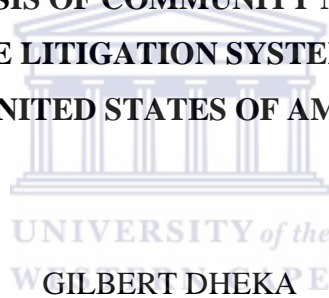




**UNIVERSITY of the
WESTERN CAPE**

FACULTY OF LAW

**A COMPARATIVE ANALYSIS OF COMMUNITY MEDIATION AS A TOOL OF
TRANSFORMATION IN THE LITIGATION SYSTEMS OF SOUTH AFRICA AND
THE UNITED STATES OF AMERICA**



(Student Number: 3159047)

Research paper submitted in partial fulfilment of the requirements for the LLM degree

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2016

DECLARATION

I declare that '*A Comparative Analysis of Community Mediation As a Tool Of Transforming in the Litigation Systems of South Africa and the United States of America*' is my own work, that it has not been submitted for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Name: Gilbert Dheka

Date: November 2016

Signed:.....



DEDICATION

This research is dedicated to my parents Mr Magura and Mrs Patience Dheka.

I can never thank you enough for everything you have done for me in my life. May the Almighty God reward them more with years of success and kindness. Thank you for your unconditional love and support in all my endeavours in life.



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I would like to extend my appreciation to the following individuals:

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KEYWORDS

ADR

ADR Institutional Structures

Community Mediation

Divorce Mediation

Family Mediation

Mediation



ABBREVIATIONS

ADR	Alternative Dispute Resolution
CCMA	Commission for Conciliation, Mediation and Arbitration
CPP	Community Peace Program
DiSAC	Dispute Settlement Accreditation Council
FAMAC	Family Mediators Association of the Cape
IMMSA	Independent Mediation Services of South Africa
MDMA	Mediation in Certain Divorce Matters Act
NABFAM	National Accreditation Board for Family Mediators
NAFCM	The National Association for Community Mediation
SGB	School Governing Body
UMA	Uniform Mediation Act
UNICTRAL Model Law	United Nations Commission on International Trade Law Model Law
VOC	Victim–offender Conferencing

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CHAPTER 1

1.1 BACKGROUND

The dynamics of the modern South African society sometimes create misunderstandings, competition, and hostility among communities, all of which contribute greatly to the endemic nature of dispute in our society.¹ Alternative Dispute Resolution (ADR) as a method of adjudication in South Africa has been very useful as a means of resolving disputes at a reasonable cost to the parties involved.

Alternative Dispute Resolution refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts.² It is not a new concept, but one that has been in existence in less formal ways, for a long time. For example, within rural SA, traditional forms of ADR, like community mediation, have existed for a long time although they were not formalised. The earliest unofficial people's courts were civic associations with dispute settlement functions which were founded in 1901 in the Cape Town area.³ Over the years, many governmental and non-governmental institutions have tried to address the question of integrating, controlling, acknowledging or formalising these 'community courts' originally known as *Makgotla*.⁴

Generally, the origins of community mediation in SA can be traced back to African group mediation in which conflicts were seen in their social contexts.⁵ They were not seen as isolated events and all relevant background information was covered during mediation. During mediation, not only are the consequences for the parties looked at but also the consequences for others in their families.⁶ The traditional objectives of African mediation are to soothe hurt feelings and to reach a compromise that can improve future relationships.⁷ The values that were upheld in African mediation were African humanistic values.

¹ Okharedia AA 'The emergence of alternative dispute resolution in South Africa: a lesson for other African countries' (2011) A paper presented at the 6th IIRA African Regional Congress of Industrial Relations, Lagos Nigeria.

² Mnookin R 'Alternative Dispute Resolution' *Harvard Law School Paper Series* (1998) 1.

³ Van Niekerk GJ 'Peoples courts and peoples justice in South Africa - new developments in community dispute resolution' (1994) 27 (1) *De Jure*

⁴ Murithi T 'Practical Peace-making Wisdom from Africa: Reflections on Ubuntu' (2006) 1 (4) *JPAS* 27.

⁵ Malan J 'Conflict resolution wisdom from Africa' (1997) African Centre for the Constructive Resolution of Disputes (ACCORD) 87.

⁶ Malan J (1997) 87.

⁷ Relationships of the past, present and future are looked at; there is an interest-based orientation towards the future. See, Malan J 'Conflict Resolution' (1997) 27, for a detailed discussion.

During the apartheid era the law was largely perceived by Black citizens to be an instrument of oppression. The inability to meet the needs of ordinary citizens was however not merely due to the content of the substantive law, but also because the structure and procedural requirements of the courts meant that many people were denied access to them.⁸ Many of the peculiar problems facing the Black community stemmed from the largely ineffective administration of the justice system in Black areas. Legal problems as well as problems of social adjustment encountered by urban Blacks were not being solved. It is therefore not strange that people resorted to self-help in the form of community mediation or folk institutions. In urban areas different forms of community courts were instituted and these courts had their philosophical background in the customary law that was being practised by traditional leaders in traditional courts in the rural areas.⁹

Traditionally mediation was not recognised as a form of dispute resolution in SA, but this changed in the 1970s when a major shift that took place in industrial relations gave rise to a need for more appropriate forms of dispute resolution in the workplace. This need was filled at the time by Independent Mediation Services of South Africa (IMSSA) which was instrumental in introducing forms of mediation and arbitration.¹⁰ In SA, mediation has been used mainly in labour disputes, matrimonial disputes, community disputes and political disputes.¹¹ While mediation has flourished in these areas, little progress has been made to date in putting the process to use in commercial disputes.¹²

Since the beginning of South Africa's political transition in the early 1990s, the country has become an active arena for experimentation in ADR systems. These efforts have arisen out of a foundation laid in the early 1980s with the establishment of IMSSA, an NGO originally devoted to expanding the use of ADR in the resolution of labour disputes before the Commission for Conciliation, Mediation and Arbitration (CCMA) was introduced by the government.¹³ In addition to IMSSA, the African Centre for the Constructive Resolution of Disputes, the Vuleka Trust, the Community Law Centre, the Wilgespruit Fellowship Centre,

⁸ Grant B & Schwikkard PJ 'People's courts' (1991) 7 *SAJHR* 304.

⁹ South African Law Commission Issue Paper 8 Project 94 Alternative Dispute Resolution (1997) 14.

¹⁰ South African Law Commission Issue Paper 8 Project 94 Alternative Dispute Resolution (1997) 17.

¹¹ McKinnell J 'Dispute Resolution' available at <http://www.bowman.co.za/DisputeResolution/Index.asp> (accessed 18 July 2015).

¹² McKinnell J 'Dispute Resolution' available at <http://www.bowman.co.za/DisputeResolution/Index.asp> (accessed 18 July 2015).

¹³ Thompson F 'Traditional Conflict Resolution Methods Used in Black Townships in South Africa' (1992) 22 *International Journal of Group Tensions* 168.

the Community Dispute Resolution Trust, the Institute for Multi-Party Democracy and the Community Peace Foundation, to name a few notable institutions, implemented a variety of training, mediation, and community reconciliation programs to help manage community tensions, resolve neighbourhood disputes, train community leaders in negotiation and conflict management techniques, and establish neighbourhood justice centres.¹⁴

When IMSSA began in the early 1980s, it focussed exclusively on the labour sector through its Industrial Dispute Resolution Service. As the reputation of the IMSSA mediators and arbitrators grew, other parts of the community began to call on them to provide similar services. As a result, IMSSA created the Community Conflict Resolution Service to help resolve community conflicts, including inter-tribal violence in the taxi wars, and disputes in schools. Later, it created the Project Management Unit to manage umbrella donor grants intended to support community dispute resolution services of all types.¹⁵

Looking at more recent procedural development, there are certain rules that were also passed with regard to mediation by courts. The Rules Board for the courts of law has amended the rules regulating the conduct of proceedings of the Magistrates Courts of SA with a view to introducing ADR mechanisms by way of court-annexed mediation in the court system.¹⁶ Since 1994, High Court Rule 37(6) (d) has required parties to report to the Court whether any issue has been referred by the parties for mediation, arbitration or decision by a third party. This requirement places a duty on the parties to consider the appropriateness of mediation and/or arbitration for their particular dispute. Unfortunately this requirement (along with the rest of the Rule 37 requirements) has for the most part been ignored, with the parties merely reporting that such procedures were not appropriate. Recently our courts have taken steps to reinforce the requirements of Rule 37. For instance, the South Gauteng High Court in a 2007 Practice Directive stipulates:

¹⁴ Thompson F (1992) 175-180.

¹⁵ Thompson F (1992) 178.

¹⁶ Mc-Laren I 'Mediation of civil matters in the Magistrates and Regional Courts of South Africa' (2014) available at <http://mclarens.co.za/mediation-of-civil-matters/> (accessed 7 September 2015).

‘The practice which has developed over the years where the provisions of the rule are ignored must come to an end. Failure to comply with the rule will in future lead to the matter not being allocated for trial’.¹⁷

These directives were given further substance by the ruling in *Brownlee v Brownlee*¹⁸ in which Brassey AJ found that there were several issues that would have benefitted from being submitted to mediation. He further found that the parties’ legal representatives, and specifically the attorneys, had a positive duty to advise the parties of these benefits, which in the instant case they had failed to do.¹⁹

In essence, what the Rules Board has done is introduce a process of mediation into litigation with a view to promoting access to justice, promoting restorative justice, as well as preserving relationships between litigants or potential litigants which may become strained or destroyed by the adverse nature of litigation. Foremost of all of this, the concept of mediation is aimed at facilitating an expeditious and cost effective resolution of a dispute between litigants or potential litigants, as well as assisting litigants or potential litigants to determine at an early stage of litigation or prior to commencement of litigation, whether proceeding with a trial or an opposed application would in fact be in their best interests or not. Litigants or potential litigants are, through the process of mediation, also provided with solutions to their dispute which may be beyond the scope and powers of judicial officers, that is, the informal solution and settlement of disputes.²⁰

Unlike SA, the United States of America (USA) has a more decided focus on and history of community mediation. McGillis²¹ notes that many communities across the USA have developed an additional approach for handling disputes by establishing community mediation programs that address a broad range of conflicts. The community mediation model in the USA emphasises the value of people hoping to seek and achieve their own solution to the disputes between them.²² The mediator is the guardian of self-reliance and his or her conduct

¹⁷ Rycroft A ‘Why Mediation is not Taking Root in South Africa’, in Africa Centre for Dispute Settlement 2009 *Quarterly Newsletter* 2-3, available at http://www.usb.ac.za/disputesettlement/pdfs/October_Newsletter_2009.pdf (accessed 7 September 2015).

¹⁸ 2008/25274.

¹⁹ *Brownlee v Brownlee* 2008/25274.

²⁰ Mc Laren I ‘Mediation of civil matters in the Magistrates and Regional Courts of South Africa’ available at <http://mclarens.co.za/mediation-of-civil-matters/> (accessed 7 September 2015).

²¹ McGillis D ‘Community Dispute Resolution Programs and Public Policy’ (1986) US Department of Justice, National Institute of Justice, Office of Communication and Research Utilization 20-22.

²² Perkovich R ‘A Comparative analysis of Community mediation in the United States and the People’s Republic of China’ (1996) 10 *Temple International Law & Comparative Law Journal* 322.

is largely dedicated to achieving compromise between the opposing parties.²³ Therefore, the mediator remains neutral and seeks to direct the process by which the disputants achieve their own solution without controlling the outcome.²⁴ In so doing, the mediator may orchestrate an adaptable series of steps, strategies, and skills to guide the parties in their effort to resolve the dispute, while refraining from imposing a solution. Mediators, despite the fact that they may be qualified to do so, make no representations or recommendations regarding the substantive law that may govern the dispute.²⁵

South African mediators, like their American counterparts, do not emphasise morality when they are assisting parties in reaching an agreement. The mediator's primary objective is to achieve a settlement but also to clarify the issues of the dispute.²⁶ When the mediator tries to emphasise the importance of values and morals to the parties he/she must not force this upon the parties as this may cause the dispute to escalate as opposed to bringing it to an end. It is important in South African mediation that the mediator is neutral and impartial; the parties need to accept the mediator from the start of the mediation process.²⁷ When parties accept the mediator, this indicates the type of influence the mediator will have when he/she has to exercise an intervention.²⁸

In some foreign jurisdiction, such as, the USA, Australia and the United Kingdom, mediation has been more openly accepted by the courts. In England, the Court in *PGF II SA v OMFS Company 1 Ltd*²⁹ held that a refusal to mediate could be seen as unreasonable and may be punished by a costs sanction. The Court of Appeal in this case also gave an unequivocal endorsement to the view expressed in the ADR handbook that silence in the face of an invitation to participate in ADR is, as a general rule, unreasonable.³⁰ In another English case, *Northrop Grumman Mission System Europe Limited v BAE System Ltd*,³¹ the judge also found that where a party to a dispute for which there are reasonable prospects of being successfully resolved by mediation, rejects mediation on grounds which are not strong enough to justify not mediating, then that conduct will generally be unreasonable.

²³ Kovach KK *Mediation: Principles and Practice* (1994) West Publishing Company 29.

²⁴ Kovach KK (1994) 29.

²⁵ Perkovich R (1996) 322.

²⁶ Anstey M *Managing Change Negotiation Conflict* 3 ed (2006) 245.

²⁷ Anstey M *Managing Change Negotiation Conflict* 3 ed (2006) 250.

²⁸ Anstey M (2006) 250.

²⁹ *PGF II SA v OMF Company 1 Ltd* (2013) EWCA Civ 1288.

³⁰ *PGF II SA v OMF Company 1 Ltd* (2013) EWCA Civ 1288.

³¹ *Northrop Grumman Mission Systems Europe Ltd v BAE Systems* (2014) (Al Diriyah C4I) Ltd (No 2) EWHC 3148 (TCC.)

In the South African case *Van den Berg v Le Roux*,³² which dealt with the variation of a custody order after divorce, Kgomo JP ordered the parties to privately mediate all future disputes with regard to their ten-year-old daughter. He noted that only subsequent to the conclusion of the mediation process could either party approach a competent court which has jurisdiction to decide the dispute. In delivering this decision the Court effectively subjected the parties to mandatory family mediation, clearly illustrating that community mediation is important as a mechanism to solve disputes in the community.³³ In *Townsend-Turner and Another v Morrow*, the Court made a similar decision when confronted with an access dispute between the father of a seven-year-old boy and the boy's maternal grandmother. The parties were ordered to attend mediation offered by private mediators of their own choice or those proposed by the office of the Family Advocate in an effort to resolve the issues of conflict between them including the issue of access.³⁴

From a slightly different angle mediation also came under the spotlight in the Zimbabwe High Court in *G v G*.³⁵ In this case it was pointed out that the adversarial system of litigation is often inimical to the interests of children when questions of divorce, custody and access are involved. Therefore the Court referred to a comparative study of parties who went for mediation and others who left it up to the court to adjudicate their differences, which showed very clearly and definitely that there was greater satisfaction among both children and parents in those cases where family mediation was used as opposed to an adversarial approach.³⁶

In light of recent developments in South African law, perhaps most notably in *Brownlee v Brownlee*,³⁷ it has been argued that a number of principles pertaining to mediation should now be accepted as forming part of South African law.³⁸ The first of these principles is that the parties to a dispute are obliged seriously to consider the appropriateness of mediation. This obligation is contained in Uniform Rule 37(6) (d)³⁹ which, in terms of the *Brownlee* judgment, is plainly of general application, spanning the gamut of different types of disputes. The second is that parties should refer a matter to mediation where a reasonable chance exists

³² *Van den Berg v Le Roux* (2003) 3 All SA 599 (NC).

³³ *Van den Berg v Le Roux* (2003) 3 All SA 599 (NC).

³⁴ *Townsend-Turner and another v Morrow* (2004)1 All SA 235 (C)

³⁵ *G v G* (2003) (5) SA 396 (Z).

³⁶ *G v G* (2003) (5) SA 396 (Z).

³⁷ *Brownlee v Brownlee* case no. 2008/25274(HC).

³⁸ Kotze H 'Rule 37 and Mediation in Africa Centre for Dispute Settlement ' QUARTERLY NEWSLETTER (2009) available at http://www.usb.ac.za/dispute_settlement/pdfs/OctoberNewsletter_2009.pdf (accessed 07/09/2015) 2-4.

³⁹ High Court of South Africa, Uniform Rule 37(6) (d).

that it might contribute to the dispute being settled *in toto* or to a settlement of certain of the issues in dispute. Moreover, the principle emerges that attorneys are duty bound to advise their clients of the benefits of mediation, and to provide them with advice concerning the submission of a dispute to mediation. The fourth principle is that a party or legal representative neglecting such duty is vulnerable to being punished by means of an adverse costs order.⁴⁰

The above developments have been somewhat undermined by the general perception that the success of mediation in employment disputes has not been sufficiently replicated elsewhere in South African law. This appears to be the case notwithstanding the fact that the legislature (and the judiciary) have been sending an increasingly strong message that mediation is a necessary tool to be applied in a wide variety of contexts.⁴¹ Notably, the legislature has identified a variety of fields as being susceptible to dispute resolution through mediation. For instance, the Children's Act 38 of 2005⁴² contains many mediation provisions, whereas section 166 of the Companies Act 71 of 2008⁴³ also provides for ADR through either mediation or conciliation.

Although there are private institutions that deal with mediation, community mediation is also being offered by various non-governmental and community based organisations and institutions, such as street committees, community courts, Family Life, and The Family and Marriage Society of SA.⁴⁴ These community mediation services are, however, seriously hampered by a lack of funds and human resources and it is an unfortunate fact that they mostly offer divorce and family mediation to the public on a very small scale.⁴⁵

Resolution of conflict whether within formal State structures or extra-statutory structures reduces the potential for social disruption. Popular justice resolves conflict in areas which formal State justice is unable to reach. Indeed, the inability of the State to provide solutions to all social conflicts facilitates the establishment and continued existence of popular justice

⁴⁰ Herbert WA et al 'International commercial mediation' (2011) *The International Lawyer* 122-123.

⁴¹ Herbert WA et al (122).

⁴² Children's Act 38 of 2005.

⁴³ Companies Act No. 71 of 2008, s 166.

⁴⁴ De Jong M 'Judicial stamp of approval for divorce and family mediation in South Africa' (2005) 68 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 195-198.

⁴⁵ De Jong M (2005) 196.

structures.⁴⁶ Therefore popular justice (such as community mediation) can be seen as a challenge to State authority in dealing with community issues.⁴⁷

1.2 LITERATURE REVIEW

It should be noted that few authors have written on the significance of community mediation in SA, and thus the literature dealing with this area remains sparse and in need of development. Its development has also been quite slow when compared to countries such as the USA which have enjoyed significant development, dating from the time of social political movement during the 1960s.

Nupen is of the view that mediation is not a recent development in SA and that it was used as the primary method of dispute resolution in some traditional pre-industrial societies, and more recently in resolving industrial conflicts and a range of disputes in other fields.⁴⁸ Nupen further submits that one cannot doubt the importance of community mediation. It appears further that our adversarial legal system tends to heighten the conflicting interests of individual family members or parties involved, for example, in divorce cases and this seems to encourage animosity and irreconcilability; therefore community mediation is seen as an easy approach to resolve issues between parties.⁴⁹

Boulle and Rycroft also suggest that mediation preserves and improves relationships by applying the 'gentle art' of reconciliation rather than the confrontationist process approach of the courts.⁵⁰ The perception exists that mediation has more in common with traditional African methods of dispute resolution than the usual adversarial style of arbitration practice associated with colonial arbitration legislation of English origin.⁵¹ Even quasi-statutory instruments, such as the King III Report on Corporate Governance, also require company directors to consider ADR (including mediation) before resorting to litigation, based on the fiduciary duty of a director and the management of risk.⁵² The recent English judgment of Ward LJ in *Colin Wright v Michael Wright Supplies Ltd and Turner Wright Investments Ltd* expressed the view that the advantages of mediation and other forms of ADR are widely

⁴⁶ Nina D & Schwikkard PJ 'The Soft Vengeance of the People: Popular Justice, Community Justice and Legal Pluralism in South Africa' (1996) 36 *The Journal of Legal Pluralism and Unofficial Law* 76.

⁴⁷ Nina D & Schwikkard PJ (1996) 73-74.

⁴⁸ Nupen C 'Mediation' in Paul Pretorius (ed) (2014) *Dispute Resolution* 50.

⁴⁹ Nupen C '(2014) 50

⁵⁰ Boulle L & Rycroft A 'Mediation: Principles Process Practice (1997) *Journal of South African Law* 178.

⁵¹ South African Law Commission Project 94 Report on Domestic Arbitration (2001) 9.

⁵² King III Report on Corporate Governance (2009).

accepted throughout the legal profession. Mediation encourages parties to communicate and negotiate the issues in dispute and leads to a number of claims being resolved without ever having to go to court, ultimately saving the parties, and the court, time and money.⁵³

1.3 RESEARCH QUESTION

To what extent is community mediation used in South Africa, and what can be done to further the development thereof formally so that it can become a legitimate alternative to traditional models of dispute resolution?

1.4 PROBLEM STATEMENT

Despite the fact that mediation can be traced for some time back in SA, it can be argued that mediation as a field of law is still in its infancy. Consideration must be given to the fact that not everyone can afford litigation, and it is submitted that mediation could be used as an aid to reduce backlog of cases in courts. The question remains as to why mediation, while statutorily supported in relation to labour issues, is still lacking in other areas, notably that of family and divorce law.

In response to the problem, there are some questions that need to be answered, such as:

1. What are the origins of community mediation?
2. How has community mediation developed?
3. What contribution has government made towards its development?
4. How does South African community mediation differ from what is being done in other countries such as the USA?
5. What can SA gain from what is being done in the USA?

1.5 BENEFITS OF THE STUDY

This study is meant to provide a close view of the importance of addressing the issue of formalisation of community mediation as an aid to the court system and how it can assist other people who cannot afford litigation. Consideration should be given thereof that if

⁵³ *Colin Wright v Michael Wright (Supplies) Ltd & Turner Wright Investments Ltd* (2013) EWCA Civ 234.

community mediation can be extensively formalised and well structured, as in the USA, it would benefit the majority of people who cannot afford the court system. It is submitted that the majority of South Africans are poor and cannot afford court expenses, therefore the government needs to put more resources in to the formalisation of mediation and this in turn will create a way to handle disputes without needlessly damaging relationships where there is a need for relationships to continue. This study seeks to showcase the benefits of mediation in communities as well as the need to have greater support for it.

1.6 RESEARCH METHODOLOGY

The research methodology will be in the form of a desk study. It will rely entirely on materials available from various primary sources, inclusive of case law and national legislation both from SA and the chosen comparative system of the USA. Secondary sources will include journal articles, academic books, reports, policy papers and newspaper articles. The methods that shall be used include, for example, the legal- historical method to trace the historical development of community mediation, the legal comparative method to compare community mediation in SA with that in the USA. A critical comparative analysis between the community mediation of SA as compared to that of USA with regards to developments and formalisation will be undertaken. The reason for selecting USA is due to the fact that it is one of the States well known for practising and maintaining mediation over a long time (since the 1960s during the political social movements) and it is better developed than in South Africa in terms of community mediation; and both countries can learn from each other. Another reason for choosing the USA as a country for comparison is primarily because its national characteristics are quite different from those of SA, and allows for an exploration of the effects of these differences and similarities on the mediation approaches in the two countries. The USA, similarly to SA, also uses litigation as the principal method to resolve disputes in its legal system; therefore there is a similar adversarial nature in both the legal systems.

1.7 CHAPTER OUTLINE

Apart from this introductory chapter, this research paper comprises three additional chapters. Chapter 2 discusses the current position of mediation as an ADR mechanism in SA focusing on community mediation with regard to its development, the debate surrounding it, and its benefits. Chapter 3 then looks at community mediation from an international perspective. It

further provides a comparison between South African community mediation and that of the USA. Finally, Chapter 4 furnishes a conclusion and provides recommendations with regard to potential mediation reforms in SA.

This chapter provides a clear insight of how important issue of community mediation is in both countries and how courts have applied their minds to resolve disputes in matters of community mediation and how they are helping in the development of community mediation structures. It also gives an insight on the growth of mediation and its significance in both countries and areas which need to be improved support mediation.



CHAPTER 2

THE CURRENT POSITION OF COMMUNITY MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN SOUTH AFRICA

2.1 INTRODUCTION

Mediation is not a novel process in SA; it was used as the primary method of dispute in some traditional pre-industrial societies and it has been used to solve a range of disputes in fields, such as, family law and commercial law, to mention only a few.⁵⁴ In addition there also exists a perception that mediation as a form of dispute resolution has more in common with traditional African methods of dispute resolution than the usual adversarial style of arbitration practice associated with colonial arbitration legislation of English origin.⁵⁵ Mediation is one of the primary processes of ADR. In mediation a neutral third party facilitates (in a variety of ways) the conflict between parties in order to assist them in reaching a mutually acceptable agreement. This agreement may take the form of a settlement and the settlement may be made an order of court if the parties want to do so.⁵⁶

Considering the fact that South Africa's primary method of dispute resolution within its legal system is adversarial in nature, many people nowadays are now considering using mediation as a tool to resolve their disputes. It is quite noticeable also that although mediation is gaining considerable popularity on the African continent, very little research has been conducted into its nature and effectiveness.⁵⁷ Even though mediation programmes are enthusiastically endorsed in many South African communities, there is limited data on their actual use, particularly in rural communities where ethnically diverse populations live in poverty in the midst of violence. The present investigation is one of the first studies on mediation conducted in a rural South African community involving subjects from a variety of ethnic backgrounds. Very little is known about the nature and frequency of the conflict actually occurring in such communities.

⁵⁴ Nupen C 'Mediation' in Paul Pretorius (ed) *Dispute Resolution* 50.

⁵⁵ South Africa Commission Project 94 Report on Domestic Arbitration (2001) 9.

⁵⁶ Singer LR 'Settling disputes: Conflict resolution in business, families, and the legal system' (1994) *Westview Pr* 2.

⁵⁷ Smit E 'Effective mediation in a rural community' 2003 35 (3) *Acta Academica* 205 (However it must be noted that mediation in South Africa has recently been expanding especially in family and divorce mediation where certain statutes, such as, the Mediation in Certain Divorce Matters Act and the Children's Act, provide for compulsory mediation in their provisions).

There is a common perception that the present system of litigation in SA is inadequate. High costs and long delays are seen as factors which deny justice to the general public, and individuals have rights which they can no longer afford to enforce or defend, and the law is available to ever fewer of the citizenry.⁵⁸ The effect of the inaccessibility of justice is to produce a highly undesirable negative attitude towards law in general.⁵⁹

The main objective of this chapter is to look at community mediation in SA and its effectiveness. In order to achieve this objective; we will look at its historic roots in African community mediation and its developments, the current state of mediation in SA, its benefits; the types of community mediation that play an effective role in solving disputes; and lastly, the roles and the qualifications of mediators.

2.2 WHAT DOES COMMUNITY MEDIATION ENTAIL?

2.2.1 Historical Roots of African Community Mediation

Community mediation is a form of social justice that uses lawful processes to change what is perceived to be unjust. Courts are not often seen as welcoming to all, but community mediation affords cultural diversity among mediators and overcomes financial barriers in the society.⁶⁰ Mediation has its origins in ancient China and tribal Africa. It blossomed in the USA, at first largely in labour disputes, thereafter spreading to community-based mediation through neighbourhood justice centres, and later to divorce (as a result of the advent of the no-fault divorce in certain US states).⁶¹ The origins of community mediation in SA can be traced back to African group mediation in which conflicts were seen in their social contexts.⁶² They were not seen as isolated events and all relevant background information was covered during mediation. During mediation, not only are the consequences for the parties looked at but also the consequences for others in their families.⁶³ The traditional objectives of African mediation are to soothe hurt feelings and to reach a compromise that can improve future relationships.⁶⁴

⁵⁸ Mowatt JG (1988) 727.

⁵⁹ Mowatt JG (1988) 727.

⁶⁰ Weinstein M 'Community Mediation: Providing Justice and Promoting Transformation' (2001) 19 *Conflict Resolution Quarterly* 251.

⁶¹ Goldberg V 'Practical and Ethical Concerns in Alternative Dispute' (1998) *JS Afr. L* 748.

⁶² Boniface AE 'African style mediation and Western divorce and family mediation: Reflections for the South African Context' 2012 (15) 5 *PER / PELJ* 385.

⁶³ Malan J 'Conflict Resolution' (1997) 87.

⁶⁴ (Relationships of the past, present and future are looked at; there is an interest-based orientation towards the future) Cited from Malan J 'Conflict Resolution' (1997) 27.

The traditional way of resolving disputes in Africa has been described as follows; whenever there is a dispute in a village between families, members of a family, or members of a tribe, it would be referred to the elders of the families, headman, chief or king, depending on the nature of the conflict.⁶⁵ The aggrieved person will state his or her case fully to the *inkundla/lekgotla*. The defendant is called upon to meet the accusations and witnesses are heard. Interrogations follow until the truth is established.⁶⁶ Discussions take place and an agreement is reached, binding both parties. That the accused is also involved, and his or her case is heard, makes it possible for both parties to accept the decision of the *inkundla/lekgotla*.⁶⁷ The question is not who is going to win or lose, but how to attain a win-win outcome.

The values that were upheld in African mediation were African humanistic values. The *lekgotla/inkundla* is a group or public mediation forum. The entire community is involved: the disputants and their family members, witnesses as well as members of the public, the mediation is conducted by the elders and the headman or chief. They provide the forum and listen.⁶⁸ All present have the right to ask questions and to make suggestions for the resolution of the dispute. The elders guide the process and also have investigative functions; they intermediate between the chief or headmen and the community and advise the headman or chief; and the objective of the mediation is to restore social equilibrium.⁶⁹ The elders traditionally did not have formal mediation qualifications.

Mediatory authority is conferred on elders because they have a reputation in the community as persons of wisdom and integrity and because they understand the cultures and traditions of their people.⁷⁰ The elders are appointed on the basis of their lineage and occasionally due to their 'notable status' in the community. Dispute resolution in Africa involves families as well as neighbours and the elders participating in public negotiation.⁷¹ Individual conflicts are seen as affecting the order of the group, the families of the parties are expected to be the guarantors of agreements, and the basis of settling disputes is reconciliation instead of

⁶⁵ Boniface AE (2009) 383.

⁶⁶ Boniface AE (2009) 383.

⁶⁷ Goldberg V (1998) 748-750.

⁶⁸ Faris J 'From Alternative Dispute Resolution to African Dispute Resolution: Towards a New Vision' (2011) *Paper delivered at the 5th Caribbean Conference on Dispute Resolution* 28-30.

⁶⁹ Faris J (2006) 427-430.

⁷⁰ Obarrrio J 'Traditional Justice as the Rule of Law in Africa: An Anthropological Perspective' (2011) *Peace building and rule of law in Africa-Just Peace* 32-34.

⁷¹ Obarrrio J (2011) 32.

retribution or punishment. Ubuntu-style values are found in African-style mediation. The essence of the African judicial system is reconciliation and the restoration of harmony is more important than stating the rule of law.⁷² The nature of the proceedings is informal and flexible, enabling litigants and witnesses to feel that ‘justice is done’, and this leads to social harmony. Harmony is important and rituals are performed to maintain it.

Malan submits that in African society the mediator functions in different roles and may even limit themselves to a passive role, as when they are simply there to represent important shared values. Mediators are entitled to change their roles from time to time according to the needs they sense at various times.⁷³

2.2.2 The Current Position of Community Mediation in South Africa

Community mediation deals with disputes between communities and with interpersonal disputes between individual members within a community. Mediation is of course not a foreign concept in South Africa with its rich heritage of the African humanist philosophy known as Ubuntu.⁷⁴ South African law makes provisions for the practice and benefits of mediation which are discussed later in the chapter.⁷⁵ Joubert believes that in keeping with Ubuntu, the new South African Parliament passed 40 statutes⁷⁶ containing mediation provisions that are either voluntary or compulsory.⁷⁷ One of the examples of such statutes is the Consumer Protection Act⁷⁸ which states that when a dispute arises, a consumer may seek resolution through an ADR agent providing mediation services, among other dispute resolution provisions in the Act and also the Child Justice Act⁷⁹ which provides for an informal procedure called ‘victim-offender mediation.’ This mediation procedure is intended to bring a child who is alleged to have committed an offence and the victim together at which

⁷² Dlamini CRM ‘The Role of Customary Law in Meeting Social Needs’ 1991 *Acta Juridica* 83-84.

⁷³ Malan J (1997) 28.

⁷⁴ Joubert J ‘Embedding Mediation in South African Justice’ (2012) available at <http://www.mediate.com/mobile/article.cfm?id=8567> (accessed 03 May 2015).

⁷⁵ For example, section 76 of the South African Constitution provides for mediation in cases of disagreement between the National Assembly and the National Council of Provinces.

⁷⁶ Notably, some of the statutes that made mediation a compulsory ADR tool are the Higher Education Act 101 of 1997, the National Land Transport Act 5 of 2009 and the Commission of Gender Equality Act 39 of 1996; whilst some that provided for voluntary mediation include the Consumer Protection Act 68 of 2008, Child Justice Act 75 of 2008, and the Public Protector Act 23 of 1993 etc.

⁷⁷ Joubert J ‘Embedding Mediation in South African Justice’ (2012) available at <http://www.mediate.com/articles/JoubertJL.com.cfm> (accessed 17 August 2015).

⁷⁸ Act 68 of 2008.

⁷⁹ Child Justice Act 75 of 2008.

point a plan is developed on how the child will redress the effects of the offence.⁸⁰ This procedure can however only be adopted if both parties consent to it.

From a commercial perspective, mediation is also being encouraged more. The new Companies Act also makes provision for and supports the growing concept of mediation as part of the ADR mechanism. It provides for a list of which a disputant may choose from to resolve corporate disputes; and one of the options is aimed at addressing a dispute through the process of ADR among other options provided by the Act.⁸¹ Section 166 of the Companies Act provides that instead of applying to court or filing a complaint with the Companies Commission, a complainant may refer a matter to either the Companies Tribunal for resolution by mediation or any forms of ADR.⁸² Section 195(1) (b)⁸³ is also empowering and permits the Tribunal to use the principles and techniques of mediation to resolve a dispute.

The King III Report⁸⁴ on corporate governance sees or favours mediation as a vital tool in the management of stakeholder relationships. Stakeholders include employees, customers and communities affected by a company's operations and business. Companies who fail to mediate disputes may now be requested by their stakeholders to explain why they ventured straight to court, before first trying to resolve their disputes through the mediation route.⁸⁵ In line with King III, the Institute of Directors of South Africa recommends the following best practice to resolve disputes: that is, negotiation, mediation and also arbitration.⁸⁶ Notably it recognises that mediation may not be suitable in all corporate disputes; however, the use and implementation of such a convenient ADR tool will generally assist in considerably lightening the burden of corporate dispute resolution.

It is quite reasonable for the legislative bodies and corporate bodies to incorporate mediation into the corporate statutes since traditionally litigation in commercial disputes has destroyed business relationships and also wasted financial resources and valuable time.⁸⁷ This might in

⁸⁰ Section 62 of the Child Justice Act.

⁸¹ Section 156 of the Companies Act 71 of 2008.

⁸² Section 166 of the Companies Act 71 of 2008.

⁸³ Section 195 (1) (b) of the Companies Act 71 of 2008.

⁸⁴ King Report on Corporate Governance for South Africa 2009.

⁸⁵ King Report on Corporate Governance for South Africa (The Institute of Directors in Southern Africa) 2009.

⁸⁶ King Report on Corporate Governance for South Africa (The Institute of Directors in Southern Africa) 2009.

⁸⁷ King M 'Civil litigation being replaced by cost effective dispute resolution' (2008) *Occupational Risk Management* 19.

the future compel parties to use mediation which saves time and the costs of litigation at the same time.

Despite many different Acts providing for mediation, SA has no overarching legislation regulating mediation generally or which sets out principles which mediation must comply with. Mediation service providers in SA have taken the first step towards professionalising mediation, which will immensely benefit community mediators, by forming the Dispute Settlement Accreditation Council (DiSAC). This organisation is tasked with developing uniform accreditation standards for the profession.⁸⁸ They hope that DiSAC will prescribe that mediators should have a minimum level of competency to effectively mediate disputes requiring specialist knowledge.⁸⁹ Medical negligence disputes between health providers and patients, for instance, require mediators who understand complex medical protocols and surgical procedures. It is however unclear how a mediator with a degree in business science would be able to add enough value to resolve such a dispute.⁹⁰

Community mediation dispute resolution structures (hereinafter called ‘community programs’) serve a useful purpose in meeting the needs of the majority of the SA population for accessible justice, and it is submitted that these structures must be recognised and supported by law to assist the communities in resolving disputes. ‘Community courts’ have become the contemporary term used when referring to popular justice structures, or the many types of informal tribunals existing outside the formal legal structures, such as, street committees and yard, block or area committees operating in urbanised African townships and informal settlements to solve these community disputes in SA. Mncadi and Citabatwa⁹¹ refer to these justice systems as being informed by African traditional law, urban popular justice practices and religious law.

2.3 TYPES OF COMMUNITY MEDIATION

⁸⁸ Dispute Settlement Accreditation Council (DISAC) available at http://www.usb.ac.za/disputesettlement/Pages/dispute_settlement_accreditation_council.aspx (accessed 15 August 2015).

⁸⁹ Joubert J ‘Embedding Mediation in South African Justice’ (2012) available at <http://www.mediate.com/articles/Joubertj1.cfm> (accessed 17 August 2015).

⁹⁰ Joubert J ‘Embedding Mediation in South African Justice’ (2012) available at <http://www.mediate.com/articles/Joubertj1.cfm> (accessed 17 August 2015).

⁹¹ Mncadi M & Citabatwa S ‘Exploring community justice’ (1996) *Imbizo Community Peace Foundation* 3.

There are so many types of community mediation, including victim-offender mediation efforts, divorce or custody and family mediation, school based dispute resolution, school based peer mediation, inter-group mediation, minor criminal or civil dispute mediation, to mention only a few.⁹² In this section the most common types of mediation used in SA will be expanded upon.

2.3.1 Family and Divorce Mediation

The idea of mediation in family issues is a new concept in SA, so new that there is very little local writing on the subject. The compulsory practice of mediation within this field is currently effected through the Mediation in Certain Divorce Matters Act 24 of 1987 (MDMA), which necessitates the compulsory process of mediation. The main purpose of the MDMA is to protect the interests of children in the event of a divorce, create the office of the Family Advocate⁹³, and to consider the recommendations and report of the Family Advocate⁹⁴ before granting a decree of divorce.

Section 28 (2) of the Constitution⁹⁵ places an obligation on, amongst others, the mediator to see to it that divorcing parties put the interests of their children first in all negotiations between them. The chances of the interests of children being protected in the mediation process are therefore excellent. The rationale for incorporating the process of mediation into the legislation stems from the critical problem that family law legal practitioners in the past often viewed divorce solely as a legal event and would often ignore the important non legal-issues pertaining to the litigation proceedings, such as, breakdown of families which may have psychological and emotional effects for the children during and after the divorce process.⁹⁶ It is submitted that the aggressive nature of litigation in divorce matters causes hostility between divorce parties as well as causes tensions amongst family members therefore mediation is seen as a necessity.⁹⁷

⁹² Corbett JR & Corbett WE 'The State of Community Mediation' (2011) *National Association for Community Mediation* (NAFCM) 56.

⁹³ Section 4 of the MDMA.

⁹⁴ 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 on any matter concerning the welfare of the minor or dependent child of the marriage concerned.

⁹⁵ Section 28 (2) of the Constitution of the Republic of South Africa, 1996.

⁹⁶ De Jong M 'An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation' (2005) *Tydskrif vir die Suid-Afrikaanse Reg* 33.

⁹⁷ De Jong M (2005) 33.

The aim of divorce and family mediation is to assist parties to reach a mutually satisfying agreement which recognises the needs and rights of all family members. Despite the fact that much has been written about mediation over the past two decades, little mediation takes place in divorce and other family related matters in SA today.⁹⁸ There is however talk of divorce and family mediation being offered by some mediators, who are generally affiliated to mediation organisations, such as, the South African Association of Mediators in Divorce and Family Matters, the Alternative Dispute Resolution Association of South Africa and the Family Mediators Association of the Cape (FAMAC); and divorce and family mediation is now increasingly developing.

It is submitted that only a small percentage of the more prosperous section of our population can afford to make use of private mediation services.⁹⁹ Besides these private services, divorce and family mediation is also being offered by various non-governmental and community based organisations and institutions, such as, street committees, community courts (known as 'makgotla'), community-based advice centres, Family Life and the FAMSA. These community mediation services are, however, seriously hampered by a lack of funds and human resources and it is an unfortunate fact that they, too, offer divorce and family mediation to the public on a very small scale.¹⁰⁰

Significant judicial support of mediation in family law can also be noticed in light of the decisions in *Van den Berg v Le Roux*¹⁰¹ and *Townsend-Turner and another v Morrow*¹⁰² regarding mandatory private mediation, and the comments in *G v G* (See Chapter 1) with regards to the inappropriateness of the adversarial system of litigation in divorce matters. It is very clear that divorce and family mediation, whether private or at community level, will soon start to play a much more prominent role as one form of community mediation in South Africa. This will surely prove to be a step in the right direction as it appears that the minimal mediation services offered by private mediators deliver excellent results in practice and that the small-scale mediation services offered at community level are generally perceived as accessible and responsive to community concerns.

⁹⁸ Schafer W (1988) 309.

⁹⁹ De Jong M (2005) 96-98.

¹⁰⁰ De Jong M (2005) 98.

¹⁰¹ *Van den Berg v Le Roux* (2003) 3 All SA 599 (NC).

¹⁰² *Townsend-Turner and another v Morrow* (2004) 1 All SA 235 (C).

In *MB v MB*¹⁰³ the Court dealt with the issues of dissolution of marriage, parental joint custody and maintenance and division of a joint estate: the importance and benefits of mediation was emphasised.¹⁰⁴ 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. It emphasised also that there existed a positive duty on the disputants' attorneys to advise their clients to mediate their disputes prior to invoking litigation.¹⁰⁵ This clearly shows that not only the legislature recognises importance of mediation in the field of mediation in SA; the judiciary does too.

In family mediation, the mediator helps parties to reach a mutually satisfying agreement that recognises the needs and rights of all family members. The mediator uses various methods, such as, empathic listening, power balancing and rephrasing, in order to achieve this.¹⁰⁶ Mediation is not family therapy, but the mediator may suggest that parties go into therapy. The mediation may at any rate result in there being less bitterness and conflict between the parties, but the objectives of mediation may differ, depending on the style of mediation that is used.¹⁰⁷ The Children Act 38 of 2005¹⁰⁸ gives effect to children's constitutional rights in matters of divorce or family disputes; it also upholds the best interests of the child in every matter concerning him or her as well as ensuring the well-being and protection of the child. Since it allows or makes provision for compulsory mediation, it seeks to promote the child's best interests when parents are reaching an agreement.¹⁰⁹

Many legal writers and feminists believe that divorce mediation is totally inappropriate in cases of family violence.¹¹⁰ Another argument against divorce mediation in cases where there is family violence abusers may avoid criminal law sanctions for their actions if their divorce is not dealt with by the courts, but settled privately in the mediation process where all

¹⁰³ *MB v MB* 2010(3) SA 220 (GSJ) para 58.

¹⁰⁴ *MB v MB* 2010 (3) SA 220 (GSJ) para 58.

¹⁰⁵ *MB v MB* 2010 (3) SA 220 (GSJ) para 59.

¹⁰⁶ De Jong M 'Child-focused mediation' in Boezaart T (eds) *Child Law in South Africa* (2009) 112.

¹⁰⁷ Roberts M 'Mediation in family disputes' (1998) 15-16.

¹⁰⁸ Section 2 of the Children Act 38 of 2005.

¹⁰⁹ Section 21 of the Children Act 38 of 2005.

¹¹⁰ It is important to note that some authors (for example, Kaganas F & Piper C 'Domestic violence and divorce mediation' 1994 *Journal of Social Welfare and Family Law* 271-273; Van Zyl L 'Divorce mediation and the best interests of the child' (1997) 203-206) fear that women, who are usually the victims of this violence, will be powerless against their husbands in the mediation environment and will be unable to negotiate fair settlement agreements for themselves).

disclosures of the parties are confidential.¹¹¹ Nevertheless, there are some writers and mediators who feel that divorce mediation can be applied and be effective in cases of family violence. They believe that since mediation places the emphasis on future relationships rather than on previous criminal behaviour, it indeed gives parties the opportunity to make their own decisions regarding their divorce as quickly as possible.¹¹² Mediation might even be more appropriate than litigation in cases of family violence, since it is indeed the courts that humiliate and discredit abused spouses by allowing opposing advocates to tear apart their evidence. In addition, mediation which is a confidential and private process also provides a comfortable atmosphere in which the violence can be assessed.¹¹³

Evidently mediation in family law and issues of divorce is extremely vital since it emphasises that unlike marriage, parenthood is not terminated on divorce, but that both parents retain their roles and responsibilities in a restructured family. Furthermore in mediated divorce matters there is a greater chance of the non-custodial parent remaining involved in his or her children's upbringing.¹¹⁴ The involvement of both parents creates a positive atmosphere for children and helps them to adapt to their new circumstances upon the divorce of their parents. On the one hand, mediation teaches parties how to deal with conflict in a non-aggressive way; while on the other hand, it gives them the opportunity to express their feelings of bitterness, disappointment and anger.¹¹⁵ Furthermore, mediation allows parties to deal with those matters they feel are important, but which the law may consider frivolous or unenforceable; therefore unlike in litigation, the mediation process is not restricted solely to legal issues, and allows parties to deal with all facets of divorce.¹¹⁶

Although it may be submitted that one of the questions that will continue to be puzzling is whether mediation is an appropriate forum for conflicted couples to resolve issues of marital dissolution and child custody in SA, it may be abundantly clear that mediation is an important tool for dealing with all divorce and family disputes.¹¹⁷ In these disputes, where there are usually strong emotional issues involved and where, very often, there will of necessity be an ongoing relationship between the parties because there are children involved, it is imperative

¹¹¹ Kabanis F & Piper C (1994) 272.

¹¹² Scott-MacNab D 'Mediation and family violence' (1992) 10 (9) *SALJ* 283.

¹¹³ Scott-MacNab D (1992) 283.

¹¹⁴ De Jong M 'Judicial stamp of approval for divorce and family mediation in South Africa' (2005) 68 (1) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 96.

¹¹⁵ De Jong M (2005) 98.

¹¹⁶ De Jong M (2005) 98.

¹¹⁷ De Jong M (2005) 98-99.

that parties should first attempt to resolve their issues by mediation before they are exposed to the confrontational nature of the adversarial court procedure.¹¹⁸

2.3.2 Victim-offender mediation efforts.

The Child Justice Act¹¹⁹ provides for an informal procedure called victim-offender mediation, which is an expression of restorative justice. The wellbeing of victims of crime is a central feature of restorative justice services. The process of restorative mediation entails all parties including the victim, the offender, their families and members of the community voluntarily participating in face-to-face dialogue, where truth-telling¹²⁰ enables the offender to take personal responsibility for his or her criminal behaviour.¹²¹

The primary goal of victim-offender mediation is seen as compensating the victim for the loss suffered as a result of the crime by making the offender take personal responsibility for making good his loss. The programme gives the victim an opportunity to tell the offender how the crime affected him or her. The offender has the opportunity to apologise, explain his or her behaviour, and make some reparation or pay compensation.¹²² The reason for the interest in victim-offender mediation in SA stems from the fact that the present system of criminal procedure in SA has the effect of marginalising the victims of crime and even the Constitution is heavily biased towards the offender. Palmer avers that the other problem that the criminal justice system faces is the congestion on court rolls which makes it very difficult for matters to be tried speedily.¹²³ As a result of these and other reasons, there have been proposals for institutionalised mediation in the criminal justice system. Although Van der Walt argues that not everyone agrees that victim-offender mediation will serve the interests of the victims, she argues that this type of mediation can only be achieved if the matter is

¹¹⁸ De Jong M (2005) 100.

¹¹⁹ Act 75 of 2007.

¹²⁰ Truth telling is usually found in transitional justice. However, in this case it is being used for purposes of mediation between the offender and the victim.

¹²¹ Steyn F & Lombard A 'Victims' experiences of restorative mediation: A Developmental Social Work Perspective' (2013) 49 (3) *Social Work/Maatskaplike Werk* 332.

¹²² Van Rooyen GH 'Blessed are the peacemakers: victim offender mediation in the criminal justice system - a practical example' (1999) 12 *South African Journal of Criminal Justice* 62.

¹²³ Van Rooyen GH (1999) 62.

dealt with by the criminal courts rested on the assumption that the offender is going to be convicted.¹²⁴

In support of the above statement, the most important example of restorative justice in SA is the victim–offender conferencing (VOC) project which was initiated by a consortium of non-governmental organisations (NGOs) in 1999. Victim–offender conferencing offers a system that is flexible enough to incorporate the parties’ belief systems. It is highly accommodative of different cultures. Since they are mediated by someone from the same community as the parties, there is a greater potential that the same value system will be shared. The mediators are able to handle the parties with sensitivity, and to assist them in arriving at a resolution that is appropriate to their situation and culture.¹²⁵

In 1999, many cases were referred to the VOC project by the courts, police and community based organisations. Most cases were referred by prosecutors, who assessed the merits and seriousness of the case and made a recommendation that it be handled by the VOC process. In such cases, the criminal prosecution would be suspended until the VOC process had been completed or the case was resolved. Rather than targeting young offenders exclusively, the VOC project was open to all age groups and types of offenders.¹²⁶

Dissel points out that a total of 660 cases were recorded as mediated by VOC offices over the three -year period of the project. Cases were also referred that did not proceed to mediation, or were only partly mediated. Unlike family group conferencing, the project required both the victim and offender to participate. If either one or both parties refused, the mediation was stopped, and the matter referred back to court. When this happened, the reasons were that one or both of the parties could not be found, one of the parties did not attend the mediation, the victim did not want to participate in mediation, the offender did not wish to continue, it was an inappropriate referral, or the victim withdrew charges before the matter could be mediated.¹²⁷

It appears that victim–offender conferencing may be one solution to dealing with some crimes in SA. The VOC project has indicated that it might be effective in dealing with crimes

¹²⁴ Van der Walt ‘Towards victims’ empowerment strategies’ in the criminal justice process (1998) 11 *SACJ* 168.

¹²⁵ Dissel A ‘Piloting victim–offender conferencing in South Africa’ (2005) *Beyond Retribution: prospects for restorative justice in South Africa*. Institute for Security Studies Monograph No 91.

¹²⁶ Dissel A (2005) 91-97

¹²⁷ Dissel A (2005) 92-94.

of a more minor nature. Its applicability to more serious crimes still needs to be developed and tested.¹²⁸ Restorative justice solutions have been used satisfactorily alongside formal criminal justice processes in other countries, which suggest a route for dealing with serious crimes in SA as well and the Department of Correctional Services has adopted restorative justice as a strategy, opening the possibility to work with offenders convicted of more serious crimes.¹²⁹ The support of government and the courts is essential if this important restorative justice work is to continue.

It is now necessary to move beyond the policy phase into implementation of real restorative initiatives, which clearly show the significance of restorative justice as a type of community mediation. It must also be noted that victim-offender mediation can either take place in a full diversion or non-custodial context or form part of a parallel process, particularly in serious matters. In the United States, in the case of violent crimes, victim offender mediation is often used in the latter context, aimed at giving victims a sense of vindication, rather than for designing non-custodial sentences.¹³⁰

Although the major success of the mediation process can probably be attributed to the interpreter's mediating skills, it is a highly effective system that has had only positive feedback from the community, and at the same time the community at large is also more interested in having an equitable balance between the offender, the victim and society in general.¹³¹ The introduction of the process has also resulted in more serious offences getting preferential treatment and resulting in a court roll where matters are finalised without undue delay.¹³²

2.3.3 School based dispute resolution

A School Governing Body (SGB)¹³³, as mandated by the South African Schools Act 84 of 1996, has a legal responsibility to minimise and manage conflicts to ensure that schools are

¹²⁸ Dissel A (2005) 93.

¹²⁹ Dissel A (2005) 94.

¹³⁰ Umbreit MS & Brown K et al 'Victim-offender dialogue in violent cases: A multi-site study in the United States' 2007 *Acta Juridica* 22- 23.

¹³¹ Van Rooyen GH (1999) 64.

¹³² Van Rooyen GH (1999) 64.

¹³³ A School Governing Body refers to a group composed of parents, educators, non-educators, co-opted members of the community, learners and the principal as an ex officio member, elected by the school community to govern the school.

safe, secure and conducive to teaching and learning by ensuring that the necessary policies, procedures and structures are in place.¹³⁴ Section 16 (1) of the South African Schools Act provides that the governance of every public school is vested in its governing body. The SGBs have special roles and duties to perform at school to ensure the smooth running of the institution by supporting the school by all means, and to ensure that conflict is taken care of by intervening properly using the suitable conflict management skills and resolution strategies.¹³⁵ The principal, teachers and other non-teaching staff have to be supported in performing their professional functions. Because conflict can erupt in schools, staff need to be aware of how to solve such a conflict when it arises. The principal is usually the mediator; therefore it is imperative that he/she evaluates conflict management practices together with the SGB to ensure that they suit the nature of the conflict.¹³⁶ However, Squelch also highlights the fact that in many schools SGBs do not have a clear understanding of their roles, duties and liability and that this is coupled with their lack of capacity to fulfil their duties; therefore, this can also be problematic.¹³⁷

Sections 20(1) (d) and 8(1) of the South African Schools Act require SGBs to adopt a code of conduct for learners after consultation with learners, parents and teachers of the school. A code of conduct should be based on human rights principles, and contain school rules, regulations, sanctions and disciplinary procedures.¹³⁸ Majola notes that media coverage in South Africa shows the increasing number of tragic events and violence that take place within the school yard and in the community due to conflicts between the stakeholders of the school.¹³⁹ According to the SGB of that school the perpetrators were still roaming around the school premises.¹⁴⁰ These conflicts originate from the school and sometimes flow into the community or vice-versa. Therefore, implementation of mediation programs to deal with school disputes will be viable.

¹³⁴ Squelch J 'Do school governing bodies have a duty to create safe schools?' *An education law perspective. South African Journal of Education: Special Issue* (2001) 138.

¹³⁵ Snodgrass L & Blunt R 'The value of play for conflict management': a case study (2009) 29 (1) *South African Journal of Education* 53-67.

¹³⁶ Tshigwane EM 'Managing conflict in primary schools' (2008) Doctoral dissertation, North-West University 3.

¹³⁷ Squelch J (2001) 139.

¹³⁸ Sections 20 (1) (d) and 8 (1) of the South African Schools Act 84 of 1996.

¹³⁹ Majola VJ 'The Role of the School Governing Body in Conflict Management (SGB)': A Case Study, Masters Dissertation, UNISA 23.

¹⁴⁰ Majola VJ 25.

Snodgrass and Haines are of the opinion that the level of conflict in South African schools is of grave concern to all involved in education, and that there is a distinct need for research into the nature of conflict and the interventions and training that will address these problems, such as, cases of rape, cultural conflicts, gangsters, etc.¹⁴¹ These issues are however addressed by the SGB through peer mediation programs and educational training, such as, sporting events, counselling by social workers, etc. This is a clear indication of how important school dispute resolution is in the South African communities to resolve issues.

Although the Constitution and various statutes as noticed above, provide for mediation in our legal system dating from the 1990s up until now, it is also noticeable that mediation is yet to gain the popularity and all the support it needs to apply to areas, such as, family law and divorce issues, although it is quite effective in victim-offender issues, and labour and commercial law matters.

2.4 MAIN ROLES OF A COMMUNITY MEDIATOR

The role of a community mediator also needs to be specified so as to have a clear picture of the scope of their duties and responsibilities in solving disputes. It is submitted that South Africa is in need of good mediators and with the mediation rules for Magistrates Courts now in effect there is a demand for mediators who are well trained and accredited in accordance with locally and internationally recognised standards.

There are mainly three mediator roles that are found in community mediation. First, there are individual mediators who do not have a prior relationship with the parties and help the parties to settle their disputes on grounds that are mutually acceptable to the disputing parties.¹⁴² The model of individual mediators is found most often in family mediation in SA. Secondly, authoritative mediators are persons who are in authority over the disputing parties, for example, managers.¹⁴³ Thirdly, there are social network mediators. These are mediators that have existing relationships with the parties and are usually respected members of the community. They are not neutral but are seen as being fair. These mediators are concerned

¹⁴¹ Snodgrass L & Blunt R (2009) 55.

¹⁴² Moore C *The Mediation Process: Practical Strategies for Resolving Conflict* (2014) 43.

¹⁴³ Moore C (2014) 43.

with maintaining long-term social relations and may even participate in the implementation of the agreement. Peer or social pressure may be used to enforce the agreement.¹⁴⁴

South Africa basically follows a non-directive approach to mediation and this approach has suited SA very well. This approach assumes that the best solutions are produced when parties listen to each other in a new way, and co-operate in the generation of options to arrive jointly at the preferred solution.¹⁴⁵ There should be no form of coercion or manipulation by the mediators. The parties must solve their own problems, because in this way their self-respect is served and the outcome is more sustainable. The role of the mediator is therefore to be a facilitator of communication.¹⁴⁶ The mediator's task is to enable the parties to listen to each other on a deeper level than their previous hostile attitudes allowed. A mediator must ensure that the parties have heard each other adequately, and that each has developed sufficient understanding of the other's perceptions, motivations and interests. Improved listening then leads to better mutual understanding, which strengthens the imperative to reach an inclusive solution, as far as possible taking the interests of all parties into consideration.¹⁴⁷

In order to achieve these objectives, the mediation process is served by a basic procedural structure. This includes the establishment of process ground rules by the parties themselves, ample time for storytelling, uninterrupted time for each side to state their perceptions and feelings, and joint problem solving. The mediators rely heavily on their listening, paraphrasing and summarising skills, checking continuously whether people have been correctly understood.¹⁴⁸

2.6 QUALIFICATIONS OF MEDIATORS

In the USA there has been a long ongoing debate around the issue of qualifications for mediators. Community mediators, particularly, have been worried that standardisation of qualifications could 'professionalise' the field which, in turn, might rid mediation of its 'informal, non-legalistic, problem-solving approach'.¹⁴⁹ In SA, the National Accreditation

¹⁴⁴ Moore C (2014) 43-45.

¹⁴⁵ Odendaal A 'Modelling Mediation: Evolving approaches to mediation in South Africa (2015) 1 (3) *Online Journal of Peace and Conflict Resolution* 5.

¹⁴⁶ Odendaal A (2015) 1.

¹⁴⁷ Odendaal A (2015) 2.

¹⁴⁸ Odendaal A (2015) 1-2.

¹⁴⁹ Goldberg V (1998) 749.

Board for Family Mediators (NABFAM)¹⁵⁰ was established as a national regulatory body for mediators and to set standards with which all accredited mediators, as well as mediation training courses, must comply.¹⁵¹ All mediators have to be accredited by this regulatory body.¹⁵²

It is essential that some degree of formality be introduced to elevate community mediation or mediation generally in SA to a legitimate profession. Incompetent mediators can do the parties a great deal of harm.¹⁵³ They ought, for example, to respect the confidentiality of the process, control the conflict, and abhor bias in any form. Where mediation generally as a whole is made compulsory through legislation, it is obviously the State's responsibility to ensure country-wide, high quality mediation services to all its citizens. There are, however, different opinions on the question of whether the State itself should offer the community mediation services. On the one hand, there are those who believe that mandatory mediation should be offered and paid for by the State.¹⁵⁴ They are therefore of the opinion that public mediation services should be attached to the formal courts. The supporters of public mediation or court annexed mediation argue that people will feel more secure with mediation offered by State institutions since these institutions form part of the State machinery. On the other hand, there are those who feel that mediation should not be offered by the State or the courts themselves since people may be unnecessarily intimidated and inhibited by the power that mediators who are attached to a court may appear to have.¹⁵⁵

It should be noted that the State may not have the financial capacity to offer large-scale and country-wide mediation services. In fact, there are not even enough funds available to enable the limited and small-scale mediation services to communities in relation to divorce matters.¹⁵⁶ Since community-based organisations still play the most important role in resolving the family and community disputes of the majority of the South African population, there is a serious need to formally recognise the informal dispute resolution procedures offered by these organisations or institutions.¹⁵⁷ The South African Law Commission¹⁵⁸

¹⁵⁰The National Accreditation Board for Family Mediators (2012).

¹⁵¹ De Jong (2010) 528-529.

¹⁵² De Jong (2010) 528-529.

¹⁵³ Goldberg V (1998) 750-754.

¹⁵⁴ Spencer DL 'Mandatory mediation and neutral evaluation: a reality in New South Wales' (2000) 11 *Australasian Dispute Resolution Journal* 250.

¹⁵⁵ Mowatt JG 'The Family Court and divorce mediation' (1991) *The. JS Afr. L* 97.

¹⁵⁶ Van Zyl GJ 'The Family Advocate: 10 years later' (2000) *Obiter* 388.

¹⁵⁷ Van der Merwe H 'Overview of the South African experience' (1995) *Community Mediation Update* 3.

indicates that there is also a need for a move away from what is termed a Eurocentric approach to the law, and a need to Africanise the approach with regard to community mediation.

It is submitted that the way to meet both these needs is to expand and support mediation services offered by existing community based organisations by creating a reformed, compulsory mediation model for SA. This will broaden the scope of the formal legal system¹⁵⁹ and address one of the most important problems with the present family law system, namely, the inaccessibility of the law. By involving existing and respected community based organisations in the formal legal process, the State will help to nurture a sense of law and justice in the majority of South Africans and systematically restore access to, and a trust in, the legal system.¹⁶⁰

Another advantage of integrating community based mediation into the formal legal process is that this form of mediation could then be formally regulated by the State. Faris¹⁶¹ makes the following important observation in this regard: if given a public purpose community justice should not be regarded as a second-rate form of justice. Instead, the private application of community dispute resolution that remains unassisted by the State holds greater potential for rendering an inferior service. Once the structures of community dispute resolution have been brought into a co-ordinated or co-operative relationship with the court system, funding and regulation by the State should ensure that necessary standards are maintained.¹⁶²

The integration of mediation services at community level into a formal family law system is also a relatively cheap option for the State since these services are to a large extent already available countrywide.¹⁶³ However, at the moment, most of the mediation services at community level are hampered by a lack of funds and human resources. The State will therefore have to provide funding in some form or another to the community based organisations or institutions with which it has concluded accreditation contracts. In addition, an attempt can also be made to obtain foreign funding for the extension and upgrading of

¹⁵⁸ South African Law Commission Issue Paper 8 Project 94 Alternative Dispute Resolution (1997) 23.

¹⁵⁹ Faris J 'ADR, community dispute resolution and the court system' (1996) 54 *Community Mediation Update* 9.

¹⁶⁰ Van der Merwe H (1995) 3.

¹⁶¹ Faris J (1996) 9.

¹⁶² Faris J (1996) 10.

¹⁶³ Lancaster K & Nxumalo A 'Community courts: what role for justice centres?' (1996) *Community Mediation Update* 14.

these organisations and institutions as part of community development projects.¹⁶⁴ If community based and private mediation organisations or institutions meet certain requirements, it is submitted that the State should conclude accreditation contracts with them in terms of which they will offer the public such services for free or at a subsidised rate.

Van der Merwe agrees that this formal recognition and support will lead to the development and advancement of community mediation.¹⁶⁵ Scott-Macnab avers that one of the most controversial and divisive issues of the mediation process at the present time is whether cases involving domestic violence should, or indeed can be mediated. He is of the view that in cases where domestic violence is absent, mediation has a conciliatory, constructive and important role to play in divorce.¹⁶⁶ Faris also believes that it is advantageous to integrate community mediation into the formal legal process, in that this form of mediation will then be formally organised and regulated by the State.¹⁶⁷

The views of the above authors should be welcomed, and the government should take serious consideration of the importance of mediation. Community mediation is still only community based rather than being formalised into our legislation. This is problematic in the long run due to the issues of case congestion in the courts, high legal expenses, and sometimes litigation damaged relationships, which is quite different from mediation which aims at reconciling parties and solving issues amicably.

2.7 CONCLUSION

It is evidently clear that community mediation is still premature in SA since is not yet formalised. The cost of litigation forces people to look for other alternatives for solving their disputes therefore community mediation is very important. It is quite encouraging that the legislature does recognise mediation and has incorporated it in some provisions of some Acts. So too does the judiciary, as we have noticed from court decisions declaring that mediation is essential in SA.

It is also clear that although there are still problems with the application of some types of community mediation, like divorce and family mediation, in SA , it is quite reassuring that

¹⁶⁴ De Jong M (2005) 35.

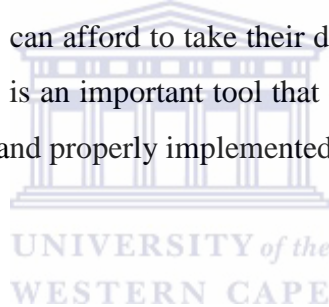
¹⁶⁵ De Jong M (2005) 33.

¹⁶⁶ Scott-Macnab D (1992) 283.

¹⁶⁷ Faris J (1996) 12.

mediation in general is receiving judicial and legislative support through court judgements and certain statutes that contain mediation provisions. However, in general, the main problem is that there is too little mediation and too much unnecessary litigation that is still taking place. It is therefore not strange that the South African government is slowly but surely starting to mandate mediation in all family law issues.

In addition to the above, another problem is that mediation services in SA are still not properly and comprehensively regulated at national level since it is not everyone who has access to such services. On a good note, though, community mediation is still developing in SA and although it is not yet developed to the extent of challenging litigation, it can act as an aid to litigation due to expensive costs of litigation which most people cannot afford to pay. Notably, the State is also focusing on restorative justice to reduce crime and also solve problems between the victim and the offender. Most importantly, the issue of formalisation of mediation in SA must be dealt with by the government as one of the most important matters to be dealt with, not many people can afford to take their disputes to the courts. As discussed in this chapter, already mediation is an important tool that can be used as an aid to litigation; therefore it should be considered and properly implemented.



CHAPTER 3

A COMPARISON OF THE STATUS OF COMMUNITY MEDIATION IN UNITED STATES OF AMERICA AND SOUTH AFRICA

3.1 INTRODUCTION

In jurisdictions such as the USA, prominent use of mediation can be traced back to the time of the Civil Rights movements in the 1960s. However, only in recent years has mediation as a form of ADR played a prominent role in the USA. The court system is viewed in the United States as the principal arena for handling disputes. Here the process is an adversarial one in which justice is the goal, and this is felt to be best achieved when each side strongly represents its own case, attacks the opposing side's case, and allows the judge or jury to decide who won.¹⁶⁸

Community mediation in the USA was seen as a grassroots, neighbour-to-neighbour form of ADR that has seen growing acceptance nationwide since the mid-1970s. The premise of community mediation is simple: to provide the public with a voluntary way to resolve conflicts in a productive, collaborative manner that relies primarily on self-determination. It strives to keep justice in the hands of the people and provide a receptive forum for their enhanced voices.¹⁶⁹

Similarly in SA, mediation is also very important; with its significance being proved during the negotiations between the ANC and the apartheid government during the 1990s. Mediation was used during SA's first national democratic election, particularly in the period leading up to the election, to reduce tensions and to foster free and fair elections.¹⁷⁰ Mediation was accorded formal status in the electoral law which governed the first democratic election.¹⁷¹ Nupen avers that this experience generated a wider interest in the efficacy of mediation to

¹⁶⁸ Wall JA & Stark JB 'North American conflict management' (1998) In Tjosvold D and Leung K (ed) *Conflict management in the Asia Pacific* ed 303-34.

¹⁶⁹ Hedeem T 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary Than Others' (2005) 26 *JUST. SYS. J.* 273-274.

¹⁷⁰ Nupen C 'ADR In South Africa: A Great Tool for Rapidly Changing Society' (1998) 4 *Dispute Resolution Magazine* 11.

¹⁷¹ Nupen C (1998) 11.

address electoral related disputes in other countries in the southern African sub-region as well as other community issues, such as, family and divorce issues etc.¹⁷²

This Chapter will develop a more comparative analysis of the use of community mediation in the USA and SA in which the historic roots and development of community mediation and the techniques used by their mediators to resolve disputes shall be discussed, as well as the regulation of mediation in both countries.

3.2 DEVELOPMENT OF COMMUNITY MEDIATION

3.2.1 Historic roots of community mediation in the USA

The community mediation movement in the USA can trace its roots to two primary sources, namely, the social and political movements of the 1960s, and then later governmental and non-governmental movements to reform the justice system.¹⁷³ It arose in the late 1960s and 1970s as an alternative to a formalised justice system that was perceived to be costly, time consuming, and unresponsive to individual and community needs.¹⁷⁴ Heeden and Coy submits that community mediation also advocates valued community training, social justice, volunteerism, empowerment, and local control over conflict resolution mechanisms but over the past quarter century, community mediation has become increasingly institutionalised and undergone various degrees of co-optation in its evolving relationship with the court system.¹⁷⁵

Since their inception, community mediation programs in the USA have often been tied to the justice system. This proximity is expressed in a number of ways. First, the courts are the leading source of case referrals for many programs. Secondly, state or local court systems provide the majority of the funding for many programs. It is partly through these ties that mediation programs have attained legitimacy in the communities they serve.¹⁷⁶

¹⁷² Nupen C (1998)11.

¹⁷³ Heeden T & Coy PG 'Community Mediation And The Court System: The Ties That Bind' (2000) 17 (4) *Mediation Quarterly* 356.

¹⁷⁴ Heeden T & Coy PG (2000) 356.

¹⁷⁵ Heeden TA & Coy PG 'Stage Model of Social Movement Co-Optation: Community Mediation in the United States' (2005) 46 *The Sociological Quarterly* 408.

¹⁷⁶ Phillips BA 'Mediation: Did We Get It Wrong?' (1997) 33 *Willamette Law Review* 677.

Notwithstanding the above, an overt relationship between community mediation and the justice system does raise potential concerns regarding the integrity and viability of mediation. With heavy caseloads in community mediation programs and funding coming from the court system, many programs may find themselves in weak or tenuous, if not compromised, positions.¹⁷⁷ Six areas of special concern in USA community mediation must be noted: (1) the dependence for funding upon the favour/support of the justice system; (2) the loss of autonomy to turn back inappropriate court referrals; (3) the potential for coerced participation in mediation; (4) the potential to be found to be at fault is faced by only one party; (5) the misunderstanding of the legal status or basis of mediation processes and outcomes; and (6) the loss of focus on 'community' in community mediation.¹⁷⁸ These problems must be addressed properly so that unnecessary consequences do not occur. The field of community mediation in the USA has developed rapidly, and its ties to the justice system bring both benefits and challenges to a field still developing. While the courts helped provide the nourishment and shelter for many fledgling community programs, the same court systems may also unduly influence the programs' further development and in some instances even compromise their integrity.¹⁷⁹ Hedeem and Coy emphasise that in order for community mediation programs to meet their communities' needs and expectations for conflict resolution services, they must safeguard their neutrality, ensure freedom from coercion, and gently yet firmly reject attempts at judicial control and oversight.¹⁸⁰ Even where coercion and partiality do not result from close ties to the courts, the mere appearance of court control may damage a program's credibility and viability.¹⁸¹

Hedeem and Coy also submit that in order to maintain independence and stature, community mediation programs must raise their visibility in the communities they serve. Many programs undertake sophisticated marketing plans to build awareness of their services, while others broaden their operations to include training and consulting in order to reach more individuals. For programs still in the planning stages it may be useful to delay the start-up of operations until broad community participation and ownership are established. Regardless of the specific

¹⁷⁷ Davis A 'Community Mediation in Massachusetts: A Decade of Development' (1986) *Administrative Office of the District Court* 35.

¹⁷⁸ Davis A (1986) 35.

¹⁷⁹ Hedeem T & Coy PG (2000) 359-363.

¹⁸⁰ Hedeem T & Coy PG (2000) 360.

¹⁸¹ Hedeem T & Coy PG (2000) 378.

efforts, initiatives like these are integral to the growth and success of community mediation.¹⁸²

Weinstein avers that community mediation is a form of social justice that uses lawful processes to change what is perceived to be unjust. Courts are often perceived as not welcoming due to expensive legal costs and time wasting, but community mediation affords cultural diversity among mediators and overcomes financial barriers.¹⁸³ He avers that community mediation presents an enormous opportunity for social change and community transformation. A community mediation program is a reflection of its community; its volunteers are representative of those who live there; and the problems that find their way to mediation mirror problematic community issues.¹⁸⁴ Weinstein further submits that using mediation allows individuals and society to reach agreements that are lawful and that bring about meaningful justice for those involved, in a collaborative, voluntary manner especially due to the fact that not everyone feels welcome in the courts. This had made community mediation in the USA become more acceptable and at the same time reliable.¹⁸⁵

It is evident that community mediation in the USA is well developed in comparison to South Africa, although there are a few potential problems still. It is also important to look at the structure of community mediation and the procedures used in the USA in order to effectively compare them to those of South Africa. This will be discussed below.

3.3. THE STRUCTURE AND PROCEDURES OF COMMUNITY MEDIATION IN THE USA AND SA

3.3.1 The regulation of mediation in the USA

The USA adopted the 2002 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation for regulation of mediation (although mediation is regulated differently in each state in the USA).¹⁸⁶ The National Association for Community Mediation (NAFCM), which is responsible for the

¹⁸² Hedeem T & Coy PG (2000) 357-359.

¹⁸³ Weinstein M 'Community Mediation: Providing Justice and Promoting Transformation' (2001) 19 *Conflict Resolution Quarterly* 252.

¹⁸⁴ Weinstein M (2001) 252.

¹⁸⁵ Weinstein M 'Mediation: Fulfilling the Promise of Democracy' (2000) 74(1) *Florida Bar Journal* 35-37.

¹⁸⁶ United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation for regulation of mediation (2002).

accreditation of mediators and also supports the maintenance and growth of community based mediation programs and processes, presents a compelling voice in appropriate policy making, legislative, professional, and other arenas, and encourages the development and sharing of resources for these efforts. Mediation in the USA is not easy to categorise or describe in general terms since each state and local jurisdiction utilises mediation as it deems appropriate for the local environment. Therefore, within the United States, the laws governing mediation vary from state to state.¹⁸⁷

In terms of the regulation of mediation in the USA, there is the Uniform Mediation Act¹⁸⁸, which was drafted in collaboration with the ABA's Section on Dispute Resolution, which establishes a privilege of confidentiality for mediators and participants. The UMA Act was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and it was created with aim or effort to create common state law regulation in different aspects of dispute resolution).¹⁸⁹ The UMA promotes the use and uniformity of mediation in the United States and also grants a legal privilege for those involved in the mediation process. It also aims to promote consistency with policies of the states and its primary interests included providing a privilege, something the parties cannot accomplish by contract, respecting confidentiality for mediation communications and encouraging the use of fair process conducted with integrity.¹⁹⁰

The Uniform Mediation Act (UMA) elected not to be a law that would diminish the creative and diverse use of mediation and the choice of process remains part of the parties' agreement though informed choice.¹⁹¹ The UMA does not provide mediation standards nor does it prescribe mediator qualifications or require that practitioners are legally qualified, although it does state that mediators must provide information on their credentials on request, and that this verification process is delegated to states and courts to organise through local rules.¹⁹² The ADR Act 1998¹⁹³ is another act that regulates ADR in the USA, which requires litigants in the federal district courts to consider alternatives, does not legislate on qualifications or training either, but delegates this to the relevant courts, which means that there is a great

¹⁸⁷ McFadden D 'Developments in International Commercial Mediation: USA, UK, Asia, India and the European Union' (2015) 8 *Contemporary Asia Arbitration Journal* 305.

¹⁸⁸ Section 9 of the Uniform Mediation Act of 2003.

¹⁸⁹ Available at <http://www.law.upenn.edu/bll/ulc/mediat/medam01.htm> (accessed 20 October 2016)

¹⁹⁰ Section 8 and 9 of the UMA Act of 2003.

¹⁹¹ Section 10 of UMA Act of 2003.

¹⁹² Sections 9 (c) & (d) of the UMA of 2003.

¹⁹³ Alternative Dispute Resolution Act of 1998, 28 U.S.C.

variance in the approaches to mediation standards and mediator qualifications in the USA. This act also requires every federal district court to implement an ADR program that offers at least one form of ADR to parties in civil cases. The Act authorizes the courts to require cases to participate in ADR but limits this authority to mediation etc. The Act also gives the courts authority to decide which ADR mechanism(s) to provide, types of cases to refer to ADR, and the qualifications and compensation of ADR neutrals.¹⁹⁴ Consequently, ADR programs vary considerably from court to court. Various Associations have developed mediator codes of ethics, such as the model standards of conduct for mediators, joint standards promulgated by the American Arbitration Association and the Association of Conflict.¹⁹⁵

There are no state requirements for the practise of mediation in workplaces or other private settings. Rather than regulate the practise of mediation, states have chosen to create lists of mediators meeting criteria for certain areas of practice. State wide lists of mediators are usually maintained by the judicial branch as an extension of its responsibility for settling civil disputes.¹⁹⁶ Lists or certification procedures have two general purposes: 1) to establish qualifications for mediators who receive funding from state government or who receive referrals from the courts or other agencies; and 2) to provide information about mediator qualifications for parties, attorneys, courts, and members of the public as they exercise free market choice among private mediators.¹⁹⁷

For example, in the state of Alabama, there are no state requirements for the practise of mediation. Parties or judges may select any mediator. Similarly in California there are no state requirements or guidelines except for child custody mediation through the courts. In the state of Florida also there are no state requirements for the practise of mediation; parties may choose any mediator, subject to the approval of the judge. This clearly shows that the regulation of mediation in the USA is done by the states as there not a specific one regulatory body that regulate mediation.

As noted, the support of the courts in the US for mediation is strong. US District Courts, for example, may order mandatory mediation. In the USA, courts have not hesitated to direct

¹⁹⁴ Section 653 of the ADR Act of 1998, 28 U.S.C.

¹⁹⁵ Klaus J.H & Steffex F *Mediation: Principles and Regulation in Comparative Perspective* (2012) 1246.

¹⁹⁶ State Requirements for Mediators available at

<http://www.mediationworks.com/medcert3/staterequirements.htm> (accessed 21 June 2016).

¹⁹⁷ State Requirements for Mediators available at

<http://www.mediationworks.com/medcert3/staterequirements.htm> (accessed 21 June 2016).

mediation in appropriate cases. Their power to do so came under scrutiny in *Atlantic Pipe Corporation (APC)*¹⁹⁸ where APC petitioned the First Circuit Federal Court because it believed that the U.S. District Court in the District of Puerto Rico did not have the authority to compel APC to participate in and pay the financial costs of mediation. Although the First Circuit Court did not support the mediation order, it nevertheless concluded that the District Court possessed the inherent power to order compulsory mediation, subject to various considerations discussed in its opinion. This clearly shows the value of mediation in the USA and the source of the statutory authority to order mandatory non-binding mediation is the ADR Act of 1998.

Aura and Vilalta aver that mediation in the USA is generally conducted outside the formal judicial framework. However, in certain circumstances, district judges may assign a magistrate judge to act as facilitator or mediator in a court case. Mediation is primarily developed by associations and private organizations that implement this modality together with other alternative mechanisms.¹⁹⁹ Such is the case of the American Arbitration Association, (AAA), the Internet Bar Association, the American Bar Association (ABA). Furthermore, each organization, association or chamber has developed its own set of regulations, or even standards of practice, guidelines or principles. This activity is often conducted by experts offering mediation services.²⁰⁰

Joubert also avers that there have been drawbacks to the US approach of making mediation compulsory. A cost sanction is considered (in some states) if one of the parties in a court ordered mediation failed to mediate in good faith. This approach is criticised for creating what is known as ‘satellite litigation’ over whether a participant failed to mediate in good faith, potentially compromising the confidential and without prejudice nature of mediation.²⁰¹ In fairness it should be mentioned that US courts have interpreted the good faith requirement narrowly and in *Karahuta v Boardwalk Regency*²⁰², for instance, the Court held that it is bad faith to knowingly send someone without the proper settlement authority to attend mediation. Joubert further argues that fundamental level, compulsory mediation may paint mediation

¹⁹⁸ In *Re Atlantic Pipe Corp* (1st Cir. 2002) Para 50-56.

¹⁹⁹ Vilalta AE ‘Mediation -Legal Framework: Comparative Law’ in *The White Book of Mediation in Catalonia: Legal Framework: Comparative Law* Chapter 2 (2010) 8.

²⁰⁰ Vilalta AE ‘Mediation -Legal Framework: Comparative Law’ in *The White Book of Mediation in Catalonia: Legal Framework: Comparative Law* Chapter 2 (2010) 8.

²⁰¹ Joubert J ‘Judicial activism essential to kick-start mediation’ (2014) 14 *Without Prejudice*.

²⁰² *Karahuta v Boardwalk Regency* 2007 *US District Lexis* 72510.

with the same coercive and adversarial brush as litigation thus creating the risk that mediation may develop into an adversarial process not all that different from litigation.²⁰³

Mediation in the USA is mandatory in many states, such as, Oregon, California, Texas and Florida. Over 1500 law firms and more than 400 companies in the USA have pledged to support ADR processes, such as mediation before litigation.²⁰⁴ Mandatory mediation in the USA has attracted criticism because it forces parties into scenarios that they have not chosen and may hinder the openness and communication of the mediation process.²⁰⁵ Although there are drawbacks to mandatory mediation, experience has shown that voluntary mediation has lower participation generally. Because voluntary mediation does not attract a significant number of participants, the costs for services are high, court dockets are not reduced, and mediators do not get very much experience of actual mediation.²⁰⁶ It should be noted that not all disputes are suited to mediation, and in some cases, rather than being a helpful step to finding an amicable solution between the parties, the legislature may be forcing the parties to expend resources on a futile process of mediation, the outcome of which is inevitably destined to result in a trial.

The community mediation model in the USA emphasises the value of people hoping to seek and achieve their own solution for the disputes between them.²⁰⁷ The mediator is the guardian of self-reliance and his or her conduct is largely dedicated to achieving compromise between the opposing parties. Therefore, the mediator remains neutral and seeks to direct the process by which the disputants achieve their own solution, without controlling the outcome.²⁰⁸ In so doing, the mediator may orchestrate an adaptable series of steps, strategies and skills to guide the parties in their effort to resolve the dispute, while refraining from imposing a solution.²⁰⁹ Mediators, despite the fact that they may be qualified to do so, make no representations or recommendations regarding the substantive law that may govern the dispute.

²⁰³ Joubert J 'Judicial activism essential to kick-start mediation' (2014) 14 (2) *Without Prejudice* 41.

²⁰⁴ Brand J & Steadman F et al *Commercial Mediation: A User's Guide to court referred and voluntary mediation in South Africa* (2012) 8.

²⁰⁵ Shaw D 'Mediation certification: An analysis of the aspects of mediator certification and an outlook on the trend of formulating qualifications for mediators (1998) *University of Toledo Law Review Winter* 7.

²⁰⁶ Shaw D (1998) 7.

²⁰⁷ Kovach KK *Mediation: Principles and Practice* (2004) 29.

²⁰⁸ Kovach KK (2004) 29.

²⁰⁹ Perkovich R 'A Comparative analysis of Community Mediation in the United States and the People's Republic of China' (1996) 10 *Temporary International law & Comparative Law Journal* 321.

The USA model is based on several important conditions.²¹⁰ First, the fact that the parties are actually acting in good faith. Secondly, the environment in which the mediation is conducted must be safe and conducive to the dialogue necessary to discuss and possibly settle the dispute. Thirdly, the parties must be able to engage in voluntary. Fourthly, any solution found should be one of a lasting nature. Lastly, the process should be flexible enough so that, if necessary, any issues related to, but which may or may not form the crux of the dispute, can be discussed in order to facilitate settlement.²¹¹ As a result, the USA system focuses on creating a healthy environment in which the disputants may interact. The USA utilises a continuum of skills and strategies ranging from establishing and enhancing communication to engaging in problem solving.²¹²

3.3.2 The Regulation of Mediation in South Africa

Mediation, unlike arbitration,²¹³ is not regulated by statute in SA. In contrast to the USA, SA has not adopted the 2002 UNCITRAL Model Law on International Commercial Conciliation. Furthermore, it does not have its own statute to provide for procedural aspects of mediation, such as, the appointment of a mediator, the mediation process, confidentiality, admission of evidence in other proceedings, etc.²¹⁴ Accordingly, parties in SA who agree to mediation in SA have to be careful to regulate these matters fully for themselves because there are limited residual provisions to assist them.²¹⁵ South African mediators must be well positioned to improve their competence and ethical behaviour and display a willingness to offer process safeguards so that the mediation option can be presented in the best light to potential users.²¹⁶

As set out above, SA has no national or provincial framework that provides certainty or reliability to mediation participants. Barin argues that formalising the process through legislation will do more harm than good, as the reason that mediation has proved successful is

²¹⁰ Perkovich R (1996) 321.

²¹¹ Kovach KK (1994) 40-41.

²¹² Lubman S (1967) 1298.

²¹³ Although the Arbitration Act of 1965 is outdated and does not specifically deal with international arbitration, it still serves a useful purpose for the regulation of arbitration in South Africa; the government has failed to implement the recommendations made by the South African Law Commission to adopt the UNCITRAL Model law on Arbitration.

²¹⁴ Paleker M 'Mediation in South Africa. Here but not all there' in *Global Trends in Mediation* 2ed (2006) Kluwer Law International 333.

²¹⁵ Brand J & Steadman F et al (2012) 8.

²¹⁶ Boule & Rycroft A *Mediation: Principles, Process, Practice* (1997) (460, note 263) cited from H Herman & D Eaker et al 'Supporting Accountability in the Field of Mediation' (2002) 18 *Negotiation Journal* 30.

due to the fact that it is not structured or regulated.²¹⁷ In practice, SA mediation practices are closely tied (at least in a geographical sense) to State sponsored institutions, particularly to the Magistrates and High Courts which is a similar to position in the USA where mediation processes and programs are also effected through the support of courts and the state.²¹⁸ Paleker avers that although mediation schemes operate with the authority of the justice system, institutionalism and a highly adversarial legal culture threaten to suppress the flexibility and empowerment opportunities often attributed to the practice of mediation.²¹⁹ He also submits that offices providing for mediation services are also frequently granted investigative and advisory powers which compromise the mediation process. SA needs more improved funding levels for public mediation services and there is also a need to revise a still adversarial State sponsored mediation process.²²⁰

The South African Law Commission recommends that community based resolution structures be given formal legislative recognition because they provide cost effective access to justice.²²¹ A good example of community mediators in SA is the Community Peace Program (CPP), a South African non-profit organisation that provides infrastructure for community based justice systems based on the model of restorative justice, which is supported in part by government funding and also by overseas aid. The Program seeks to help local communities establish peace committees, which work to resolve community conflicts and to address the social problems faced by the community.²²² The CPP is deployed in the townships of South Africa with the support of the Justice Department. The CPP operates by working with local communities to set up Peace Committees and each committee is composed of peacemakers who are members of the community and trained in conflict resolution procedures based on the principles of restorative justice.

South Africa does not yet have a national system of mediation standards. On 8 March 2010, the National Dispute Settlement Practitioners Council was launched. The objectives of the

²¹⁷ Babak B 'UNCITRAL Model Law on International Commercial Conciliation, How Can Canada Make a Contribution to the Uniform Enforcement of Settlement Agreements Around the World?' IBA Legal Practice Division *Mediation Committee Newsletter* August (2005) 69.

²¹⁸ Boule and Rycroft (1997) (note 231) at 199.

²¹⁹ Paleker M 'Mediation in South Africa. Here but not all there' in Alexander N (ed) *Global Trends in Mediation* 2ed (2006) 333.

²²⁰ Paleker M 'Mediation in South Africa. Here but not all there' in Alexander N (ed) *Global Trends in Mediation* 2ed (2006) 334.

²²¹ South African Law Reform: Commission Community Dispute Resolution Structures: Discussion Paper 87 Project 1999.

²²² Beck E & Leonard PB et al *Social Work and Restorative Justice: Skills for dialogue, peace-making and reconciliation* (2010) 253.

Council are to define and publish national accreditation standards for dispute practitioners, including mediators and arbitrators, as well as for trainers, courses and assessors.²²³ The standards are based on those of the International Mediation Institute, and the Council also intends to maintain and publish a national register of affiliated service providers, accredited settlement practitioners, trainers, courses and assessors.²²⁴ The Council is housed at the African Centre for Dispute Settlement at the University of Stellenbosch Business School. In recent years, South Africa has recognised a need for mediators to be trained and accredited to world standards. To this end Conflict Dynamics²²⁵ in association with the Centre for Effective Dispute Resolution in the United Kingdom has trained and accredited more than 400 South African commercial mediators in the past four years. The African Centre for Dispute Settlement in association with the ADR Group in the United Kingdom has trained and accredited 117 mediators to international standards.²²⁶ Family and divorce mediation is regulated by NABFAM though NABFAM operates as a sub-committee of Dispute Settlement Accreditation Council (DiSAC).²²⁷

It is also important to note that in SA there is currently no regulatory requirement that mediators accredit themselves, in contrast to the USA where each state regulates its own mediators and accreditation is also done by each state. Although courts also supervise the process and also NAFCM is responsible for the accreditation of mediators, a persons need to have a qualification in order to be a mediator. This means that some people without the necessary qualifications hold themselves out to be mediators. DiSAC provides industry supported certification of qualification and good standing.²²⁸ This accreditation is voluntary, but provides peace of mind to the public that a DiSAC accredited mediator meets the minimum industry standards for practice.²²⁹ In addition to that, Rycroft argues that there has been little transformation in South African dispute resolution and he suggests that South African lawyers are not sufficiently trained in the skills of negotiation or even aware of the mediatory process available to them. Because there is little appreciation of the principles,

²²³ Its founding members are the Arbitration Association of Southern Africa, Tokiso Dispute Settlement (Pty) Ltd, Equillore Group, Conflict Dynamics, and the African Centre for Dispute Settlement.

²²⁴ Brand J 'Amicable Dispute Resolution in South Africa' (2011) 2 in Goldsmith JC et al *ADR in Business: Practice and Issues across Countries and Cultures* 598.

²²⁵ Available at www.conflictdynamics.co.za (accessed 16 May 2016).

²²⁶ Brand J 'Amicable Dispute Resolution in South Africa' in Goldsmith JC et al *ADR in Business: Practice and Issues across Countries and Cultures* (2011) 598.

²²⁷ Available at <http://www.saam.org.za/training/nabfam-accredited> (accessed 06 May 2016).

²²⁸ DiSAC available at http://disac.co.za.winhost.wa.co.za/?page_id=3414 (accessed 06 May 2016).

²²⁹ It is important to note that lawyers are not automatically also mediators, mediation is a different skill, and requires additional qualification.

ethics and strategy of negotiation, lawyers are often less than effective in the process of last-minute settlement negotiations to ensure the best outcome for their client.²³⁰

3.4 COMPARISON OF COMMUNITY MEDIATION TECHNIQUES

Marquis generally avers that the shift in SA from the adversarial mode of resolving disputes to one embracing modes of ADR, such as mediation, has been slow compared to the emergence of mediation in other countries, such as the USA.²³¹ Newer statutes incorporate mediation and this has led to an increase in the prominence and use of mediation.

In the USA community mediators do not have a strong or broad power base and they infrequently utilise assertive techniques. Even if the mediators had power, the disputants would resist their influence because US citizens do not readily accept the exercise of power.²³² Interestingly, this might be similar to the situation in SA where citizens have too much belief in the court system than in other types of dispute resolving mechanisms. It is averred that citizens in the USA readily accept a mediator's exercise of power because they do not have so much belief in the programs of mediation. It may also be that most of them have been used to litigation for a while now; therefore they put much faith and their money in litigation rather than trying something new that can be as effective as litigation.²³³ American residents are also very individualist by nature, they strongly believe in individual rights and pursue their own interests, even when doing so infringes on the interests and outcomes of others. This individualism is very consistent with the most distinguishing characteristic of USA citizens, namely, that they enjoy, value, and are comfortable with competition rather than collectivism; therefore this also influences the way that community mediation operates in the USA.²³⁴

Boulle and Rycroft submit that mediators in South Africa are expected to act impartially, aid and improve communications between parties, enhance the negotiation process, and act as the agents of reality but without making a final decision. The mediator is responsible for facilitating the process (not to act as a judge, advisor or representative). The mediator does

²³⁰ Rycroft A 'Why is mediation not taking root in South Africa?' available at http://www.usb.ac.za/disputesettlement/Documents/pdfs/October_Newsletter_2009.pdf (accessed 17 May 2016) 5.

²³¹ Broodryk T 'A developing Mediation Minnow: The South African Perspective' in Esplugues C and Marquis L (eds) *New Developments in Civil and Commercial Mediation* (2015) Global Comparative Perspective 25.

²³² Wall JA & Callister RR (2004) 581.

²³³ Wall JA & Blum M (1991) 18.

²³⁴ Wall JA & Callister RR (2004) 577.

not express his or her views on the merits or make suggestions about the outcome.²³⁵ In South Africa mediation is applicable to all types of disputes. If it is ineffective, the parties can take their dispute to litigation or rather arbitration which is more effective especially in commercial disputes. Since some disputes require a finding of fact, not finding common ground means therefore that mediation will not be effective.²³⁶ In contrast to SA, USA mediation is used to solve all types of disputes ranging from contractual violations, commercial disputes, civil disputes and other disputes; the mediators and advocates need to be aware of other dispute resolution alternatives, such as arbitration etc.²³⁷

Despite the fact that different acts provides for mediation, SA has at present no overarching legislation regulating mediation in general or which lays down rules or principles which mediation must comply with. Furthermore although a variety of forms of mediation exists and plays an important role in our society, western mediation as it is currently practised in SA is to a large extent based on the English model.²³⁸ It generally occurs in a formal setting. The mediation is invariably preceded by a mediation agreement that sets out the 'ground rules' for the mediation process and defines the roles and responsibilities of the parties to the mediation and the mediator who is independent and neutral.²³⁹ There are recognisable stages that occur during the mediation process. Generally they include the mediator's opening statement, which includes an explanation of the purpose of the mediation and the mediator's role; the parties' opening statements and mediator's summaries thereof; the identification of the issues; the clarification and the exploration of the issues identified; the negotiations; and lastly the mediation outcome. The outcome may be an agreement or adjournment or termination of the mediation, and the objective is that the parties reach consensus which gives rise to a settlement agreement.²⁴⁰

De la Harpe argues that mediation has had a profound influence on South African history and its citizens, that it has proved successful under various circumstances, and forms part of the

²³⁵ Brand J & Todd C et al *Commercial Mediation: A User's Guide* (2012) 25.

²³⁶ Clark KC (2002) 59.

²³⁷ Clark KC (2002) 60.

²³⁸ De la Harpe S 'Mediation: Status Quo in Europe and Overseas ': Mediation in SA, *quo vadis?* available at http://www.rgsl.edu.lv/uploads/files/7_RGSL_Mediation_Stephen_de_la_Harpe-South-Africa-Overview.pdf (accessed 10 May 2016) 10.

²³⁹ Mediation: Status Quo in Europe and Overseas ': Mediation in SA, *quo vadis?* available at http://www.rgsl.edu.lv/uploads/files/7_RGSL_Mediation_Stephen_de_la_Harpe-South-Africa-Overview.pdf (accessed 10 May 2016) 10.

²⁴⁰ Mediation: Status Quo in Europe and Overseas ': Mediation in SA, *quo vadis?* available at http://www.rgsl.edu.lv/uploads/files/7_RGSL_Mediation_Stephen_de_la_Harpe-South-Africa-Overview.pdf (accessed 10 May 2016) 10.

culture of a large part of the community.²⁴¹ Mediation in SA is however diverse and fragmented and referred to in various pieces of legislation, thereby creating its own rules and peculiarities. De la Harpe also avers that the courts have had little opportunity to deal with the principles of mediation and this will probably still prove to be a minefield in litigation. He believes that this raises the question as to the extent to which mediation in general should be regulated, principles set, standards determined, training harmonised, and different forms of mediation recognised; also whether it will be fruitful to have a single Act regulating mediation considering the fact that historically in SA there is diversity of ways of mediation.²⁴² One of the main features in SA is its adaptability to the particular circumstances, however in the future the quality of the mediation and its success will mainly depend on the people involved, and for that reason proper training and specialisation, especially amongst lawyers, need to be given more attention in SA.

Since there is no national system of accreditation for mediators in SA and very little transferability of training credentials, issues of training and accreditation have been left to mediation agencies who have also acted as ‘accreditors.’²⁴³ While accreditation is not an absolute indication of competence or a guarantee for those who have become accredited that they will have a career in mediation, it does ensure though the observance of certain standards.²⁴⁴ With regards to mediators’ qualifications, anyone can be a mediator and can set a charge for their services, but a truly successful one is one educated in the field. SA mediators must have qualifications in order to mediate on any issue; therefore they must be accredited by DiSAC.²⁴⁵ The DiSAC is a voluntary industry association that publishes and maintains accreditation standards for mediators and arbitrators, as in the USA, where mediators must also be accredited by NAFCM. In addition to that the USA has a UMA which was enacted to create uniform state law regulation in regard to different aspects of dispute resolution.

²⁴¹ De la Harpe S ‘Mediation in SA, quo vadis?’ In *Mediation: Status Quo in Europe and Overseas Mediation. Options for countries in transition* 2013 (National Conference) 12.

²⁴² De la Harpe S (2013) 12.

²⁴³ Boulle L & Rycroft A *Principles, Process & Practice* (1997) 205.

²⁴⁴ Mistelis LA ‘ADR in England and Wales: A Successful Case of Public Private Partnership’ (2003) 6 (3) ADR Bulletin 53-56.

²⁴⁵ Jordaan B ‘Court-Based Mediation Becoming A Reality In SA Civil Justice System’ available at https://www.google.com/search?q=CourtBased+Mediation+Becoming+A+Reality+In+SA+Civil+Justice+Syst+em%E2%80%99&ie=utf-8&oe=utf-8&client=firefox-b-ab&gfe_rd=cr&ei=9st8V7_cB4ip8we_poa4CQ (accessed 13 May 2016)

Since mediation in SA is practised by a large number of individuals who have been trained in mediation techniques, the mediation movement has developed to a very sophisticated level in most city areas, for example, the Gauteng region, Durban, Port Elizabeth and Cape Town.²⁴⁶ Private mediation services have largely been available only to those who can afford the fees of professional mediators, while the majority of Black communities have had to rely on the dispute resolution services of advice centres, community based structures and traditional healers only.²⁴⁷ This is quite different from the USA where mediation is accessible to everyone and is free.

In the USA, community mediators do not have a strong or broad power base. Even if the mediators had power, the disputants would resist their influence because USA citizens do not readily accept the exercise of power.²⁴⁸ South African mediators, similarly to USA mediators do not emphasise morality when they are assisting the parties to reach an agreement. The mediator's primary objective is to achieve a settlement but also to clarify the issues in the dispute.²⁴⁹ When the mediator tries to emphasise the importance of values and morals to the parties, he or she must not impose these upon the parties. This will cause the dispute to escalate instead of bringing it to an end. Emphasising the importance of values and morality to the parties would be better achievable in divorce proceedings where one or both parties have had an affair.²⁵⁰

It is important in South African mediation that the mediator is neutral and impartial. The parties need to accept the mediator from the start of the mediation process.²⁵¹ When parties accept the mediator, this indicates the type of influence the mediator will have when he/she has to exercise an intervention.²⁵²

3.5 CONCLUSION

It is quite interesting from a global perspective that people are widely exploring diversified dispute settlement mechanisms, such as mediation, which are not replacements of litigation, but becoming the leading way for resolving various forms of dispute.

²⁴⁶ South African Law Commission Project (94) Issue Paper 8, 22.

²⁴⁷ South African Law Commission Project (94) Issue Paper 8, 22.

²⁴⁸ Callister R.R & Wall JA (2004) 581.

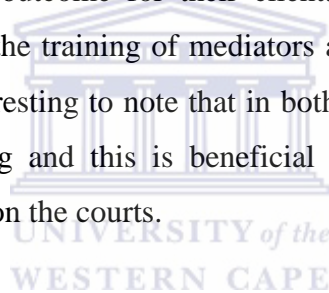
²⁴⁹ Anstey M *Managing Change, Negotiation Conflict* 3 ed (2006) 245.

²⁵⁰ Anstey M (2006) 245.

²⁵¹ Anstey M (2006) 250.

²⁵² Anstey M (2006) 250.

The similarities and differences between community mediation in South Africa and the USA are quite evident. In both SA and the USA the parties may reject an initiative taken by the mediators to mediate if both parties are against it, otherwise the parties may end up taking their matter to litigation. South African and USA mediators both do not have a strong power base. In both countries mediation can be mandatory or compulsory. The most notable difference is that South Africa, unlike the USA, has no legislation that regulates mediation, and it has not adopted the UNICTRAL Model Law of 2002. Notably in the USA each state has its own legislation to regulate mediation (there isn't one specific provisions regulating mediation generally). It is also noticeable that there has been little transformation in South African dispute resolution. The main problem is that South African lawyers are not sufficiently trained in the skills of negotiation or even aware of the mediatory process available to them. Because there is little appreciation of the principles, ethics and strategy of negotiation, lawyers are often less than effective in the process of last-minute settlement negotiations to ensure the best outcome for their client.²⁵³ USA mediation is also quite advanced especially in terms of the training of mediators and the skills required to mediate, than in SA. Lastly, it is also interesting to note that in both countries the use of mediation is rather increasing than decreasing and this is beneficial to the courts since it potentially reduces the burden of case work on the courts.



²⁵³ Rycroft A 'Why is mediation not taking root in South Africa?' Available at http://www.usb.ac.za/disputesettlement/Documents/pdfs/October_Newsletter_2009.pdf (accessed 17 May 2016).

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

In our global village and laboratory of life, we have a tremendous amount to learn from one another as humans, practitioners, researchers, and social scientists. There is no doubt that community mediation can lead to societal transformation and creation of peaceable communities. We need to see the importance of community mediation as a tool of transformation in our societies which are affected by lack of justice and other issues. It is in sharing our stories, evaluating the lessons learned, and measuring the depth of our achievements that we can acknowledge the deeper value of community mediation as a conduit for societal justice.

The central aim of this research paper, as set out in Chapter 1, was to determine to what extent community mediation is used in SA, and what can be done to further the development thereof formally so that it can become a legitimate alternative to traditional models of dispute resolution. An investigation had to be undertaken by means of comparative analysis of community mediation in SA and the USA, basically to compare the similarities and differences between these two countries. Noticeably, this research paper also discovered 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 also further discovered that this ADR tool was implemented with a view to remedying the adversarial shortcomings in the areas of South African law which are flooded with delayed court cases. 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, and through the level of support from the corporate governance system in company law although shortcomings were also evident due to lack of a statute regulating mediation..

It is clear that although there are still problems with the application of some types of community mediation like divorce and family mediation, in SA, it is quite reassuring that mediation in general is receiving judicial and legislative support through court judgements and certain legislative statutes that contain mediation provisions. However, in general, the main problem is that there is too little mediation and too much unnecessary litigation still taking place. It is therefore not strange that the South African government is slowly but surely starting to mandate mediation in all family law issues and also fully support mediation

programs to aid litigation. In addition to the above statement, another problem is that mediation services in SA are still not properly and comprehensively regulated at national level since it is not everyone who has access to such services. Despite the different Acts providing for mediation, SA has at present no overarching legislation regulating mediation in general or laying down rules or principles with which mediation must comply. Although a variety of forms of mediation exists and plays an important role in our society, there is a need for a statute to regulate mediation for whole of SA.

It is quite noticeable nevertheless, that legislating mediation is not a new phenomenon in SA. Over 23 pieces of legislation provide for mediation in various areas of law. Moreover, mediation is expressly legislated for in the areas of labour, family and commercial law. At present mediation remains the most prolific in labour, family and credit disputes because of the legislation making it compulsory. On a good note, though community mediation is still developing in SA and also not yet developed to the extent of challenging litigation, it can act as an aid to litigation due to the expensive cost of litigation which people cannot afford to pay. Notably, the State is also focusing on restorative justice to reduce crime and resolve problems between the victim and the offender. Most importantly, the issue of formalisation of mediation in SA must be dealt with by the government as one of the most important matters to be dealt with. Since not many people can afford to take their disputes to court, as discussed above, already mediation is an important tool that can be used as an aid to litigation. Therefore it should be considered and properly implemented. However, it may be argued that the integration of mediation into SA judicial proceedings requires much more comprehensive statutory regulation. For instance, provision should be made for specific circumstances when mediation should either be unnecessary or may be dispensed with therefore there is a need for improvement.

It is quite interesting from a global perspective that people are widely exploring diversified dispute settlement mechanisms such as mediation, which is not a replacement of litigation, but is becoming the leading way for resolving various forms of dispute.

Another noticeable distinction is the way in which mediation is regulated in these two countries. In the USA, as discussed before, mediation is regulated differently depending upon which state is involved. The UMA simply seeks to ensure uniformity of mediation services and covers confidentiality, privilege and also creates a standard, nationwide framework for

protecting the confidentiality of mediation communications and creating more certainty for participants in the process.²⁵⁴ Not all states have adopted the UMA however, and some problems still persist. In contrast, SA does not have specific legislation regulating mediation, although private attempts have been made with regards to the accreditation of mediators. Due to the fact that there is no national system of accreditation for mediators in SA and very little transferability of training credentials, issues of training and accreditation have been left to mediation agencies who have also acted as ‘accreditors’. Such organisations have been influential but remain voluntary.

Considering the fact that mediation is vastly expanding in South Africa due to growing support by the government and the judiciary, it is important that South African mediators must be well positioned to improve their competence and ethical standards and display a willingness to offer process safeguards so that the mediation option can be presented to potential users. Another matter that must be considered is the regulation of mediation which must be made a priority considering that fact that South Africa has no national or provincial provisions regulating the practise of mediation or conferring legal status on mediators (mediation is currently regulated by private accreditors). There is a need for one body or statute to regulate the accreditation of mediators to create uniformity in the practise of mediation; and it also creates efficiency and ensures the observance of certain standards. This paper is of the view that mediation in South African communities should be regulated properly and there is a need for one body that accredits mediators throughout the country.

The main problem that needs to be addressed is the creation of mediation standards that mediators must abide by. The absence of due process safeguards creates potential risks and opportunities for manipulative and oppressive behaviour both between the parties themselves and by the mediator. Although some South African organisations have developed their own standards, there is a need for a statute clearly stipulating the rules and regulations to be followed.

²⁵⁴ Ollapally LT ‘Private mediation can relieve burden of courts’ available at <http://www.deccanherald.com/content/544836/private-mediation-can-relieve-burden.html> (accessed 23 June 2016).

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