

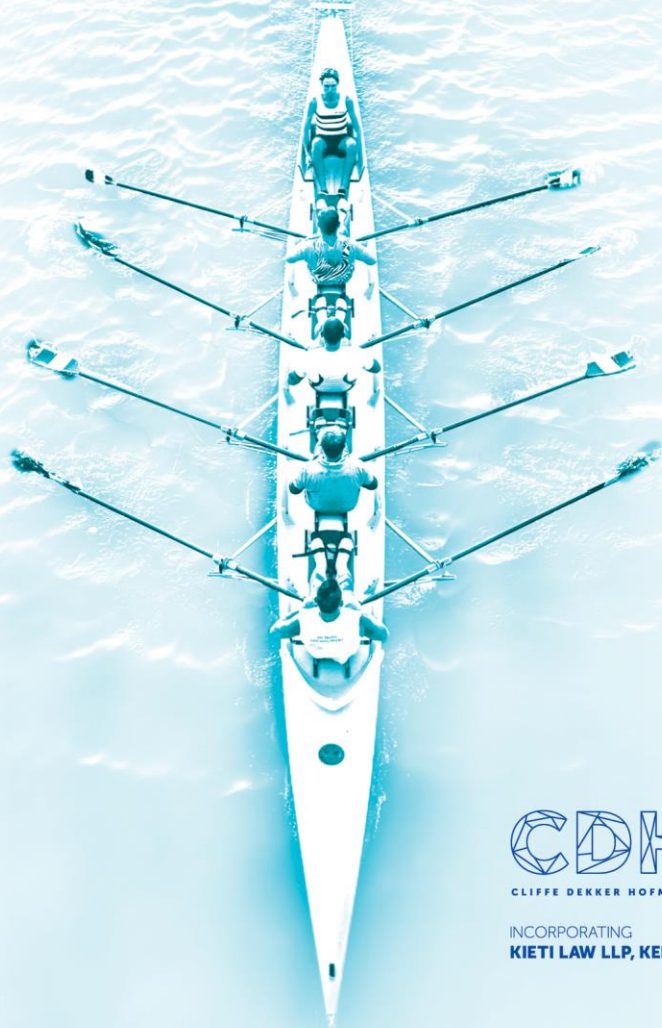
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- Mediation:
 - neutral third party
 - navigating resolution / narrowing of issues

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- Litigation/arbitration not always the best option
- Method of narrowing down issues in dispute
- Litigation fatigue



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- A large majority of disputes:
 - breakdown of trust
 - betrayal
 - standing fast to position
 - so begins the institution of legal proceedings
 - all but the kitchen sink at one another
- Spend inordinate number resources
 - time, money, effort one party satisfied (in many instances, only marginally)

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The Relationship

- Introduction



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- Dating



- Proposal



- Negotiations





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- Honeymoon



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The separation

- Difference of opinions



- Disputes



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Separation - Contested

- Divorce



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- Litigate



RESOURCES

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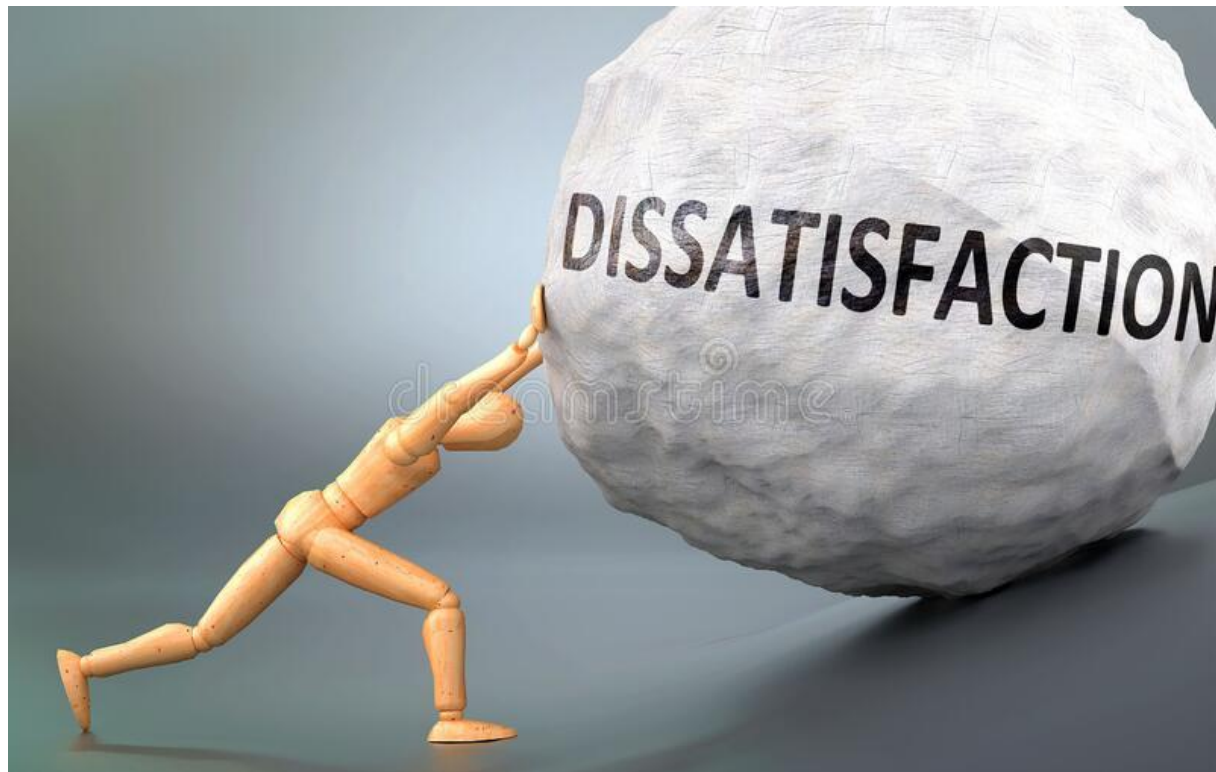


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Alternative

- Difference of opinions
- Disputes
- **THEN...**

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- Counselling / mediation



- Reunion



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- “Amicable” separation



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- “Amicable” separation



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The Relationship

- Introduction



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- Dating / due Diligence



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- Proposal / offer



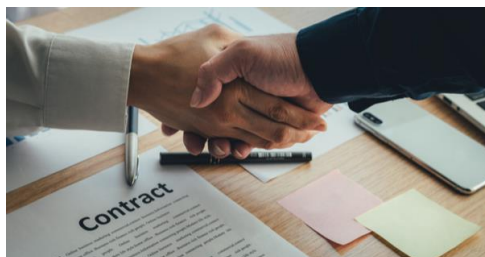
The Relationship

- Negotiations



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- Marriage / conclude contract



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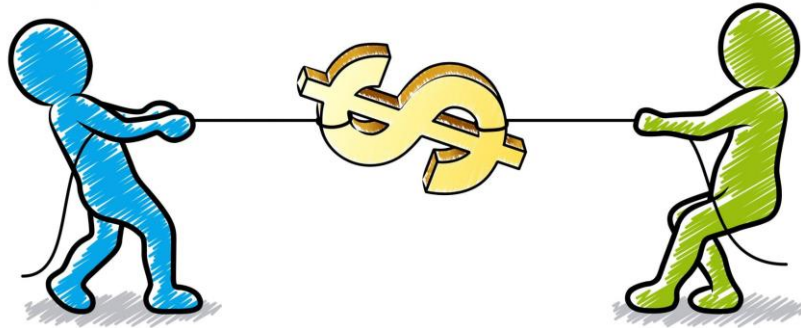
- Honeymoon / implementation



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Separation

- Disagreement
- Dispute



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Separation - contested

- Divorce / cancellation of contract and/or damages claim – i.e. total breakdown of relationship



- Litigate



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RESOURCES



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Alternative

- Difference of opinions
- Disputes
- **THEN...**

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- Counselling / mediation



- Renegotiation



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- Reunion
- Commercial separation



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Advantages

- Reunion
- Highlight actual disputes
- More cost effective
- Quicker
- Flexible
- Confidential
- Neutrality

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Positioning in legal realm?

- Private vs court annexed / statutory mediation
- Non-compliance court annexed mediation / statutory mediation
 - Costs
- Binding?

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International recognition

- United Nations (UN) Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”)
- https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en

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- 7 August 2019
- 55 signatories to date
- Strengthens mediation as an alternative dispute resolution method for international commercial disputes
- Eswatini

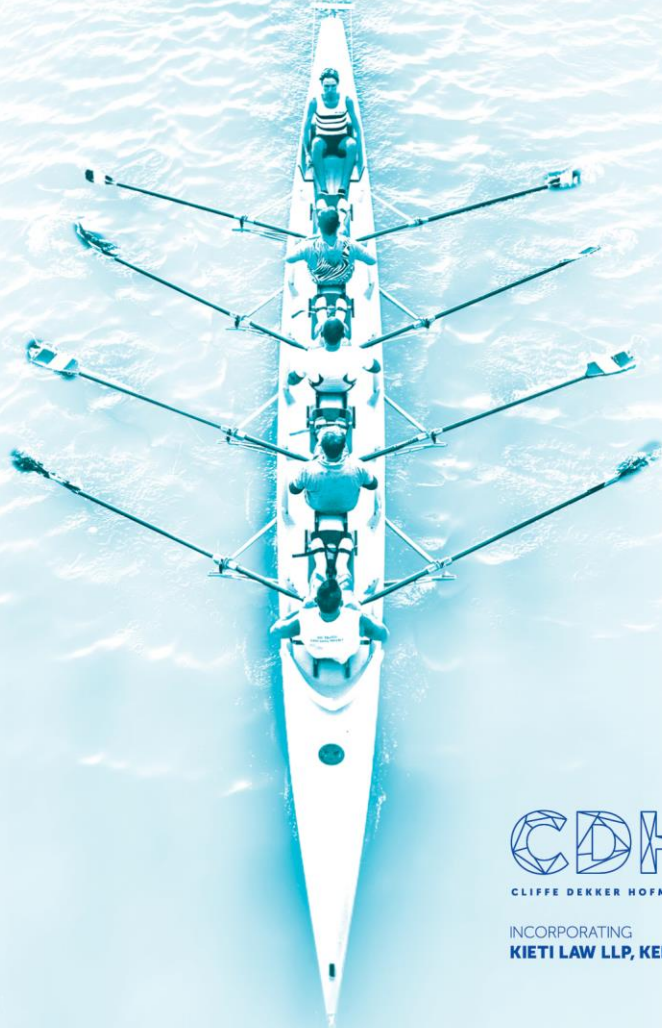
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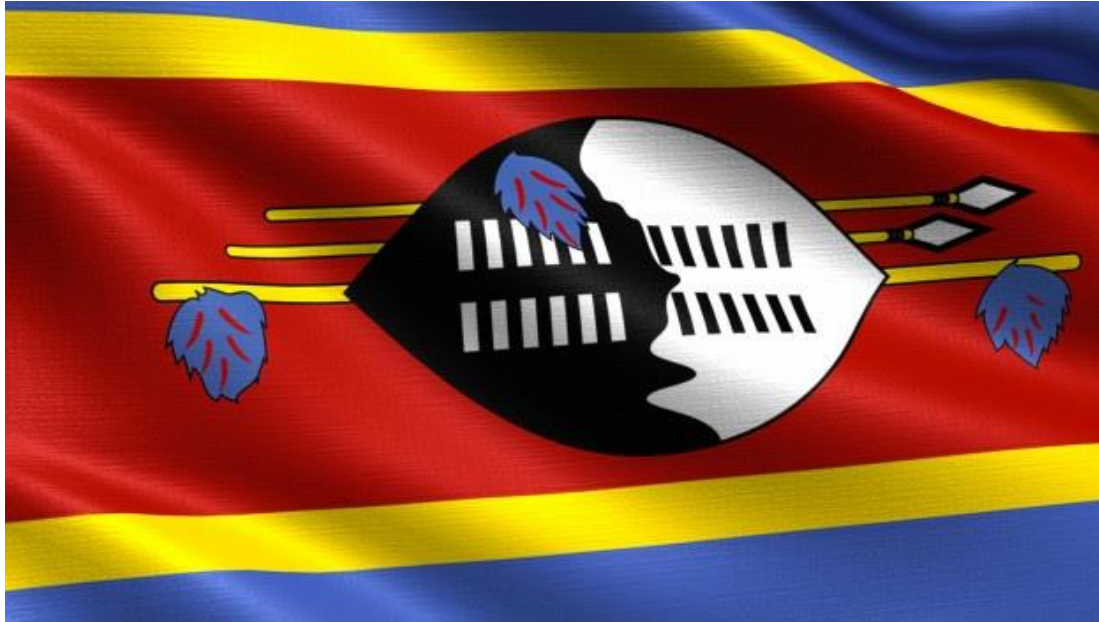
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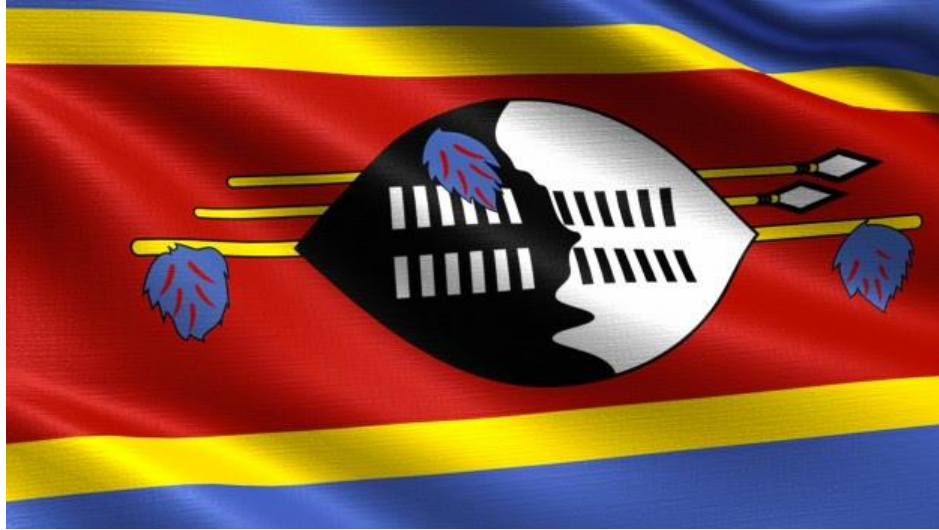


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ESWATINI



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- Not yet court annexed mediation
- Various statutes
 - Industrial Relations Act

SOUTH AFRICA

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MEDIATION
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- Court annexed mediation:
 - Rule 41A & Case Managements Rules
 - *Considered* (37A(11)(a))
 - Costs implication (Rule 41A(9)(b))



- Statutes:
 - Companies Act
 - Labour Relations Act

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LESOTHO



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- Court annexed mediation - High Court (Mediation) Rules
 - Rule 7(1) – *mandatory*
 - Rule 7(2) – similar to Rule 41A of SA Rules
 - Rule 7(3) – assumption

NAMIBIA



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- Court annexed **alternative dispute resolution**:
 - Rule 38 & Case Managements Rules (25(2)(o))
 - Case management – *considered*
 - No adverse costs implications BUT
 - Judicial referral (38(1)) – *mandatory*



- Statutes
 - Labour Relations Act
 - Not Companies Act
 - Arbitration (not ADR)

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BOTSWANA



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- No court annexed mediation:
 - High Court – intention to amend
 - Industrial Court Rules (Trade Act)
 - *agreement*
 - *compulsory*

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ZAMBIA



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- Court annexed mediation – since **1997**:
 - Order 31 Rule 4 (1) – *mandatory amenable to mediation*
 - **Exceptions:** constitutional issues; liberty of person; injunction; unsuitable for mediation
 - Order 31 Rule 8 (3) – adverse costs order failure to attend without reasonable cause

ZIMBABWE



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- No court annexed mediation:
 - Practice directives encourage alternative dispute resolution

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MOZAMBIQUE



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- No court annexed mediation
- Law on Arbitration, Conciliation and Mediation (“LACM”), Law No. 11/99, of 8 July 1999

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Mediation in East & Central Africa by Desmond Odhiambo

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Types of Mediation practiced in East and Central Africa

- **Court annexed Mediation** - mediation under the umbrella of the court
- **Traditional mediation**- African cultural practices are applied
- **Private mediation**- parties privately resort to mediation before an accredited mediator.



Mediation in East
and Central Africa

Disputes that are commonly resolved through mediation in East and Central Africa

- **Commercial disputes** in the High Court- in Kenya, Uganda, Tanzania, Rwanda, and Cameroon.
- **Family disputes** in the High Court – Kenya
- **Labour disputes**- Tanzania, Kenya, Uganda, and Rwanda
- **Land disputes**- Uganda, Tanzania, Kenya, Rwanda, DRC, Burundi
- **Political disputes**- Central African Republic, DRC.
- **Petty criminal offences**- Rwanda
- **All Civil Suits**- Rwanda and Uganda

Mediation in East
and Central Africa



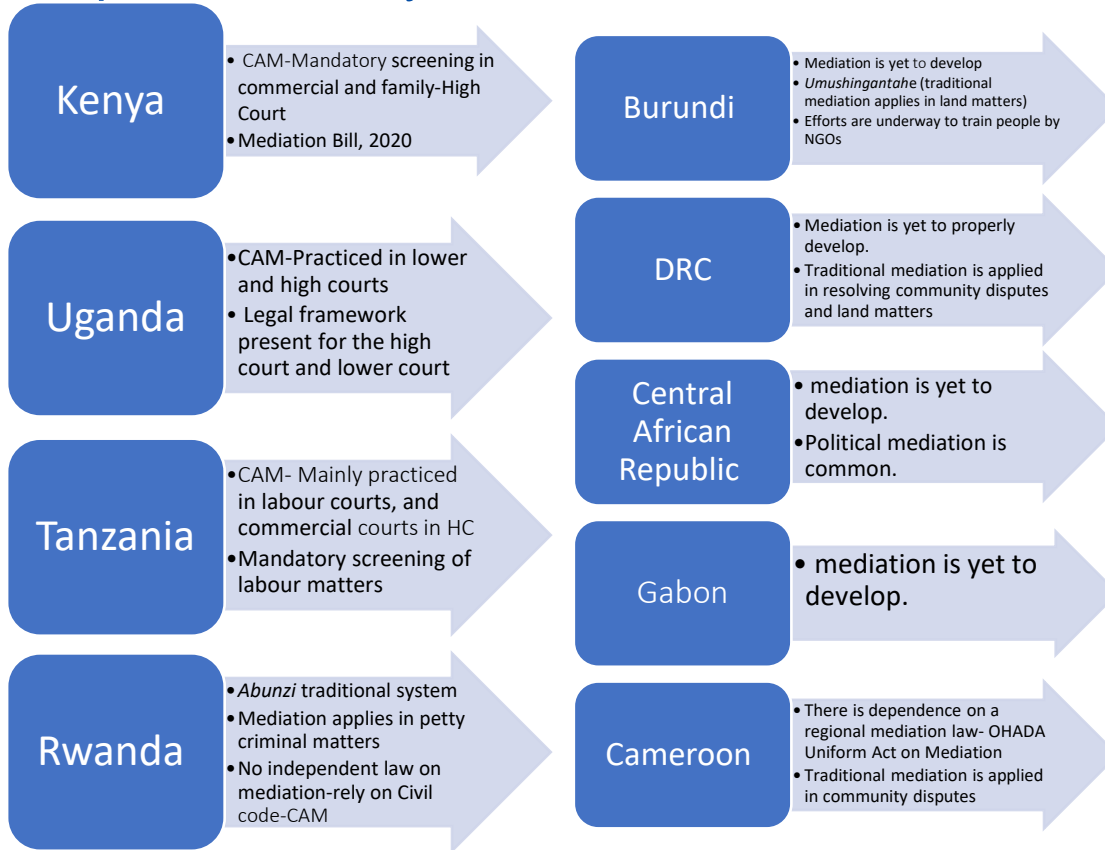
Mediators

- **Trained and accredited mediators-** Kenya, Uganda, Tanzania, Rwanda.
- **Elders of good reputation-** Rwanda, Tanzania, Uganda, Burundi, DRC, and Cameroon
- **Judges and magistrates act as mediators-** Uganda, Rwanda, and Tanzania
- **In Kenya-** judicial officers **do not** act as mediators



Mediation in East
and Central Africa

Comparative Analysis on Mediation



Mediation in East and Central Africa



Mediation and Technology considering the Impact of COVID-19

1. Pros of online mediation

- **Cost saving**- no need to hire a physical venue
- **Flexibility**- time and convenience

2. Cons of online mediation

- Difference in time zones
- Cyber security-could affect confidentiality
- Inability to read the body language
- Varying degree of internet access



Mediation in East
and Central Africa

The Impact of Court Annexed Mediation in Kenya

- The 2019-2020 judiciary financial report, about 4315 matters were referred to mediation.
- About 1290 matters were settled through mediation.
- About KES. 7.3 billion was saved by settling the matters through mediation
- Matters took 90 days to be completed.



Mediation in East
and Central Africa

Practical Tips

- **Mediation/conflict resolution clause**
- **Institutional mediation**



“I’m glad we settled our conflict this way.
War is expensive.”



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Evolution of ADR amid
litigation fatigue and
COVID-19 restrictions

How has dispute
resolution been
impacted by COVID?



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How has dispute resolution been impacted by COVID?

- Courts were closed
- Backlog in case load
- Urgent applications
- Forced to consider ADR



Introduction of Technology

- Caselines
- Microsoft Teams
- Zoom
- Skype



Court Process prior to Caselines:

- South Africa had very dated court process- issuing and filing had to be done at court
- All originals were required to be in the court file
- Accumulation of masses of paper – Court files; Arch Lever files in congested archiving rooms
- Increase in misfiled or lost files- process for opening a duplicate court file is time consuming (5-stamps)
- Chaotic file retrieval and accessibility: Long queues

Caselines:

- Rolled out in Johannesburg and Pretoria during the fourth term of 2019
- Caselines is an advanced online solution that offers digitalization of court processes.
- To enable the efficiency and effectiveness of court administration
- Implementation of a secure user-friendly online system to easily manage pleadings and records within the High Court for effective processing of court cases
- High Security re: Manage participants and restricted permissions

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Continued:

- Ensure efficient delivery of document archiving and records management : Audit trail
- Push notification function ensures that all parties are notified when new documents are uploaded
- Dispense with pagination and indexing –built - in indexing and pagination capability
- Eliminate trips by CAs and messengers to the Court to attend to the court file

Virtual hearings: Benefits

- Cost effective: save on travel and accommodation cost; arbitration venue and the need for recording facilities.
- Expediated: scheduling easier because they avoid the need for parties to congregate at a specific location and time.
- Virtual hearings also decrease the reliance on hard copy documents as electronic documents can be shared between parties and/or on screens. This is more efficient, and it is also better for the environment- OneDrive/Dropbox
- Recordings are available immediately for purposes of preparing for cross-examination and the parties avoid incurring the cost of rolling transcripts.

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Virtual hearings: Challenges

- Technical and Connectivity issues
- Security and confidentiality of the proceedings
- There are concerns about the inability of presiding officers and counsel to assess the demeanour or body language of witnesses during virtual hearings which makes it difficult to assess the witness credibility
- There is also a real risk of witness tampering in virtual hearings since it is hard to ascertain whether a witness is being coached or reading notes during testimony.

Virtual hearings: Ways to address the challenges

- Invigilators present at each venue where witnesses will testify
- The Judge/Arbitrator should confirm with the witness that he or she is alone and will not receive any communication during his or her testimony
- The witness should be positioned close enough to the camera so that facial expressions can be gauged. His or her upper body, hands and desktop ought to be visible
- A proper view of the room should be displayed at the beginning of the session.
- It must be required that the witness does not have a virtual background.

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Virtual hearings: Protocols

- High Court and SCA: Microsoft Teams
- The Arbitration Foundation of Southern Africa (AFSA) has- Remote Hearing Protocol
- Africa Arbitration Academy- Protocol Hearings in Africa
- The National Consumer Tribunal: makes use of Microsoft Teams for its hearings and has developed its own Microsoft Teams Manual to assist participants

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Interplay between
mediation and
arbitration/litigation –
can they co-exist?

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Can they co-exist?



Negotiation



Mediation



Arbitration/ Litigation

Negotiation: Contractual Obligations (examples)

- *“Any dispute between the parties shall be referred to a special committee (“**Special Committee**”) consisting of the managing director of Party A and the CEO or his duly authorized representative, which shall meet as soon as possible after referral of the dispute to it and shall use its bona fide best efforts to resolve the dispute.*
- *In the event that the Special Committee shall have failed, for whatever reason to resolve the dispute by no later than 30 (thirty) business days after the dispute shall first have arisen, **the dispute shall be submitted to and decided by arbitration**”*

Examples of Dispute Resolution provisions-

- *“Any dispute, which arises between the Parties, shall be referred to a **joint committee of a director or partner of each party, who will use their best endeavours to resolve the dispute within 14 (fourteen) days** of the dispute having been referred to them.*
- *Should the joint committee be unable to resolve a dispute in accordance with the foregoing such **dispute will be submitted to and decided by arbitration in terms of this clause 36**, or upon agreement between the parties, to a court of competent jurisdiction. Should the parties fail to agree to refer the matter to court, the dispute shall be decided by arbitration in the manner set out in this clause.”*

Examples of Dispute Resolution provisions-

- “Each party will appoint a **Vice President or Senior Management representative to discuss the dispute**, and no formal proceedings for judicial resolution of such dispute, except for the seeking of equitable relief, may begin until either Vice President or Senior Management representative concludes, after good faith effort to resolve the dispute, **that resolution through continued discussion is unlikely within a period of 20 (twenty) days of the dispute arising**.
- Either party may thereafter **refer the dispute for mediation**, to be concluded by a **mediator appointed by the Arbitration Foundation of Southern Africa (“AFSA”)** and conducted in accordance with the AFSA rules. Such mediation **shall occur before suit** and the mediation process will not result in a binding decision, with either party being entitled to seek judicial resolution.”

Rule 41A: Mediation as a dispute resolution mechanism

- (2) (a) *In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a **notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.***
- (b) *A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, **a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.***
- (c) *The notices referred to in paragraphs (a) and (b) shall be substantially in accordance with Form 27 of the First Schedule **and shall clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediated.***
- (d) *Subject to the provisions of subrule 9(b) the notices referred to in this subrule **shall be of a without prejudice and shall not be filed with the registrar.***

Rule 41A: Mediation



The parties may at any stage before judgement agree to refer the dispute to mediation. If the trial or opposed application has already commenced, you require leave of the court.



A judge or Case Management Judge may also direct the parties to consider referral of the dispute to mediation.



The parties are required to sign a joint minute recording their election to mediate and enter into a mediation agreement.



All the prescribed time periods for the filing of pleadings and/or affidavits will be suspended for the duration of the mediation process which should be concluded within 30 (thirty) days.

Courts: Fear of the unknown

- **Limpopo**: The courts were not permitting virtual hearings and parties were required to appear in person or run the risk of their matters being removed from the roll.
- **Kwa-Zulu Natal**- Limited virtual hearings, within the judge's discretion.
- **Botswana**: The courts require appearance in person, but litigants are more inclined to agree to arbitration proceedings- expert determination within 2 (two) weeks.
- **Eastern Cape**: Limited virtual hearings, within the judge's discretion.
- **Lesotho**:
 - The courts did not permit virtual hearings and parties were required to appear in person.
 - On 15 March 2021, a Practice Manual was issued which made provision for virtual hearings, the implementation thereof only commence in May 2021, but the use of virtual hearings is the exception rather than the norm.
 - Mediation is mandatory in terms of their court rules.
 - Arbitrations are uncommon- also do not have the necessary structures such as AFSA in place.





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