# THE INTRODUCTION OF COURT-ANNEXED MEDIATION AND ITS PLACE IN THE ZAMBIAN JUDICIAL SYSTEM



**BY**

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**Directed Research Paper presented to the University of Zambia Law faculty in partial fulfillment of the requirements of the Degree of Bachelor of Laws**

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**DECEMBER 2004**

**The University of Zambia**

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**Entitled:**

# THE INTRODUCTION OF COURT – ANNEXED MEDIATION AND ITS PLACE IN THE ZAMBIAN JUDICIAL SYSTEM

**Be accepted for examination. Having checked it carefully, I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing directed research.**

6/12/2004
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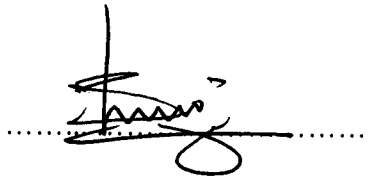
**Date**



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## DEDICATION

*For my late mother* **THERESA CHISHALA MASUWA** *who believed in me and made me appreciate from a tender age that with hard work and focus dreams are attainable.*

**ACKNOWLEDGEMENTS**

I would not have accomplished a task of this magnitude without mentoring, counsel and discourse with a number of people, more knowledgeable than myself in many respects, whose valuable experiences have had a fundamental impact on my perception of the legal profession generally and Alternative Dispute Resolution in particular.

Firstly, I wish to thank my supervisor and mentor **Mr. Stephen Lungu** who on several occasions disrupted the tranquility of his home to spend time with me even over weekends and after office hours. It was a wonderful experience.

**Honourable Mrs. Justice I.C. Mambilima** read and re-read this manuscript and gave countless valuable hours and counsel. I remain indebted.

**Honourable Mr. Justice P. Musonda** offered invaluable advice and his association with mediation from inception in Zambia when he was Chief Administrator of the Judiciary proved extremely valuable.

My gratitude also goes to **Mr. Sydney Watae** of USAID who provided me with numerous materials on mediation and facilitated my two (2) training visits to the United States of America in September 2001 and January 2002. This work goes to show that I survived September 11th 2001 in New York for a purpose. Thank you Sydney.

# ABSTRACT

Mediation is negotiation facilitated or assisted by the introduction into the dispute of an intermediary. Therefore, mediation involves a neutral third party called a Mediator. The Mediator assists the parties to a dispute in communicating their position on the issues and in exploring possible solutions or settlement. The Mediator does not give an evaluation or opinion of the case but rather facilitates the exchange of information, ideas and alternatives for settlement between parties.

The traditional legal response to a dispute between parties has been for a lawyer for one of the parties to initiate the litigation process. For most lawyers, the litigation process is assumed to be the appropriate means of resolving a client's legal problems. To this end, every legal case is perceived as involving two major tasks: -

(a) determining the substantive law applicable to the facts of the case; and

(b) choosing a dispute resolution process that will assure a client fair treatment and a just outcome.

Most law school course work concentrates on how to research, analyse and apply the substantive law. Yet, issues of process may be as important as substantive issues in determining whether the final result for a client is the best attainable.

During the last few decades, increased concern has been expressed by professionals engaged in litigation and the public at large about the traditional adversarial judicial systems. Litigation has been criticized as being too slow, costly and as ultimately failing to provide a satisfactory resolution mechanism of disputes that is fair and which the parties will respect.

Litigation has been described variously as being formal, tricky, divisive, time consuming and distorting. Clients have began to demand attention to process issues and will expect lawyers to know about the full range of alternative processes available for dispute resolution and lawyers, in trying to respond to this challenge, have began to treat process as an important variable in the dispute resolution equation.

The Zambian Judiciary, on its part, in attempting to dismantle the mass of delayed cases, has introduced the Court-Annexed Mediation Programme to address the myriad of complaints raised by lawyers and litigants alike.

The question now remains whether or not the introduction of Court-Annexed Mediation beginning with the passage of Statutory Instrument No. 71 of 1997, being the High Court (Amendment) Rules of 1997, introducing mediation as an alternative dispute resolution procedure into

the Zambian jurisdiction, has had the desired results of reducing the backlog in the Zambian Court System.

The general aim of this research is to highlight the philosophical basis of mediation and trace its origins world-wide and its introduction to the Zambian Court System.

The study is largely descriptive and analytical.

The objectives of the study are: -

(a) to trace the historical development of mediation;

(b) to highlight the factors precipitating the introduction of Court-Annexed Mediation in Zambia;

(c) to show obstacles so far encountered in the Zambian Mediation Programme; and

(d) to make recommendations as to how the Court-Annexed Mediation Programme in Zambia can be made sustainable.

This research comprises of five (5) Chapters as follows: -

**Chapter I** is devoted to discussing the concept of Mediation in general. The basics of the process and its development have been discussed in this chapter. The chapter introduces the topic and traces its genesis as an alternative to the traditional court adversarial system.

**Chapter II** traces the historical development of ADR generally and mediation in particular into the Zambian legal system. Thus, an appraisal has been made of the Court-Annexed Mediation Programme in Zambia on the basis of its effectiveness in reducing the bloated case load in Zambian Courts.

**Chapter III** analyses the current status of the Court – Annexed Mediation Programme in Zambia. The chapter traces the number of mediators on the programme, statistics countrywide and an analysis of the success or otherwise of the programme on account of the available statistics.

**Chapter IV** assesses the effectiveness of current legislation and the institutional arrangements in place. Other shortcomings and discernible obstacles to the programme are also analysed.

**Chapter V** constitutes the general conclusion. A summary of the arguments raised in the paper is outlined. Some recommendations are made as to how the Court-Annexed Mediation Programme in Zambia can be improved in order to institutionalize the process and make it sustainable.

# CHAPTER 1

## INTRODUCTION TO THE FUNDAMENTAL PRINCIPLES OF MEDIATION

### I THE PROBLEM

In an economy under pressure with dwindling resources, an ever-increasing population plagued by the ravages of HIV-AIDS affecting the most productive age-group of the country, it became apparent that Zambian Courts, equally plagued by a huge mass of backlogged cases dating back many years, could not effectively handle the task.

This problem is not peculiar to Zambia alone. Worldwide, judicial systems in many countries are facing much the same difficulties. A jurist of note in the United States of America, W. Burger once lamented: -

> *"We read in the news of cases that continue not weeks or months, but years. Can it be that the authors of our judicial system ever contemplated cases that monopolize one Judge for many months or even years?*
>
> *All litigants standing in line behind a single protracted case-whether it is a one-month, a three-month or a longer case – are denied access to that court."*[1]

[1] W. Burger, Isn't There a Better Way?, West Publishing Co., 1982

The obvious resultant effect is that many people are being denied access to speedy justice. Delays imply expense and so a long winding case will incur such high expenses as to make the whole process of seeking justice unworthy of the effort of redressing an injustice occasioned by a party.

Up to the time until the introduction of mediation in the High Court Rules in the year 2000, therefore, the Zambian Courts were labouring under a huge backlog of cases. The sharp increase in the volume of litigation with the onset of the Third Republic and the state of the rules of civil procedure had taken its toll. Cases were moving at a snail's pace and the Court watched helplessly because the control of the pace of litigation was in the hands of the lawyers.

In this unsatisfactory scenario, the court system was at times open to abuse by unscrupulous litigants. In most cases, decisions rendered after a long time did not serve the justice of the situation. Business disputes were notably adversely affected. With galloping inflation, an unstable currency and a harsh economic climate, it was imperative that the Judiciary embarks on workable solutions acceptable to all stakeholders.

In 1995, a team of Zambian Judges led by the late Hon. Mr. Justice Weston Muzyamba, (a Judge of the Supreme Court) visited the District of Columbia Superior Court in Washington D.C. at which they were

introduced to that court's Civil Delay Reduction Programme. The Washington D.C. Superior Court had put in place an effective Case Flow Management Programme under which the control of the pace of litigation was in the hands of the Court and not the lawyers. This entailed the Court monitoring a case from the time of filing up to the time of disposal and enforcing the prescribed time limits to ensure compliance with the rules of procedure. In addition, the Court had put in place an Alternative Dispute Resolution (ADR) Programme, which introduced Court-Annexed Mediation. There was thus, a Multi-Door Courthouse to which people came, not only to litigate but also to be assisted by the court to settle their disputes through mediation. It was noted that of all cases filed, less than 40% went up to trial. The majority of cases were settled. The relief on the Court workload was apparent.

With lessons from Washington D.C. Superior Court, as well as from other advanced judicial systems in the Common Wealth especially Canada and the United Kingdom, the Zambian Judiciary resolved to go back to the drawing board to consider the state of the rules governing ADR.

ADR is an umbrella term used to refer generally to alternatives to court adjudication of disputes such as, negotiation, mediation, arbitration, mini-trial, med-arb and summary jury trial.

## II THE HISTORICAL DEVELOPMENT OF MEDIATION

When parties are unable to resolve their dispute 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."*[2]

Mediation, therefore, is negotiation carried out with the assistance of a third party. It must be emphasized from the outset, though, that the mediator in contrast to the judge or arbitrator, has no power to impose an outcome on disputing parties.

Despite the lack of 'teeth' in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impending agreement, the mediator may attempt to do the following: -

(i) encourage exchanges of information;

(ii) provide new information;

(iii) help the parties to understand each other's views;

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

(iv) let them know that their concerns are understood;

(v) promote a productive level of emotional expression;

(vi) deal with differences in perceptions and interests between negotiators and constituents (including counsel and clients);

(vii) help negotiators realistically assess alternatives to settlement;

(viii) encourage flexibility;

(ix) shift the focus from the past to the future;

(x) stimulate the parties to suggest creative settlements;

(xi) learn (often in separate sessions with each party)about those interests the parties are reluctant to disclose to each other; and

(xii) invent solutions that meet the fundamental interests of all parties.

Some contend that the mediator changes not only the dynamics of negotiations but also the outcome. Hence, questions are raised about the impact of the change which parties tend to gain power? Which lose? Mediation does not always result in settlement. Is the overall picture a cost-effective one for the parties? For the courts? What is the impact of mediation on the effectiveness of the justice system and the role of the law? These are some of the cardinal questions that we will endeavour to satisfy in this work.

Mediation probably predates the formal creation and enforcement of law, for humans in the social state seem to have a natural instinct to seek guidance of others in settling differences between individuals. Indeed, formal legal structures may have developed out of informal attempts by family members, neighbours and friends to mediate between disputing individuals.

The classical Chinese viewed the use of Mediation as superior to recourse to law for settlement of disputes, F.S.C. Northrop has described the view of the Confucian Chinese that "litigation' was a 'second best' solution to disputes:

> *"The 'first best' and socially proper way to settle disputes, used by the 'superior man', was by the method of mediation, following the ethics of the 'middle way'. This consisted in bringing the disputants to something they both approved as a settlement of the dispute, by means of an intermediary. This middleman served largely as a messenger. 'Good' dispute settling consisted in conveying the respective claims of the disputants back and forth between them until the disputants themselves arrived at a solution which was approved by both."*[3]

[3] Murray, Process of Dispute Resolution P.294

In many societies, mediation through a third party has been a favoured alternative to formal legal processes. *"The mediator may be chosen because of special qualities, for example, the "prestige mediators" among the Singapore Chinese, the "big man" among the Ifugao tribe or the Iranian bazaar mediators."*[4]

On the other hand, the mediator may simply be a friend or disinterested person. *"The "Book of Discipline" of the Society of Friends stated that when differences arise between persons, their friends shall forthwith speak to and tenderly advise, the persons between whom the difference is, to make a speedy end thereof."*[5]

Mediation has often existed alongside formal legal structures, offering a community-based, consensual alternative to legal remedies. In African societies, tribal "moots" were an informal mediation process which continued after the imposition of colonial rule:

> *"A court system, established by the British, was primarily adjudicative, while a tribal 'moot' performed an integrative, conciliatory function. Whereas the court was characterized by social distance between Judge and litigants, rules of procedure which narrowed the issues under discussion, and a resolution which*

[4] Uhle, Christian Buhring. Arbitration and Mediation in International Business, Kluwer Law International, 1996 P.101

[5] Uhle, Arbitration and Mediation in International Business P205

*ascribed guilt or innocence to a defendant, the moot emphasized the bonds between the convenor and the disputants, 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 the disputes by consensus about future conduct, rather than by assessing blame retrospectively."*[6]

## III THE DEVELOPMENT OF CONTEMPORARY MEDIATION: ONE PROCESS TOO MANY?

Mediation as we find it today is a product of a variety of historical influences and sources. The term "mediation" describes at best a loosely knit set of values, objectives and techniques derived from a variety of sources over the past fifty years. At the risk of oversimplification, some of the principal developments include the following: -

1. **Labour Mediation**:

   Labour disputes were the first significant area in which mediation was routinely used. Attempts at mediating labour disputes were made in the 19th century both in England and the United States. "*Government sponsored mediation dates from 1913 when the Department of Labour appointed 'commissioners of conciliation' to be made available to the parties in labour disputes."*[7]

   Resort to mediation increased in the 1930s, with the passage of national collective bargaining legislation, as a means of dealing with impasses between a union and management in the collective

[6] Goldberg Dispute Resolution Little, Brown & Co. London 1993 P72
[7] Goldberg Dispute Resolution P.295

bargaining process. Mediation thus served as a form of 'social intervention' though which outside neutrals assisted labour and management to find a socially-desirable solution. *"This labour mediators were often more activist and directive in their mediating style, sometimes using cajoling, warnings, reality testing, and appeals to higher interests to achieve an agreement."*[8]

A unique feature of collective bargaining mediation is that the participants are chosen from the complex organizational structures of labour and management . The mediator is therefore dealing with experienced and well-prepared adversaries and generally starts at a higher level of understanding and structuring of positions than in community and family dispute mediation. Labour mediation, therefore requires the mediator to be sensitive not only to the agreement that can be achieved between the company and the union but also to the need for approval by the union bureaucracy and rank-and-file, on the one hand, and the different management teams on the other.

In contrast to collective bargaining mediation, mediation of employee grievances is generally performed by a single or small number of representatives on each side. Arbitration is still the principal process for resolving employee grievances under union-management contracts, particularly in the private sector, but "grievance-mediation" is increasingly being used as an alternative. It is said to offer substantial promise of resolving grievances more quickly, inexpensively, and informally than arbitration.

[8] Murray Process of Dispute Resolution P.295

2. **Family Law Mediation**

Family law was an early arena for application of mediation. Even in the 19th Century, churches, schools and community groups in situations of family break-up sometimes provided mediation. *"In the 1930s, American divorce courts began to recommend mediation to the parties and in 1939, California created the Conciliation Court, with parties allowed to go through conciliation, usually in an uncontested divorce, as an alternative to the normal adversary divorce process."*[9] In the last decade, California mandated conciliation for issues of child custody or visitation as a pre-requisite to a divorce trial and Judges in some other states have imposed this requirement through court rule.

3. **Community Mediation**

Community mediation was the next significant development in American ADR; Neighborhood Justice Centres sprang up in the 1960s under the impetus of federal government grants under the poverty and other great society programmes. At the same time, there was an increased interest at the local level in establishing alternatives to courts, and community mediation centers were established with sponsorship from local governments, churches, charities and community organizations. Particular institutions and government agencies to attempt to resolve misunderstandings in such areas as

[9] Murray Process of Dispute Mediation P297

Community - Police Relations, Race Relations, Hospital and Health Care Services, Environmental Protection and Divorce and Family-Law Problems, developed specialised forms of mediation.

A central theme of the Community Mediation Movement was that mediation was a way to empower disputants to build stronger community ties and resolve their disputes without having to rely on the power establishment of courts, Police and government agencies and to frame the issues and devise solutions of their own making.

> *"Community Mediation Services also shared a common methodological approach to dispute resolution. Although the exact form of mediation varied from center to center, a standard methodology gradually became accepted, spread by mediator trainers and training handbooks."*[10]

This 'classical mediation' model taught that since it is desirable for people to resolve their own disputes, the mediator should use a 'non-directive' style that encourages the parties to communicate but eschews influencing them by such 'directive' conduct as expressing opinions, using stratagems to bring them around to certain positions, or giving evaluations of their cases. Since voluntariness is important,

[10] Murray Process of Dispute Resolution P299

the parties who should not be coerced into engaging in it should initiate meditation.

And since parties are more likely to abide by agreements that they have worked out between themselves, the mediator should only be a facilitator for discussion and problem solving and should not attempt to influence the parties in favour of or against particular solutions. And because the legal system is distrusted, both because of its coercive procedures and the inflexibility of the law, mediation should encourage parties to resolve disputes without concern of how the legal system would resolve them if the case went to trial.

4. **Settlement Promotion**

Concern in the late 1970s and 1980s over the 'litigation boom' led to a movement to promote settlement to relieve court congestion. The related 'case management movement' within the courts urged Judges and court personnel to undertake active management of court cases in the interests of getting an early resolution, including the use of ADR. Emphasis was placed on promoting settlement as early in the litigation process as possible in order to conserve resources and reduce the parties' litigation costs.

This objective was especially attractive to business interests and traditional defendants in law suits and defence-oriented organizations and lobbyists urged both the voluntary use of ADR before suit and its mandatory use in the courts.

The 'settlement promotion' movement initially focused on ADR processes other than mediation. New or hybrid forms of ADR emerged - such as the mini-trial, summary jury trial, court-annexed arbitration, and mediation-arbitration hybrids. However, mediation proved more popular than anticipated, and it has become the principal ADR process invoked by institutions and courts. Nevertheless, there has been an impact on the nature and style of mediation, and a more directive and evaluative kind of mediation has emerged.

5. **Co-operative Problem - Solving**

During the 1980s, a new approach to corporate and institutional management, as well as the art of negotiation, incorporated emerging techniques of cooperative problem solving. *"In the corporate world, the Japanese had devised new management methods that involved all employees in collaborative processes to recommend policies and monitor*

*quality, and these concepts were quickly assimilated into American management practices."*[11]

*"In the field of dispute resolution, Professors Roger Fisher and William Ury published an important little book, Getting to yes, that provided a popularized synthesis of co-operative problem-solving techniques".*[12]

They rejected the traditional competitive approach to negotiation for what they called 'principled negotiation' that involved an attempt to discover mutual interests and solutions for mutual gain. Although 'interest based' negotiation was not new to mediation, 'the win-win' approach advocated by the authors captivated both mediation professionals and millions of readers. By the mid-1980s, it began to be applied to public policy disputes, with an elaborate scheme for involving all stakeholders in collaborative problem solving.

The 'problem-solving' dimension was always a part of the traditional mediation model. But for some mediators it has taken a central role, arguably overshadowing other aspects of the mediation process. One critique of this development comes from advocates of a

[11] Goldberg ,The Total Quality Management Program. The Quest for TQM 79 ABA Journal 52(Nov. 1993)

[12] Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement without Giving In (1981) 2nd Edition 1991, with B. Patton

'transformational' effect in mediation who urge that mediation offers an opportunity to transform the parties by engendering moral growth.[13]

The approach views the emphasis on problem-solving as too heavy-handed and robbing the parties of the moral autonomy to confront each other and devise their own forms of resolution of their conflict.

## 6. **Evaluative Mediation**

The dramatic influx of lawyers into the ranks of trained mediators occurred in the late 1980s and 1990s as Court-Annexation of ADR created a need (or at least an opportunity) for mediators and other third party neutrals who had a background in the legal issues involved in law suits. Some lawyers did not easily take to the traditional non-directive style of mediation, relying instead on their legal knowledge and experience to 'reality test' with the parties about the strength of their cases and to predict outcomes.

One organization JAMS (Judicial Arbitration and Mediation Service), in USA, primarily provided former Judges as ADR neutrals in the conviction that the parties often wanted some sort of evaluation of their cases by a person who could speak with experience and

[13] Murray, Process of Dispute Resolution P302

authority about how a court might resolve a dispute. Thus a new form of 'evaluative' mediation emerged, although most mediators use an evaluative approach in tandem with other techniques.

## CHAPTER II

## HISTORICAL DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION AND THE COURT-ANNEXED MEDIATION PROGRAMME IN ZAMBIA

### I INTRODUCTION

The broad based advocacy over the past two decades for increased use of mediation, arbitration and related processes is also called the Alternative Dispute Resolution Movement. These movement years merit study because the issues raised by institutionalization of dispute resolution processes have their roots in the hopes of ADR movement supporters and in the early critiques of their aspirations.

*"Even before there was an ADR movement, methods other than litigation were used for resolving disputes. Some claims were not "voiced" at all for fear of alienating the offender, and those that were raised often were resolved by a host of indigenous mechanisms such as the ward boss, the village priest, and the family friend. Even if a case was filed ultimately, it was likely to be resolved by a process other than litigation."*[14]

Negotiation has long been the most popular method for resolving differences-even after the filing for litigation. In fact, only about a tenth of the civil cases filed in U.S courts are disposed of by trial and another fifth by some sort of pretrial adjudication. Arbitration has been used throughout the world for centuries, and law in most American jurisdictions has favoured its use for over 60 years.

Mediation by respected community members was a central means of conflict management in small-scale societies across the world and

[14] Goldberg, Sander, Rodger. Dispute Resolution London, Little, Brown & Co 1992.Pg 6.

common places in USA. Interest increased substantially in the 1970`s in what were called for the first time 'alternative' methods of disputes resolution, a reference to the use of these processes in place of litigation. The term was vague and some proponents of ADR focused only on certain methods, such as non-binding third party processes. It should be pointed out here that advocacy for ADR served different goals.

One part of the movement responded to the civil rights strife of the 1960's and 1970's. In 1972,the community relations service of the Justice Department of USA hired mediators to assist in resolving community wide civil rights disputes drawing on an earlier program set up by the Ford Foundation.

*"At approximately the same time, the courts also became involved. At the 1976-Pound Conference, leading jurists and lawyers expressed concern about increased expense and delay for parties in a crowded justice system. A task force resulting from the conference was intrigued with professor Frank Sander's vision of a court that was not simply a court house but a dispute resolution center where the grievant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case."*[15]

The taskforce recommended public funding of pilot programs using mediation and arbitration, and the American Bar Association's new committee on dispute resolution encouraged creation of these three model 'multidoor court houses'.

[15] Goldberg, Dispute Resolution P.58

While courts and litigations focused on a variety of dispute resolution processes to reduce the courts' and parties' costs, other ADR advocates saw mediation as a means to serve different interests.

In the late 1970s' applicants for funding of dispute resolution programs followed the time-honored method of announcing that all these aims-from reducing caseloads to strengthening communities –could be accomplished through their efforts. *"Not surprisingly, only a few years after the establishment of the first 'neighbourhood justice centers' offering mediation of criminal and small civil disputes, researchers announced that only a portion of their goals had been realized. The parties found mediation less expensive and were satisfied with its fairness, but few people took advantage of mediation services, thus producing no significant effects on court caseloads or savings in public funds.*[16]

With recognition that all hopes could not be realized in each program, the late 1980's were characterized by efforts to justifications for dispute resolution:

i) to lower court caseloads and expenses;
ii) to reduce the parties' expenses and time;
iii) to provide speedy settlement of these disputes that were disruptive of the community or the lives of the parties' families;
iv) to improve the public's satisfaction with the justice system;
v) to encourage resolutions that were suited to the parties' needs;
vi) to increase voluntary compliance with resolution;
vii) to restore the influence of neighbourhood and community values and the cohesiveness of communities;
viii) to provide accessible forums to people with disputes; and

[16] Goldberg P62

ix) to teach the public to try more effective processes than violence or litigation for settling disputes.

**II Differences In Priorities**

Differences in priorities among different jurisdictions led some, for example, to favor local neighbourhood-based dispute resolution programs over court-run programs, to advocate funding for mediation over processes that resembled trials for similar disputes, or to favor free dispute resolution services over services for a fee. These differing weights to various values persist, leading to arguments over the shape of current public policy toward dispute resolution.

> *"In the 1980's,client groups began their own advocacy. The insurance industry funded experiments to reduce the litigation expenses. Further, corporate counsel supported efforts by the non-profit center for public resource to institutionalize disputes resolution practices among businesses and their lawyers."*[17]

These efforts placed high priority on the needs of the parties themselves, their access to faster and less costly resolutions, and procedures less disruptive of business relationships. The period produced increased use of private adjudicators, such as arbitrators and retired judges.

Another development of the 1980's was the emergence of commentary critical of the ADR movement. Yale law professor Owen Fiss led the charge with allegations that the justice system would suffer as the result of publicly supported settlement facilitation:

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[17] Goldberg P.301

*"The courts' job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when parties settle."*[18]

In addition to this commentary, social scientists and legal scholars began to report research that challenged every premise of the movement's call for public support. Was there truly a 'litigation crisis' (Galanter, 1984;Daniels 1984)? Did the processes merely provide more hospitable procedures or did they change the out comes (Greatbatch and Dingwall, 1989)? Did the 'community' mediation programs have any impact on the host neighbourhood (Merry & Miller, in press)? Were there cost savings or reductions in courts delay as the results of ADR (Esser, 1989)?

Critics of the movement argued that the burden of persuasion should be on those advocating change to demonstrate that the gains in terms of the courts, community, parties, and quality of life exceeded the harm they forewarned for the justice system.

During this period, lawmakers who supported ADR added statutory provisions to ensure the fairness of ADR outcomes; to provide guidelines for excluding certain cases from disputes resolution programs, including those involving important public policies; and even to require evaluation of the programs as a prerequisite to future funding.

As the 1990's began, the focus of statutes and commentary seemed to shift from experimentation to institutionalization. For instance, congress in USA imposed a requirement on every federal district court to convene

[18] Quoted to the author by Washington D.C. Superior Court Chief Judge, Justice King on the author's visit to Washington D.C. in January 2002.

a group to consider, among other changes, increased use of dispute resolution procedures. Sophisticated business clients are also demanding greater use of ADR. Pressure from these two critical sources-the courts and the clients-is forcing the legal profession to learn new tools that will equip it better to handle the increasing number and complexity of disputes in years ahead.

## III The Historical Development of ADR in Zambia

It cannot be disputed that over the years, there has been a growing interest among advocates in the use of ADR techniques to resolve their clients' disputes more efficiently and economically. It is no wonder therefore that faced with backlogs, courts and members of the world-wide legal fraternity have become a part of the movement seeking means other than litigation to resolve disputes-Zambia has not been spared.

Zambia's justice delivery system dates back to pre-colonial times, and like many other African societies, 'traditional mediation' always formed the basis of the indigenous disputes resolution mode. Paramount chiefs, senior chiefs, chiefs, village headmen, village elders and indeed village counselors all played varying roles in dispute resolutions of one form or the other in the pre-colonial territory today called Zambia.

First Zambian indigenous Chief Justice Hon. Annel Silungwe in a paper presented at the First Judicial and Law Association of Zambia (LAZ) seminar at Lusaka in 1990,October 16-17 on ADR described the evolution of Zambia's dispute resolution system as being:

(i) Pre-colonial period;

(ii) Colonial period; and

(iii) Post independence period.

(i) **The Pre-Colonial Period**

Justice dispensation here was through the village administration customary law of individual kingdoms and chiefdoms. Substantial justice unlike the application of formal legal rules applied and was obeyed due to the respect accorded village heads and chiefs as it were.

These were closely tied societies bonded usually by blood and/or marriage or common decent and the promotion and maintenance of societal harmony were fundamentally paramount. The traditional institutions of the extended family were crucial and played a significant role in resolution of differences, quarrels and disputes between community members. Peaceful co-existence was paramount and the judicial system was built around that objective and as former Chief Justice Silungwe noted:

> *"The indigenous judicial system was characterized by simple and informal procedures; compensation rather than punishment; peaceable reconciliation and mediation and, in some cases, arbitration. This was so due to the importance attached to the notion of settling disputes without the rupture of harmonious relationships or the creation of lifelong enmity. Significance was thus placed on the promotion and maintenance of harmonious relationships as a pragmatic means of engendering order, tranquility and social equilibrium in society"*[19]

[19] Silungwe J op.cit

From the forgoing it is clear that ADR was an integral part of this country even in the pre-colonial era. In this paper, Silungwe J. demonstrated that in the event of a conflict, parties were allowed an element of control in resolving their conflict, first among themselves, and, where this failed, a neutral third party, acceptable to the disputants would be introduced. The third party would then attempt to break the impasse using various techniques:

> *"Such a person would then try to help the parties to arrive at their own solution without making recommendations to them. Alternatively, he would listen to the views of the parties and make recommendations, which the parties could or could not accept. In other circumstances, the neutral would receive evidence and thereafter impose a solution."*[20]

It was, therefore, the case in this era that a Chief or Headman whose personal ability was acclaimed in the area of dispute resolution could command respect and loyalty and acquire judicial prestige within a given society.

Upon successful settlement of a dispute, it was common that disputants were often required to perform, publicly, some act of reconciliation or compensation such as a handshake or exchange white chickens as a demonstration of mutual goodwill and peace. A recalcitrant or headstrong disputant who publicly refused to lay a matter to rest risked the prospect of ostracision and as this fate was religiously implemented in such matters, refusal to co-operate was rare.

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[20] Silungwe J.op.cit

(ii) **The Colonial Period**

Colonial rule came with its instruments of resolution of disputes- only this time split into civil and criminal matters. Britain came with the common law system but in a sense allowed customary law to persist but only as regards indigenous parties. Indigenous courts, therefore, became 'native courts' and were called 'native urban courts' in urban centers.

> *"Prior to the arrival of the white settlers, the indigenous population enforced customary laws through their own system of courts. There was no clear distinction drawn between the criminal and civil law as recognized by the common law."*[21]

Although, generally speaking, native justice was considered inferior and 'repugnant' to natural justice and morality, it continued co-existing with the 'white man's' system within the confines alluded to. As Silungwe J. explains the 'new' system brought into our land a new judicial phenomenon of winner takes all, and not the traditional system of ensuring the loser adjusts and looks up to the loss.

A positive feature of the colonial era vis-à-vis ADR though was the role of Christianity. Priests and church elders assumed an increasingly prominent role in resolving disputes on the lines of conciliation, negotiation and mediation.

(iii) **Post-Independence Period**

Silungwe J. observed correctly that upon attainment of independence on October 24th 1964,a number of milestones, which

[21] Ndulo & Hatched. Readings in Criminology in Zambia. London, James Curry 1994.Pg 1

were to have an indelible mark on the history of dispute resolution in Zambia, were attained: -

(a) The independence constitution established and enshrined the independence of the Judiciary;

(b) Secondly, the native and urban native courts were divorced from provincial administration, brought under the aegis of the Judiciary and reconstituted as Local Courts; and

(c) Thirdly, the newly acquired freedom of movement, which was restricted before independence, allowed unimpeded movement of rural folk to urban areas in search of 'greener pastures' hence promoting the traditional concepts of settling disputes.

However, as a result of the massive exodus into urban areas, coupled with enhanced literacy, Zambian society became more fragmented and complex. The traditional institutions of the extended family which had played a significant part in the harmonious resolution of disputes had began disintegrating and evidently did not retain the importance it commanded during the years before.

Silungwe J quoted Ronald L Olson, chairman of the American Bar Association Special Committee on dispute resolution as though speaking for Zambia at independence thus;

> *"Increased urbanization, broadening government involvement in everyday life, and a waning of non-judicial institutions traditionally engaged in dispute resolution have combined to produce an unprecedented explosion of formal litigation. Judicial institutions have not kept pace. As a result, courts have been congested, living costs having reduced the effectiveness of the judicial system, and justice as well as mercy has become more remote."*[22]

[22] OP.Cit Silungwe

As court congestion increased and the costs for litigation also began to soar, it became clear that there was need to explore alternative avenues of dispute resolutions. As attention focused on the modes of alternatives to the adversarial system abroad, LAZ and the Judiciary began to move- the ADR movement in Zambia had began taking shape.

## IV **Arbitration**

It should be noted that although Zambia maintained the Arbitration Act of 1933 on its statute books, arbitration was rarely employed as an alternative to litigation for a long time. This is owed mainly to ignorance particularly as regards the advantages of arbitration vis-à-vis litigation. But with the advent of the ADR movement in Zambia spearheaded by the Judiciary and LAZ supported by the donor community, particularly the United States Agency for International Development, the Arbitration Act number 19 of 2000 was recently enacted.

Arbitration is a procedure for the settlement of disputes under which the parties agree to be bound by the decision of an arbitrator, whose decision is in general final and legally binding on both parties. Arbitration and litigation are evidently different from all other forms of dispute resolution procedures. Apart from litigation, arbitration is the only other dispute resolution method under which the decision can, if necessary, be registered and enforced on the same way as a judgment of a court of law.

Arbitration, though, is different from litigation in four main respects, that is to say, the parties choose the arbitrator, they choose the procedure to be followed, the proceedings are conducted in private

and there is generally no right of appeal from the arbitrator's decision provided the arbitration is conducted fairly.

Arbitration, hitherto, has not been widely used in Zambia because of the limited pool of trained and experienced arbitrators, the outdated legislative regime governing arbitration, judges with little commercial experience, parties' tendency to ignore arbitration agreements when disputes occur which were encouraged by the judges' reluctance to enforce arbitration agreements and Zambia was by and large a closed economy before the advent of the third republic.

But under the new arrangement, a pool of arbitrators has been trained; a new Arbitration Act based on the United Nations Commission on International Trade Law (UNCITRAL) model law has been enacted to govern both domestic and international arbitration.

The Zambia Center for Dispute Resolution (ZCDR) Limited and the Zambia Association of Arbitration (ZAA) have been incorporated and recognized as arbitral institutions to promote the practice of arbitration. In fact Zambia has acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. On its part, the Zambian Judiciary has recognized the important role of arbitration in dispute resolution and is now referring all cases with arbitration agreements to the ZCDR for arbitration. With the opening up of the economy after 1992,the potential for arbitration in resolving commercial disputes has greatly increased.

## V **Mediation**

Unlike arbitration which has been on our statute books since 1933, mediation is a fresh concept and until it was introduced with the

support of USAID in conjunction with LAZ, the country had no trained mediators to assist settle legal battles outside the traditional court system.

USAID operates with renown international contractors in specialized fields and for the Zambian Court-Annexed Mediation Program, Chemonics International, a global multi-national firm was contracted for the project. Chemonics International's head offices are in Washington DC with co-operate offices on five continents and a multi-national team of experts.

Chemonics International initially sent two trainers in 1996 after a team of Zambian Judges led by the late Hon Mr. Justice Weston Muzyamba, (a Judge of the Supreme Court) had been to Washington DC in 1995. Hon. Justice Muzyamba's team visited the District of Columbia Superior Court at which they were introduced to that Court's civil delay reduction program.

The first mediation training in Zambia, therefore took place in 1996 and eleven (11) Zambian lawyers and Judges were trained, notably the current Deputy Chief Justice Hon. Mr. Justice D.M. Lewanika, late Supreme Court Judge Hon. Mr. Justice Weston Muzyamba, Supreme Court Judge Hon. Mr. Justice P. Chitengi, Supreme Court Judge Hon. Mrs. Justice I. C. Mambilima, High Court judge Hon. Mr. Justice P. Musonda, then Chief Administrator, Mr. V. Malambo S.C., to mention but a few.

After the first mediation training program, the Hon Chief Justice resolved to constitute a Judicial Mediation Development Committee headed by Hon. Mrs. Justice I.C. Mambilima to spearhead the program. Among her duties, Hon. Justice Mambilima was to facilitate

appropriate legislation to provide for mediation. Justice Mambilima's terms of reference also included close contact with Ms Melinda Ostermeyer and Mr. Charles Bethel, former Director and Deputy Director respectively of the Multi-Door Dispute Resolution Division of the Washington D.C superior court but then working for Chemonics International. In the USAID Lusaka office, Justice Mambilima was to closely work with Messrs Miles Todder and Sydney Watae in the Good Governance Department.

It was after the foregoing therefore that statutory instrument number 71 of 1997,being High Court (Amendment) Rules of 1997 was passed, making reference to mediation when ordered by a High Court Judge mandatory. Otherwise mediation could be said to be a voluntary process to the effect that parties can apply before a judge to go for mediation. As in arbitration, parties generally control the ground rules. The processes in both instances are less formal and more flexible than in a trial. The processes have less pre- hearing discovering, rules of evidence are more relaxed, parties can enjoy the informality of proceedings and both these processes are private and confidential. In cases where parties have no wish to settle the matter in mediation, they are at liberty to get back to the court system. When parties voluntarily agree to sign a settlement order, however, there is no appeal.

## CHAPTER III

## THE STATUS OF COURT-ANNEXED MEDIATION IN ZAMBIA

Seven USA mediators and trainers travelled to Lusaka, Zambia to conduct the 'first' mediator training programme from April 17 to 21, 2000 and to mentor Zambian mediators during settlement week, April 24th to 28th, 2000.

A number of cardinal activities were to be accomplished before the USA team arrived in order to ensure a successful outing as follows:

I **Mediator Training**

a) thirty mediators were selected by Law Association of Zambia in conjunction with the Judiciary for the mediator training programme scheduled April 17th through April 21, 2000. The training was to be held from 13.00 hours to 16.00 hours on Friday;

b) role-play case scenarios, provided by the consultants were sent for editing to ensure cultural appropriators to the Zambian context;

c) seven U.S. consultants were scheduled to serve as the training team and co-mediate with newly trained mediators during settlement week;

d) mediators were to mediate cases for at least one full day each during settlement week - the services to be offered pro bono;

e) the Judiciary in conjunction with Law Association of Zambia were to co-ordinate opening and closing ceremonies.

II **General Settlement Week Administration**

a) the Chief Administrator of the Judiciary was mandated to handle publicity and all media related activities and the day to day management responsibilities of the mediator training and settlement week together with the Registrar of the High Court;

b) the Judiciary was further tasked to select suitable cases for settlement week, process orders for mediation and related documents, co-ordinate case scheduling, create a date-base, organize tracking of case records and monitor related administrative issues;

c) settlement week mediations were scheduled at the High Court in the Conference Rooms, Judge's Chambers and other offices. At least eight rooms were identified and the Supreme Court entrance was used as settlement week Headquarters;

III **Settlement Week Selection and Scheduling**

a) High Court Judges were tasked to select appropriate cases for settlement week and priority was given to the following categories of cases:-

1) oldest pending cases;

2) mortgage and debt cases;

3) tort; and

4) contract cases.

b) cases considered ineligible were those in which preliminary applications were pending;

c) labour matters before the Industrial Relations Court;

d) criminal matters or matters involving the liberty of an individual; and

e) constitutional cases.

IV **Computerization**

The consultants recommended an automated management of the scheduling, case co-ordination and data retrieval functions for the successful administration of settlement week. The consultants were unclear about the Zambian Judiciary's status regarding computerization and recommended an instant assessment so that before they arrived, a system was in place capable of capturing and manipulating data.

V **Project Co-ordination**:-

To ensure logistical co-ordination in Zambia and USA, the author was engaged by Chemonics International Inc. as Local Project Co-ordinator to provide local project co-ordination, including: assisting with the preparation and implementation of project activities; facilitate vendor agreements etc.

VI **Mediation Training**

- Thirty-six (36) Zambian Professionals were trained as Mediators;
- Thirty-three (33) mediators were mentored during Settlement-Week;
- Settlement-Week procedures were established and implemented;

- Two hundred and seven (207) cases were scheduled for mediation during Settlement-Week.

- Formal and informal discussions were held between the consultations and the Hon. Chief Justice, High Court Judges, the Law Association of Zambia and representatives from USAID and the U.S. Embassy.

The five (5) day training programme included substantive discussion of mediation theory and practice with both individuals and groups, mediation demonstrations, and exercises to strengthen communication, negotiation, and facilitation skills. Much of the training was devoted to role-play sessions in which the participants practiced mediating disputes characteristic of cases filed in the High Court for Zambia. The trainers evaluated each participant's performance in these practice sessions, as well as the progress of the group as a whole. Throughout the week, the training programme and role-play assignments were adjusted to ensure maximum learning opportunities.

Among those trained were architects, lawyers, engineers, surveyors and other professionals. Daily evaluations were administered and the participants endorsed experimental training as an effective method for teaching mediation skills.

After the training, participants reinforced their newly acquired skills through practical mediation experience during settlement week. With every case mediated, the mediators appeared more confident and enthusiastic about mediation. Out of thirty-six professionals trained,

three did not meet the trainers minimum requirements for certification and eventual court accredition.

At the end of the day, participants were asked to rate the effectiveness of the training, ranking each item from (1) Very Ineffective (2) Moderately Effective (5) Very Effective.

The rates were generally high.

**Table 1: Participants Evaluation of Overall Training**

| Overall Rating (25 Responses) | Average |
|---|---|
| Role Plays | 4.8 |
| Group Discussions | 4.6 |
| Training Materials | 4.0 |
| Trainings | 4.8 |
| Overall Training | 4.6 |

**Table 2 Daily Evaluations of Key Elements of the Training**

| Monday, April 17th, 2000 (29 Responses) | Average |
|---|---|
| Conflict Discussion | 3.5 |
| Negotiation Discussion | 3.3 |
| Mediation - Arbitration Exercise | 4.2 |
| Mediation Demonstration | 4.8 |

**Table 3**

| Tuesday, April 18, 2000 (35 Responses) | Average |
|---|---|
| Mediator's Introductory Statements | 4.3 |
| Identifying Interests Discussion | 4.1 |
| Summarizing Interests Practice | 3.9 |
| Questioning Practice | 4.0 |
| Role Play | 4.6 |

**Table 4**

| Wednesday, April 19, 2000 (34 Responses) | Average |
|---|---|
| Information Gathering Discussion | 4.3 |
| Individual Sessions Discussion | 4.5 |
| Communication Skills Practice | 4.0 |
| Role Play | 4.8 |

**Table 5**

| Thursday, April 20, 2000 (30 Responses) | Average |
|---|---|
| Facilitative Mediation Demonstration | 4.5 |
| Role Play | 4.7 |

**Table 6**

| Friday, April 21, 2000 (25 Responses) | Average |
|---|---|
| Practical Problems | 4.6 |
| Settlement --Week Administration and Logistics | 4.3 |
| Role Play | 4.9 |

## VIII Achievements of The First Mediation Training

The mediation training and settlement week in Lusaka achieved many of its intended goals:-

a) The Chief Justice, the Minister of Legal Affairs and the Law Association of Zambia publicly endorsed mediation;

b) A large number of people (lawyers, litigants, court personnel, judicial personnel etc.) were educated about mediation in the formal sense. "Participating in a single mediation session is far more effective in spurring endorsement of the process than is attendance at seminars, reading about mediation, or engaging in theoretical discussions about it"*

c) The professionals trained as mediators and the many lawyers who participated in settlement week because vocal advocates of the process;

d) Lawyers and litigants through user – surveys administered during settlement week conferred that participants were highly satisfied with mediation and considered it a welcome enhancement of the Zambian judicial system;

e) A successful partnership emerged between the bench and the bar in resolving cases which promised to create a synergy that would have lasting positive effects; and

f) Administrative procedures, automated capabilities and policy decisions were tested which showed promise for development.

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* A senior lawyer who had just participated in Mediation was overheard commenting that he had accomplished more for his client in a two-hour mediation than he had in three years of litigation.

## VIII Recommendations After The First Training Programme

a) It was observed that the computer programme devised for scheduling Settlement Week cases was able to organize the cause list by date/time and cause number, but not by individual advocates. As a result, some mediators were scheduled for two or three concurrent sessions and obviously they could not appear at all of them. It was strongly recommended that resources for computerization be made a priority;

b) It was observed that in addition to criteria used to select cases for the first training programme, the oldest cases should be prioritized for any future programmes;

c) It was observed that a critical factor in the success of the mediation programme lay in advocate education. It was further observed that in any jurisdiction, when members of the bar do not understand mediation, there are low appearance rates, lack of preparation for mediation, and failure to negotiate constructively. To this end it was recommended that:-

1) Regular meetings be held by the Judiciary, the Law Association of Zambia and the Ministry of Legal Affairs to assist promote mediation;

2) An aggressive campaign be mounted to publicize mediation country wide including printing materials explaining the general principles of mediation and radio and television interviews in that regard;

3) The Attorney General's Chambers be approached with a view to encouraging the State to engage in mediation; and

4) Resources be made available for strengthening administrative capacities of the Judiciary throughout the country.

## IX Follow-up Activities

After the first mediation training programme, a number of follow up activities were undertaken to strengthen mediation in Zambia as a form of alternate resolution mode to the traditional adversarial system. The following are the highlights:-

a) A second and third mediation training programme was held in Ndola and Livingstone in July, 2000 and May, 2002 respectively. Therefore, a total of ninety-one mediators were trained and then mentored by experienced US mediators immediately following their trainings in Lusaka, Ndola and Livingstone respectively;

b) Three Settlement Weeks were organized and executed during which 314 cases were scheduled for mediation. (April, 2000, July, 2000 and May, 2002);

c) Over 100 advocates participated in workshops on mediation, and an undefined number were informed through one-on-one conversations with US consultants during Settlement Week events;

d) Thirty-five Zambian Judges from the Supreme Court, High Court and the Industrial Relations Court received an

extensive workshop on the role of Judges in mediation. Other Judges were mentored through formal meetings and informal one-to-one conversations with US consultants during various trips and Settlement Week events;

e) Fifteen mediators were observed during actual mediation sessions held in Lusaka and Ndola. The US consultants provided feedback on their performance as a means of further skills development. Thereafter, the consultants identified particularly skilled Zambian mediators to be future mediator trainers (December, 2001);

f) Forty-five interviews were conducted with Judges, advocates and mediators to assess programme operations. (December, 2001 – July, 2003);

g) Multiple written questionnaires were distributed soliciting feedback from mediators, Judges, advocates and litigants and the questionnaire responses were analyzed at various points during the project period (April, 2000, July, 2000, May, 2002, July, 2003);

h) Ten Judges and administrators participated in a study tour to compare Zambia's approach with mediation operations in Washington DC, Maryland and Virginia;

i) Ten Zambian mediators were trained as mediation trainers and six were mentored as trainers in May, 2002;

j) Approximately fifty Judges, administrators, mediators and advocates participated in a final assessment of the mediation

programme with the US consultants. Thereafter, strategic plans were formulated to enhance and advance the use of mediation in Zambia.

## X Current Status

The statistics of mediation in Zambia stand as tabulated here below. There are currently eighty-seven (87) court accredited mediators on the Zambian programme.

## COUNTRY-WIDE STATISTICS FROM FEB 2001 – DEC 2004

**Table 7:**

| MEDIATION STATISTICS FOR THE PERIOD FEB. 2001 – DEC. 200 | | | | | | |
|---|---|---|---|---|---|---|
| **TOWN** | **REFERRED** | **SETTLED** | **FAILED** | **ON-GOING** | **NON-APPEARANCE** | **T** |
| Lusaka High Court | 1644 | 719 | 479 | 299 | 442 | 1 |
| Ndola High Court | 710 | 314 | 207 | 171 | 140 | 8 |
| Kitwe High Court | 262 | 119 | 84 | 52 | 53 | 3 |
| Livingstone High Court | 97 | 49 | 38 | 10 | 16 | 1 |
| Industrial Relations Courts | 1867 | 675 | 531 | 638 | 139 | 1 |
| **TOTAL** | **4580** | **1876** | **1193** | **684** | **810** | **4** |

# CHAPTER IV

## LEGISLATION AND INSTITUTIONAL ARRANGEMENTS

The single most important issue regarding mediation in Zambia is that it is court-annexed. So, while a probability subsists to the extent that private mediations may and do 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. The answer is in the negative Court-Annexed mediation is triggered pursuant to a statutory provision in the High Court Act, Order 31, rule 4 of the Rules of the High Court which reads:-

"Except for 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 mediation fails, the trial Judge, shall summon the parties to fix a hearing date." [23]

In the Industrial Relations Court (IRC), the Chairman having been vested with power to make rules under Section 96 of the Industrial and Labour Relations Act which reads:-

"The Chairman shall, by statutory instrument make rules regulating the procedure of court,"[24]

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[23] High Court Act
[24] Industrial and Labour Relations Act

has promulgated a statutory instrument and under Section 12(1) it reads:-

"The court or a Judge may refer any action to mediation at any stage of proceedings except where:-

a) the case involves an injunction, or;
b) the court or a Judge consider a case unsuitable for reference to mediation – arbitration." [25]

It must be emphasized that it is good practice that a Judge should not make an order referring a matter to mediation without the consent of the parties or their advocates as this could be receipt for failure of mediation. If the referral is at the court's 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 very good reasons for a Judge to refuse such application's.

In the Industrial Relations Court, a collective bargaining agreement between an employer and the union that represents the firms employees is likely to be a complex document. It will deal with a large number of subjects, among many other things setting wages and other terms of employment, imposing limits on the employees, and providing for seniority for purpose of lay offs, promotion and job-assignment. It will constitute, in short, an overall framework for employer-employee relations.

[25] The Industrial Relations Court (Arbitration and Mediation Rules) 2002.

Most agreements also spell out a process by which the inevitable questions of interpreting and application arising during the life of the contract will be settled. At the beginning, for example, there may be informal attempts to adjust a grievance on the shop floor by consultations between the employee's immediate superior and the union shop steward. If the dispute is not settled at this stage it will move to successively higher levels. The agreement is likely to make it clear that at all stages work is not to be interrupted because of the dispute but is to continue pending a final settlement and is likely also to impose strict time limits to ensure that a grievance is heard and processed speedily.

The final stage in the grievance process is likely to be binding arbitration or mediation settlement. Binding arbitration or mediation is where the parties have chosen the mode of settling disputes. However, the Industrial Relations Court under Sections 3-10 can be requested by the parties to refer the matter to arbitration or may on its own volition do so.

In, United Steelworkers of America Vs Warrior and Gulf Navigation Company, Supreme Court of the United States, Justice Douglas said,

> "*The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration or mediation of grievances in the collective bargaining agreement. There, the choice is between the adjudication of cases or controversies in court with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal ADR tribunal on the other. In the commercial case, ADR is the substitute for litigation. Here ADR is the substitute*

*for industrial strife. But since ADR of labour disputes has quite different functions from ADR under an ordinary commercial agreement, the hostility evidenced by courts towards ADR of commercial agreements has no place here. For ADR of labour disputes under collective bargaining agreements is part and parcel of collective bargaining itself."*[26]

The foregoing is applicable to the domestic scene.

[26] Nolan Haley M. Jacquelline. Alternative Dispute Relation In a Nutshell: St. Paul Minnesota (1992) P. 491

# CHAPTER V

## Shortcomings, Challenges, Recommendations and Conclusion

### I INTRODUCTION

In late 1999, Chemonics International Inc. embarked on a project with USAID and the Republic of Zambia via the Judiciary to implement mediation in the commercial and civil courts in Zambia's most populated jurisdiction in the commercial and civil courts in Zambia's most populated jurisdicts – Lusaka, Ndola, Kitwe and Livingstone.

Four years later, mediation is thriving in these jurisdictions and it has been expanded to the Industrial Relations Court as well. The project culminated in July, 2003 in a national strategic planning event involving over fifty stakeholders; including Judges, mediators, court staff, and advocates throughout Zambia.

### II Project Events

Chemonics International Inc. experienced Judges, advocates and mediators provided training and support throughout the duration of the event which run from 1999 through 2003. Positive personal and professional relationships were forged between US Consultants and Zambians and everyone worked towards the same goal which was: to develop an effective self-sustaining mediation system in Zambia.

Vincent Malambo S.C., then Minister of Legal Affairs at the official closing ceremony of the first mediation course on the 28th April, 2000 aptly described the mood:

> *"whether we have too many cases or too few or even miraculously, precisely the right numbers, these can be little doubt that the*

*system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and tax payers alike. No one should have to wait five years for a case to come to trial, but many litigants in this country face this reality."*[27]

The US Consultants and the Zambian Judiciary particularly worked together in training mediators and at least six local mediator trainers, developed administrative systems and produces and worked around existing infrastructure necessary for Zambia to carry-on mediation after the pilot project period.

**III Final Strategic Planning Event**

A significant project activity during the close of the project period with Chemonics was the final strategic planning event which was a two day activity held in July 2003. Fifty stakeholders joined together on day one, followed on day two by a meeting of the Zambian Court Operations Committee. The objectives of the strategic planning event were to: -

- Assess the administration of the mediation programme;
- Identify strengths and areas for improvement; and
- Develop action plans for the advancement of mediation in Zambia over the next few years.

In the one day strategic planning event held on the 10th July, 2003, the Judges, advocates, mediators and administrators in attendance were presented with an overview of data that had gathered for the purpose through one-on-one interviews with various stakeholders, and through the written survey responses of nine Judges, thirty advocates and thirty-five mediators.

[27] Vincent Malambo, S.C.

The assessment findings are summarized below:

1. The issues listed here received a "high priority rating" by at least 49% of the survey respondents – meaning stakeholders believe the Court should focus to the greatest degree on these initiatives during the next few years:
    - Ensuring parties and especially advocates attend mediation sessions (83%);
    - Expanding mediation to the Magistrates Courts in highly populated locations (59%);
    - Maintaining and regular reporting of mediation statistics and other programme evolution data to Judges, mediators and advocates (56%);
    - Providing regular and ongoing training and professional development for current mediators (55%)
    - Providing mediation facilities to conduct mediation sessions (54%);
    - Security and training an increased number of new mediators (51%); and
    - Strengthening the administration of the mediation programme through resources and/or training of personnel (49%).
2. By far, the most frequently used criteria by Judges for referral of a case to mediation (75%) was that the case was "simple";
3. 65% of the mediators felt that mediation should occur early in the discovery process, while 61% thought mediation should occur after all discovery was completed;
4. 89% of all survey respondents indicated that a meeting between the parties/advocates and the Judge prior to mediation would increase the likelihood of parties attending the mediations session/s. 50% reported that this happens only "occasionally."

5. 90% of responses indicated that sanctions should be introduced in the rules for non-appearance of parties
6. 75% of the mediators rated the on-going training and support provided by the court as "very or what effective". One – fourth of the mediators rated it as "ineffective".
7. One-third of the mediators rated the responsiveness of the mediation programme personnel as "very or somewhat ineffective". An even larger number of mediators, almost half, rated the administrative efficiency of the programme similarly "ineffective". However, three-fourths of the advocates and 89% of the Judges gave ratings of "somewhat or very effective" for both factors (responsiveness and administrative efficiency).

Following upon a discussion of the above data, the stakeholders divided into small groups to consider strategies to address priority areas which served as a basis for the Court Operations Committee strategic plan conducted the following day.

## IV Court Operations Committee Strategic Plan

Building upon the work of the larger stakeholder group. The Court Operations Committee developed a strategic plan to address the top priorities facing the court. During the meeting, committee members committed themselves to the actions listed below:

### (a) Mediator Professional Development and Public Education

(1) The Chairman undertook to establish a sub-committee to devise a plan related to Mediator Professional Development and Public Education (i.e. of Judges, advocates, public and business community);

(2) The Committee would be comprised of Court Mediator Trainers, Mediation Administrative staff, and the leadership of the Zambia Association of Arbitrators.

(3) The mandate of the sub-committee would be to devise a plan to:

- Create a professional association of Court-Annexed Mediators (or affiliation to the Zambia Association of Arbitrators);
- Identify training needs of current court mediators (for example: courses in Industrial Relations, legal information etc);
- Develop a strategy for the evaluation of mediators' skills and the removal of mediators with sub-standard skills or consistent non-participation; and
- Develop a public education strategy.

(4) It was resolved that the sub-committee would submit recommendations to the Court Operations Committee for approval and action.

(b) **Non-appearance of Parties/Advocates at Mediation and shortening the Time Cases are Pending in Mediation.**

The Chairman of the Court Operations Committee was tasked to communicate with the Honourable Chief Justice regarding the appointment of members to the High Court Rules Committee who should in Turn take appropriate steps and action related to the following mediation issues.

- Pre-Mediation meetings between Judges and advocates/parties to encourage attendance at mediation;
- Penalties/sanctions for non-attendance;
- Mediator discretion to extend the mediation deadline of 60 days for High Court Cases and 90 days for IRC cases;

- Mediator fees – IRC fees to be in line with High Court fees; and
- IRC Judges to refer cases directly and not to leave the job to the Register of the IRC.
- The issue of Judges writing judgments on Fridays so that mediations can be set down for that day so that parties'/advocates' attendance is maximized.

## V. Recommendations

There is a no question about the fact that mediation in Zambia has come to stay and as then Legal Affairs Minister Vincent Malambo observed in his closing remarks at the first mediation course on the 28th April, 2000:

> *"A country like ours which has been liberalizing our social, political and economic systems finds it desirable that we institutionalize mediation as part of alternative dispute resolution mechanisms (ADR) not only as a way of preserving the social and economic relations of litigants, which must surely be one of the goals of a justice system, but also as a way of rationalizing and maximizing quality output from the scarce Judge power"*[*]

There are, however, a number of problems facing the mediation programme in Zambia which if not properly handled, threaten to undermine the whole process. It can not be doubted that Zambia leads the rest of the region in mediation but the following recommendations must be implanted if the process is to be sustainable.

[*] Ibid Vincent Malamba S.C.

1. **Improved and Automated Programme Management**

The Judiciary is increasingly devoting valuable resources to the administration of the mediation programme. All three (3) locations i.e. Lusaka, Livingstone and Copperbelt have made significant advancements with little resources. However, increased and highly skilled personnel, specialized training for personnel, allocation of administrative resources, and dedicated facilities such as mediation rooms are very much needed to maintain the programme;

2. **Advocate and Client Participation**

Extensive administrative, mediator and litigant resources are being spent on efforts to get all the parties and advocates to the mediation table at the same time. This is the single greatest problem facing the mediation programme today. There is therefore an urgent need to ensure that Judge set aside every Friday of the week as Judgment writing day so that mediations are conducted mostly on Fridays. Further, there is need to encourage pre-hearing sessions where Judges can encourage or direct parties to attend mediation face to face.

Additionally, there is need to amend to rules to introduce sanctions against parties who, for no good reason, refuse to attempt mediation when so directed.

3. **Indigent Litigants and Mediation Fees**

A problem of indigent litigants who cannot afford the mediation fees has emerged especially at the Industrial Relations Court. During the US study tour, the Zambian participants learnt from the courts in the surrounding DC area of various solutions to this problem. Possible strategies for implementation are:

- Using a sliding scale for payment of mediator fees based on the litigants ability to pay;
- Securing volunteers to provide free mediation services
- Requiring mediators to provide a specific number of cases or number of hours each year in exchange for the privilege of mediating cases for which they will be paid;
- Establishing a joint programme with the University of Zambia such that law students or other graduate level students are required to volunteer as mediators as a part of their education;
- Securing the support of co-operating partners to provide finances and/or grants; and
- Increasing the cost for all litigants to file a case in court and allocating a portion of that cost to fund mediation services for indigent litigants.

It is also clear that mediation fees at the Industrial Relations Court are currently K300,000 per session (i.e. every adjournment will attract a further K150,000 per party) while at the High Court the fee is only K300,000 per case regardless of the number of adjournments. It is strongly recommended that the fees be streamlined for the avoidance of confusion.

4. **Mediation Public Awareness Campaign**

Several constituency groups were identified as needing a greater awareness of the benefits and procedures related to mediation. It is recommended that the following groups be specifically targeted.

(a) The general public;
(b) Judges;
(c) Advocates
(d) Court Personnel

(e) Business People: Corporate people and small business;

(f) The State Chambers;

(g) The Police; and

(h) The Media.

A well thoughtout Public Awareness Campaign would ensure that the most effective strategies are used to repeatedly target each of these groups throughout the year. A complete Public Awareness Campaign might include the types of activities listed below:

- Issuing quarterly Public Service Announcements (PSAs) on TV and in print publications, as well as, frequent press releases about cases successfully resolved and other public events;
- Coordinating a national Dispute Resolution Week during which the courts, governmental entities, LAZ, UNZA and other organizations hold seminars and events throughout the country. The week is an excellent opportunity to generate interest and coverage by the media;
- Holding quarterly meetings with Judges, advocates, and mediators to discuss issues related to mediation;
- Holding education seminars for local business people;
- Approaching business leaders and leading advocates and securing their commitments to adhere to an ADR pledge. This "Pledge Approach" has been used effectively in the US with Fortune 500 companies and large law firms. In this respect, 4000 companies have subscribed to a Corporate Policy statement on Alternatives to litigation known as the ADR Pledge.

## CONCLUSION

The Zambian Judiciary has made giant strides in ensuring equality, fairness and efficiency in the administration of justice. Of particular note are reforms which have seen ADR take root. As a consequence of the reforms that are in fact on-going, a greater number of our citizens now have enhanced access to court facilities and services.

What is of particular interest is the positive attitude all the stakeholders in the delivery of justice have towards ADR and particularly mediation as a necessary adjunct to the work of the courts.

It should be appreciated that the support of the United States Government has been monumental in the introduction of ADR in Zambia. The Hon. Chief Justice's leadership in providing these revolutionary ideas has been focused and consistent and for Zambia, ADR is the future and we must continue to embrace and evolve new ideas and initiatives in this area.

On the whole, the belief in the power of mediation to improve the justice system has been inspirational. The persuasion of judges and advocates to embrace the concept of mediation has changed the legal culture. This writer has had the rare honour, pleasure and privilege to work with all who have been involved in this initiative these past several years. I wish them the best of luck, and stand ready to assist in any way possible in the future.

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