Mediation Talk to the 2023 Mediation Training Intake

by

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1. Now that you have been introduced to the High Court's mediation program, I want to share with you some of the challenges we have faced in practice. That will be useful in two respects. To our local mediators who are going to be accredited to start work as accredited mediators immediately; and to our colleagues from Zimbabwe – so that in crafting their own mediation program they will build in safeguards to avoid the challenges we have experienced.

2. I am credibly informed that my team shared with you the tangible benefits that we have had from mediation as a strategic intervention to promote greater access to justice for the public. The more cases that are settled, the more space is created on the Court's calendar to entertain additional cases. Ideally, courts should devote their time and resources to those cases that cannot be resolved through mediation. For example, complex questions of law and enforcement of the Constitution. No court system can ever have enough judges and facilities to entertain and finalise within a reasonable time all the cases that are registered at the Court's registry.

3. Mediation started off well at the High Court but over time we begun to experience bad habits and practices. It is those that I am going to share with you today, now that you have come to the end of your training.

The Government as a litigant

4. It is an unavoidable reality that in the majority of cases filed in the High Court, the Government is the defendant. The other reality is that the Government machinery moves quite slowly. Too many actors are involved before a decision can be taken. Most importantly, for Government to settle a dispute sounding in money, the Treasury has to give the go-ahead. That makes it difficult to have a representative at the mediation session who, as the rules require, has settlement authority. Now, to conduct a mediation with a person without settlement authority is a complete waste of time. The result is that the majority of mediation sessions involving the Government fail. That is very frustrating to both the mediator and the other party.

5. To deal with that reality, I have advised managing judges to be more creative in cases involving the Government. The preferred approach now is not to order mediation in such cases until pleadings have closed, discovery has been made and witness statements have been filed. It is at that stage that the responsible Government officials often realise the strength or weakness of their case. It is then that people realise, faced with the certainty of trial, that they will have to go into the witness box and face cross-examination – which is often not a pleasant experience.

6. While on the Government, let me address a related issue. It is lay litigants suing Government from prison. Our experience is that this kind of litigant does not settle easily. Often they are serving long terms of imprisonment and they value a day out to come to the Court building. Often their claims are for big sums of money and any realistic counter offer in line with past awards do not appeal to them. It is also preferable in such cases to allow pleadings to close and to move the case up to the stage of witness statements.

<u>Attending without settlement authority</u>

7. On a more general level, the worst mediation is one where one of the parties in attendance has no settlement authority. This is not confined to the Government. It could be a company, for example. Never allow that to happen.

<u>Delay in having the settlement agreement signed</u>

8. If a mediator is not astute enough and allows the parties to go away without signing the settlement agreement that they have agreed upon, chances are one of them will renege. Mediators are therefore encouraged to reduce to writing all that has been agreed and make the parties sign right there at the mediation venue. That means, of course, that a computer, printer and a copy machine must be available at the mediation venue. The mediation office sees to it that those facilities are available.

Wrong choice of mediator

9. Our mediation program started off on the basis of the generalist mediator. In other words, we did not insist on the selection of a mediator for a case based on skill and expertise. Over time that did not work well. For example, it is expecting too much that a person with no knowledge of the construction industry can competently mediate a complex building or engineering dispute. Likewise, little profit is gained from letting an inexperienced lawyer mediate a medical negligence dispute. We have learnt valuable lessons and are moving in the direction of placing the accent on matching skill and experience with the subject matter of the dispute. We have therefore asked all mediators to specify their areas of specialisation or skill and that is published on our website in the hope that litigants will select a mediator based on his or her particular skill and or experience.

10. The process is not complete until we bring about appropriate changes to the Rules of Court and Practice Directions to empower the judges to approve the mediator in a particular case. Judges will then be able to assist the litigants to match skill and expertise with subject-matter. Under the current legal dispensation, the parties exclusively retain the choice of mediator.

Unhelpful mediation briefs

11. You would have learnt that the parties are required to exchange settlement proposals as a precursor to the mediation. Often times, that does not happen and no genuine

effort is made by some lawyers to be constructive by making realistic proposals to solve the dispute. Guard against that and insist on compliance with the rules.

The judges

12.

(a) Managing judges sometimes do not apply their minds properly before referring a matter to mediation. Some disputes are of the nature, perhaps because of the litigants' personality traits or emotions involved such as in divorces, that it is unhelpful to refer a matter to mediation too early in the litigation process. It is a judgment call that judges are expected to make guided by the practitioners and the pleaded case. It is unhelpful to be prescriptive on this.

(b) Points of law are not susceptible to mediation. I will be bold to say that it is not in the public interest to refer to mediation a case which requires, say, interpretation of the Constitution, a statute, a will or a Trust. In some cases such as under the Labour Act 11 of 2007, appeals to the High Court are only allowed on points of law. Such disputes should not be referred to mediation. An authoritative decision of the court is required in such matters.

Legal practitioners

13. I have reserved for last the biggest culprits: Lawyers.

(a) Legal practitioners have, regrettably, presented the biggest challenge to the success of the mediation program. Why is that?

(b) They have the penchant to see mediation as an extension of the court process. They tend to turn mediation into an adversarial process. Mediation under our Rules of Court is intended to be the avenue for a neutral third party to communicate directly with the lay litigants and to tease out settlement possibilities and to encourage an amicable resolution of the dispute. It is not a forum for grandstanding by lawyers. Lawyers' role is to make sure that their clients are not prejudiced in their rights during the process. Not to try and cross-examine the client's opponent. It is important therefore for the mediator to upfront clarify the purpose of mediation and keep lawyer's conduct in check.

(c) Our law permits legal practitioners from comparable legal systems to represent clients in Namibia in litigation. Lawyers from South Africa have regrettably misunderstood that and seek to 'represent' litigants at mediations. We have had situations where junior and senior counsel were being briefed to come and 'represent' clients during mediation. That kind of conduct is discouraged.

(d) We have experienced obstructive behaviour from some legal practitioners who would actively discourage their clients to settle. Some lawyers show up unprepared to mediation sessions and in some cases would see the client for the first time at the mediation. It is not unheard of for lawyers to tell mediators that they are in a hurry and have only limited time for the mediation; texting on cellphones and disrupting proceedings. The moral of the story is that as mediators you should be firm with lawyers and report obstructive behaviour in your report to the Judge.

Conclusion

14. I am pleased to welcome you to our pool of accredited mediators. You are an important cog in the wheel of our administration of justice. I now let you loose on the public and trust that you will acquit yourself honourably in the service of the High Court.

15. Remember, you are officers of the Court and your first and foremost duty is to the Court.

All the best.