

HOW EFFECTIVE HAS MEDIATION BEEN IN THE ADMINISTRATION OF JUSTICE?

**BY
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**Obligatory Essay
On**

**HOW EFFECTIVE HAS MEDIATION BEEN IN THE ADMINISTRATION OF
JUSTICE?**

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partial fulfillment of the requirements of the Degree of Bachelor of laws (LL.B).**

THE UNIVERSITY OF ZAMBIA

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DEDICATION

This work is dedicated to my God who has given me the gift of life and has also sustained me to this level. To my family especially my parents **Mr.(Edward) and Mrs.(Easther) Mwalimu**, through whom it has been possible for me to be on this earth and whose endless love, guidance and comfort I will always be grateful for, may the good Lord continue keeping you in good health.

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To start with, I would like to thank my elder sister **Mrs. Lillian Mwalimu Banda** whom I fondly call Mamamia because of the motherly love she has for me. Mamamia, thanks for being there for me just at a tender age and for the support you have given me financially, morally and emotionally. I would not have gone this far in my education without you who has sacrificed a lot in you life to make sure that my tuition fees and other school needs were met in time. May God Bless you and always provide for you in your times of need.

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Chitambala and also to those I cannot mention by name but whose help I appreciate greatly.

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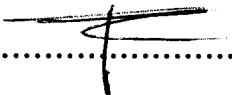
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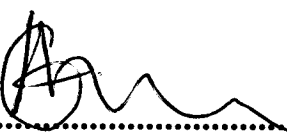
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Supervisor.......... Date.....9th FEB 2009.....

Dr.P.Matibini

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I, Marian Mwalimu, do solemnly declare that this dissertation represents my own work, which has not been submitted for a degree at this or any other University. Further, that other people’s work has been fully acknowledged to the best of my knowledge.



Author’s Signature: (Marian Mwalimu)

Date: 9th February 2009.....

TABLE OF LEGISLATION AND CASES

STATUTES

Arbitration Act Number 19 of 2000

The High Court (Amendment Rules) Rules Statutory Instrument No. 29 of 1999

The Industrial and Labour Relations Court (Arbitration and Mediation Rules) 2002

CASES

Bank of Zambia v Nyambe and Others SCZ Judgment No.30 of 2006

Makungu v Galaunia Farms Limited 2001/HP/0829 (Unreported)

ABSTRACT

In Zambia and world over, the most common way of resolving disputes between individuals and individuals and the states is through the court system. However, it has been observed that there are other ways in which a dispute can be resolved apart from using the court system. This method is what is termed as Alternative Dispute Resolution (ADR). Alternative dispute resolution is defined as any of a variety of techniques for resolving civil disputes without the need for conventional litigation. It may include informal methods of arbitration, and structured forms of conciliation using a specially trained mediator as a go between.

Why resort to ADR one may ask? The answer is that the Zambian Courts are flooded with a lot of cases and most of them have not been resolved within the expected time frame. Moreover, litigation has been described as being too formal, costly and rather divisive. ADR in Zambia has mainly existed through one mechanism known as arbitration which has been on the statute books for quiet some time in Zambia. Arbitration is the determination of a dispute by one or more independent third parties rather than by a Court. The Arbitration Act was first introduced in 1993. However, it was repealed and replaced by the enactment of a new Arbitration Act number 19 of 2000.

One of the major forms of ADR mechanism is called mediation and is the main focus of this study. Mediation is a form of ADR in which an independent third party called a mediator assists the parties involved in a dispute or negotiation to achieve a mutually acceptable resolution of the points of conflict. The Zambian Judiciary in an attempt to reduce the backlog of cases in the courts introduced the Court-Annexed mediation programme to address the number of complaints raised by lawyers and litigants alike.

This was done through the passage of statutory instrument number 11 of 1997 to amend the High Court Rules. The question left to consider now is if the introduction of mediation in general but especially Court-Annexed mediation has been effective in the administration of justice

TABLE OF CONTENTS

DEDICATION..... i

ACKNOWLEDGMENTS..... ii

Certification Page..... iii

Originality Declaration.....iv

Table of Legislation and Cases.....v

Abstract.....vi

CHAPTER I INTRODUCTION AND CONCEPTT OF MEDIATION IN ZAMBIA

1.0 Introduction.....1

1.1 Statement of the Problem.....2

1.2 Research Questions.....2

1.3 Methodology.....3

1.4 Objectives.....3

1.5 Historical Development of Mediation.....3

1.6 Mediation Process.....5

Conclusion.....8

CHAPTER II COURT-ANNEXED MEDIATION

2.1 High Court and Industrial Relations Court Mediation Statistics.....17

Table 2.2 High Court Mediation Statistics.....19

Table 2.3. 2007 Mediation Statistics.....20

Table 2.4. 2008 High Court Mediation Statistical Report.....21

Table 2.5 2008 Industrial Relations Court Mediation Statistics.....21

Conclusion.....22

CHAPTER III MEDIATOR TRAINING AND ACCREDITING

History.....23

Training.....24

Advantages of Settlement Week.....26

Conclusion.....27

CHAPTER IV LEGISLATION AND INSTITUTIONAL FRAMEWORK

3.1 Mandatory Vs Voluntary Mediation.....30

3.2 Advantages of Mandatory Mediation.....31

Conclusion.....34

CHAPTER V CONCLUSIONS AND RECOMMENDATIONS

5.0 Conclusion.....35

5.2 Recommendations.....38

5.2.1 Continuation of ADR as a Course at UNZA.....38

5.2.2 Harmonization of the Rules.....39

5.2.3 Extension of Court-Annexed Mediation to Lower Courts.....40

5.2.4 Training of Judicial Officers in ADR.....40

5.2.5 Training of Mediation Officers in ADR.....40

5.2.6 Mediation Awareness Campaign.....41

5.2.7 Permanent Places for Mediation Sessions.....41

5.2.8 Introduction of Circuit Courts at Provincial Centers.....42

BIBLIOGRAPHY.....43

CHAPTER ONE

THE INTRODUCTION AND CONCEPT OF MEDIATION IN ZAMBIA

1.0. INTRODUCTION

Mediation has often existed alongside formal legal structures offering consensual alternative to legal remedies. However, in Zambia, mediation as a form of dispute resolution process was formally introduced on 28th May 1997, when Statutory Instrument number 11 of 1997, was passed. This was passed to amend the High Court Rules. The effect of the amendment is that except in cases involving constitutional issues or the liberty of an individual or an injunction a matter may in suitable cases be referred to mediation by a trial judge. It is also important that organisations or companies agree that in case of any dispute, the matter will be settled through mediation.

From the aforesaid, it can be noticed that statutory instrument number 71 of 1997 only covers court- Annexed Mediation in the High Court. However, mediation is also conducted at the Industrial Relations Court (IRC) though it was introduced at a later stage in 2002. This was done through the passage of statutory instrument number 26 of 2002. It was introduced for the same reasons as the High Court that is to reduce on the backlog of cases in the Court. The IRC was basically ten years backwards that is if a compliant was lodged, it would usually take longer than usual for it to be decided upon.¹

Interview: M.Mwale, 6/11/2008

.1 STATEMENT OF THE PROBLEM

With the ever increasing population, the effect is that there is an increase in the number of disputes that require to be resolved. Consequently, there is an increasing number of people who are bringing their matters before the Court to be resolved. As the American Jurist Warren Burger lamented:-

“We read in the news of cases that continue not for weeks or months, but years. Can it be that the authors of our judicial system ever contemplated cases that monopolise one judge for many months or even years? All litigants standing in line behind a single protracted case whether it is one month, a three-month or longer cases are denied access to that court.”²

It is therefore encouraging to note that mediation was introduced as a form of dispute resolution to help reduce on the backlog of cases in the Courts. However, the question is whether it is serving its purpose. Thus the aim of this is to address the effectiveness of mediation in the administration of justice.

.2 RESEARCH QUESTIONS

1. What is Mediation?
2. How is Mediation conducted?
3. Has the legislation and legal frame work behind mediation been effective?
4. To what extent has mediation reduced the backlog of cases in the Zambian Courts?
5. Do many people have knowledge about mediation?

Warren Burger, *Isn't There A Better Way?* London, West Publishing Co, 1982

3 METHODOLOGY

The research was qualitative. It was done largely by desk research by consulting publications as well as field investigations. Documents consulted included books, reports and statutes. Field investigations on the other hand comprised of interviews as well as visiting places like the High Court, Industrial and Labour Relations Court and the Zambia Centre for Dispute Resolution.

4 OBJECTIVES OF THE STUDY

The research seeks to demonstrate whether mediation has been serving its purpose from the time it was introduced in Zambia. It is important to evaluate the efficacy of the law regulating mediation in Zambia so as to give recommendations on how the law can be improved or strengthened so that the masses of people can have access to justice. Therefore, the paper is aimed at making a contribution towards Alternative dispute resolution in Zambia efficacious in the administration of justice.

5 THE HISTORICAL DEVELOPMENT OF MEDIATION

When parties are unable to resolve their disputes through discussion and negotiation, a logical step is to seek the assistance of a third party to facilitate communication and the search for a solution. “Mediation is the broad term used to describe the intervention of third parties in the dispute resolution process. The term ‘conciliation’ is sometimes used to describe the same process of involving third parties, often in the context of labour relations when neutral intervention is used to break a stalemate.”³

Murray S.J. Process of Dispute Resolution, The Foundation Press, Inc. 1996 P.10

from the above definition, it can be derived that mediation is a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator who helps them to try to arrive at an agreed resolution of their dispute. One of the most important issues to note in mediation is that the mediator has no authority to make any decisions that are binding on the parties; but uses certain techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.⁴ This is the case even where the mediator expresses a view about the merits of the dispute, this would be a non-binding opinion, and in no circumstances would a mediator have the power to impose his view on the parties. This is one of the things which distinguish mediation from litigation in that in the latter, a judge imposes his or her view on the parties which they have to accept.

The use of mediation can also be justified from a historical perspective. The activity of mediation itself appeared in very ancient times. Historians presume early cases in Phoenician commerce. The practice developed in ancient Greece which knew the non-martial mediator as a *proxenetas*.⁵ Therefore mediation probably predates the formal creation and enforcement of law, for humans in the social state seem to have a natural instinct to seek the guidance of others in settling differences between individuals.⁶ Indeed, formal legal structures may have developed out of informal attempts by family members, neighbours and friends to mediate as superior to litigation as a course for settlement dispute.

Mediation has often existed along side formal legal structures offering community based, consensual alternative to legal remedies. In African societies there was an informal mediation

P. Matibini. Mediation: An Alternative Dispute Resolution Process, Zambia Law Journal Volume 1999/2000 P. 31

[WWW.MediationWorks. Com](http://WWW.MediationWorks.Com).

Deburg v. Parker Chappin Flatau and Kimp
324 NE 2d 995, 1000 (N.Y.1993).

process. A Court system established by the British was primarily adjudicative, while the African informal mediation process performed an integrative and conciliatory function. Whereas the court system is characterised by social distance between judge and litigants, rules of procedure which narrow the issues under discussion and a resolution which ascribe guilt or innocence to a defendant, the African mediator sessions emphasised the bonds between the convenor and the disputants.⁷ It encouraged the widening of discussion so that all tensions and viewpoints psychologically, if not legally, relevant to the issue were expressed and it resolved disputes by consensus about the future rather than assigning blame respectively.⁸

6 MEDIATION PROCESS

A critical step in the development of mediation as earlier alluded to was the passage of statutory instrument number 71 of 1997 that introduced the Court Annexed mediation. The main reason of passing the instrument was to amend order 31 of the High Court Rules relating to the place and mode of conducting a trial by providing for the practice of mediation in the High Court. To this end, therefore, some of the rules relating to how mediation is to be conducted will be analysed in this Chapter.

The first rule relating to mediation under the statutory instrument is rule 4 which addresses the reference of matters to mediation. It provides that except for cases involving constitutional issues the liberty of an individual or an injunction or where the trial Judge considers that the case to be unsuitable for referral, every action may, upon being set down for trial, be referred by the trial judge for mediation and where the mediation fails the trial judge shall summon the parties to fix

P. Matibini, Mediation An Alternative Dispute Resolution Process, Zambia Law Journal Volume 1999/2000 p.28

P. Matibini, Mediation an Alternative Dispute Resolution Process, Zambia Law Journal Volume 1999/2000 p. 29

hearing date.⁹ The cases that are referred to mediation are those on the general list and the commercial list.

Rule 5 provides for a list of mediators. It provides that there shall be kept by the Mediation Office or proper officer a list of mediators who have been trained and certified by the Court to act in this capacity with the field or fields of bias or experience indicated against each of their names. The mediators shall not be of not less than seven years working experience in their respective field.¹⁰ The people who assign the various cases to the trained mediators are those at the mediation office because as can be seen from the provision of rule 5, they are the ones who keep the list of trained and accredited mediators.

An important issue to note about this provision is that the mediator's list is always updated to include newly trained mediators. This is an appropriate move because mediators are sometimes lost through death and physical incapacity. The other thing to note is that when mediation was first introduced in Zambia, among the first people to be trained as mediators were the judges. In as much as they are still on the mediation list, they do not conduct mediation but refer the cases to mediation.¹¹ Thus, it is important that new people are trained and more mediators are included on the list. However, it has been suggested by some of the mediators that the mediation trainings must be spacious to allow for those who are trained to gain the necessary experience.¹²

The mediator shall sign for and collect from the mediation office or proper officer the record referred to under sub-rule (3) of rule 3 Of Order 31.¹³ In as much as this is not provided for by the rules, parties are also free to choose a mediator from the mediation list. This is because some

Rule 4 of statutory Instrument No. 71 of 1997. The High Court (Amendment) Rules 1997
Id. Rule 5

Interview: M. Njelesani, 23/10/08

Interview S.K. Sharma, 23/10/08

Rule 6 of Statutory Instrument number 71 of 1997

parties have undergone mediation before and were impressed with the outcome and so would all want the same mediator that they had during the first mediation that they had undergone. Lawyers also choose the mediator they want when a case has been referred to mediation by virtue of being familiar with most of the mediators.¹⁴

However, the consequence of parties choosing a preferred mediator is that other mediators are disadvantaged especially those who are newly trained because they will lack experience. Another disadvantage is that the same preferred mediators can have a load of work and so will not manage to handle all of the cases in the required time frame which is 60 days. The advantage of having the mediator's list kept at the mediation office is that the proper officers know what kind of case to assign to a particular mediator depending on the expertise.

For there to be order in mediation, there has to be a record which will show which mediator is handling which case. To this end, there is provision under the statutory instrument of what should happen when a mediator collects the record, in that the mediator shall sign for and collect the record.¹⁵ The same forms which the mediators sign to acknowledge that they have collected the record are the same that they sign when they return the record whether the mediation was a success or not.

Some of the important details on the forms are the slot for the cause number and also a slot to indicate whether the mediation was successful or not. This is very important because mediators come from all walks of life and are very busy people who do not frequent the Court grounds like lawyers and that is the more reason why the cases are not put in the pigeon holes of the various mediators.

Interview M. Njelesani, 23/10/08
Rule 6 of Statutory Instrument No.71 of 1997

in this regard, when a case has been referred to mediation since the list is kept at the mediation office, the officers look at the record and then assign the record to a mediator depending on their expertise. This is done by contacting the mediators whose details are kept at the mediation office and any other information which is for the mediator is communicated to them. This is important so that the mediation office knows which mediator is handling what case.¹⁶

CONCLUSION

In conclusion therefore, statutory instrument number 71 of 1997, being the High Court (Amendment) Rules of 1997 was passed making it possible for cases to be referred to mediation by a High Court Judge mandatory. Otherwise mediation could be said to be a voluntary process with the effect that parties can apply before a judge to go for mediation and in cases where parties do not wish to settle the matter in mediation, they are at liberty to get back to the Courts of law.

CHAPTER TWO

COURT ANNEXED MEDIATION

Statutory instrument number 71 of 1997 brought about the introduction of the Court Annexed mediation programme. The programme is currently administered in the High Court and the Industrial Relations Court (IRC). However, statutory instrument number 71 of 1997, outlines the procedure of mediation in the High Court. The starting point in the mediation process is that a High Court Judge may in a suitable case; refer any matter to mediation at any stage of the proceedings.¹⁷ It must be emphasised that cases involving constitutional issues, the liberty of an individual or an injunction may not be referred to mediation.

Mediation as earlier alluded to is also administered in the Industrial Relations Court and it is of importance to note that statutory instrument number 71 of 1997, only introduced mediation in the High Court and not the Industrial Relations Court (IRC). For the IRC, mediation was introduced after the passage of statutory instrument number 26 of 2002. That is, the Industrial Relations Court (Arbitration and Mediation Procedure) Rules of 2002. Before a case is referred to mediation, a complaint has first to be lodged in Court at the registry by the complainant. The respondent is then given 21 days to respond. After this, the record is then given to a Judge who then refers it to mediation if he deems it fit to do so.

For the IRC, mediation is usually conducted at the mediation office itself. Another important thing to note is that both Courts use the same list of mediators and to this end there is provision that the mediators to be listed under sub-rule (1) shall be those currently approved or certified by

Rule 4 of statutory instrument No.71 of 1997

the Chief Justice in respect of the High Court proceedings under the Rules of the High Court.¹⁸ However, the IRC usually prefers to use mediators who are human resources practitioners because of the cases which the IRC handles which are employment in nature.¹⁹ The preceding rules are in many respects similar to the mediation rules that apply to the High Court but with very few differences.

The first difference between the High Court and the IRC rules are that a mediator in the IRC is required to complete the mediation process within ninety days from the date of collection of the court record.²⁰ Whilst in the High Court, the time frame is 60 days. The second difference is that in the IRC, a mediator may postpone or adjourn a mediation hearing at any stage if consideration of justice so demand or if that postponement is likely to facilitate a possible settlement.²¹ It is important to note that a postponement or adjournment of a matter under this rule may only be granted by a mediator only within the ninety days period prescribed. However, cases are sometimes not settled within the required periods due to factors like the mediators being busy handling other aspects of their work or parties not turning up for the mediation sessions.

Thirdly, where on the request of the mediator after expiry of the ninety days the Court or Judge is of the opinion that the chances of settlement are still feasible, the Court or Judge may grant a further period as may be thought reasonably by the mediator.²² This rule entails that there are usually a lot of regular adjournments which in turn leads to delays in disposing of cases. Fourthly, where a party fails to comply with the order of reference to mediation, a trial Judge in the IRC may enter a judgment in default; or strike out or dismiss the case where the party is the

Rule 13(2) of Statutory Instrument number 26 Of 2002
Interview: M.Mwale, 06/11/2008
Rule 14 of Statutory Instrument number 26 Of 2002
ibid Rule 26(1)
ibid. Rule 26(3)

applicant or complainant. Further, where the Court makes an order or judgment under rule 24, Court or Judge may not set aside such decision unless sufficient cause is shown on application duly made by a party to the Court or Judge.²³

However, it is important to stress that this provision has been struck out by the Supreme Court through the case of *Bank of Zambia v Nyambe and Others*²⁴, in which the Supreme Court had occasion to interpret rule 24 of the statutory instrument number 26 of 2002. In this matter the complainants commenced an action against the respondent in the IRC seeking an order for reinstatement or in the alternative damages for wrongful dismissal. The respondent resisted the action. This action was however not tried because it was referred to mediation on 17th August, 2005. When the matter was referred to mediation, the respondent did not attend the mediation on several occasions. As a result, the complainants obtained judgment in default pursuant to rule 24(1)(b) and 2 (a) and (b) of the Industrial Relations Court (Arbitration and Mediation) Rules 2002. After entry of the judgment in default, the respondent took out summons to set aside the judgment in default, but the trial Court refused to do so. Consequently, the respondent appealed against the refusal by the trial Court to set aside the judgment in default to the Supreme Court. On appeal, the Supreme Court held that the mediation conducted in the High Court and the IRC is Court Annexed Mediation; meaning that it is part of the judicial system.

The Supreme Court went on to observe that where for whatever reason, mediation fails, the case should be referred back to the Judge who is required to summon the parties and fix a hearing date. Ultimately, the Supreme Court held that in so far as it relates to mediation, Rule 24(1) and (b) of the Industrial Relations Court (Arbitration and Mediation) Rules 2002, is in conflict with

²⁴id. Rule 24
SCZ Judgment NO. 30 OF 2006

philosophy of Court Annexed mediation. The Supreme Court also noted that mediation was not intended to take away the parties right to have their case heard and determined by the High Court or indeed the IRC and eventually struck down rule 24.

One last difference between the two statutory instruments has to do with the mediation fees. In the IRC, where a party fails to pay a mediation fee, that party shall be barred from taking any further proceedings in the matter until payment of that fee; or judgment has been entered against that party, execution will be levied against that party by the Court to recover the fee on behalf of the mediator. The mediator is also paid the mediation fee for each sitting as opposed to the entire mediation process, as the case in the High Court.²⁵

It must be noted that these differences have brought about discrepancies in the mediation rules. This is because the distinction between the two statutory instruments is unjustified since mediators perform the same functions irrespective of which Court the matter has been referred to. Moreover Dr. Mwenda notes that all the mediators come from the same pool of mediators and there is no need for these differences.

The above are some of the notable differences between the two statutory instruments while the majority of the provisions are similar. As soon as the mediator collects the record, he or she contacts the parties to give them the date, time and venue of the mediation and shall not more than sixty days from the date of collecting the record, complete the mediation process.²⁶ The same provision can be found under rule 15(1) of statutory instrument number 26 of 2002. The parties are also required to appear before the mediator in person and if they are represented, their advocates

²⁵ Rule 29 of statutory instrument number 26 of 2002
²⁶ Rule 7 of statutory instrument number 71 of 1997

all accompany them.²⁷ However, it is under this provision that mediators face some problems of non appearance by the parties. This is because there is no provision for contempt of the process as the case in litigation where one can be held in contempt of Court if they do not appear before the Court.²⁸

Thus parties will not turn up for mediation for reasons such as they did not know the exact date because they merely do not want to and they cannot be sued for not turning up. Some do not know the notice to appear before a mediator. Sometimes, the parties live in an area which is far and communication is difficult with that party. This is especially true of cases from the IRC where there are situations of an employee who lives far in some compound and does not always have enough resources to travel to town. This in turn leads to frustration among the mediators.

The mediator as earlier alluded to is a neutral party and to this end he or she must read and explain to the parties a statement of understanding on the role of the mediator at the commencement of the mediation in form 28B in the first schedule and shall require the parties to sign the form.²⁹ For the IRC, a similar provision can be found under rule 17 of statutory instrument number 26 of 2002, though the statement is contained in form 2 set out in the first schedule. During the mediation sessions, a mediator can take down some notes as parties are narrating their problem. However, he or she is not supposed to keep a record of the sessions as mediation is a confidential process.

The law thus provides that the mediator shall not be required to keep a record of mediation proceedings and any document prepared by the mediator during the proceedings shall, where the

proposed rule 8
Interview: E.K.Sharma, 23/10/2008
rule 9

mediation fails, be destroyed at the end of the mediation process in the presence of the parties.³⁰ For the IRC, this provision can be found under rule 18(2). Statements made during mediation are confidential and privileged, and shall not be used as evidence in any matter. The mediator shall not communicate with any trial judge about the mediation.³¹ A similar provision can be found under rule 20 for the IRC. It is for this reason that cases which are successfully meditated upon are not available to the public even for research purposes and the only information that is available is statistical in nature to show how many cases have been referred to mediation and how many are successful as will be illustrated in this chapter at a later stage.

If the mediation fails, the mediator shall not more than ten days after the close of the mediation proceedings, return the records to the mediation office or proper officer with a report in form 3 set out in the first schedule set out in the Appendix to the rules. The mediation officer or proper officer shall, not more than seven days after receipt of the report referred to in sub-rule (1), submit the record to the trial Judge who shall, not more than fourteen days after receipt of the record from the mediation officer or proper officer summon the parties in terms of rule 5.³² In statutory instrument number 26 of 2002, a similar provision is found under rule 21 and the form to be used is form 3 set out in the first schedule.

However, despite the provision of the law, the mediation office faces problems of non retention of records by the mediators in certain instances. Thus most mediators do not return the files at the required periods as some files are kept for periods of up to one year by some mediators due to problems of parties or their counsel failing to show up at mediation sessions. Sometimes files have been returned to the Court without mediation having been attempted. This is a setback for

the mediation office as it becomes difficult to keep track of both successful and failed mediation cases. The proper officers will also not have any record to send to the Judge so that he or she can know whether the mediation was a success or not.

If mediation is successful, a mediation settlement in form 28D in the first schedule set out in the appendix to these rules shall be signed by the parties and the mediator and registered under Order XXXVII, rule 1, and shall have the same force and effect for all purposes as a judgment, order or decision and be enforced in the like manner.³³ For the IRC, this similar provision can be found under rule 22 of statutory instrument number 26 of 2002. It is important to note that once a settlement is registered in the Court, there can be no appeal. This is provided for under rule 14 and rule 22 of statutory number 71 of 1997 and number 26 of 2002, respectively. This means that a registered mediation agreement when registered with the Court is legally binding upon the parties. The only form of appeal though not provided for by the rules can be when a party does not execute their part of the agreement. In such an instance, the affected party can seek redress at the sheriff's office by issuing a writ of faifa.³⁴

Sometimes a settlement may not be reached because parties do not agree and then the matter has to be referred back to Court. Another instance in which a settlement is not reached is when the requirements of mediation are not adhered to. There is a requirement especially on the part of the respondent that the person present in the mediation sessions is one equipped with authority to come up with a decision.³⁵ This is to avoid situations where negotiations are done but when it comes to making an agreement, the respondent says they do not have authority to make an agreement and have to go back to the company and consult.

Rule 12 of Statutory Instrument number 71 of 1997.
Interview: M.Mwale, 06/11/2008
ibid

this is one of the other reasons why mediation may not be conducted within the required time frame because the sessions will have to be adjourned. It is also prudent to note that if a person without authority turns up, then the mediator will send the record back to the Judge who will decide to enter judgment in default depending on the reasons but will not do so if the respondent gives a satisfactory reason as to why they sent a person without authority especially if they did not know that they were supposed to send a person with authority.³⁶

There shall be paid to the mediator a mediation fee as agreed between the parties and the mediator which shall be paid by the parties in equal proportions at the time of lodging documents for trial: Provided that where the parties and the mediator fail to agree on the fee, the fee shall be referred to the trial Judge for determination.³⁷ A similar provision is found in statutory instrument number 26 of 2002 under rule 28. The only difference between the two rules is that in the IRC rules, a failure to pay mediation fees will earn the party a penalty: that party shall be barred from taking any further proceedings in the matter until payment of that fee; or and judgment has been entered against that party, execution will be levied against that party by the court to recover the fee on behalf of the mediator.³⁸

Though the amount of money to be paid for mediation is not stipulated in the rules, a standard fee of K500, 000 is paid for the entire process. This means that each party will be expected to pay a sum of K250, 000 each. This has been changed from the past practice in which payment was made for each mediation session. The money is used for incidentals to help the mediators with different things they need during the process.³⁹

Interview: M.Mwale, 06/11/2008

Rule 13 of statutory instrument number 71 of 1997

Rule 29 of statutory instrument number 26 of 2002

Interview: M.Mwale, 06/11/2008

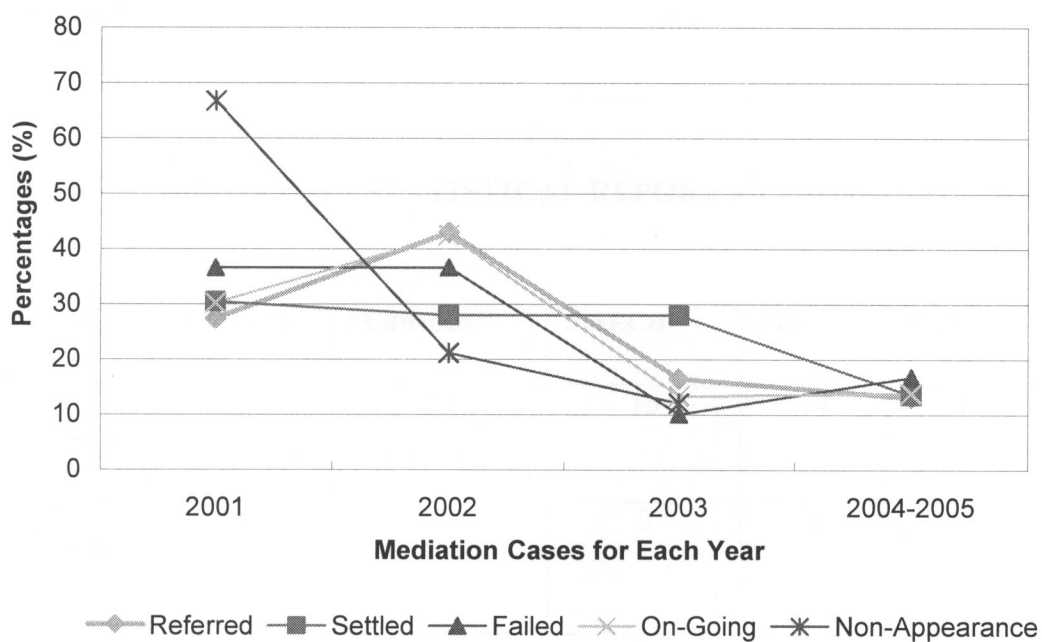
However, there are instances when the parties do not pay. For some parties, this is a deliberate choice. For most of the time the plaintiff especially in employment matters cannot afford to pay. On the other hand it is the respondent who may refuse to pay usually on grounds that it is the plaintiff seeking redress for any grievances that they have and that they should therefore pay the whole amount.⁴⁰

Despite facing such difficulties in payments, mediators still go ahead with the process because for them, it is a service that they are offering to the people.⁴¹ Whether mediation has been successful or not, the record has to be returned. To this record must be attached a consent settlement order as well as the mediator case reporting form. This is not always the case because there is no requirement for the parties to reach a settlement and sometimes they do not. This is for the Judge to look at when the record is returned. This is also important especially when there is failed mediation; the mediator can add some notes on the mediator case reporting form which the Judge can refer to when the matter goes back to trial. The original copy of the said forms is kept on the record, while photocopies are made and kept at the mediation office.

4.1. MEDIATION STATISTICS FROM 2001- 2005.

The statistics of mediation will be tabulated here below. The statistics are both for the High Court and Industrial Relations Court.

Ibid
Interview :S.K. Sharma, 23/10/2008



From the graph, it can be seen that there is a fall in the number of settled cases. This can be seen from a high settlement rate in the year 2002 and then a drop in the year 2003. Nevertheless, there was a slight increase in the settlement rate in the year 2004-2005. An important point to note from the graph is that dealing with the non-appearance of the parties which was high in the year 2001 but reduced progressively in between the years 2003-2005. This shows that more and more people are beginning to appreciate the process of mediation and are hence willing to undergo mediation.

TABLE 2.2

MEDIATION STATISTICAL REPORT JAN 2006-JUNE 2006

	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE
CASES REFERRED	24	32	15	14	13	13
FULLY SETTLED	5	9	5	3	2	3
NOT SETTLED	13	11	7	7	3	2
PARTIALY SETTLED	2	-	-	-	1	-
NOT MEDIATED	3	8	1	1	6	8
ON GOING	1	4	1	1	6	8
TOTAL	48	64	30	28	26	26

This table also shows that very few cases from the High Court were settled despite having a lot of cases referred to mediation.

2.3. 2007 MEDIATION STATISTICS

TABLE 2.3

MONTHS	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER
CASES REFERRED	11	1	4	3	10	-
FULLY SETTLED	-	-	2	1	1	-
NOT SETTLED	-	-	-	-	1	-
PARTIALY SETTLED	-	-	-	-	-	-
NOT MEDIATED					8	
ON GOING	4	-	1	2	-	-

This table shows a serious draw back in the number of settled cases and most of the cases were not mediated in 2007

**2.4. MEDIATION STATISTICAL REPORT FROM JANUARY 2008-OCTOBER 2008
(HIGH COURT)**

TABLE 2.4

MONTH	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT
REFERRED CASES	7	33	4	14	11	7	4	8	2	7
SETTLED	1	2	2	4	3	3	1	-	-	-
NOT SETTLED	3	1	-	4	1	3	1	-	-	-
NOT MEDIATED	1		8	2	6	1	-	2	-	-
ON GOING	2	1	2	4	4	3	1	5	3	2
TOTAL	14	45	16	29	25	17	7	18	5	9

**2.5. INDUSTRIAL RELATIONS COURT MEDIATION MONTHLY MEDIATION
STATISTICS FOR 2008**

TABLE 2.5

MONTH	DEC 2007	JAN	FEB	MAR	APRIL	MAY	JUNE	JULY	AUG	SEP	TOTALS
CASES REFERRED	7	7	8	11	18	19	14	13	7	9	113
NOT SETTLED	4	3	6	7	10	8	5	6	2	2	53
FULLY SETTLED	3	4	2	3	8	9	8	3	3	2	45
PARTIALY											
MEDIATED	-	-	-	-	-	-	-	1	-	-	1
ON GOING	-	-		-	-	2	-	3	1	5	11

This table shows an increase in the number of settled cases from the Industrial Relations Court. It is evidence of how fast the mediators are disposing off cases and also the willingness of the parties to come up with settlements.

CONCLUSION

In conclusion, despite some problems that mediators face during and before mediation, from the aforesaid, it can be pointed out that mediation is a process that has found a place in the *Zambian* legal system and is encouraged through the prescribed legislation. It can also be noted that though Court-Annexed mediation was first introduced in the High Court, it can be seen from the statistics that the Industrial Relations Court is also doing well despite mediation having been introduced five years after that of the High Court. However, it must also be pointed out that from the statistics, mediation has not been a smooth process in that most cases are not settled within the required period though from the on going cases, it is encouraging to note that parties are still willing to negotiate and there is therefore room for improvement.

CHAPTER THREE

MEDIATION TRAINING AND ACCREDITING

3.1. HISTORY

The United States government launched a programme to assist the judicial system among some African countries to deal with dispensation of court cases to reduce expenses and delays. To this effect the United States Aid for International Development (USAID), the United States Information Service (USIS) and the United States Department are funding projects amongst other African countries, such as Tanzania, Uganda, Malawi, Ghana and Zambia in order to expose the judicial system to alternative forms of resolving disputes apart from the courtrooms.⁴²

In Zambia the programme began in 1995, after three local judges, Ireen Mabilima, Peter Chitengi and Weston Muzyamba went to the United States of America for one month to study various types of dispute resolutions that have been employed by the United States judicial system. Alternative dispute resolution is a new concept and until the programme was introduced by the USAID in conjunction with the Law Association of Zambia (LAZ), the country had no trained mediators to help settle legal battles outside the traditional court system.

The first mediation training in Zambia took place in 1996 conducted by the trainers provided from Chemonics International in conjunction with the United States Agency for International Development. A good number of lawyers and judges underwent this training. After the successful holding of the first mediation training, the then Chief Justice of Zambia Matthew Ngulube resolved to constitute a Judicial Mediation Development Committee headed by a Supreme Court Judge, Justice Irene Mabilima whose role was to spearhead the programme.

⁴² Times of Zambia, 23rd August 2000

Among her duties, Judge Mabilima was to facilitate appropriate legislation to provide for mediation.

Following a recommendation of this Committee, Statutory Instrument Number 71 of 1997, the High Court (Amendment) Rules, 1997 was passed. A settlement week was held from 24th to 28th April, 2000. Before then, the Judiciary was tasked to select suitable cases for settlement during the week scheduled to be heard at the High Court building in Lusaka. To this effect, High Court judges were tasked to select appropriate cases for settlement week with priority being given to the oldest cases; mortgage and debt cases; tort and contract cases.⁴³

Cases considered ineligible were those in which preliminary applications were pending; labour matters before the Industrial Relations Court; Criminal matters involving the liberty of an individual and constitutional cases. Thirty three mediators were mentored during the settlement week and settlement week procedures were implemented. 207 cases were scheduled for mediation during settlement week and participants reinforced their newly acquired mediation skills through practical mediation experience during the week.⁴⁴

3.2. TRAINING

Mediation training in Zambia is now conducted by the Zambia Centre for Dispute Resolution (ZCDR) which is an organisation established by the Arbitration Act of number 19 of 2000 ⁴⁵and other stake holders like Abbha Patel. Some of the principal functions of ZCDR include the following: training and accrediting of both Arbitrators and Mediators; maintenance of a register from which disputants may select arbitrators for appointment; and provision of facilities for

⁴³ Winnie Sithole Mwenda, *Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia* 2006. P137

⁴⁴ *ibid*

⁴⁵ Section 23 of the Arbitration Act Number 19 of 2000

hosting Arbitration or Mediation processes. ZCDR has been conducting mediation training for about three years now since USAID pulled out.⁴⁶

People from all walks of life are trained as mediators. All those who want to become mediators have to apply and submit their curriculum vitae which are then taken to the High Court for screening.⁴⁷ The training is done over a period of two (2) weeks and this divided into five days of theory and five days of practicles. Under the theoretical part, the mediators to be are given a general introduction about mediation.

Among the most important issues emphasised during the theoretical aspect is that of neutrality. A mediator is an impartial person and it is very important that they realise that they can easily influence the outcome of the proceedings by the questions they ask. They therefore do not have to impose their decisions directly or indirectly try to impose their own view or settlement terms on the parties. An abuse of this ethical rule could be harmful rather than beneficial and could bring the mediator's reputation and that of the process into disrepute.

The second week is reserved for practicles at the High Court. This is the period that there is settlement week. Settlement week is a period set aside from the regular calendar.⁴⁸ During settlement week, a large number of cases the court's pending cases are referred to mediation. Mediators appointed by the Court will help parties and their advocates to reach an amicable settlement to their dispute.⁴⁹ During settlement week the mediation session will last about two hours. However, it may be necessary for the mediation to continue for a longer period of time or to be continued on another day.

⁴⁶ Interview: Joyce Mupeta, Zambia Center for Dispute Resolution

⁴⁷ *ibid*

⁴⁸ Court-Annexed Mediation In The High Court Of Zambia, Mediator Training Manual p.6

⁴⁹ *Ibid* at p.7

3.3. ADVANTAGES OF SETTLEMENT WEEK

Settlement week is conducted because many Courts have had experience that it is an excellent way to accomplish several goals. The first goal that is accomplished from settlement week is that a large number of cases are audited and the audit itself generally disposes of a large number of cases prior to the settlement week. Secondly, a large number of people are educated about mediation especially the mediators to be as participating in one mediation session is far more effective in spurring advocates for the mediation process, than numerous seminars, written materials and discussions about the topic.⁵⁰

Thirdly, those who are trained as mediators tend to become advocates of mediation and they have substantial influence over the acceptance of mediation throughout the community. The fourth goal is that through exposure to mediation, judges develop an understanding of the mediation process and of case selection criteria so as to know which cases must be referred to mediation. This understanding of cases leads to the sixth goal which is that a successful partnership between the bench, bar and community comes about which in turn creates a synergy that will have enduring positive effects.⁵¹ Judges also receive additional training and hands-on experience that is needed to develop their skill and expertise regarding the process of mediation and referral of appropriate cases to mediators.

Another important goal that is achieved from settlement week is that a substantial number of cases are disposed of during a one week period which demonstrates that mediation successfully resolve cases. This is due to the availability of the large number of people who are being trained

⁵⁰ Ibid p.6

⁵¹ Ibid

as mediators who help in mediating these cases.⁵² This especially puts certain parties at an advantage especially those who cannot afford mediators because during settlement week mediation is free. The other goal is that data from advocates and litigants can be gathered during a short period of time (typically each advocate and litigant completes a survey form at the conclusion of the mediation). This data can be used to make necessary changes in administering the program, verify the views of participants about their satisfaction with the process, and allow a forum for the users of mediation to be heard. Finally, on the fifth and final day of the mediation training, certification of those who have successfully taken part in the training is done by the Chief Justice.

So far since the year 2000, a number of training sessions have been held. These are: 21-31 May 2002 in Livingstone where thirty (30) mediators were accredited; 13-23 October 2003 in Lusaka where 20 mediators were accredited; 8-19 December 2003 in Kitwe where 23 mediators were accredited and 29 May-9 June 2006 in Lusaka where 23 mediators were accredited. The last mediation training was held from 7 May- 18 May 2007.⁵³

CONCLUSION

Since the first settlement week, a number of settlement weeks have been organised by the judiciary over the years. This trend is likely to continue. Between 2002 and 2006, about 96 mediators have been trained and accredited in the country. However, the author of this paper is of the view that there is need to have a formalised period or date when mediation training is conducted. There is also need to consider more training of mediators in other areas of the country as training seems to be highly concentrated only in areas such as Lusaka, Kitwe and Livingstone.

⁵² **ibid**
⁵³ **Mediation Statistics Office**

In as much as these are the areas in Zambia where there are High Courts, they are not the only towns or places in which people have disputes. Disputes are found in every part of the country and it is only fair that other parts of the country have trained mediators to help settle disputes. This would also lessen on the travelling cost of mediators who have to travel out of their towns to resolve a dispute and also parties will not incur unnecessary expenses if their mediator is within their town.

CHAPTER FOUR

LEGISLATION AND INSTITUTIONAL FRAMEWORK OF MEDIATION IN ZAMBIA

The most important issue regarding mediation in Zambia is that it is Court-Annexed. This means that cases that are actually taken to Court can be referred to mediation. Order 31 rule 4 of the High Court rules provides that:-

“Except in cases involving constitutional issues or the liberty of an individual, or an injunction, or where the trial judge considers the case to be unsuitable for referral, every action may upon being set down for trial be referred by the trial judge for mediation and where the mediation fails, the trial judge shall summon the parties to fix a hearing date.”⁵⁴

The High Court Rules Committee excluded cases involving constitutional issues and the liberty of the individual from the list of matters suitable for mediation for the reason that these are matters of public interest and therefore, unsuitable for mediation. In the Industrial Relations Court, the Chairman of the court has been vested with power to make rules under section 96 of the Industrial and Labour Relations Act.⁵⁵ By virtue of this provision the Chairman has promulgated a statutory instrument, which gives the Court or Judge the discretion to refer any action to mediation at any stage of the proceedings except in a case which involves an injunction or which the court or judge considers unsuitable for reference to mediation or arbitration.⁵⁶

This entails that mediation in Zambia is compulsory to the extent that parties may be ordered to proceed to mediation. This then raises the question as to whether mediation is voluntary or not. Matibini notes that mediation is voluntary because the parties are not compelled to settle the

⁵⁴ Order 31 rule 4 of the High Court Rules Statutory Instrument Number 71 of 1997

⁵⁵ No. 27 of 1993, Chapter 269 of the Laws of Zambia

⁵⁶ Rule 12(1)

matter during the mediation session.⁵⁷ It is also important to note that disputants are at liberty to refer their dispute to private mediation.

MANDATORY Vs VOLUNTARY MEDIATION

There are divided views as regards Court-annexed mediation being voluntary as it has been perceived as being paradoxical. Matibini notes that many of those who advocate voluntary participation in mediation programme do so on philosophical grounds pointing to what they see as a fundamental conflict between mediation's ideal of party determined outcomes and forced participation.⁵⁸ To this extent, he further notes that concerns have been expressed that parties participating in mandatory mediation programmes may feel pressured into accepting undesirable settlement terms, especially in situations where mediators make recommendations to the Court regarding resolution when the parties themselves do not reach an agreement.⁵⁹

Another view is that held by Dr. Mwenda who is of the opinion that mediation is premised on it being voluntary and that Court-Annexed mediation has some element of coercion and this means that it cannot be said to be voluntarily entered into.⁶⁰ This has also raised questions as to the efficacy of a procedure that forces parties to participate in a consensual decision-making process, but does not require them to reach agreement.

Another author notes that cases that are mandated to mediation do not settle as readily as those that submit voluntarily and that the problem could be attributed to lack of participation in good faith. Thus, a compelled party may not participate in good faith and may go to the mediation

⁵⁷ **P. Matibini, Mediation: An Alternative Dispute Resolution**, Law Association of Zambia Law Journal Volume 2, 199/2000 p.46

⁵⁸ Ibid at p.47

⁵⁹ ibid

⁶⁰ **Winnie Sithole Mwenda, Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia**, submitted in accordance with the requirements for the degree of Doctor of Laws at The University of South Africa: 2006 p.144

without being ready to and with no intention to settle, in which cases the process would be doomed to fail.⁶¹

ADVANTAGES OF MANDATORY MEDIATION

Despite these opinions about Court-Annexed mediation being voluntary or not, there are also those people who consider some advantages which come out of the supposed mandatory Court-Annexed mediation. The first point to note is that in as much as private mediations (that is voluntary mediation) may and do actually occur, a question that arises is whether enforceability of a mediation settlement there from can be as effective and binding as a settlement arising from a Court driven process which is provided for by legislation. Court-Annexed mediation is triggered pursuant to a statutory provision in the High Court Orders. It is also important to note that the rules also provide for registration of a settlement from mediation in the Court which settlement will have the force and effect of a court judgement and shall be enforced in the like manner.

A case to illustrate how effective court-annexed mediation is is that of *Makungu v. Galaunia Farms Limited*⁶², which was based on the employment law principle of unlawful dismissal. The plaintiff was an employee of the defendant until 5th March, 2001 when the defendant gave a notice of termination of employment to the plaintiff purporting to give three months' notice pursuant to paragraph 2(a) of the employment agreement, while the plaintiff was in effect told to stop work immediately without payment of the three months' pay in lieu of notice. The plaintiff had not been paid his terminal benefits at the time of commencement of the suit. The plaintiff's claim was for damages for unlawful dismissal or in the alternative an order that the dismissal was

⁶¹ Marinari, M (2006). ADR and the Role of the Courts. 72, No.1 Arbitration International. Chartered Institute of Arbitrators. p.49

⁶² 2001/HP/0829 (Unreported).

null and void; payment of inducement allowance, outstanding leave dues, repatriation and interest. Further, that the plaintiff be deemed redundant or retired. The defendant's defence was that it had lawfully terminated the plaintiff's employment in accordance with his contract of employment and due to his unsatisfactory performance and that he had been duly paid his terminal benefits in full. The defendant had a counterclaim for unreturned company furniture. At the hearing, the defendant's advocate informed the Court that the defendant was applying for the case to be referred to mediation. However, the plaintiff's advocate suggested that the parties try to negotiate a settlement before the matter went for mediation. The Court ordered that the parties attempt an *ex curia* settlement within ten working days and thereafter, if need be, the matter be referred to mediation. The negotiation failed and the matter went for mediation and was successfully mediated and settled. The consent settlement order was to the following effect, namely, that the defendant agreed to pay the plaintiff the sum of US\$12,500, in full and final settlement of the plaintiff's claim. Such payment was to be paid in monthly instalments of US\$2,000, on or before the 15th day of each month. In the event of default in payment for more than five days from the due date of 15th of the month, the whole amount was to become payable.

This case also shows that it is sometimes parties who insist on their cases to be referred to mediation. If the referral is at their instance, a judge will normally address counsel on why he or she considers that the matter is suitable for mediation settlement. Sometimes, counsel for a party or parties may at their own instance apply that the matter be referred to mediation and in such cases there should be every good reason for a judge to refuse such applications. It is also important to note that when parties enter into contracts, there is usually a provision on how disputes are going to be settled when they arise. This is especially common in employment contracts.

Matibini also notes that proponents of mandatory mediation support it for reasons largely based on efficiency and that mandatory mediation is more likely to generate a case volume large enough to lighten the courts caseload, thereby justifying the costs of a mediation programme.⁶³ Brown and Marriot further note that on the other side of the coin, those who are pro-court-annexed or court-attached systems of ADR are of the view that such systems serve to establish standards of competence which are monitored by the courts and which in due course define the relationship between the courts and mediation. With such a system, it is argued a legal framework based on concepts of good faith, independence and impartiality would evolve.⁶⁴

Some commentators also believe that a bit of coercion does no harm and is necessary. Thus, Arthur Marriot in one of his lectures⁶⁵, argues that without widespread use of ADR attached to formal adversarial process, whether before court or tribunals, no significant improvement in access to justice is to be expected. He further gives an indication of the experience in the United States, Canada and Australia where, according to him, the key to the effectiveness of ADR is that references are mandatory and experience shows the same level of satisfaction with the result by the litigants whether they were compelled by the court or voluntarily agreed.

Tamara Oyre also observes that while some believe that actively pushing parties to mediation, when the process is meant to be consensual, can never result in success, the opposite appears to be the case. Thus according to Oyer, up to April, 2000 the Commercial Court made 241 ADR

⁶³ P.Matibini, Mediation: An Alternative Dispute Resolution, Law Association of Zambia Law Journal Volume 2, 1999/2000, p.47

⁶⁴ *ibid*

⁶⁵ Marriot Arthur, Mandatory ADR and Access to Justice. 71, No.4. Arbitration International. Chartered Institute of Arbitrators, 2005 p. 308

Orders, and only in 20 cases did ADR fail to resolve the dispute. This was an 83 per cent settlement rate.⁶⁶

Further, Oyer reports that between July 1996, and June 2000, the Lord Chancellor's Department carried out a study to assess the impact of ADR orders issued by the Commercial Court on the progress and outcome of cases and explored reactions of practitioners. She reports:

“During the first three years of the study, the annual number of ADR Orders was about 30. There was a substantial increase towards the end of the period, with 68 Orders in the final six months. This was a result of one or two judges significantly increasing the number of Orders issued.”⁶⁷

To this extent, Dr. Mwenda is of the view that for a country such as Zambia where ADR is still a new concept, court-annexed mediation should be seen as a necessary evil. While accepting that mediation is a consensual process, court involvement is needed to ensure guidance by the court and maintenance of acceptable levels of standards.⁶⁸ And as Tamara Oyer states, ADR orders can have a positive effect in opening up communication between the parties and may avoid the fear of one side showing by being the first to suggest settlement.

CONCLUSION

In conclusion, even if mediation is done by court order or at the instance of either the court or the parties, reference of the cases to mediation has brought about much speedier resolution of the cases than would have been the case had they remained on the court list. Hence both parties to the cases benefit from a faster way of resolving their cases and also a reduction in expenses

⁶⁶ OYER, T Civil Procedure and the Use of Mediation/ADR. 70 No.1. Arbitration International. Chartered Institute of Arbitrators, 19 p.21

⁶⁷ *ibid*

⁶⁸ Winnie Sithole Mwenda, Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia, submitted in accordance with the requirements for the degree of Doctor of Laws at the University of South Africa: 2006 p.145

which brings about more satisfaction. The other thing is that since parties play a more active role in the resolution of their cases during mediation, they achieve quite a lot and are usually satisfied with the outcome because they are the ones who agree on the terms of the settlement and since such settlements are binding on the parties and are not subject to appeal as provided for in the mediation rules of both the High Court and the Industrial Relations Court, finality of the proceedings is invariably guaranteed.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 CONCLUSIONS

A dispute involves a disagreement over issues that can be resolved through the use of any dispute resolution system. To this extent there is a saying that justice delayed is justice denied and further there is a maxim in law which says justice must not just be done but must be seen to be done. This entails that if people have taken their matters before the Court and the result is not forthcoming for a number of years, then people are being denied justice. This will continue to be the case if people continue having the notion that cases can only be resolved through litigation. Fortunately, the Zambian Judiciary has found a way to handle the said problems through the introduction of mediation. Mediation as has been alluded to is facilitated negotiation with a neutral third party. The introduction of mediation has been well embraced by the people who have had an opportunity to know the basics of mediation especially the first trained mediators and also the current mediators whose comments the author of this paper found to be very inspirational. Parties, whose cases have been referred to mediation and have been a success, have equally been happy with the turn out.

Chapter one outlined the concept of mediation and the process and it was further established that to sought out the problem of the backlog of cases that the Courts are flooded with, the Judges of both the High Court and Industrial Relations Courts can refer cases to mediation as provided for in statutory instrument number 71 and statutory instrument number 26 of 2000, respectively. In as much as this is being done, there are problems when it comes to disposing off cases by mediators due to different reasons like parties not turning up and other things.

Chapter two discusses Court-Annexed mediation and also the types of cases that can be referred to mediation. However, ADR, mediation to be particular cannot provide a complete substitute for litigation because not all cases can be referred to mediation. This can be seen from the two statutory instruments that provide that cases involving constitutional issues, the liberty of an individual and an injunction cannot be referred to mediation. In this chapter, the differences in the High Court Rules and IRC Rules concerning mediation have been noted. Notwithstanding this, mediation has and is still helping reduce the backlog of cases in the Zambian Courts and also in the delivery of justice. This is especially true of the Industrial Relations Court where mediation has helped expedite legal proceedings. In an interview conducted with the Mediation officer, it was noted that prior to the introduction of Court-Annexed mediation, the IRC was hearing cases going back ten years down the line. The backlog is still there but it is not as huge as it used to be before the introduction of Court-Annexed mediation.

Chapter three traces the history of mediation training in Zambia and also the current training program. This training has brought about a number of developments in the area of mediation in that Judges have been trained and were actually among the first people to be trained. This is good because it is the Judges that refer matters to mediation and it is only proper that they are equipped with mediation skills. Legal practitioners as well as other professionals have also not been left out in that they have also been trained and continue to be trained as mediators. During the training, a lot of cases are handled especially during settlement week. This brings out the advantages of mediation such as it being faster, conducted in a less formal manner and less costly. It also provides an unlimited opportunity for the parties to exercise flexibility in communicating their underlying concerns and priorities regarding the dispute. Besides the parties are in control of the process as the mediator only helps them to come up with an agreement if

any. The other advantage is that representation by counsel is not necessary unless the parties insist. The parties are also educated about other alternative solutions and also maintain and strengthen relationships for future interactions unlike litigation where parties' relationships end after a case has been resolved. When it also comes to fees and costs, mediation fees are usually much less than those associated with a case that is handled in the course of the Court adjudication process. A mediation proceeding is private and so is the outcome thus the process commands a degree of confidence.

Chapter four highlights the legislative and industrial framework around mediation. It was also noted that mediation is a leading form of ADR in Zambia because it is mainly Court-Annexed and that very few mediations take place outside the courts. This is very prudent and has strengthened the mediation process in that people usually take processes attached to the Courts very seriously. Moreover, if a settlement is reached during a mediation process, it can be registered in Court and be enforced just like a Court Judgement.

5.2 RECOMMENDATIONS

There is no doubt that mediation has come to stay in Zambia. This can be seen from the way the implementation of the process has been handled and also the number of cases that have been referred to mediation as well as the outcome of the cases. However for mediation to even work better in this country there is need to make some improvements as well as look at aspects that need to be adjusted and those that need to be sustained.

5.2.1 CONTINUATION OF ADR AS A COURSE AT UNZA

Alternative Dispute Resolution was introduced at the University of Zambia as one of the courses with focus on mediation and arbitration. This was a good move which development was also

welcomed by the Chief Justice his Lordship Earnest Sakala who said that the introduction of the course in the Law School was a demonstration of the seriousness with which the legal profession had embraced the idea of ADR in Zambia.⁶⁹ However despite this good measure, there has been lack of consistency in offering this course in that it has not been on a continuous basis. The last time the course was offered was in 2006 and currently is not being offered. Therefore something needs to be done by the Law School administration to reintroduce the course in the school as it helps to demonstrate to upcoming lawyers that there is more to dispute resolution than just litigation. This is not to say that litigation should be done away with.

5.2.2 HARMONISATION OF THE COURT RULES

Mediation as earlier alluded to, was first administered in the High Court through the passage of statutory instrument number 71 of 1997 and was only introduced in the Industrial Relations Court in 2002 through the passage of statutory instrument number 26 of 2002. However, there are differences in the two statutory instruments which were referred to in chapter two of this paper. These differences bring about some discrepancies in the administration of mediation. Some of the notable differences were the time frame for conducting the mediation process in that the mediators from the IRC have more time than those from the High Court.

While the High Court rules provides that a mediator should complete the mediation process within sixty days, Rule 15 (2) of the Industrial Relations Court (Arbitration and Mediation Procedure) Rules, 2002, provides for the mediator to complete the process of mediation within ninety days from the date of collection of the suit, action or legal proceedings. The other difference is that in the IRC, if there is reasonable cause for the chairperson to believe that a settlement can be reached, then the time frame will be extended.

⁶⁹ The Post Newspaper, 21 June, 2006

Why should there be such differences when the mediators to whom the rules apply are the same in that they undergo the same training and the High Court and the IRC are on the same level in terms of hierarchy in the Zambian judiciary and appeals from both courts only lie to the Supreme Court. The mediation rules should thus be harmonised so as to avoid any discrepancies and for there to be fairness in the rules. It is important to note that the other difference was in relation to the fees payable to the mediators which is now the same for both Courts though it would even be much more better if the fees would also reflect in the rules.

5.2.3 EXTENSION OF COURT –ANNEXED MEDIATION TO THE LOWER COURTS

Mediation in Zambia is currently only administered in the High Court and the IRC. However it is not only these two courts that are flooded with a lot of cases. The lower courts in Zambia, especially the subordinate or magistrate's courts which are also courts of record equally handle a lot of cases and in the opinion of the author of this paper a lot more than the High court and the IRC. It would therefore be prudent that Court-Annexed Mediation is also introduced in these courts to also reduce on the backlog of cases in these courts. This will also reduce on the number of appeals going to the High Court.

5.2.4 TRAINING OF JUDICIAL OFFICERS IN ADR

Training of judicial officers in ADR is advisable in because as judges are referring cases to mediation they should have proper understanding of the process they are referring cases to so as to know that justice will also prevail during mediation. The same training should be given to magistrates before the extension of court-annexed mediation to the lower courts.

5.2.5 TRAINING OF MEDIATION OFFICERS IN ADR

Mediation officers at both the High Court and the IRC should also undergo training in ADR. Currently, the members of staff in the mediation offices are not trained in mediation. There is therefore need for these Officers to also undergo training so that they can be kept abreast with the latest developments in mediation.

5.2.6 MEDIATION PUBLIC AWARENESS CAMPAIGN

In as much as mediation has been around for quite some time though not very long, the author of this paper still notes that mediation is a not a process that is well known. This is especially true in employment matters where the employers do not usually want to attend mediation sessions and if they do, they do not want to pay for the sessions because they think that mediation is a process which only benefits the employees. This is because some employers believe that if their case is settled through mediation, they might just be setting a precedent which would be taken advantage of by other employees and they therefore prefer to proceed with litigation. There is therefore need to have some workshops or seminars for personnel in top management of companies such as directors, managers etc. Employees also need more knowledge on mediation so that if their case is referred to mediation, they do not feel like they are going to be cheated of their benefits and other related issues. As for the general public, there is also need to educate them on mediation more especially that mediation is a process that is controlled by the parties themselves so there is need to know how it is done. There is therefore need for organisations like the Zambia Centre for Dispute Resolution Limited (ZCDR) to be in the forefront of organising workshops and seminars for purposes of educating the public.

5.2.7 PERMANENT PLACES FOR MEDIATION SESSIONS

There are not really permanent designated places where mediation sessions are conducted from. In the High Court, mediation sessions are usually held in the robbing room which is not really an appropriate place for the sessions because as the name itself suggests, the robbing room is used when the lawyers are robbing. Moreover one important aspect of mediation is that it must be done in a conducive environment where the parties will be free to air their views and not where the session would have to be adjourned unnecessarily. In the IRC, the sessions are usually held in the mediation office itself which is also not favourable as it is an office of inquiry as well as an office where the mediation officers work from. But whenever there is a session, the officer's work comes to a stand still as they have to vacate the room for the mediation sessions to take place.

5.2.8 INTRODUCTION OF CIRCUIT COURTS IN PROVINCIAL HEADQUARTERS

There have been complaints raised about the distances that people have to cover from different parts of Zambia to either Lusaka or Ndola where the Industrial Relations Court is situated. The mediation officer at the IRC expressed his sentiments that the introduction of circuit courts in provincial centres could alleviate the problems of travelling long distances to the Industrial Relations Court. This would also help most people who cannot afford to pay the mediation fees especially some employees or certain people who are unemployed. They can easily use the money they are supposed to use for transport and channel it to the payment of mediation fees.

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