

MEDIATION

Alternative Dispute Resolution

Lynne Pringle

Definition of Mediation

An alternative process for resolving disputes expeditiously and effectively with the assistance of an independent third party

Parties are guided by their **interests** and less so by their rights with a focus on **preserving relationships**

- Litigation
- Arbitration
- Mediation
- CCMA

•Litigation

- public court process
- (past) facts and applicable Law
- third party decision
- time consuming
- costly – hidden cost
- unpredictable outcome
- binding, high cost of SCA

• Arbitration

- outside courts more private
- third party decision maker
- facts and evidence
- less time-consuming
- usually less costly
- final and binding

•Mediation

- not public court
- private and convenient
- informal and voluntary
- M not third party decision maker
- facilitates both parties create options for their own best possible solution
- timely
- cost effective
- agreement can be made order of court
- cost are usually equally shared/agreed apportionment

•CCMA

Commission for Conciliation Mediation and Arbitration

- labour disputes
- more private and informal
- Commissioner third party decision maker
- Conciliation meeting

- Conciliation: 'the action of stopping someone being angry';
'placation'

•CCMA

- labour disputes
- more private and informal
- Commissioner third party decision maker
- Conciliation meeting
- arbitration meeting at CCMA
- commissioner makes decision
- can be made order of court
- no appeal
- may take further to court

TRUST Firm belief in the reliability, truth, or ability of someone or something. Trusting in someone else to make decisions.

- Relationships built on trust – a dependence, assumption and/or confident expectation that assets/property will be legally protected by a nominated trust/trustees for the benefit/good/welfare of one or more beneficiaries.

Ensure distribution according to your wishes, manage potential tension/conflict

- Core concern drives human emotion and behaviour - need for autonomy

Beneficiary - autonomy violated, needs not met - resentful and victimised.

Trustees break the trust - decisions imperil assets of trust, and welfare of a beneficiary

- Divisiveness of legal conflict - authority to act on beliefs.

Trust is a casualty of conflict

Disharmony

broken relationships

Conflict >>

mistrust and fear >>

uncertainty

Dispute

loss of control

- Power struggle.

Manipulation and deception - purpose of a victory.

- Risk averse – decision can breach your rights – don't fight back - resentment

The Law is a system of individual rights. Any dispute immediately reverts to the language of rights. - PK Howard.

- Everyone has Rights:
 - not be a victim
 - needs met, at least not violated
 - disagree
 - confront troubling issues
- First line of defence for an aggrieved party, who fears losing what they believe is rightfully theirs, is to fight with the expectation that their rights will triumph.

This is war!

'From the cradle' - Alfred Bester

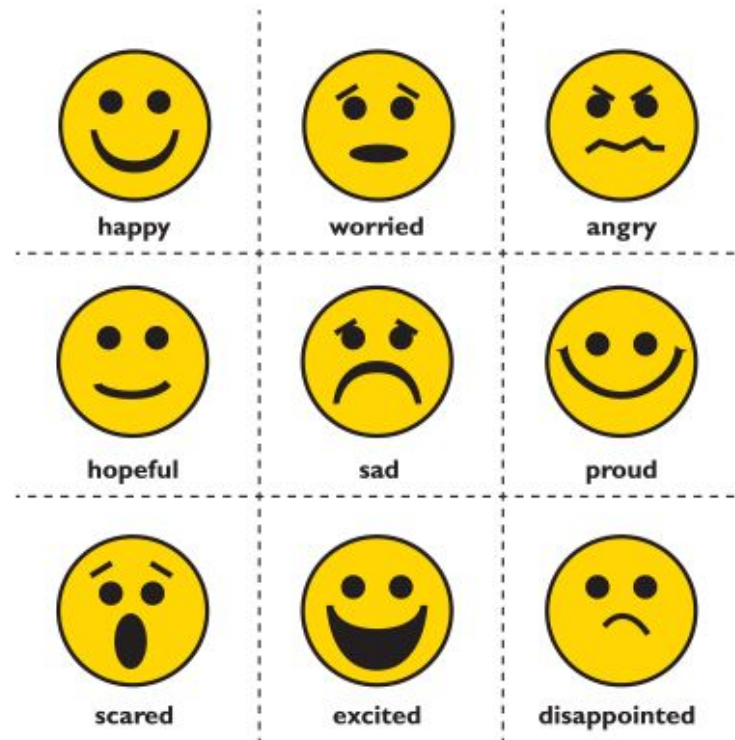


Entitlement

- The theory of rights is one of legal entitlement. Believing and asserting right - bitter conflict
- Litigation = vindication
- Conflict - adjust the facts and remember only their story. Absolutely believe that entitled to
- The idea of loss plays a large role in human behaviour
- Scarcity principle by GK Chesterton: *the way to love anything is to realise that it may be lost*
- Need for it or not - will fight!
- First-born- larger portion

Emotions and Feelings

Feeling and longing are the motive forces behind all human endeavour and human creations. - Albert Einstein



Reactions humans experience in response to events/situations

- **Fear** (losing or being robbed of a right)
- **Surprise** – anticipation
- **Anger/disgust vs Trust**
- **Happiness vs Sadness**

Strong influence on our function in our daily lives.

Make decisions based on our feelings/emotions. Influenced by our perception of the situation (whether accurate or realistic, biased, altered by your own mental misconceptions)

Trust disputes applicants particularly emotional

Conflict - Emotions flare up, difficult to think straight , lose sight of what is best

Fear is the catalyst of suggestion and suggestion implants all kinds of stubborn and absurd fear in the hearts of even the most intelligent and courageous men - Paul Tournier

- A **Cognitive Bias** is the beliefs and feelings that causes one to respond in a particular way.
- Endowment bias – overvalue things that belong/may belong to one in the future
- Fixed pie bias – benefits due to be distributed are like a fixed pie that cannot be enlarged.
- Reciprocity bias – only share with those that share with you
- Loss aversion bias – losses loom larger than potential gains

You can change how you feel, or how long you are going to react on that feeling/emotion, how you are going to behave.

M - overcome in order to reach consensus.

Attitudes

- People do not readily change their attitudes before putting up a fight
- Once established (from the cradle) tend to be more resistant to change
- Compassion and empathy. Past facts not ignored, emphasis how to go forward
- Acknowledge their contribution towards the conflict in ways they had never been prepared to acknowledge even to themselves

When to mediate

First prize prior to court.

Never too early and
never too late.



When to Mediate

An ounce of Mediation is worth a pound of Arbitration and a ton of Litigation - Joseph Grynbbaum (USA Mediator)

Any time during Litigation process. Agreement may be reached on certain issues of dispute and shorten court time and save costs should it proceed to trial

Mediators are able to visualise the conflict terrain of the war between parties

A man will fight harder for his interests than for his rights - Napoleon.

- Assisted Negotiations
- Assists parties
 - trade their interests,
 - generate their own options for solving their dispute(s)
 - reach solution both satisfied to live with
 - positional, fear of compromise
 - interests not positions
 - diminish resentment of defeated foe by mutual gains

Reciprocity

- Usually treat people fairly in expectation that they will treat us fairly in return. Part of building trust
- Negative reciprocity - '...after all I have done for you....'
- Having voluntarily cared for testator/ managed assets – very real and strong belief should positively affect future compensation/benefits (regardless of whether according to the trust directive)

- Dialogue orientated or Settlement orientated
- Focus on **preserving relationships**, looking to ongoing future relationships
- Requires understanding of each other, and that is often lost in the adjudication process
- Stopped communicating with each other, talk merely to impress third parties into taking sides
- Difficulties in perception and communication can be acknowledged and addressed
- Brings calmness - one is usually only able to work on creative solutions once you have calmed down

- Mutual gain and win-win
- Even if an applicant has made some concessions they still save face
- Shared conflicts and shared interests are reconciled, not positions
- Not arguing about a cause (past fact) but a purpose looking forward
- Mutually satisfying options typically result in a gradual consensus on a joint decision efficiently
- Outcome is one that parties can live with
- 'mere disharmony or discord'

'I do not say it is good, I do not say it is bad. I say it is the way it is' - Talleyrand.

•Costs and Value

- Small cost – high value vs high cost - small value
- Personal and commercial
- Might not even recover 30% of your costs even should you win
- 90% settled steps of court – not have their day in court to be heard

Mediation process:

- Structured - joint and side sessions
- Confidential - private, safe space to be able to speak freely, keep contents of M from being used as evidence
- Non-prejudiced – any offer, admission, concession made is without prejudice and may not later be used in a court or Arbitral proceedings
- Non-binding until agreement signed by both parties
- M may be required by the court to write a report if court recommended
- M works hard for each party – Sawubona... 'I see you'... 'I hear you' ...carries the importance of recognising the worth and dignity of each person
- Nothing divulged to the other party unless mandated

Code of conduct

- Impartial and non-judgemental
- Controls the process – parties have assurance that they will not be manipulated/intimidated by the other participant
- Respectful, patience with tolerance for ambiguity
- Not function to give advice
- Works to win trust of parties – assurance of confidentiality encourages trust

What is required of parties

- Willingness to participate in earnest and openness
- Asked to give an undertaking that they will not abandon the process without giving the M opportunity to see if the reason can be addressed.
- Provide prior summary of complaint/dispute
- Mediation is not a platform for blaming

Settlement authority/mandate

- Participant(s) authority to sign an agreement or have mandate from the Trust
- The agreement can contain contingencies should anything go wrong

Court compelled?

- A judge/case manager/court may at any stage during litigation refer the parties to Mediation.
- Rule 41A introduced into the uniform rules of court in February 2020, allowing mandates to parties to a dispute to consider M as an ADR.

When may Mediation not be suitable?

- Less effective when questions of Law represent key elements of the dispute
- Where a party has no reasonable confidence in the future conduct of the other party as a result of allegations of fraud or dishonesty. When reasonable concerns exist regarding the enforceability of the final agreement.
- A disadvantage - can be difficult if either party withholds information.
- There seems to be that there are now increased clauses to mediate or arbitrate in terms of wills

'failed' Mediation

- Very rarely so
- When settlement cannot be reached, helps parties to decide and define some issues, whether to try again or to take to trial.
- 90% in SA dispute is resolved and 70% on first day
- Have nothing to lose . Pause button, not delete button, on their rights.

A case that could have been best resolved by Mediation

Testator vs trustees: 1 (grand)father, 2 husband, and 3 attorney.

Divorced. 3 minor children reside with father remarried. R20000 pm maintenance. Dissatisfied not enough R41000 pm. Declined. Wishes mother private school, father too expensive. Grandfather knew wishes and paid out of own pocket. Applicant had terminated contact between children. Grandfather wanted more access and for children to attend private school. Third trustee seen as 'puppet' of first alleged received business referrals from first and obliged to comply with whatever first wanted, and that he was not impartial. Wanted 2 and 3 trustees removed, appoint new trustees choose himself. Applicant wanted relief from the trust to fully cover his cost of supporting the children regardless of his obligation as a father and legal guardian. Children were both capital and interest beneficiaries, he wanted trustees to distribute the capital so that by the time they turned 21 the trust capital would be depleted. This was against the testator's intent. Having envisaged capital remaining to cater for contingencies.

- Applicant without consent of fellow trustees concluded a lease to rent one of the properties to a third person and collected rent. His second wife became involved with emotional emails and Whatsapp messages. The case went on for years, ended up in the Appeal court and outcome was that the applicant lost his case with costs.
- Case in family court UK Judge: `This case cries out for M. Feelings are running high, early positions taken...the litigation bandwagon rolls on. The best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of common sense. The results are astonishingly good. Try it more often. The legal costs come out of the common pot...deplete the assets that can be used to advancement of the interest of the family.

In conclusion: *'Peace is not absence of conflict, it is the ability to handle conflict by peaceful means'* -
Ronald Reagan

- Adjudication is not to be replaced by M, but for M to be part of the litigation process, one of the important options available to resolve disputes.
- M is accepted as appropriate in commercial and family cases, thus how much more appropriate in trust disputes.
- Alternative workable resolution in Trust disputes for both parties vs costly adversarial court proceedings. Timely, convenient with a high rate of compliance.
- Mediation is a way for two parties to find their own peaceful solution for a disagreement that they can live with, and which would preserve the relationship, particularly important in a Trust, between them.

References

1. Thinking, Fast and Slow – Daniel Kahneman
2. Fierce conversations – Susan Scott
3. Getting to Yes – Roger Fisher & William Ury
4. The Lost Art of Drawing the Line – Philip Howard
5. The Strong and the Weak – Paul Tournier
6. Influence, the Psychology of Persuasion – Robert B Cialdini
7. Communication by Objectives – HP Fourie
8. Social Psychology – Jonathan L Freedman, J Merrill Carlsmith, David O Sears
9. Egon v Motel services (Bath) 2007 UK
10. Rademeyer v Jesseman Gauteng High court

Lynne Pringle
Mediator

Accredited Mediator (UCT)

BA Psych (Unisa) / Occupational Therapist (UPta)



082 784 5979

PO Box 30786



lpringle@iafrica.com

Tokai, 7966