by the court.⁶⁴³

The Civil Procedure Act imposes the obligation of furthering the aforementioned overarching purpose on any person who is a party to the proceedings, any legal practitioner and law

⁶³⁷ Magistrates' Court General Civil Procedure Rules 2010.

⁶³⁸ Civil Procedure Act 47 of 2010.

⁶³⁹ Section 4 of the Civil Procedure Act 47 of 2010.

⁶⁴⁰ Section 66 of the Civil Procedure Act 47 of 2010.

⁶⁴¹ Section 7 (1) of the Civil Procedure Act 47 of 2010. When the bill was introduced to Parliament, the attorney general at the time, Rob Hulls, said that this legislation ‘will promote a culture that focuses on achieving the best outcome in a timely and cost effective way for disputants, whether they are global corporations or individuals going about their daily business.’ As quoted in McFarlane T ‘Mediation comes of age in Victoria’ available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

⁶⁴² Section 3 of the Civil Procedure Act 47 of 2010 defines ‘appropriate dispute resolution’ as ‘a process attended, or participated in, by a party for the purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute, including, but not limited to- (a) mediation, whether or not referred to a mediator in accordance with rules of court; (b) early neutral evaluation; (c) judicial resolution conference; (d) settlement conference; (e) reference of a question, a civil proceeding or part of a civil proceeding to a special referee; (f) expert determination; (g) conciliation; (h) arbitration’.

⁶⁴³ Section 7 (2) of the Civil Procedure Act 47 of 2010.

practice acting on behalf of such party, and any party providing financial assistance to such party.⁶⁴⁴ Thus, each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice with respect to any proceeding in which that person is involved, including inter alia any appropriate dispute resolution process undertaken.⁶⁴⁵

This Act further enforces these overarching obligations and paramount duty by requiring all disputants to personally certify that they have read and understood the aforementioned obligations.⁶⁴⁶ This certification must be filed with the court, together with the first substantive document⁶⁴⁷ in the civil proceedings.⁶⁴⁸

In conjunction with the disputing party's filed certification, a legal practitioner is also required to certify that there is a proper basis for each allegation of fact or denial or non-admission in the court document, which should likewise be filed at court.⁶⁴⁹ This certification is called the 'Proper Basis Certification'. This certification places an onus upon a legal practitioner to ensure that his/her client understands what is involved in either bringing or defending a civil claim.⁶⁵⁰

The Civil Procedure Act makes provision for sanctions for contravening the overarching obligations mentioned above. The Act provides that the court is to take into account any

⁶⁴⁴ Section 10 of the Civil Procedure Act 47 of 2010.

⁶⁴⁵ Section 16 of the Civil Procedure Act 47 of 2010.

⁶⁴⁶ Section 41 (1) of the Civil Procedure Act 47 of 2010.

⁶⁴⁷ The document which initiates the civil dispute. Thus, for instance, such document could be a complaint, a summons or application which commenced a civil proceeding, a notice of defence or a counterclaim, among others.

⁶⁴⁸ Section 41 (2) of the Civil Procedure Act 47 of 2010.

⁶⁴⁹ Such document inter alia being a party's first substantive document or any subsequent substantive document filed at court which adds or substitutes the first substantive document. Section 42 of the Civil Procedure Act 47 of 2010.

⁶⁵⁰ Section 41 of the Civil Procedure Act 47 of 2010.

failure to comply with the certifications to be made by the relevant parties and is accordingly to determine a cost order appropriate to the proceedings or make a discretionary order in sanctioning such contravention.⁶⁵¹

It is evident that the Civil Procedure Act does not simply make provision for the mandatory practice of mediation through the court, but further incorporates the necessity of involving the good faith participation of all parties to the dispute, in order to promote the just, efficient, timely and cost-effective resolution of all civil disputes in Victoria. The Act further commits to the efficiency of the mediation process by putting sanctions in place for non-compliance with it. The Act therefore goes deeper into the rationale and practice of mediation in courts in order to ensure its effective and successful practise.

4.6.3 The Impact of Mandatory Court-Referred Mediation in Victoria

Victoria⁶⁵² is one of the states that have been practising mandatory court-referred mediation over the longest time period and is one of the most committed states to the advancement of ADR in Australia.⁶⁵³ Over the past two decades mediation in Victoria has grown and is now at

⁶⁵¹ Sections 28 and 29 of the Civil Procedure Act 47 of 2010.

⁶⁵² As with NSW, due to the extensive history of ADR and mediation in Victoria (Astor H & Chinkin CM *Dispute Resolution in Australia* (1992) 5), this section provides for only the major developments which lead to the incorporation of mandatory court based mediation in Victoria.

⁶⁵³ In 2009, in recognition of the international moves towards non-adversarial methods of conflict resolution, Victorian Attorney-General, Robert Hulls, noted that '[w]e need to think smart when it comes to attempting to solve disputes, and the courts should be a place of last resort'. This comment underscores the Victorian government's commitment to ADR, which is also evidenced by the May 2008 multi-million dollar State budget package, aimed at positive initiatives in dealing with the 3.3 million civil disputes in Victoria each year. Strategies, during this time, for improving dispute resolution services included the expansion of mediation programmes in all jurisdictions, including the Supreme Court and County Court of Victoria, and upgrading ADR facilities in regional Victoria. The comment also suggests that adjudicative court processes should be a last resort option for conflict resolution, because legalism fails to take into account the needs and interests of disputants. Disputes originating within the substantive context of human relations are translated by legal rules and court procedures, into generic categories of rights, entitlements and duties. This process can be a deficient conflict resolution mechanism because it eliminates the human aspects of disputes, that is, the needs, interests, values, beliefs and commitments of the participants. Gutman J 'The reality of non-adversarial justice: Principles and practice' (2009) 14 *Deakin Law Review* 30.

a point where no civil case, except for appeals and judicial reviews, proceeds to hearing without at least one round of mediation.⁶⁵⁴

Examples of some of the statistical success rates of mandatory court-referred mediation in Victoria are as follows. In the Supreme Court in 2006, more than 70 per cent of mediated cases were able to achieve settlement and thereby relieve the parties and the court of the burden of trial (according to the court's 2005/2006 Annual Report).⁶⁵⁵ In the County Court, approximately 60 per cent of civil cases were successfully settled at mediation (according to the court's 2005/2006 Annual Report).⁶⁵⁶ In the Magistrates' Court, approximately 64.42 per cent of civil cases were successfully mediated according to a 2007 year end annual report and approximately 70 per cent of cases were successfully mediated at court according to a 2005/2006 Annual Report.⁶⁵⁷

Based on the above statistical success rates, it appears that the implementation of court-referred mediation in Victoria has been both effective and successful in the Victorian civil justice system.

As with NSW, based on the above discussion regarding the growth and beneficial implementation of mandatory court-referred mediation in Victoria, possible lessons may be drawn from this state. These possible lessons may be useful to South Africa and are discussed below.

⁶⁵⁴Soudin T *Report for the Department of Justice of Victoria, Australia: Mediation in the Supreme and County Courts of Australia* (2009) 1.

⁶⁵⁵ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 213.

⁶⁵⁶ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 213.

⁶⁵⁷ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 213.

4.6.4 Possible Lessons for South Africa from Mandatory Court-Referred Mediation in Victoria

Victoria, as a state with extensive shortcomings in its adversarial civil justice system⁶⁵⁸ has become a state maintaining an established and effective mandatory court-referred mediation system.⁶⁵⁹

The success of this system may stem from key role players which include the legal profession,⁶⁶⁰ the judiciary,⁶⁶¹ the legislature,⁶⁶² and importantly, the general public. The legislature played a key role as it is the body which created the law authorising the mediation process.⁶⁶³ This included the enactment of the CPA, which sanctions the non-compliance of parties to the dispute and encourages the good faith commitment of the parties to the mediation process.⁶⁶⁴

The Judiciary also plays a key role in the success and development of mandatory court-referred mediation, as it applies the aforementioned court rules and statutes to all civil disputes.⁶⁶⁵ Thus it is essential for this body to support the mediation process.

The legal profession plays a key role in the development and success of mandatory court-referred mediation.⁶⁶⁶ This is evidenced by the duty placed upon legal practitioners to

⁶⁵⁸ See 4.3.2 above.

⁶⁵⁹ See 4.6.3 above.

⁶⁶⁰ See 4.6.2 above.

⁶⁶¹ See 4.6.2 above.

⁶⁶² See 4.6.2 above.

⁶⁶³ See 4.6.2 above.

⁶⁶⁴ See 4.6.2.4 above.

⁶⁶⁵ See 4.6.2 above.

⁶⁶⁶ In the initial stages of the development, this body was assembled in order to conduct one of the first mediation programmes in Victoria (on a pro bono basis). Furthermore through the legal profession's Advisory Council and Law Foundation, a set of mandatory court based mediation standards were published in support of the mediation process. Through this publication and the aforementioned 'offensives', a more sophisticated

promote the overarching purpose of the CPA to ensure that there is a proper basis for their client's claim in dispute and to ensure that the disputant understands the procedure in resolving his or her matter.⁶⁶⁷ Also, through their influential role lawyers are able to lead and guide their clients in the ways of mandatory court-referred mediation. In other words, if lawyers support the practice of this process, it is likely that their clients will follow suit. In this regard the legal profession assists in the promotion of this mediation process and the bona fide participation of civil disputants to the process.⁶⁶⁸

The general public may also play a key role in the mandatory court-referred mediation process. This is due to the fact that if the public is sufficiently aware of the process and supports the concept, the aim of ensuring that disputants act in good faith and supports the objects of the process would be more easily attained.⁶⁶⁹ Therefore the manner in which such a mediation process is introduced to the public is of significant importance in order for them to buy into this process and potentially promote the just, efficient, timely and cost-effective resolution of their civil disputes, as per the CPA.⁶⁷⁰

Should South Africa implement a mediation system similar to that of the mediation system implemented in the Victorian civil justice system a number of lessons may be learnt from this state. Briefly, the collaborative commitment of the South African legislature, judiciary, legal profession and general public would be necessary in order to ensure the success of a mediation system being implemented in the South African civil justice system.⁶⁷¹

mediation referral scheme was established which lead to all levels of courts becoming involved in the mandatory court based mediation system. See 4.6.1 above.

⁶⁶⁷ See 4.6.2.4 above.

⁶⁶⁸ See 4.6.2.4 above.

⁶⁶⁹ See 4.6.2.4 above.

⁶⁷⁰ See 4.6.2.4 above.

⁶⁷¹ This is similarly to NSW, see 4.5.4 above.

4.7 CRITISMS OF MANDATORY COURT-REFERRED MEDIATION IN AUSTRALIA

Despite the long standing practice of mandatory court-referred mediation in NSW and Victoria, certain criticisms remain prevalent. These criticisms include that due to the fact that the courts have the discretion of ordering appropriate cases to mediation, the court may select broad categories of cases as being amenable to mediation, thereby failing to take into consideration the unique circumstances of each case and vast divergences between disputes and parties, as well as the different needs of litigants.⁶⁷²

Further criticisms include the issue of timing, that is, the question of when is it most appropriate for cases to be referred to ADR. The obvious answer may be that the appropriate timing will depend on the nature and complexity of the case.⁶⁷³ However, if the referral to mediation is ordered too late, there is the risk that the parties will have expended significant sums in preparation for court proceedings only to have their trial delayed pending the outcome of the mediation procedure.⁶⁷⁴ This can have a variety of impacts, such as the frustration of litigants who have their proceedings delayed while they undertake another process.⁶⁷⁵ Furthermore, where the matter is not settled, the mediation can lead to additional costs in the proceedings.⁶⁷⁶ However, if the matter is settled, the parties might be equally frustrated that substantial costs were expended before the successful mediation process was

⁶⁷² Bathurst T.F 'The role of the courts in the changing dispute resolution landscape' (2012) 35(3) *University of New South Wales Law Journal* 878.

⁶⁷³ Bathurst T.F 'The role of the courts in the changing dispute resolution landscape' (2012) 35(3) *University of New South Wales Law Journal* 879.

⁶⁷⁴ Bathurst T.F 'The role of the courts in the changing dispute resolution landscape' (2012) 35(3) *University of New South Wales Law Journal* 879.

⁶⁷⁵ Bathurst T.F 'The role of the courts in the changing dispute resolution landscape' (2012) 35(3) *University of New South Wales Law Journal* 879.

⁶⁷⁶ Bathurst T.F 'The role of the courts in the changing dispute resolution landscape' (2012) 35(3) *University of New South Wales Law Journal* 879.

attempted, particularly where there are a large number of documents or expert report requirements.⁶⁷⁷

In addition, mediation may not be suitable for every type of dispute arising out of civil matters.⁶⁷⁸ For example, if a party wishes to have a legal precedent or it is a public interest matter, judicial determination may be more appropriate than mandatory court-referred mediation.⁶⁷⁹ Furthermore by proceeding through the process of mediation, parties thereby give up most court protections, including the right to a decision by a judge, based on admissible evidence, and appeal rights; and the right to reasons for the judicial decision.⁶⁸⁰

Moreover there is generally less opportunity to find out about the other side's case with mediation proceedings than with litigation.⁶⁸¹ Mediation may not be effective if it takes place before the parties have sufficient information about the strengths and weaknesses of their respective cases.⁶⁸²

In addition, with regards to costs, mediators may charge a fee for their services.⁶⁸³ If a dispute is not resolved through mediation, the parties may have to expend money into both mediation process and a court hearing.⁶⁸⁴

Lastly, there may be power imbalances if a party is not represented.⁶⁸⁵ Thus effective mediation proceedings require that parties have the capacity to bargain effectively for their

⁶⁷⁷ Bathurst T.F 'The role of the courts in the changing dispute resolution landscape'(2012) 35(3) *University of New South Wales Law Journal* 879.

⁶⁷⁸ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 214.

⁶⁷⁹ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 214.

⁶⁸⁰ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 214.

⁶⁸¹ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 215.

⁶⁸² Victorian Law Reform Commission *Civil Justice Review Report* (2008) 215.

⁶⁸³ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 215.

⁶⁸⁴ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 215.

⁶⁸⁵ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 215.

own needs and interests.⁶⁸⁶ A party may be vulnerable where there is an unequal power relationship, particularly if the party is not represented.⁶⁸⁷

In conclusion, it is acknowledged and understood that mandatory court-referred mediation in Australia, particularly in NSW and Victoria, does not function without criticism and contestation. However even though the above criticisms are valid, they do not detract from the fact that this programme operates effectively in the civil justice systems of both these states and have aided in eradicating the shortcomings of these states' past civil justice systems.⁶⁸⁸

4.8 CONCLUSION

'The emergence and development of mediation in Australia has occurred largely as a result of pressure on politicians and governments to respond to an inefficient, protracted and, for most citizens, unaffordable and **highly** unsatisfactory litigation process.'⁶⁸⁹

Australia once favoured civil litigation,⁶⁹⁰ now, in NSW and Victoria, maintains one of the oldest and most successful mandatory court-referred mediation systems in the world.⁶⁹¹ The type of mediation system in operation in these two states is of a similar nature and entails that the courts have the authority to refer any dispute to mediation without the consent of the parties in dispute.⁶⁹²

⁶⁸⁶ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 215.

⁶⁸⁷ Victorian Law Reform Commission *Civil Justice Review Report* (2008) 215.

⁶⁸⁸ At 4.3 and 4.5 above.

⁶⁸⁹ Alexander N 'Mediating in the shadow of Australian law: Structural influences on adr' (2006) 9 *Yearbook of New Zealand Jurisdiction* 334.

⁶⁹⁰ McFarlane T 'Mediation comes of age in Victoria' available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

⁶⁹¹ As mentioned at 4.1 above.

⁶⁹² See 4.5.2.4 and 4.6.2.4 above.

Mandatory court referred mediation may operate effectively in NSW and Victoria however; a number of valid criticisms against this mediation process persist.⁶⁹³ The criticisms identified in this study should be evaluated against the successful practices of mandatory court-referred mediation in these two states.⁶⁹⁴ What should further be taken into consideration and assessed against these criticisms, are the past conditions which both states' adversarial civil justice systems were in. These past conditions ultimately resulted in the implementation of mandatory court-referred mediation.⁶⁹⁵ When one considers the remedial benefits and success of this system, it is evident that such benefits far outweigh the aforementioned criticisms.

Initially some legal practitioners and judges regarded the process with scepticism, but time and the success of the process has changed their negative response.⁶⁹⁶ Mandatory court-referred mediation has become more established over the years and is ideally placed to assist everyone, from self-represented parties to large corporations despite prevailing criticism.⁶⁹⁷

The success in the operation of mandatory court-referred mediation may be attributed to its enabling legislation and the collaborative effort and support from related parties.⁶⁹⁸ Based on the discussions in this chapter, one may deduce from the experiences of NSW and Victoria, that the commitment from the Legislature, Judiciary, legal profession, civil disputing parties as well as the general public, is essential for a successful implementation of this ADR process.⁶⁹⁹ It is therefore important that the legislative change, regarding the implementation

⁶⁹³ See 4.7 above.

⁶⁹⁴ See 4.5.3 and 4.6.3 above.

⁶⁹⁵ See 4.3.1 and 4.3.2 above.

⁶⁹⁶ McFarlane T 'Mediation comes of age in Victoria' available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

⁶⁹⁷ McFarlane T 'Mediation comes of age in Victoria' available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

⁶⁹⁸ See 4.5.4 and 4.6.4 above.

⁶⁹⁹ See 4.5.4 and 4.6.4 above.

of mandatory court-referred mediation, does not occur in a vacuum.⁷⁰⁰ Judges, legal practitioners, law societies, civil disputants and lay people must support this concept, so that the value of mediation is upheld and the intent of the Legislature is achieved.⁷⁰¹

As identified in this chapter, South Africa, NSW and Victoria have experienced similar shortcomings in their adversarial civil justice systems.⁷⁰² Therefore implementing mediation into South Africa's adversarial civil justice system may successfully remedy the shortcomings currently experienced therein.⁷⁰³ However, given South Africa's unique past⁷⁰⁴ and constitutional order,⁷⁰⁵ the suitability and benefits of instituting a mandatory mediation system needs to be investigated.

Chapter 5 investigates the process of mandatory court based mediation as introduced by the South African government in recent years.

⁷⁰⁰ McFarlane T 'Mediation comes of age in Victoria' available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

⁷⁰¹ McFarlane T 'Mediation comes of age in Victoria' available at <http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria> (accessed 12 April 2014).

⁷⁰² See 4.3.2 above.

⁷⁰³ See 2.5 above. Identified with NSW and Victoria at 4.3 above.

⁷⁰⁴ See discussions of South Africa's legal history, at 2.2 above.

⁷⁰⁵ See 2.2.2.1 above.

CHAPTER 5

MANDATORY COURT BASED MEDIATION IN THE SOUTH AFRICAN CIVIL JUSTICE SYSTEM

5.1 INTRODUCTION

As previously discussed, South Africa's civil justice system is not unfamiliar with the concept of mediation, and even more so, mediation on a mandatory basis.⁷⁰⁶ This is further evident in the former Department of Justice and Constitutional Development introducing mandatory court based mediation as a possible means of overhauling South Africa's challenging civil justice system.⁷⁰⁷

The aim of this chapter is to investigate the concept 'mandatory court based mediation'.⁷⁰⁸ This will also include discussions on the country's latest developments towards court based mediation as well as the possible future implementation of this process on a mandatory basis. Practical issues such as the costs associated with mandatory court based mediation will also be discussed in this Chapter. Chapter 5 will then investigate the advantages and benefits, as well as the arguments against mandatory court based mediation. The constitutionality the ADR process will also be assessed.

⁷⁰⁶ This was confirmed through discussions at 3.3 above, regarding the presence of mediation in various pieces of legislation as well as the successful mandatory practice thereof in the areas of labour and family law, specifically.

⁷⁰⁷ Department of Justice and Constitutional Development *Discussion Document* (2012) 20.

⁷⁰⁸ Mandatory court based mediation is derived from the 2011 draft set of mandatory court based mediation rules (discussed at 5.2.1 below). However the focus of this thesis is not on the rules, but on the concept and system of mandatory court based mediation itself.

5.2 MANDATORY COURT BASED MEDIATION

Mediation, as a form of alternative dispute resolution, has been dealt with in Chapter 1.⁷⁰⁹

Mandatory court based mediation is based on this form of ADR⁷¹⁰ and the way in which it could operate in South Africa is discussed below.

Mandatory court based mediation provides that whenever an appearance to defend is instituted in action proceedings, or a notice of intention to oppose is delivered in application proceedings, the matter must first be referred to mediation in an attempt to settle and resolve the dispute.⁷¹¹ In the event of the disputants being unable to resolve their dispute or conclude a settlement agreement during the mediation process, the matter is then referred back to the conventional process of litigation to be adjudicated at court, as a defended action or opposed application procedure.⁷¹²

Should the matter be partially settled, that is, when some issues are resolved through mediation and some issues are left unresolved, the unresolved issues may be referred to litigation for resolution.⁷¹³ However, should the matter be successfully settled in its entirety at mediation, a settlement agreement will be concluded between the parties, which may, by

⁷⁰⁹ See 1.6.2 above.

⁷¹⁰ See 1.1 above.

⁷¹¹ Rule 3 of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules' available at <http://www.lssa.org.za/upload/DRAFT%20MEDIATION%20RULES%20APPROVED%20BY%20BOARD%2019%202011.pdf> (accessed 15 November 2014).

⁷¹² Rule 5 (6) of the Draft Set of Rules. Law Society of South Africa 'Draft mediation rules' available at <http://www.lssa.org.za/upload/DRAFT%20MEDIATION%20RULES%20APPROVED%20BY%20BOARD%2019%202011.pdf> (accessed 15 November 2014).

⁷¹³ Therefore narrowing the issues in dispute before litigation proceedings. Joubert J & Jacobs Y 'The debate - a case for mandatory mediation in South Africa' *Legalbrief Today* 6 October 2009 available at <http://www.legalbrief.co.za/article.php?story=20091006103426675> (accessed on 8 February 2014); Joubert J 'Mandatory mediation will soon arrive in South Africa, and should be warmly welcomed by the legal profession' *Legalbrief Today* 9 November 2011 available at <http://www.legalbrief.co.za/article.php?story=20111109093439544> (accessed 25 January 2013).

consent between both parties or upon the application to court by any of the parties, be made an order of the court.⁷¹⁴

5.2.1 Mandatory Mediation Rules of the High Courts and the Magistrates' Courts

The constitutional mandate upon the state to promote the underlying values of the Constitution⁷¹⁵ and the need for remedying the civil justice system⁷¹⁶ moved the Department of Justice to introduce the process of mandatory court based mediation.⁷¹⁷

The former Department of Justice⁷¹⁸ requested the Rules Board to develop the 2011 Draft Set of Rules to facilitate the practice of mandatory court based mediation for higher and lower courts in South Africa.⁷¹⁹ The purpose was to regulate the procedure for the mandatory referral of disputes to mediation and the conduct of mediation in accordance with the objectives of these rules.⁷²⁰ The objectives of these rules are considered below.

The objectives set out in rule 1 of the 2011 Draft Set of Rules provided that the purpose of these mediation rules was to facilitate an expeditious and cost effective resolution of

⁷¹⁴ Rule 9 of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules' available at <http://www.lssa.org.za/upload/DRAFT%20MEDIATION%20RULES%20APPROVED%20BY%20BOARD%2019%202011.pdf> (accessed 15 November 2014).

⁷¹⁵ Section 7 of the Constitution of the Republic of South Africa, 1996.

⁷¹⁶ As discussed at 2.5 above.

⁷¹⁷ Through the CJRP, see 1.1. At an 'Access to Justice Conference' in 2011, the former Minister of Justice and Constitutional Development stressed that it is inexplicable that South Africa had taken such a long time to undertake the task of reforming the country's civil justice system by implementing process of court based mediation into its civil justice system in order to achieve the delivery of accessible and quality justice for all. Radebe J 'Access to Justice Conference' *Department of Justice and Constitutional Development* 8 July 2011 available at http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html (accessed on 16 on February 2014); Department of Justice and Constitutional Development *Discussion Document* (2012) 20.

⁷¹⁸ The Department of Justice and Constitutional Development.

⁷¹⁹ See 1.1 above.

⁷²⁰ Rule 1 ('The Purpose of these Rules') of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules' available at <http://www.lssa.org.za/upload/DRAFT%20MEDIATION%20RULES%20APPROVED%20BY%20BOARD%2019%202011.pdf> (accessed 15 November 2014).

disputes⁷²¹ and to assist in determining at an early stage of litigation whether proceeding with a trial or an opposed application would be in the disputants' best interests.⁷²² These rules allowed litigants to revert to the conventional litigation process should the initial attempt at mediation not be successful.⁷²³ Further objectives include that the practice of mandatory mediation will preserve the relationships between litigants which may become strained or destroyed through the adversarial nature of litigation.⁷²⁴ These rules aimed to provide litigants with solutions to their dispute, which are beyond the scope and powers of judicial officers⁷²⁵ and to further dispense with formalistic litigation procedure and rules of evidence.⁷²⁶ Lastly these rules were importantly aimed at promoting access to justice.⁷²⁷

Once the Rules Board had drafted these rules, they called upon a number of institutions and organisations⁷²⁸ for comments before submitting the draft to the Minister for his approval in June 2012.⁷²⁹

5.2.2 The Unlawfulness of the 2011 Set of Draft Mandatory Court Based Mediation Rules

After considering the 2011 draft set of rules, the Minister referred it back to the Rules Board to be adapted into a voluntary court based mediation programme instead.⁷³⁰ The Minister's

⁷²¹ Rule 1 (i) of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules' available at <http://www.lssa.org.za/upload/DRAFT%20MEDIATION%20RULES%20APPROVED%20BY%20BOARD%2019%2011.pdf> (accessed 15 November 2014).

⁷²² Rule 1 (ii) of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules'.

⁷²³ Rule 1 (iii) of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules'.

⁷²⁴ Rule 1 (iv) of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules'.

⁷²⁵ Rule 1 (v) of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules'.

⁷²⁶ Rule 1 (vi) of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules'.

⁷²⁷ Rule 1 (vii) of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules'.

⁷²⁸ Institutions such as the legal profession, judiciary, sheriffs' associations, academic institutions, mediation forums, the office of the Family Advocate, the Law Society of South Africa (LSSA) and various ADR practices. Barbeau N 'Mediation pilot project for 2012' available at <http://www.iol.co.za/dailynews/news/mediation-pilot-project-for-2012-1.1195243#.USHKTx1kRYV> (accessed 17 February 2013).

⁷²⁹ Barbeau N 'Mediation pilot project for 2012' available at <http://www.iol.co.za/dailynews/news/mediation-pilot-project-for-2012-1.1195243#.USHKTx1kRYV> (accessed 17 February 2013).

⁷³⁰ See 1.1 above.

decision was based on a legal opinion sought by the Department of Justice which suggested that in the absence of an Act of Parliament sanctioning such rules, they were likely to be challenged on constitutionality grounds.⁷³¹ Section 171 of the Constitution, 1996, pertaining to court procedures, provides that court rules and procedures must be provided for in terms of national legislation.⁷³² Therefore a set of court rules must be read in conjunction with its enabling legislation and cannot exist apart therefrom.⁷³³

In view of the Minister's decision and abovementioned legal opinion, the Department of Justice moved to introduce a system of voluntary court based mediation.⁷³⁴

5.3 THE CURRENT STATUTS OF COURT BASED MEDIATION IN SOUTH AFRICA

5.3.1 The Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa

In 2013, the Rules Board drafted the 'Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts', which the Minister of Justice subsequently approved.⁷³⁵

⁷³¹ See 1.1 above.

⁷³² See 2.4 above. The grounds of constitutionality pertain only to the court rules in this regard and not to the constitutionality of the concept or system of mandatory court based mediation itself. The possible arguments for the constitutionality of mandatory court based mediation as a system or concept is discussed at 5.8 below.

⁷³³ Pete S , Hulme D & du Plessis M et al *Civil Procedure: A Practical Guide 2* ed (2011) xlv. Court rules essentially regulate what is already established through enabling legislation. For example, with respect to civil litigation, the Uniform Rules of Court of 2009 and Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa are only effective and able to function as result of their enabling legislation in the form of the Superior Courts Act 10 of 2013 and the Magistrates' Court Act 32 of 1944, which creates and authorises the practice of litigation in these courts, at 2.4. This is similar to the CCMA Rules in that 'the CCMA Rules, as subordinate legislation, must therefore yield to the LRA and to the Constitution'. In *Kasipersad v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 178 (LC) 182, see 3.2.2.1 above for brief case discussion.

⁷³⁴ Department of Justice and Constitutional Development *Strategic Plan 2013-2018*(2013) 17; see 5.3.1 below.

⁷³⁵ Theys G 'Opinion on the new Rules for court directed mediation' *Master Mediators* 7 May 2013 available at <http://mastermediators.co.za/opinion-on-the-new-rules-for-court-directed-mediation/> (accessed 16 November 2014).

These voluntary rules were consolidated and published as the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa⁷³⁶ ('the Amended Magistrates' Court Rules'). These rules will function on a pilot project basis and will be rolled out at selected Magistrates' Courts across South Africa⁷³⁷ on 1 December 2014.⁷³⁸

The enabling legislation supporting these Amended Magistrates' Court Rules is the Rules Board for Courts of Law Act⁷³⁹ and the Jurisdiction of Regional Courts Amendment Act.⁷⁴⁰

⁷³⁶ Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014. The Amended Magistrates' Court Rules amends the current Magistrates' Court Rules 2010 by inserting the voluntary mediation rules under 'Chapter 2', following current Chapter 1, rule 2 of 'the Amended Magistrates' Court Rules'.

⁷³⁷ The selected Magistrates' Courts will be published in the Government Gazette prior to the commencement of these projects on 1 December 2014. Rule 74(2) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa.

⁷³⁸ Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; as further amended by Amendment of Rules Regulating the Conduct of Proceedings of Magistrates' Courts of South Africa in GN 571 GG 37848 of 18 July 2014.

⁷³⁹ Act 107 of 1985. Specifically, sections 6(1) and 6(2) of the Rules Board for Courts of Law Act state that: '(1) The Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Courts and the lower courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court of Appeal, the High Courts and the lower courts regulating-

(a) the practice and procedure in connection with litigation, including the time within which and the manner in which appeal shall be noted;

(b) the form, contents and use of process; ...

(2) (a) Different rules may be made in respect of the Supreme Court of Appeal, the High Courts and the lower courts and in respect of different kinds of proceedings.

(b) The Board may, with the approval of the Minister, make different rules in respect of-

(i) the Supreme Court of Appeal and the High Courts;

(ii) the different High Courts; or

(iii) the lower courts in different magisterial districts,

which shall be of force for the period or periods determined by the Board.'

Preamble of the Amended Magistrates' Court Rules'.

⁷⁴⁰ Act 31 of 2008. Specifically section 9 of the Jurisdiction of Regional Courts Amendment Act, 2008 states:

'(6) (a) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), must, within six months after the commencement of this Act, review and amend the existing rules of the magistrates' courts and the rules referred to in subsection (4), in order to ensure that courts of regional divisions can exercise the jurisdiction conferred on them under the Magistrates' Courts Act, 1944, as amended by this Act, effectively and efficiently.

(b) Any rules made or amended as a result of the amendments to the Magistrates' Courts Act, 1944, by this Act, must be aimed at enhancing access to the courts by, amongst others and as far as is reasonably possible—

(1) providing for simplified and expeditious procedures;

(ii) providing for clerks or registrars to assist litigants;

(iii) limiting the costs associated with the litigation processes; and

(iv) retaining or improving the measures introduced by the rules referred to in subsection (4) in order to facilitate and promote access to the courts referred to in subsection (1).

(c) The rules referred to in paragraph (a) must be submitted to Parliament.'

The Amended Magistrates' Court Rules provide that parties may refer a dispute to mediation prior to the commencement of litigation, or after the commencement of litigation, but before judgment is handed down.⁷⁴¹ However, where the trial has already commenced, the parties must first obtain the authorisation of the court.⁷⁴² A judicial officer may also at any time after the commencement of litigation, but before judgment is given, enquire into the possibility of mediation of a dispute and accord the parties an opportunity to refer the dispute to mediation.⁷⁴³

Similarly to the mandatory court based mediation rules, these rules for voluntary mediation aim to promote access to justice,⁷⁴⁴ restorative justice,⁷⁴⁵ preserve relationships between 'potential litigants which may become strained or destroyed by the adversarial nature of litigation',⁷⁴⁶ facilitate an expeditious and cost-effective resolution of disputes between parties,⁷⁴⁷ assist the parties in determining at an early stage of the litigation or prior to the commencement of litigation whether proceeding with trial or opposed application is in their best interests or not,⁷⁴⁸ and provide them 'with solutions to the dispute, which are beyond the scope and powers of the judicial officers'.⁷⁴⁹

These rules further provide that the parties to the mediation are liable for the fees of the mediator, except where the services of a mediator are provided for free.⁷⁵⁰ The tariffs of such

Preamble of the Amended Magistrates' Court Rules.

⁷⁴¹ Rule 75(1) of the Amended Magistrates' Court Rules.

⁷⁴² Rule 75(1) of the Amended Magistrates' Court Rules.

⁷⁴³ Rule 75(2) of the Amended Magistrates' Court Rules.

⁷⁴⁴ Rules 71(a) of the Amended Magistrates' Court Rules.

⁷⁴⁵ Rules 71(b) of the Amended Magistrates' Court Rules.

⁷⁴⁶ Rules 71(c) of the Amended Magistrates' Court Rules.

⁷⁴⁷ Rules 71(d) of the Amended Magistrates' Court Rules.

⁷⁴⁸ Rules 71(e) of the Amended Magistrates' Court Rules.

⁷⁴⁹ Rules 71(f) of the Amended Magistrates' Court Rules.

⁷⁵⁰ Rules 84(1) of the Amended Magistrates' Court Rules; discussed further at 5.8 below.

mediator fees will be determined by the Minister and published in the Government Gazette..⁷⁵¹

5.4 FUTURE IMPLEMENTATION OF MANDATORY COURT BASED MEDIATION IN SOUTH AFRICA

Even though court based mediation will be implemented on a voluntary basis in South Africa,⁷⁵² all is not lost for the possible future of mandatory court based mediation in the country.

The Minister stated at the Inaugural African Alternative Dispute Resolution and Arbitration Conference of 2013⁷⁵³ that he is fully aware that mandatory court based mediation is an international trend in foreign jurisdictions and that the common view is that South Africa should follow suit.⁷⁵⁴ In view of this, he proposed that the South African Law Reform Commission investigate this matter thoroughly and advise him on whether such mediation system could or should be implemented in South Africa's civil justice system.⁷⁵⁵

Subsequently, in March 2014, the Minister advised that while the current court based mediation rules⁷⁵⁶ may be voluntary, he takes cognisance of the fact that mandatory court

⁷⁵¹ Rules 84(3) of the Amended Magistrates' Court Rules; discussed further at 5.8 below..

⁷⁵² On 1 December 2014, see 5.3.1 above.

⁷⁵³ An ADR conference arranged by the Cape Chamber of Commerce and Industry together with the Chamber Trade Sweden, which took place in Cape Town on 28 and 29 November 2013. Radebe J 'The Inaugural African Alternative Dispute Resolution and Arbitration Conference' Cape Chamber of Commerce and Industry 28 November 2013 available at <http://capetownchamber.com/wp-content/uploads/2013/12/Mnisters-speech.pdf> (accessed on 14 March 2014).

⁷⁵⁴ Radebe J 'The Inaugural African Alternative Dispute Resolution and Arbitration Conference'.

⁷⁵⁵ Radebe J 'The Inaugural African Alternative Dispute Resolution and Arbitration Conference'.

⁷⁵⁶ The Amended Magistrates' Court Rules, due for implementation on 1 December 2014, discussed at 5.3.1 above.

based mediation rules would require enabling legislation.⁷⁵⁷ In view hereof he requested the Department of Justice to investigate the desirability of implementing such legislation and to prepare a draft Bill accordingly.⁷⁵⁸ He further advised that there are precedents in other comparable jurisdictions from which South Africa can draw lessons and best practices in developing such legislation.⁷⁵⁹ In this regard the Minister has appointed a Mediation Advisory Committee, who is responsible for, amongst others, assisting the Department in investigating the desirability and possibility of legislation regarding mandatory court based mediation.⁷⁶⁰

Based on the foregoing ministerial statements, the future implementation of mandatory court based mediation in South Africa's civil justice system remains a possibility. Perhaps the pilot projects, once launched⁷⁶¹ and monitored, would aid in investigating the desirability and practicality of introducing mandatory court based mediation as legislation in South Africa.

5.5 COSTS RELATED TO MANDATORY COURT BASED MEDIATION

Costs relating to mandatory court based mediation will be briefly highlighted below in order to consider the practical implication of mandatory court based mediation, from a cost perspective, if implemented in South Africa. The investigation into costs may be divided into the two enquiries, below, namely, the cost of implementing such a system in South Africa's civil justice system and who would bear the cost of engaging in the actual mediation process.

⁷⁵⁷ As discussed at 5.2.2 above. Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates' Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2.

⁷⁵⁸ Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates' Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2.

⁷⁵⁹ Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates' Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2. The jurisdiction of Australia may be a good example, as discussed in Chapter 4.

⁷⁶⁰ Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates' Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2.

⁷⁶¹ The Amended Magistrates' Court Rules, which are to be implemented on a pilot project basis from 1 December 2014. See 5.3.1 above.

5.5.1 The Cost of Implementing Mandatory Court Based Mediation

The costs of implementing mandatory court based mediation into South Africa's civil justice system would likely be covered by the Department of Justice and Correctional Services. Evidence of this can be identified in the Minister's speech, at the 'Access to Justice Conference' in 2011 where he stated that it was inexplicable that South Africa had taken such a long time to commit to reforming its civil justice system, through the implementation of a system such as mandatory court based mediation.⁷⁶² The Minister further explained that the Department of Justice had provided additional capacity in view of the financial budget and Human Resources in support of the CJRP and the implementation of mandatory court based mediation, at the time.⁷⁶³ It may therefore be evident that the Department of Justice supports the reformation and review procedures of South Africa's civil justice system and would therefore fund the implementation of mandatory court based mediation.

5.5.2 The Cost of Engaging in the Process of Mandatory Court Based Mediation

In the 2011 Draft Set of Rules as well as the Amended Magistrates' Court Rules, similar provision is made for the costs of the mediation process.⁷⁶⁴ These provisions stipulate that the parties participating in the mediation process are to pay for the mediator's fees and that such fees are to be split proportionally to the number of parties to the mediation process.⁷⁶⁵

The Amended Magistrates' Court Rules, give an indication of how court based mediation fees would be charged by mediators. These rules provide that tariffs of the fees chargeable by

⁷⁶² Radebe J 'Access to Justice Conference' Department of Justice and Constitutional Development 8 July 2011 available at http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html (accessed on 16 on February 2014).

⁷⁶³ Radebe J 'Access to Justice Conference'.

⁷⁶⁴ Section 10 of the of the Draft Mandatory Mediation Rules of the High Courts and the Magistrates' Courts of 2011 and section 84 of the of the Amended Magistrates' Court Rules. See 5.2.1 and 5.3.1 above

⁷⁶⁵ Section 10 of the of the Draft Mandatory Mediation Rules of the High Courts and the Magistrates' Courts of 2011 and section 84 of the of the Amended Magistrates' Court Rules. However, as provided in Rule 84(1) of the Amended Magistrates' Court Rules, parties are not liable for the fees of the mediator where the services of the mediator are provided free of charge (possibly pro bono mediators or where any party offers or undertakes to pay the fees of a mediator).

mediators must be published by the Minister together with the schedule of accredited mediators.⁷⁶⁶ Furthermore, mediators are prohibited from soliciting or negotiating any private arrangement relating to fees and must abide by such fee structure determined by the Minister.⁷⁶⁷

According to the status quo of South Africa's adversarial civil justice system, litigation, as the primary method of dispute resolution, is usually funded by the disputants themselves.⁷⁶⁸ It should likewise be understood that costs of mediation, as a primary method of dispute resolution, would be covered by the disputants involved.

The legal fees involved in litigation are excessive and often exceed the value of the claim in dispute.⁷⁶⁹ Further, the unpredictable time-frames in the litigation process often leads to unpredictable costs to be covered by the disputants.⁷⁷⁰

Therefore the costs related to litigation remain excessive and unpredictable.⁷⁷¹ However, the legal costs of mandatory court based mediation are standardised and controlled. Disputants are able to pay a determined fee prescribed by the Minister of Justice and Correctional Services⁷⁷² and are able split the costs of mediation process. Furthermore, mandatory court based mediation is speedy in nature,⁷⁷³ thereby curbing the costs that would have been

⁷⁶⁶ Rules 84 of the Amended Magistrates' Court Rules.

⁷⁶⁷ Department of Justice and Constitutional Development regulations in GN 598 GG 37883 of 1 August 2014.

⁷⁶⁸ See 2.5 above.

⁷⁶⁹ See 2.5 above.

⁷⁷⁰ See 2.5 above.

⁷⁷¹ See 2.5 above.

⁷⁷² Department of Justice and Constitutional Development 'Request for comments on court-annexed mediation rules' available at <http://www.justice.gov.za/legislation/invitations/invite-mediation.html> (accessed on 24 March 2014); see 5.5.2 above.

⁷⁷³ See 5.2.1 above.

expended on lengthy litigation processes. The costs involved in mandatory court based mediation, are therefore considerably less than the costs involved in litigation.⁷⁷⁴

Based on the above, mandatory court based mediation is more cost effective⁷⁷⁵ than the conventional practice of litigation. Even though disputants have to pay for using this ADR tool, it still remedies the shortcomings of the high costs of litigation as well as the uncertainty of escalating legal costs. Further benefits of mandatory court based mediation are discussed below.

5.6 THE ADVANTAGES AND BENEFITS OF MANDATORY COURT BASED MEDIATION

The advantages of mandatory court based mediation are set out in the objectives and purpose of the 2011 draft set of rules (as well as in the Amended Magistrates' Court Rules), as identified earlier in this chapter. In addition to these advantages, mandatory court based mediation provides a range of benefits to the South African civil justice system.

5.6.1 The Benefits of Mandatory Court Based Mediation to Legal Practice

It is acknowledged that legal practitioners may fear the implementation of mandatory court based mediation.⁷⁷⁶ This is premised on their perceived general belief that this ADR tool may considerably affect the revenue potential of their practices, as mediation would become the

⁷⁷⁴ Department of Justice and Constitutional Development 'Request for comments on court-annexed mediation rules' available at <http://www.justice.gov.za/legislation/invitations/invite-mediation.html> (accessed on 24 March 2014).

⁷⁷⁵ See 5.2.1 above.

⁷⁷⁶ Radebe J 'The Inaugural African Alternative Dispute Resolution and Arbitration Conference'.

primary method of dispute resolution, as opposed to litigation.⁷⁷⁷ However, as with litigation, disputants still have the option of making use of legal representation.⁷⁷⁸ The value of legal representation therefore remains recognised and unchallenged.⁷⁷⁹ In this regard, legal practitioners may be able to generate additional income through possibly acquiring mediation skills themselves and providing creative ways for generating decent fees for assisting their clients in the mediation process.⁷⁸⁰ Furthermore, the Minister of Justice, in his opening address at the Inaugural ADR in Africa Conference, stated that:

‘experience has shown that early resolution of disputes through an ADR Mechanism frees invaluable time for practitioners to focus on lengthy and complex matters.’⁷⁸¹

Legal practitioners are even able to broaden the scope of their practices to become dispute settlement practitioners and include negotiation skills, mediation skills as well as general ADR skills, in conjunction with litigation as part of their practice areas.⁷⁸² This may further substantially increase the revenue of their practices and enhance the legal practitioner’s reputation, as clients seek certainty, speedy and cost effective solutions to their disputes.⁷⁸³ In

⁷⁷⁷ Radebe J ‘The Inaugural African Alternative Dispute Resolution and Arbitration Conference; ‘Mediation is a much misunderstood process. Legal representatives often view it with suspicion, believing that the acronym for alternative dispute resolution,” ADR”, refers to” Alarming drop in Revenue”!’ Jordaan B ‘Court based mediation becoming a reality in SA civil justice system’ (2012) 517 *De Rebus* 21.

⁷⁷⁸ Rule 11 (1) of the Draft Mandatory Mediation Rules of the High Courts and the Magistrates’ Courts of 2011.

⁷⁷⁹ Joubert J ‘Court-annexed mediation opens doors to exciting opportunities’ *Legalbrief Today* 23 September 2014 available at <http://www.legalbrief.co.za/article.php?story=20140923130558982>(accessed 18 October 2014).

⁷⁸⁰ Jordaan B ‘Court based mediation becoming a reality in sa civil justice system’ (2012) 517 *De Rebus* 21.

⁷⁸¹ He further maintains that he optimistic for the future of mediation in South Africa’s civil justice system and looks forward to the participation and contribution of legal practitioners in implementing mediation into the civil dispute resolution arena. Radebe J ‘The Inaugural African Alternative Dispute Resolution and Arbitration Conference’.

⁷⁸² Jordaan B ‘Court based mediation becoming a reality in SA civil justice system’ (2012) 517 *De Rebus* 21.

⁷⁸³ Jordaan B ‘Court based mediation becoming a reality in SA civil justice system’ (2012) 517 *De Rebus* 21; Sedutla M ‘Mediation presents new opportunities for attorneys’ (2012) *De Rebus* available at <http://www.derebus.org.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=derebus:10.1048/enu> (accessed on 22 October 2014).

addition, because mediation is a speedy process, it can further improve the practice's cash flow.⁷⁸⁴

5.6.2 The Benefits of Mandatory Court Based Mediation to Disputants

One of the most fundamental benefits for disputants using mandatory court based mediation is the expedient nature and cost effectiveness of the process.⁷⁸⁵ This ADR tool has the potential of having a dispute resolved in a matter of days, from the institution of a dispute.⁷⁸⁶ This is opposed to a matter of years, through the litigation process, of which most of the time is spent on waiting for a trial date.⁷⁸⁷ Furthermore this tool is more cost effective, as the parties involved would pay a set mediation tariff and split the costs of the speedy mediation process, thereby avoiding huge litigation costs and legal fees.⁷⁸⁸

A successful mediation process and concluding settlement agreement has the benefit of being made a formal order of court, binding both parties.⁷⁸⁹ However, should the mediation process be unsuccessful, parties still have the benefit of having their matter resolved through conventional litigation.⁷⁹⁰ A further benefit to a failed mediation session is that it would assist in narrowing the contested issues in dispute, thereby saving time and money during later court proceedings.⁷⁹¹

⁷⁸⁴ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 21.

⁷⁸⁵ See the aims of the 2011 Draft Set of Rules and the Amended Magistrates' Court Rules', 5.2.1 and 5.3.1 above.

⁷⁸⁶ Joubert J 'Court-annexed mediation opens doors to exciting opportunities' *Legalbrief Today* 23 September 2014; alternatively concluded within the set time period allocated prior to the mediation proceedings, Rule 8 (a) of the Draft Mandatory Mediation Rules of the High Courts and the Magistrates' Courts of 2011.

⁷⁸⁷ As discussed at 2.4.1 and 2.5 above; Joubert J 'Court-annexed mediation opens doors to exciting opportunities' *Legalbrief Today* 23 September 2014

⁷⁸⁸ See 5.5.2 and 5.3.1 above.

⁷⁸⁹ Rule 9 of the Draft Mandatory Mediation Rules of the High Courts and the Magistrates' Courts of 2011.

⁷⁹⁰ See 5.3.1 and 5.2.1 above.

⁷⁹¹ Joubert J & Jacobs Y 'The debate- a case for mandatory mediation in South Africa' *Legalbrief Today* 6 October 2009; Joubert J 'Mandatory mediation will soon arrive in South Africa, and should be warmly welcomed by the legal profession' *Legalbrief Today* 9 November 2011.

Furthermore, through the practise of mandatory court based mediation, court rolls would become less crowded.⁷⁹² This is due to the fact that more cases will be settled early without going through the usual court procedure.⁷⁹³ In addition, matters referred to litigation may be finalised sooner, as the issues in dispute would have been narrowed down during prior mediation processes. Shortened court rolls and readily available court dates may also put pressure on disputing parties to settle their matters without going to court.

In addition, the practise of mandatory court based mediation would dispense with the formal and rigid litigation procedures and rules of evidence.⁷⁹⁴ Parties would therefore be able to represent themselves at the mediation proceedings, as the mediation proceedings would be simple enough to understand.

Furthermore, parties are still able to exercise their 'right to have their day in court'.⁷⁹⁵ This may be evidenced by the opportunity that disputants have to not only have their say, but to also have their message conveyed accurately to the opposing party, in a controlled environment.⁷⁹⁶ This further encourages proper communication and possible reconciliation between disputants.⁷⁹⁷ This is opposed to traditional adversarial litigation processes where the

⁷⁹² Overburdened court rolls as discussed under parts 2.3 and 2.5 of Chapter 2. Barbeau N 'Mediation Pilot Project for 2012' *Daily News* 9 December 2011 available at <http://www.iol.co.za/dailynews/news/mediation-pilot-project-for-2012-1.1195243#.USHKTx1kRYV> (accessed 17 February 2013).

⁷⁹³ As described under part 2.4.1 of Chapter 2. Barbeau N 'Mediation Pilot Project for 2012' *Daily News* 9 December 2011 available at <http://www.iol.co.za/dailynews/news/mediation-pilot-project-for-2012-1.1195243#.USHKTx1kRYV> (accessed 17 February 2013).

⁷⁹⁴ As mentioned above at 5.2.1.

⁷⁹⁵ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 19; Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 27.

⁷⁹⁶ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 19.

⁷⁹⁷ As per Draft Set of Rules, regarding the objective of preserving relationships, see 5.2.1 above.

lawyers handle negotiations during litigation, which seldom offer opportunities for the parties to speak to one another.⁷⁹⁸

Disputing parties have control over the duration, timing, cost and outcome of the dispute⁷⁹⁹ and possibly the choice of mediator to facilitate their dispute.⁸⁰⁰ Disputants are therefore able to play a more active role in the course of the resolution of their disputes.⁸⁰¹ They therefore no longer feel excluded from the resolution process due to the complex nature of litigation proceedings and being reliant on their legal practitioners to resolve their disputes on their behalf.⁸⁰² Furthermore, for a disputant with a legal representative who may wish to draw out a matter beyond his or her client's means or needs, mediation can ensure that such client has the final say on whether and when settlement should be negotiated and on what terms.⁸⁰³ This would therefore curb superfluous or exorbitant legal costs pertaining to the resolution of the disputant's matter.⁸⁰⁴

Mediation processes are also private and confidential in nature.⁸⁰⁵ Any information shared during these proceedings cannot be disclosed outside of the mediation session.⁸⁰⁶ Therefore, these sessions are not harmful to any of the disputants' lives or business reputations outside of the mediation process. Any of disclosures made during the mediation process are without

⁷⁹⁸ Joubert J 'Court-annexed mediation opens doors to exciting opportunities' *Legalbrief Today* 23 September 2014.

⁷⁹⁹ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 19.

⁸⁰⁰ Rule 5(2)(i) of the Draft Mandatory Mediation Rules of the High Courts and the Magistrates' Courts of 2011.

⁸⁰¹ Parties are provided with an 'opportunity to play a greater role in the management of their disputes by actively participating in the dispute resolution process. Mediation provides a forum for self-determination by encouraging parties to, identify their needs and interests; generate options to satisfy each party's needs and to maximise fulfilment of interests; and to create their own outcomes.' Alexander N 'Global trends in mediation: Riding the third wave' in Alexander N (ed) *Global Trends in Mediation 2* ed (2006) 10.

⁸⁰² See 2.5 above.

⁸⁰³ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 19.

⁸⁰⁴ Jordaan B 'Court based mediation becoming a reality in SA civil justice system' (2012) 517 *De Rebus* 19. This is opposed to civil litigation where the duration, timing, cost and outcome are out of the disputants' control and are unpredictable.

⁸⁰⁵ See 1.6.2 above..

⁸⁰⁶ Rule 8 (h) of the Draft Mandatory Mediation Rules of the High Courts and the Magistrates' Courts of 2011.

prejudice and will not be admissible as future evidence in any court.⁸⁰⁷ Therefore, mandatory court based mediation will not be harmful to any disputant's prospects later at the trial or hearing proceedings.⁸⁰⁸ The benefit of confidentiality during the mediation process also provides a safe environment within which parties can be encouraged to make full and frank disclosures.⁸⁰⁹ This provides significant opportunities for exploring and creating solutions to the dispute that might not be identified and that could not be imposed or provided for by a court through civil litigation.⁸¹⁰

There are additional benefits to the safety of the mediation environment, as discussed above. Due to the structured, yet informal and flexible, approach of mediation,⁸¹¹ a more comfortable and non-adversarial environment may be created for disputants.⁸¹² In this type of environment disputants are able to freely and creatively discuss resolution options⁸¹³ beyond the scope and function of the judicial officers.⁸¹⁴ Therefore,

‘with the assistance of a mediator, parties are encouraged to create options and search for new solutions, beyond what a court or arbitrator might be capable of providing. The parties are also not constrained to the scope of existing pleadings

⁸⁰⁷ Nor be binding on the parties outside of the mediation process, unless reduced to a written and signed settlement agreement. Rule 8 (e) of the Draft Mandatory Mediation Rules of the High Courts and the Magistrates' Courts of 2011.

⁸⁰⁸Joubert J & Jacobs Y ‘The debate- a case for mandatory mediation in South Africa’ *Legalbrief Today* 6 October 2009; Joubert J ‘Mandatory mediation will soon arrive in South Africa, and should be warmly welcomed by the legal profession’ *Legalbrief Today* 9 November 2011.

⁸⁰⁹ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 30.

⁸¹⁰ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 30.

⁸¹¹ Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates' Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2.

⁸¹² ‘The informality of the process should make a mediation process more “user-friendly” and less stressful than formal litigation processes.’ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 24.

⁸¹³ Sedutla M ‘Launch of Court-Based Mediation Pilot Project’ (2012) 516 *De Rebus* 8.

⁸¹⁴See 1.6.2 above, mediators during a mediation session, assist disputants in exploring different potential outcomes to their dispute. This ADR tool further allows disputants to find solutions that are generally not available in litigation. Joubert J & Jacobs Y ‘The debate- a case for mandatory mediation in South Africa’ *Legalbrief Today* 6 October 2009; The mediator ‘helps them explore their own and the other party's underlying concerns and interests...’ Joubert J ‘Court-annexed mediation opens doors to exciting opportunities’ *Legalbrief Today* 23 September 2014; Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 29.

or the remedies that a court can provide. They may seek to resolve a range of different issues, whether or not the subject of current litigation, or even to resolve in a single process disputes that span separate court proceedings in one or more jurisdictions.’⁸¹⁵

This will therefore better satisfy the needs as well as interests of the disputants involved, as opposed to the orders at the conclusion of court proceedings which are outside of the disputants’ control.⁸¹⁶

Disclosures during the mediation session may not be binding on the parties; however a settlement agreement reached between them is.⁸¹⁷ Research suggests that mediated settlements have a higher rate of voluntary compliance than court orders.⁸¹⁸ The reason for this is that the settlement will often conclusively deal with the underlying issues⁸¹⁹ and not merely the positions adopted by the parties.⁸²⁰ Furthermore, the problem-solving nature of the mediation process leaves parties with a sense that they have arrived at a fair outcome through a process that is conducive to the building, rather the destruction of relationships.⁸²¹

⁸¹⁵ Brand J, Steadman F & Todd C *Commercial Mediation: A User’s Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 29.

⁸¹⁶ Sedutla M ‘Launch of Court-Based Mediation Pilot Project’ (2012) 516 *De Rebus* 8; Joubert J ‘Court-annexed mediation opens doors to exciting opportunities’ *Legalbrief Today* 23 September 2014. This shortcoming discussed at 2.5 above.

⁸¹⁷ As discussed above, a settlement agreement may be made a formal order of court, binding all parties to the agreement; Joubert J & Jacobs Y ‘The debate- a case for mandatory mediation in South Africa’ *Legalbrief Today* 6 October 2009 (accessed on 8 February 2014).

⁸¹⁸ Jordaan B ‘Court based mediation becoming a reality in SA civil justice system’ (2012) 517 *De Rebus* 20; ‘Some of the most important benefits of mediation... which broadly relate to the efficiency of mediation as a dispute resolution process, are the following:... high levels of compliance with the terms of a settlement agreement [and the]... satisfaction of the parties.’ Brand J, Steadman F & Todd C *Commercial Mediation: A User’s Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 27.

⁸¹⁹ The mediator ‘helps them explore their own and the other party’s underlying concerns and interests, without commenting on the merits of the concerns.’ Joubert J ‘Court-annexed mediation opens doors to exciting opportunities’ *Legalbrief Today* 23 September 2014.

⁸²⁰ Jordaan B ‘Court based mediation becoming a reality in SA civil justice system’ (2012) 517 *De Rebus* 20; ‘During private sessions with the parties, a skilled mediator finds out more about the nature and origin of the dispute and explores different potential outcomes of the dispute.’ Joubert J & Jacobs Y ‘The debate- a case for mandatory mediation in South Africa’ *Legalbrief Today* 6 October 2009.

⁸²¹ Jordaan B ‘Court based mediation becoming a reality in SA civil justice system’ (2012) 517 *De Rebus* 20; Joubert J & Jacobs Y ‘The debate- a case for mandatory mediation in South Africa’ *Legalbrief Today* 6 October 2009. The benefits of mediation generally and the benefits of mandatory court based mediation to

5.6.3 The Benefits of Mandatory Court Based Mediation for South Africa as a Nation

The objective of mandatory court based mediation, to preserve the relationship between disputing parties,⁸²² may encourage peace, reconciliation⁸²³ and restoration between South Africans. This is opposed to fighting disputes through the adversarial civil litigation system, resulting in destroyed relationships between disputing parties.⁸²⁴

Furthermore, the language used in mediation is the language of the parties involved, thereby breaking down any barriers in communication and enabling parties to speak freely and without hindrance.⁸²⁵ The mediation process therefore encourages direct communication between the aggrieved parties, which further encourages reconciliation and restoration among South Africans.⁸²⁶ In furtherance to this, the process also provides the possibility of bridging mistrust and poor communication,⁸²⁷ and

‘provides an opportunity to protect relationships, even those damaged by the dispute, and it may minimise the deterioration of relationships or even provide an opportunity to deepen and develop existing relationships. At the very least, it provides an opportunity to get relationships ‘back on track’ and to provide a sounder footing for longer term relationships that may have been affected negatively by a dispute.’⁸²⁸

disputants, discussed under 5.6.2, are similar. However, if mediation is made compulsory the benefits of this ADR process would be experienced even by unwilling participants, see 5.7.2 below.

⁸²² See 5.2.1 above.

⁸²³ Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates’ Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2; as per the Preamble of the Constitution, 1996, see 2.2.2.1 and 2.6 above.

⁸²⁴ See 2.5 above.

⁸²⁵ Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates’ Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2.

⁸²⁶ Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates’ Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2.

⁸²⁷ Brand J, Steadman F & Todd C *Commercial Mediation: A User’s Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 29.

⁸²⁸ ‘Of course some mediations result in relationships ending, either by agreement or by virtue of the fact that settlement is not achieved. In such situations mediation has the potential to assist parties to clarify the issues in dispute and consider realistically their alternatives to a negotiated agreement.’ Brand J, Steadman F & Todd C *Commercial Mediation: A User’s Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 29.

Therefore, the implementation of mandatory court based mediation may also importantly promote the spirit of Ubuntu,⁸²⁹ as the ideal strived for in South Africa in order assist in healing the injustices of its past. This spirit of Ubuntu emphasises ‘community building, respect, sharing, empathy, tolerance,’⁸³⁰ and the seven ‘C’s’, being ‘communication, ‘consultation, compromise, cooperation, camaraderie, conscientiousness and... compassion.’⁸³¹ All of these qualities of Ubuntu can be found in the objectives and beneficial impact of mandatory court based mediation on South Africa, as discussed above.

In a broader sense, as a nation striving to move on from its adverse and disharmonious past, these abovementioned benefits may be essential to South Africa, especially in view of its Constitution.⁸³²

5.7 ARGUMENTS AGAINST MANDATORY COURT BASED MEDIATION

A number of criticisms and concerns regarding this process have been raised, particularly from the legal profession.⁸³³ These are discussed below, followed by possible counter arguments thereto.

5.7.1 Criticisms and Perceived Challenges from the Legal Profession

The criticisms and perceived challenges of mandatory court based mediation, particularly from the legal profession, include the fact that mandatory court based mediation is not suited

⁸²⁹ See 2.2.2.1 above.

⁸³⁰ Brand J, Steadman F & Todd C *Commercial Mediation: A User’s Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 1.

⁸³¹ Marks SC *Watching the Wind: Conflict Resolution During South Africa’s Transition to Democracy* (2000) 183.

⁸³² See 2.2.2.1 above.

⁸³³ Jordaan B ‘Court based mediation becoming a reality in SA civil justice system’ (2012) 517 *De Rebus* 21.

to all types of civil disputes.⁸³⁴ Litigation, in their view, would remain the most appropriate dispute resolution process for all types of civil matters.⁸³⁵

Further, the blanket-inclusion of mediation as a compulsory first step may prolong the dispute resolution process, especially in matters which may be ‘destined to fail at mediation’.⁸³⁶ It is also believed that this system may prejudice a litigant who may have limited financial resources from achieving a preferred legal outcome at the lowest possible cost, in a dispute where the opposing party is not prepared to negotiate on the matter⁸³⁷ and particularly if the opposing party has a weak case.

A further pertinent criticism, as previously mentioned, is the concern that the revenue of legal practises would be negatively affected through the lesser pursuit of litigation in civil disputes.⁸³⁸ This may be of even greater concern to legal practises which specialise in civil litigation.

By making mediation a mandatory process for civil disputants, it may diminish the freedom of parties to resolve their dispute as they may deem appropriate.⁸³⁹ Moreover, compelled collaboration between disputing parties may encourage further hostility between them,⁸⁴⁰

⁸³⁴ Oosthuizen S & Blom P ‘Mandatory mediation as integrated into the process of dispute resolution in South Africa’ (Autumn 2012) *Dispute resolution matters*’ (DLA Cliffe Dekker Hofmeyr) 4.

⁸³⁵ Oosthuizen S & Blom P ‘Mandatory mediation as integrated into the process of dispute resolution in South Africa’ (Autumn 2012) *Dispute resolution matters*’ (DLA Cliffe Dekker Hofmeyr) 4.

⁸³⁶ Oosthuizen S & Blom P ‘Mandatory mediation as integrated into the process of dispute resolution in South Africa’ (Autumn 2012) *Dispute resolution matters*’ (DLA Cliffe Dekker Hofmeyr) 4.

⁸³⁷ Oosthuizen S & Blom P ‘Mandatory mediation as integrated into the process of dispute resolution in South Africa’ (Autumn 2012) *Dispute resolution matters*’ (DLA Cliffe Dekker Hofmeyr) 4.

⁸³⁸ Radebe J ‘The Inaugural African Alternative Dispute Resolution and Arbitration Conference’.

⁸³⁹ Oosthuizen S & Blom P ‘Mandatory mediation as integrated into the process of dispute resolution in South Africa’ (Autumn 2012) *Dispute resolution matters*’ (DLA Cliffe Dekker Hofmeyr) 4.

⁸⁴⁰ Oosthuizen S & Blom P ‘Mandatory mediation as integrated into the process of dispute resolution in South Africa’ (Autumn 2012) *Dispute resolution matters*’ (DLA Cliffe Dekker Hofmeyr) 4.

which may possibly have the opposite effect regarding the objectives of mandatory court based mediation.⁸⁴¹

5.7.2 Counter Arguments for Mandatory Court Based Mediation

Each criticism and perceived challenge from the legal profession is discussed below with some being contested and others being accepted. The contestations of these criticisms and perceived challenges will be mostly based on the benefits and advantages of mandatory court based mediation.⁸⁴²

It is acknowledged that mandatory court based mediation may not be suited to every type of civil matter.⁸⁴³ However, those matters which are successfully mediated, would aid in assisting litigious matters being resolved at court more expeditiously. In other words, all successfully mediated civil disputes, negating the usual court process, would ease the burden on court rolls and aid in achieving better access to justice in civil disputes.⁸⁴⁴ Therefore, with lighter court rolls a sooner trial or hearing date may be allocated to litigious disputes. Although mandatory court based mediation may not be suited to all civil disputes, matters suited to the usual processes of litigation would still benefit from this ADR tool.

As argued in the preceding section, there will be cases where mediation is unsuccessful. There are also cases where only certain issues in the matter reach agreement and certain issues left unresolved. The advantage in such circumstances would be the fact that the disputed issues in the matter would be narrowed down before proceeding to litigation at

⁸⁴¹ With regards to the objective of preserving the relationships of the disputing parties involved, as discussed at 5.2.1.above.

⁸⁴² As discussed at 5.5 above.

⁸⁴³ For example, where one party to the dispute may want binding judicial precedent to apply to resolution of the matter, or where one of the parties has no valid defence in the matter. For a few further examples, see 4.7 above.

⁸⁴⁴ See 5.8.3 above.

court.⁸⁴⁵ Therefore, the matter may be resolved more expeditiously than if it went straight to court without the initial phase of mediation.⁸⁴⁶

A further contested criticism is the fact that disputants with limited resources may be disadvantaged in mediation proceedings where the opposing party is not prepared to negotiate on the matter. This may be the case when mandatory court based mediation is in its early stages of implementation in South Africa's civil justice system. In other words, when the benefits and advantages of the system are yet to be recognised and the general practise thereof is unfamiliar to South Africans. However, perhaps once the process becomes established and the beneficial impacts recognised,⁸⁴⁷ people maybe more willing to participate in the mediation process. Disputants may then no longer resist the process and approach it with apprehension, but would instead participate with the aim of reaching a negotiated settlement at a lower cost to litigation.

The argument of the drop in revenue of legal practises can also be contested. The expeditious nature of mediation would improve cash flow and the practice thereof would also enhance the reputation of the business.⁸⁴⁸ Should mandatory court based mediation become established and gain popularity, clients would seek legal services from practices involved in mediation.⁸⁴⁹

⁸⁴⁵ Particularly the benefits towards disputants, see 5.6.2 above.

⁸⁴⁶ 'Even if a dispute is not settled in its entirety, mediation may succeed in resolving parts of a dispute or limiting the issues. In this way it may succeed in resolving parts of a dispute or limiting the issues. In this way it may operate as an extremely effective adjunct to litigation.' Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 30.

⁸⁴⁷ See 5.6.2 above

⁸⁴⁸ See 5.6.1 above.

⁸⁴⁹ '[E]xciting new opportunities are available for the legal profession. Not only to refer to and represent clients at court-annexed mediations, but also to offer mediation services. If the profession does not make use of these opportunities it may find itself playing catch up with other professions who are keen to get involved'. Joubert J 'Court-annexed mediation opens doors to exciting opportunities' *Legalbrief Today* 23 September 2014.

Two other criticisms, namely the infringed freedom of choice and compelled collaboration⁸⁵⁰ will now be considered.

It is acknowledged that South Africans' freedom to choose how they wish to resolve their civil dispute may be affected. However mandatory court based mediation is not aimed at disadvantaging civil disputants, but aimed at benefiting them.⁸⁵¹ In view hereof one should therefore weigh up the possible infringement of the freedom of choice against the considerable amount of benefits which this system generally provides to disputants.⁸⁵² In this regard the benefits of mandatory court based mediation may hold more weight, making the possible aforementioned infringement seem less significant. Furthermore, as previously mentioned, should the mediation process become established in South Africa and all the beneficial impacts recognised, disputants may not necessarily consider mandatory court based mediation to be an infringement on their freedom to choose a method of resolving their dispute.

In addition, the perception that compelling collaboration between disputing parties possibly resulting in further hostility between them, will now be considered. It may be argued that South Africans may not be keen on going through this mediation procedure as they have not been exposed to this process before nor experienced its benefits.⁸⁵³ Thus, as mentioned above, once the aims and benefits of mandatory court mediation are realised in South

⁸⁵⁰ Mentioned at 5.7.1 above.

⁸⁵¹ See 5.2.1 above.

⁸⁵² As discussed at 5.6.2 above.

⁸⁵³ Particularly the aim and benefit of encouraging the preservation of relationships and non-adversarial and more environments created for dispute resolution. As discussed at 5.2.1 (objectives) and 5.6.2 (benefits) above.

Africa's civil justice, parties may be more willing to participate in this ADR process and mandatory court based mediation would become more supported in this regard.⁸⁵⁴

However despite these perceived challenges, the implementation⁸⁵⁵ of mandatory court based mediation would significantly aid in benefiting not only the disputants but also the civil justice system. This ADR process may be beneficial to the South African civil justice system; however its constitutionality still needs to be considered.

5.8 THE CONSTITUTIONALITY OF MANDATORY COURT BASED MEDIATION

This section includes a brief discussion on various constitutional rights, values⁸⁵⁶ and state duties which mandatory court based mediation would give effect to. This Chapter further discusses whether implementing this system contravenes any rights contained in the Bill of Rights, particularly section 34 of the Constitution.⁸⁵⁷

5.8.1 The Founding Provisions of the Constitution

The preamble of the Constitution,⁸⁵⁸ inter alia seeks to move South Africans forward from its adverse history, promote unity in the nation, heal the divisions of the past and build a united nation based on democratic values, social justice and fundamental human rights.

⁸⁵⁴ It has been noted that unwilling disputants can become willing participants in the mediation process and further participate in the constructive and successful outcomes of the matter, Bathurst T.F 'The role of the courts in the changing dispute resolution landscape' (2012) 35(3) *University of New South Wales Law Journal* 876 ; As Spigelman CJ states, 'There is a category of disputants who are reluctant starters, but who become willing participants', as quoted from Bathurst T.F 'The role of the courts in the changing dispute resolution landscape' (2012) 35(3) *University of New South Wales Law Journal* 877.

⁸⁵⁵ As implemented in terms of South Africa's Draft Set of Rules 2011, see 5.2.1 above.

⁸⁵⁶ Some of the benefits and advantages of mandatory court based mediation, discussed at 5.5 above, correspond with a number of constitutional rights and values. These identified constitutional rights and values are briefly discussed below.

⁸⁵⁷ See 2.4 above.

⁸⁵⁸ At 2.2.2.1 above.

According to section 1, the founding values of the Constitution are human dignity, the achievement of equality and the advancement of human rights and freedoms.⁸⁵⁹

Mandatory court based mediation may aid in facilitating the goal of restoring the injustices of South Africa's past through encouraging reconciliation and compromise between disputants, in the face of adversity.⁸⁶⁰ This ADR process may further encourage the constitutional aim of the nation to move away from its adverse past, through the benefit of encouraging unhindered communication between aggrieved parties⁸⁶¹ and maintaining the objective of preserving the relationship of the disputants through mediation⁸⁶²

Moreover, allowing disputants the opportunity to discuss their differences with the aim of reaching a harmonious solution, would unite South Africans in their diversity, assist in healing the injustices and divisions of the past, promote social justice, restorative justice⁸⁶³ and ensure that each party's human dignity, equality and freedom (basic democratic and human rights) are exercised.

Therefore, based on the above discussions, mandatory court based mediation gives effect to the preamble as well as section 1 of the Constitution.

⁸⁵⁹ Section 1 of the Constitution, 1996.

⁸⁶⁰ As disputants are to discuss their underlying issues and differences and work towards a mutually beneficial solution, as discussed at 5.6.2 above. Further, that the objective of mediation is to preserve the relationship between the litigants which may become strained or destroyed by the adversarial nature of litigation. Also see compromise and reconciliation, as discussed at 5.6.3 above.

⁸⁶¹ See 5.6.3 above.

⁸⁶² See 5.2.1 and 5.6.3 above.

⁸⁶³ Department of Justice and Constitutional Development *Court Annexed Mediation (Palm Ridge Magistrates' Court, Seat of the New Ekurhuleni Magisterial District in the Gauteng Province)* (2014) 2; as discussed above regarding the preamble of the Constitution, 1996.

5.8.2 Rights contained in the Bill of Rights that Mandatory Court Based Mediation gives effect to

Chapter 2 of the Constitution, the Bill of Rights, is ‘the cornerstone of democracy in South Africa’ as ‘it enshrines the rights of its people and ‘affirms the democratic values of human dignity, equality and freedom’.⁸⁶⁴ The Constitution further provides for the state’s duty to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.⁸⁶⁵

Section 9 (1) provides that everyone has the right to be equal before the law as well as to have equal protection and benefit of the law. Section 10 goes on to provide that everyone has inherent dignity and the right to have their dignity respected and protected. Section 14 further provides that everyone has the right to privacy and section 16 states that everyone has the right to freedom of expression.

The above fundamental rights are promoted and given effect to through the implementation of mandatory court based mediation into South Africa’s civil justice system in the following way.

The disputing parties are considered to be equal before the law, in that they have an equal opportunity to present their respective cases before an impartial mediator, in an attempt to settle their dispute.⁸⁶⁶ Moreover, the disputants may be able to do so in a dignified manner while simultaneously having their dignity respected and protected.

In addition, the forum of a mediation process is of a private nature, thereby maintaining the disputants’ right to privacy, as discussed above. In furtherance to promoting the right to

⁸⁶⁴ Section 7(1) of the Constitution, 1996.

⁸⁶⁵ Section 7(2) of the Constitution, 1996.

⁸⁶⁶ The concept of mediation is discussed at 1.6.2 and applied in mandatory court based mediation as discussed at 5.2 above. The disputants are furthermore given an opportunity to have their cases communicated accurately to opposing party, see 5.6.2. above.

privacy, any disclosures made during the mediation process are made entirely without prejudice to the parties' rights, remain confidential and are not allowed to be disclosed outside of the mediation session.⁸⁶⁷

The disputants' right to freedom of expression is promoted not only through the fact that their disclosures are private, but through the fact that they are encouraged to be open and speak their minds in an attempt to reach a win-win solution.⁸⁶⁸ The structured, yet flexible and informal environment created⁸⁶⁹ encourages disputants to have the freedom to discuss their views and resolve their matter amicably.⁸⁷⁰

Based on the above discussions it is evident that a number of essential and fundamental rights in the Bill of Rights are given effect to through the implementation mandatory court based mediation. Therefore such system appears to lines up with the Constitution and its foundational democratic values. Further constitutional discussions, however, follow below.

5.8.3 The Constitutional Value of Access to Justice

As previously discussed,⁸⁷¹ given South Africa's unjust and unequal past, access to justice is considered 'an inalienable constitutional right flowing from [its] constitutional democracy'.

⁸⁷²

⁸⁶⁷ As discussed at 5.6.2 above.

⁸⁶⁸ '...the mediation process gives parties an opportunity to speak their minds and to express their emotions; provide the parties with their 'day in court', but without requiring them to give up control of the outcome; and offers the opportunity, if settlement is reached, to secure a final and certain outcome of the dispute.' Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 27.

⁸⁶⁹ Brand J, Steadman F & Todd C *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 25.

⁸⁷⁰ As discussed at 5.6.2 above.

⁸⁷¹ See 1.6.3 above.

⁸⁷² Radebe J 'Challenges facing access to justice in S.A' *The Department of Justice and Constitutional Development* 16 October 2012 available at http://www.justice.gov.za/m_speeches/2012/20121016_min-uct.html accessed on 15 February 2014). See 1.6.3 above.

The fundamental benefits and advantages that mandatory court based mediation provides for disputants include the less costly, less complex and speedier ways of resolving civil disputes as well as the benefit of alleviating the heavy burden on court rolls.⁸⁷³ These beneficial aspects would fundamentally aid in promoting access to justice in South Africa,⁸⁷⁴ given the definition of access to justice, described in Chapter 1 above.⁸⁷⁵ This is evidenced as follows:

‘In order to ensure access to justice in a civil justice system, the system should be just in the results it delivers; be fair in the way it treats litigants; offer appropriate procedures at a reasonable cost; deal with cases with reasonable speed; be understandable to those who use it; be responsive to the needs of those who use it; provide as much certainty as the nature of particular cases allows; and be effective that is, adequately resourced and organised.’⁸⁷⁶

The promotion of access to justice is also a pivotal objective of mandatory court based mediation.⁸⁷⁷

5.8.4 The Mandate of the South African Branches of State as Contained in the Constitution

Certain sections of the Constitution place duties upon and mandate the branches of state in South Africa. These sections include section 7(2) of the Bill of Rights that provides that the state is mandated to respect, protect, promote and fulfil the rights contained in the Bill of Rights. Furthermore section 8 provides that the Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary as well as all organs of state. This ensures that the

⁸⁷³ See 5.6.2 above. Also, a discussion on the cost-effectiveness of mandatory court based mediation is 5.8 below as a possible further benefit of mandatory court based mediation.

⁸⁷⁴ ‘There is no doubt that optimal use of the ADR [mediation] enhances access to justice especially in a country such as ours [South Africa’s] where costs associated with litigation have spiralled upwardly.’ Radebe J ‘The Inaugural African Alternative Dispute Resolution and Arbitration Conference’.

⁸⁷⁵ See 1.6.3 above.

⁸⁷⁶ Chief Justice Ngcobo ‘Enhancing access to justice: The search for better justice’ *Access to Justice Conference* 6 July 2011 18-19 available at http://www.justice.gov.za/ocj/cfw/2011-access-to-justice-conference/20110708_ajc_chief-justice-speech.pdf (accessed 25 September 2014).

⁸⁷⁷ As discussed at 5.2.1 above.

South African state works towards transforming the country's justice system (in this regard, the civil justice system), in order to keep it in line with the Constitution, 1996.

The South African government sought to fulfil the abovementioned constitutional mandate through its aim of implementing mandatory court based mediation into the country's civil justice system. This is evidenced through the following discussions.

The primary aim of the Civil Justice Reform Project (CJRP)⁸⁷⁸ and the introduction of mandatory court based mediation is:⁸⁷⁹

‘the alignment of the civil justice system with the constitutional values, and the simplification and harmonisation of rules to make justice easily and equally accessible to all, particularly the vulnerable and the poor members of society. An effective and efficient justice system is indispensable for upholding the rule of law in the country.’⁸⁸⁰

Furthermore, the former Minister of Justice in his speech at a 2012 ‘Challenges Facing Access to Justice in South Africa’ presentation, stated that the South African government is to reform and improve its civil justice system to ensure that it serves the interest of justice and is consistent with the dictates of the Constitution, 1996.⁸⁸¹ To this end the Department of Justice and Constitutional Development developed mandatory court based mediation.

A further constitutional mandate can be found at item 16, subsection 6(a) of Schedule 6 of the Constitution, which states that as soon as is practical after the 1996 Constitution takes effect,

⁸⁷⁸ See 1.1 above.

⁸⁷⁹ See 5.2.1 above.

⁸⁸⁰ Department of Justice and Constitutional Development *Discussion Document* (2012) 20.

⁸⁸¹ Radebe J ‘Challenges facing access to justice in SA’ *The Department of Justice and Constitutional Development* 16 October 2012 available at http://www.justice.gov.za/m_speeches/2012/20121016_min-uct.html (accessed at 15 February 2014).

‘all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.’

Therefore in view of the preceding discussions in this part of the chapter, it would appear that the implementation of mandatory court based mediation together with its constitutional benefits would support this important mandate, through the establishment of a civil judicial system upholding the ethos and value system of the Constitution. It may therefore be that, given the fact that 18 years have passed since the Constitution, 1996 took effect, that such implementation of this ADR tool is well overdue.

5.8.5 Does the Concept of Mandatory Court Based Mediation Infringe Section 34 of Constitution?

5.8.5.1 Section 34 of Constitution

Section 34, entitled ‘Access to Courts’, states that

‘everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’.

Upon the straightforward reading of section 34, it provides that everyone has the right to have disputes that are susceptible to legal determination decided in a fair, public hearing by a court or by another independent or impartial tribunal.⁸⁸² Thus, the purpose of this section is essentially to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law.⁸⁸³

⁸⁸² *LufunoMphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 201.

⁸⁸³ *Lesapo v North West Agricultural Bank and Another* 1999 (12) BCLR 1420 (CC) 8. The rule of law in this regard, may further be understood as an obligation placed upon the state ‘to provide the necessary mechanisms for citizens to resolve disputes that arise between them’, with ‘its corollary in the right or entitlement of every

As Justice O'Regan in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*⁸⁸⁴ held, upon interpreting section 34, that if one reads this section closely, it clearly provides disputants with

‘a right to have disputes resolved (a) by the application of law in(b) a fair(c) public hearing before(d) a court or (e) where appropriate an independent and impartial tribunal. Properly read, an independent and impartial tribunal...must hold fair, public hearings when it resolves disputes by the application of law. It is not possible textually to detach the requirement of fairness from the requirement of being in public: both requirements apply to proceedings before courts and independent and impartial tribunals.’⁸⁸⁵

The court further held that ‘this section must be interpreted on its own language and with integrity’;⁸⁸⁶ thus, in answering the question of whether ‘another independent and impartial tribunal or forum’ applies to forums which conduct private proceedings in the resolution of disputes, the court held that in terms of section 34, it does not.⁸⁸⁷ Therefore these impartial tribunals or forums are to be interpreted as state provided tribunals and forums similar in this respect to courts in which fair, public (open) hearings are to be held.

person to have access to courts’ or similar independent forums, provided by the state for the settlement of their disputes. *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) 39.

⁸⁸⁴ *LufunoMphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC). This constitutional court case raised a series of constitutional issues regarding the relationship between arbitrations, the courts and the Constitution. The case further involved the interpretation of section 34 of the Constitution (as well as whether this section applies to the ADR process of private arbitrations).

⁸⁸⁵ *LufunoMphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 211.

⁸⁸⁶ *LufunoMphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 214.

⁸⁸⁷ Justice O'Regan held that ‘in considering whether private arbitration fits into the framework of section 34, we have to acknowledge that private arbitration, as conventionally understood, is ordinarily not held in public. It is, as its name implies, a private process. Nor can it ordinarily be said that arbitrators have to be independent in the full sense that courts and tribunals must be...The language of section 34 does not seem to fit our conception of private arbitration. The section must be interpreted on its own language and with integrity, and I cannot conclude, given the general lack of fit between private arbitration and the language of the section, that the section has direct application to private arbitration.’ *LufunoMphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 213.

5.8.5.2 Concerns regarding infringement of section 34

In view of the discussion of section 34 above, some have expressed their concerns that mandatory court based mediation would infringe on the constitutional right of access to courts, that is, to have their dispute adjudicated through the application of law in a fair hearing before a public court or similar tribunal, in order to arrive a final finding or judgment in their matter.⁸⁸⁸

Mandatory court based mediation is not conducted in a public forum or tribunal and is in fact private and confidential process.⁸⁸⁹ Therefore, by compelling disputants to pass through another (private) forum, which section 34 does not provide for, may possibly be construed as unconstitutional. Furthermore, a mediator, by nature, cannot make a decision by the application of law nor arrive at a judgment or final decision, as the court does.⁸⁹⁰ Thus, further compelling disputants to have their disputes mediated may be seen as an infringement on their constitutional right to have their matter determined by the court who would make a final decision in law and arrive at a judgment producing a legal winning party and losing party.⁸⁹¹

⁸⁸⁸The Cape Law Society, at its annual general meeting in November 2011 hosted a workshop on the draft rules for mandatory court based mediation, led by a panel of members from its specialist committee. Some questions were raised in response to the presentation; one in particular being whether mandatory court based mediation would infringe the constitutional right to have a justiciable dispute heard by a court of law, in terms of section 34 of the Constitution. Hawkey K 'Mandatory Mediation Rules to Shake Up Justice System' (2011) 515 *De Rebus* 21.

⁸⁸⁹ See characteristics of mediation at 1.6.2 above.

⁸⁹⁰ A mediator can only facilitate or guide the disputants to arrive at their own settlement, producing a outcome or solution by mutual agreement between the parties. See 1.6.2 above.

⁸⁹¹ As discussed at 5.8.5.1 above, section 34 is said to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law.

5.8.5.3 Counter Arguments to the Concerns Regarding the Contravention of Section 34

The aforementioned arguments for mandatory court based mediation infringing section 34 can be understood. However they may not necessarily be valid. The reason disagreeing that section 34 is contravened, is discussed below.

The process of mandatory court based mediation provides that litigants, once an appearance to defend or notice of intention to oppose has been entered, should attempt to mediate their dispute. Should the mediation be unsuccessful, litigants may revert to mainstream litigation to have their matter formally decided in an open court.⁸⁹²

It should be understood that mandatory court based mediation compels disputants to attempt to settle their dispute but does not compel them to settle.⁸⁹³ Therefore nothing prevents disputants from reverting to normal court procedures to have their matter judicially resolved, should the parties be unable to achieve settlement. Further, should the dispute only be partially settled, the rest of the disputed issues may still be resolved at court, as usual.⁸⁹⁴ It may therefore be asked, how then is a disputant's right of access to courts infringed, if the right remains intact and available to them?

In furtherance to the above argument, one of the compulsory requirements of the rule 37 pre-trial conference⁸⁹⁵ is to attempt settlement by way of mediation.⁸⁹⁶ Even though legal practitioners often consider this to be a mere a formality and thus not attempted,⁸⁹⁷ the

⁸⁹² See 5.6.2 above.

⁸⁹³ As per the nature and concept of mandatory court based mediation, discussed at 5.2 above.

⁸⁹⁴ See 5.2 and 5.5.2 above.

⁸⁹⁵ See 2.4.1.1.1 above.

⁸⁹⁶ See 2.4.1.1.1 above. The emphasis here is 'attempt'.

⁸⁹⁷ See 3.2.1.2 above.

compulsory requirement still exists in terms of the Uniform Rules of Court of 2009.⁸⁹⁸ All litigants, in terms of this rule of court, are compelled to attempt to settle their dispute, however are not compelled to settle.⁸⁹⁹ It is therefore not clear why the Rule 37 pre-trial conference is not deemed unconstitutional, that is, an infringement of section 34 of the Constitution.

The process of mandatory court based mediation is therefore not likely to contravene section 34, as some may be of the view. The right to return to mainstream litigation, after attempting settlement through mediation, is not taken away through the implementation of mandatory court based mediation in South Africa's civil justice system.

Considering the argument that section 34 will not likely be contravened by mandatory court based mediation, and considering the fact that this ADR tool facilitates the promotion of the values as well as the fundamental rights in the Constitution, this system may in fact be constitutionally sound and lines up with the values therein.⁹⁰⁰

5.9 CONCLUSION

This chapter assessed the concept of mandatory court based mediation together with its advantages and benefits to the legal fraternity, disputants and the nation of South Africa. It was also shown how this ADR tool gives effect to the Constitution's core rights and values and confirmed that no constitutional right is likely to be contravened through its implementation into the civil justice system.

⁸⁹⁸ See 2.4.1.1.1.1 above.

⁸⁹⁹ 'Rule 37 (6) The minutes of the pre-trial conference shall be prepared and signed by or on behalf of every party and the following shall appear therefrom:...(c) that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto; (d) whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred;...' Uniform Rules of Court 2009. See 2.4.1.1.1 above.

⁹⁰⁰ And consistent with section 2 of the Constitution.

It is acknowledged that mandatory court based mediation is not free from criticism and may not be suited to all civil disputes. However, this does not detract from the overall beneficial impact that this system may have on South Africa and its civil justice system if implemented. Moreover, the benefits of mandatory court based mediation outweigh the arguments against it.

Even though the pilot schemes will implement court based mediation on a voluntary basis in South Africa, the implementation of mandatory court based mediation remains a future possibility.

CHAPTER 6

CONCLUSION

6.1 INTRODUCTION

The central aim of this thesis, as set out in Chapter 1, is to determine whether mandatory court based mediation is a suitable ADR tool to implement in South Africa in order to remedy the shortcomings within the South African civil justice system.

To this end, the South African civil justice system and its primary method of dispute resolution (litigation) were investigated as a point of departure.⁹⁰¹ It was discovered that the civil justice system remains characterised by complex and time-consuming litigation procedures; overburdened court rolls; excessive delays in the resolution of civil disputes; and high costs of litigation.⁹⁰² It was established that these shortcomings hinder the attainment of access to justice in the civil justice system.⁹⁰³ Despite numerous state initiatives over decades in order to assist in remedying these shortcomings, these injustices prevail.⁹⁰⁴

Nelson Mandela, when interviewed in the 1960s during the Apartheid era, stated that

‘there are many people who feel that it is useless and futile for us to continue talking peace and non-violence — against a government whose only reply is savage attacks on an unarmed and defenceless people. And I think the time has come for us to consider, in the light of our experiences at this day at home, whether the methods which we have applied so far are adequate.’⁹⁰⁵

⁹⁰¹ Chapter 2 of this thesis.

⁹⁰² Discussed at 2.5 above.

⁹⁰³ See 2.5 above.

⁹⁰⁴ See 2.5 above.

⁹⁰⁵ Hutchinson B ‘Nelson Mandela dead at 95: Fearless leader helped bring democracy to South Africa’ *New York Daily News* 8 December 2013 available at <http://www.nydailynews.com/news/world/grim-robben-island-couldn-sap-nelson-mandela-spirit-article-1.1541025> (accessed 23 October 2014).

Perhaps the time has come to consider, in view of the persistent shortcomings in South Africa's civil justice system, whether the government's⁹⁰⁶ attempts at remedying these shortcomings, are adequate. In this regard, it is concluded that perhaps a fundamental change in the civil justice system, such as altering the primary method of civil dispute resolution, may be necessary.⁹⁰⁷

The thesis went on to discover that mediation, as an alternative to litigation, operates as an important method of dispute resolution in the areas of labour, family and commercial law. It was further discovered that this ADR tool was implemented with the view of remedying the adversarial shortcomings in these areas of South African law.⁹⁰⁸ The success of mediation in these specific fields was highlighted and was evidenced through the support from the legislature and judiciary, particularly in the fields of labour and family law,⁹⁰⁹ and through the level of support from the corporate governance system⁹¹⁰ in company law.⁹¹¹

Mediation as a primary method of dispute resolution is suited to Australia's NSW and Victorian civil justice systems⁹¹² and was also implemented together with case management as one of the two main methods to the remedy.. It was discovered that South Africa has a similar civil justice system to NSW and Victoria with similar shortcomings due to the adversarial nature of these systems through the primary method of dispute resolution being litigation.⁹¹³ The mediation programmes adopted in NSW and Victoria may therefore be

⁹⁰⁶ Together with the legislature and judiciary, see 2.5 above.

⁹⁰⁷ See 2.6 above.

⁹⁰⁸ See 3.2.1, 3.2.2 and 3.2.3 above.

⁹⁰⁹ See 3.2.1.1, 3.2.1.2, 3.2.2.1 and 3.2.2.2 above.

⁹¹⁰ See 3.2.3

⁹¹¹ See 3.2.3.1, 3.2.3.2 and 3.2.3.3 above.

⁹¹² See 4.5.3 and 4.6.3 above.

⁹¹³ See 4.3.2 above.

useful as a model that South Africa could follow, regarding implementing mediation into an adversarial civil justice system in order to remedy the shortcomings of the system.⁹¹⁴

In view of recent developments in South Africa's civil justice system, a voluntary set of court based mediation will be implemented on a pilot project basis on 1 December 2014. The South African government, however, had initially introduced these court rules as a system of mandatory court based mediation.⁹¹⁵ The process of mandatory court based mediation was investigated in Chapter 5, together with its beneficial and constitutional qualities as well as its criticisms.⁹¹⁶

The concluding chapter of this thesis will therefore establish whether mandatory court based mediation is a suitable ADR tool to implement in South Africa in order to remedy the persistent shortcomings within its civil justice system. This chapter will then conclude with brief recommendations on how this system may be implemented into the country's civil justice system.⁹¹⁷

6.2 THE SUITABILITY OF MANDATORY COURT BASED MEDIATION IN THE SOUTH AFRICAN CIVIL JUSTICE SYSTEM

Theoretically, it should be borne in mind that the rationale behind the implementation of mandatory court based mediation is for the benefit of the South African civil justice system, the people and their interests.⁹¹⁸ Mandatory court based mediation does not intend to

⁹¹⁴ See 4.8 above.

⁹¹⁵ See 3.2 above.

⁹¹⁶ See 5.6, 5.7 and 5.8 above.

⁹¹⁷ The implementation of mandatory court based mediation is not the focus of this study and methods of implementation have not formally been investigated. However suggestions will be made in this regard. See 1.2 above.

⁹¹⁸ See 5.2.1 above regarding the objectives of mandatory court based mediation and for the aims of the CJRP which introduced mandatory court based mediation, see 1.1 above. For the benefits of mandatory court based mediation see 5.6 above.

eradicate mainstream litigation and remove disputing parties' constitutional right to have their disputes decided at court (or a similar tribunal).⁹¹⁹ On the contrary, this ADR tool is implemented in order to work alongside the already existing court system⁹²⁰ in order to enhance its functioning. That is, to attain the overarching purpose of remedying the shortcomings in South Africa's civil justice system. This includes promoting access to justice as well as restorative justice.⁹²¹ This is the lense through which mandatory court based mediation should be viewed when answering the research question: is mandatory court based mediation is a suitable ADR tool to implement in South Africa, in order to reduce significantly the shortcomings within its civil justice system?

Mandatory court based mediation appears to remedy the recurring shortcomings identified in the South African civil justice system.⁹²² Furthermore in view of the advantageous and beneficial qualities of mandatory court based mediation,⁹²³ as well as the Constitution's core values and preamble which this system gives effect to,⁹²⁴ it appears that this ADR tool is indeed suitable to implement in the South Africa.

Furthermore, it appears that mandatory court based mediation lines up with section 2 of the Constitution, and does not appear to contravene any Constitutional provision. Instead, this ADR process upholds the spirit of Ubuntu and the country's Constitutional ethos.⁹²⁵

⁹¹⁹ See 5.6.5 above.

⁹²⁰ As evidenced by the objectives of the mandatory court based mediation rules (see 5.2 above) and discussions of against the possible contravention section 34 (see 5.8.5.3 above).

⁹²¹ See 5.8.3 and 5.6.3 above.

⁹²² See 5.6 above.

⁹²³ See 5.6.1, 5.6.2 and 5.6.3 above.

⁹²⁴ See 5.8.1 and 5.8.2 above.

⁹²⁵ As per Constitution's Preamble.

It is acknowledged that mandatory court based mediation is not free from criticism and may not be suited to all civil claims and disputes.⁹²⁶ However, this does not detract from the overall suitability of the concept to the South African civil justice system.

It is not suggested that mandatory court based mediation will cause South Africa's civil justice system to operate at optimal efficiency. However, implementing this ADR process will make a significant contribution in remedying the aforementioned prevailing shortcomings and assist in promoting access to justice as well as the constitutional framework and ethos of the country.

6.3 RECOMMENDATIONS

If mandatory court based mediation is a suitable process for South Africa's civil justice system, it may be asked how such system may be implemented. When the introduction of mandatory court based mediation in South Africa was proposed in 2011 by way of court rules,⁹²⁷ it was rejected in the absence of enabling legislation sanctioning these rules.⁹²⁸ In this regard, it therefore is suggested that mandatory court based mediation be introduced via legislation, in order to give effect to the regulation of these processes through specific court rules. There currently exists no legislation in South Africa authorising the compulsory practice of mediation in all civil disputes.⁹²⁹ In view hereof the former Minister of Justice⁹³⁰ seeks to be advised whether such enabling legislation should be implemented in the country.⁹³¹ The arguments in this thesis regarding the suitability of mandatory court based mediation may therefore hold persuasive value in advising the Minister accordingly.

⁹²⁶ See 5.7.1 above.

⁹²⁷ See 5.2.1 above.

⁹²⁸ See 5.2.2 above.

⁹²⁹ See 5.2.2 above.

⁹³⁰ The Minister of Justice and Constitutional Development, Jeffery Radebe.

⁹³¹ See 5.4 above.

In addition, legislating mediation is not a new phenomenon in South Africa. Over 23 pieces of legislation provide for mediation in various areas of law.⁹³² Moreover, mediation is expressly legislated in the areas of labour, family and commercial law.⁹³³ Furthermore, the former Minister⁹³⁴ advises that there are precedents from other comparable jurisdictions from which South Africa may draw lessons and best practices from, in developing such compulsory legislation.⁹³⁵ As discussed, the Australian states of NSW and Victoria may be appropriate jurisdictions in this regard.⁹³⁶ Therefore, should mandatory court based mediation be implemented as legislation in future, lessons may be drawn from these states.⁹³⁷ Based on the possible lessons identified in this thesis, the enabling legislation on mandatory court based mediation should not be implemented in a vacuum.⁹³⁸ The support and commitment from the legislature, judiciary, legal profession, legal education institutions, civil disputing parties as well as the general public is necessary when implementing this ADR tool as legislation in South Africa.⁹³⁹

Further, the mandatory mediation systems implemented in NSW and Victoria still experience a number of valid criticisms.⁹⁴⁰ However, despite criticism, the mediation programmes operate effectively in these states and have significantly aided in eradicating the shortcomings previously experienced in their civil justice systems.⁹⁴¹ Therefore, despite the arguments against mandatory court based mediation in South Africa,⁹⁴² this ADR tool may still be able

⁹³² See 3.4 above.

⁹³³ See 3.2.1, 3.2.2, 3.2.3 above.

⁹³⁴ The Minister of Justice and Constitutional Development, Jeffery Radebe.

⁹³⁵ See 5.4 above.

⁹³⁶ See 4.9 above.

⁹³⁷ See 4.5.4 and 4.6.4 above.

⁹³⁸ See 4.9 above.

⁹³⁹ See 4.9 above.

⁹⁴⁰ See 4.7 above.

⁹⁴¹ See 4.7 above.

⁹⁴² See 5.7.1 above.

to operate effectively and aid in significantly eradicating the shortcomings identified in the country's civil justice system.

Nonetheless, on 1 December 2014 the Amended Magistrates' Court Rules will be launched across South Africa on a pilot project basis.⁹⁴³ This programme is not mandatory in nature and many disputants may avoid this programme, as it may be unfamiliar to them, with the result that the benefits of mediation may not be initially experienced. However, the voluntary court based mediation rules may be a step in the right direction for South Africa in finding an adequate method for remedying the shortcomings of its civil justice system. This will therefore leave the door open to the possibility of implementing mandatory court based mediation in the South African civil justice system in the future.

Word Count: 55 331

⁹⁴³ At selected Magistrates' courts, see 5.3.1 above.

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