

**WHAT DOES ALTERNATIVE DISPUTE RESOLUTION ENTAIL? A REVIEW
OF THE SUCCESS OF THE ALTERNATIVE DISPUTE RESOLUTION
PROGRAMMES IMPLEMENTED IN ZAMBIA AND THE INSTITUTIONS
THAT FACILITATE THE USE OF THE A.D.R PROGRAMMES**

BY

NTAMBO ALICE MIPUNGA

**An obligatory essay paper submitted to the University of Zambia faculty of law in
partial fulfillment of the requirement for the award for the degree of bachelor of
laws (LLB)**

**RTD JUDGE KABAZO CHANDA
SUPERVISOR**

NOVEMBER 2003

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DEDICATIONS

*To my beautiful and lively daughter, Mukapu,
I thank God for you as you have helped me change
My perspective of life and set my priorities right,
You are my source of joy and inspiration
,
To my mother, for the role you have played in my
life as a friend , I love you both!*

ACKNOWLEDGEMENTS

I would like to sincerely thank God for sustaining me through out my stay at Unza. I would like to especially thank my supervisor RTD Judge Kabazo Chanda for his patience and guidance during the course of writing this paper. I shall forever remain indebted! I would also like to thank Mr. Mutuna and Mr. Matibini for taking time off their busy schedules to grant me interviews on the subject. My gratitude is extended to Mr. simukoko for the interview and the materials he made available to me on the topic.

To my friends, Sharon Simasiku for ever encouraging and supporting me, Sidney Chisenga, Chileshe Nkole, Bertha, Maipepi, Kondwani, Kapulwa, Tammy Vivian and Kombe. For those that I have not mentioned, you still mean a lot to me.

I shall forever remain indebted to my family for the love, support and care they have shown me through out my academic life and in other areas of my life. You will always remain close to my heart!

To Makando, I thank you for being my friend and partner, i will always thank you for being so encouraging and understanding even when the workload overwhelmed me and I paid you no attention I shall forever remain thankful.

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CHAPTER ONE

We read in the news of cases that continue not for weeks or months, but years. Is it 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, three months or longer case are denied access to that court.¹

Though an American jurist made this sentiment, it is not, an altogether strange scenario of our Zambian judicial system. Criminals as well as civil records at the various courts show that there are cases that have been dragging on for more than three years.

It is not strange to have a person remanded in prison for an unbailable offence for months without ever going to trial because the case hasn't been committed to the high court by the Director of Public Prosecutor's office' or because there is no transport at the prison or for any other flimsy reason.

Inmates die without ever having their cases heard or judgement ever being passed. With regards to civil matters, some cases drag on for such long time, that some litigants abandon them due to this unjustified delay leading to an increase in the cost of lawyers fee's if one has been engaged. Some cases are

¹ WARREN BURGER, ISN'T THERE A BETTER WAY? (1982)

abandoned by the time the decision is made, as the award will be of insignificant economic value.

It is against this bleak scenario of our Zambian adjudicatory system that the need to look in summary, at our system of resolving disputes in Zambia has arisen.

With this bleak picture, it is important to bring to the fore other modes of resolving disputes, more especially commercial disputes, which will make the litigants more satisfied parties.

Before we go into a discussion of what these other modes of dispute resolution are, it is important to give a brief analysis of what exactly is adjudication and what means of adjudication have led to this scenario, which has been depicted.

(ii) WHAT IS ADJUDICATION

Adjudication is a public process of resolving disputes that are instituted by any affected party in the courts of law.² An adjudicator can therefore be said to be the person who resolves disputes brought to them publicly through the government instituted courts of law. The role of the adjudicator is simply to arrive at a decision through the indulgence of the law obtaining on the matter.

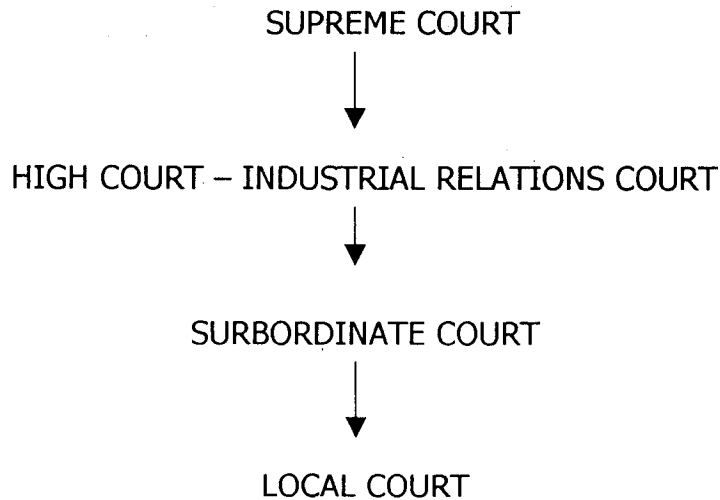
Through the principle of 'stare decisis', a judge will apply the same principle used in a similar decided case, to arrive at a similar conclusion.

² JUDGE PHILLIP MUSONDA, PAPER PRESENTED AT A JUDICIAL MEETING IN SIAVONGA

iii. **ADJUDICATION IN ZAMBIA**

Traditionally, adjudication in Zambia has been, and largely remains through the court system. The courts in Zambia are placed in a hierarchical structure with the Supreme Court at the apex and the local court at the base. Below is an illustration of the hierarchical structure of the court system in Zambia.

3(i)



3(ii) **SUPREME COURT**

This is the highest court of the land. It is a court of appeal, mainly, but can act as a court of first instance though this is not clearly defined in the Supreme Court Act.

Section 7 of the Supreme Court outlines Supreme Court jurisdiction as being.

“To hear and determine appeal in civil and criminal matters as provided in

the Act and such appellate or original jurisdiction as may be conferred upon it by or under the constitution or any other law.”

The Supreme Court has been seen to act as a court of first instance in presidential petition cases such as the current one where the legitimacy of President Mwanawasa’s election to power in the 2001 tripartite elections is being questioned.

The jurisdiction of the Supreme Court was elucidated in the case of Godfrey Miyanda vs. THE HIGH COURT³ where the then deputy chief Justice Matthew Ngulube explained the jurisdiction of the Supreme Court in civil matters as:

“The original civil jurisdiction of the Supreme Court is very limited indeed, and would appear to cover such matters as the granting of injunctions pending appeal, the making of orders to extend time or for leave to appeal, or as to COSTS or security for costs of appeal. The Supreme Court would also have original jurisdiction as the court of appeal in England, to make orders requiring the fulfillment of an undertaking given to it and an inherent jurisdiction to strike out an incompetent appeal. to prevent abuse of process and to protect its (the courts) authority and dignity.

³ (1984) ZR 62, at 66

(iv) **THE HIGH COURT**

Creating the High Court of Zambia is Chapter 27 of the Laws of Zambia, which is the high court Act. The High Court is composed of 30 puisne judges. The high court is bound by decisions of the Supreme Court. It is supervised by a judge-in-charge. The judge in charge pursuant to statutory instrument no. 71 of 1997 does the allocation of cases to each judge.

v) **THE MAGISTRATES COURT**

This is created by the Subordinate Court Act which is chapter 28 of the Laws of Zambia. There are two classes of magistrates namely professional magistrates, who are qualified advocates, with a degree in law and practicing certificate and lay magistrates who are not qualified advocates but have obtained a diploma in a magistrates course.

vi) **LOCAL COURTS**

These are created under the local court act, which is chapter 29 of the laws of Zambia. The local courts, found in every town in Zambia are divided into grades A and B and their jurisdiction is determined according to the warrant assigning them. They are primarily authorized to apply and enforce customary law, by-laws, and regulations promulgated under the local government act. Local court justices preside over the local court.

iv) **ALTERNATIVE DISPUTE RESOLUTION**

The main reason for this paper is to bring to the fore other means of settling matters, commercial matters to be specific, other than through the traditional adjudicative environment that has been summarily depicted. ADR is an umbrella term used to refer generally to alternatives to court adjudication of disputes. It refers to alternative methods of resolving disputes, instead of through the traditional system of court litigation or judicial process.

Litigation can sometimes be laborious, costly and as such over the years, the past two decades to be specific, there has been seen (and achieved) the need to come up with more flexible means of resolving disputes. This dire need for alternatives has been fuelled by the increased globalization of the modern business world, in which matters are to be dealt with as flexibly as they can.

v) **HISTORICAL DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION IN ZAMBIA**

This concept of ADR has not been altogether new in our Zambian society. The system of justice in Zambia dates as far back as the traditional pre-colonial days. Conflict/dispute dates as far back as human kind and as such, man had to use his initiative and tailor means of resolving these conflicts.

In Zambia, there has always existed a dispute resolution structure which employed methods such as those used in the current ADR processes. Village

chiefs, headmen and counselors all had varying roles to play in the dispensation of justice and resolution of conflicts and disputes within a society. An essential function of both the chief and village headmen was to administer justice⁴.

In the more traditional times, people lived in a closely-knit society and as such promotion and maintenance of societal harmony was of paramount importance. It was in such an arrangement that the importance of the need to resolve disputes among community (family) members adequately was seen.

The indigenous judicial system was characterised by simple and informal procedures; compensation other than punishment... This was so because of the importance attached to the notion of settling disputes without the rapture of harmonious relationships or the creation of life long enmity Premium was placed on the promotion and maintenance of harmonious relationships as a pragmatic means of engendering order, tranquility (and) social equilibrium.....
...in society"⁵.

When a dispute arose, the parties to it where sat down by a village headman, elder, counselor or chief if they failed to come up with an amicable solution. The headman or chief, herein referred to, as the third party would help the disputants come to an amicable solution, acceptable to both parties. The third

⁴ J. J. Mofat, Foreword in Hans Cory, Sukuma Law and Custom 1953

⁵ Former Chief Justice, Annel Silungwe, ADR Paper presented at the first Judicial and LAZ Seminar held at Lusaka, Zambia, October 16-17; 1990

party would mostly offer alternative solutions to the disputants who would select the one, which suited them best. In this mode of resolution, disputants were personally involved and played an active role in arriving at a conclusion.

vi) **WHY THE MOVE TO ADR**

As has already been noted, ADR is an option to litigation. It involves other means of solving disputes without having to take the matter to court. It involves various methods such as Arbitration, Mediation, Negotiation etc which will be considered in detail in the following chapter.

When considering why ADR should be resorted to it is imperative to point out the disadvantages of the traditional system of litigation and the entire judicial process.

vii) **WHY NOT LITIGATION - ITS DISADVANTAGES**

As the scenario at the beginning of the chapter spelt out, there are various reasons why disputants may avoid the traditional method of litigation. To begin with, there are so many matters which the courts have to deal with and as such, it may take years before some cases are dealt with. This backlog in cases is attributed to an increase in the number of qualified lawyers which stands at (516) five hundred and sixteen⁶ as against the few judges who have trouble

⁶ LAZ REPORT 2003

handling the ever increasing numbers of cases as quickly as they would hope to or with the urgency the cases demand.

This backlog on cases automatically entails a delay in the much-desired justice and as the saying goes – justice delayed is justice denied.

Another issue is that cases are ever being adjourned, even where it would be avoided, either due to non-availability of a key witness or to the lack of preparedness on the part of the lawyer. During all these adjournments, costs continue being incurred by the litigants and even when judgement is passed in *their favors or against them, lawyer's fees still have to be settled.*

This lack of efficiency in the court system that is reflected by the courts failure to handle matters expediently can be attributed to the deteriorating economic system the nation is continually falling into. To begin with, workers aren't adequately provided for which actions have resulted in the judiciary workers calling a nationwide strike which begun on 9th July, 2003⁷ and lasted for about a week. This action paralyzed all operations at the courts, much to the disadvantage of litigants, who so badly require that the courts remain open so as to have their cases dispensed.

⁷ Times of Zambia dated July, 2003 pg. 2

There is also the usual inefficiency of the understaffed court registry and the fact that most of the work at the registry is done manually. The high number of cases as against the few judges at the courts (A registry usually has about 4 judges) makes it difficult to secure dates for hearing cases as the judges are usually overwhelmed by the number of cases they have to deal with. The limited number of court rooms also means only a few cases can be heard at a time or in a day, depending on the availability of the court rooms. There has, also, not been an improvement with regards to extending or renovating court rooms since the colonial era to accommodate the increase in population.

As has already been alluded to, cases may drag for years and during which while expenses are being incurred such that "even when an acceptable result is finally achieved in a civil case the result is often drained of much of its value because of the time lapse, the expense and the emotional stress of the litigation process.

Another reason for avoiding litigation is the personal element of the problem. Some people are not keen on the idea of washing their dirty laundry in public, which is exactly what litigation would entail especially in divorce cases for instance. This element of confidentiality can cause people to shun the publicity of the courtroom and rather opt to suffer in silence.

Taking the case for litigation removes, in a way, the problem from the hands of the owner, placing it in the hands of a stranger to deliberate upon it, without the

interference or contribution of the owner. The owner of the dispute has no control over how the matter unfolds. As one noted:

The legal process distorts reality; not only speed and economy but also the real issues in dispute and the treatment of disputants by the professional dispute resolve expel our control. Even top corporate managers feel as if their business problems take on a legal life of their own once they turn them over to lawyers or the courts.

Another aspect which is a result of litigation and which cannot be ignored is the fact that at the end of the whole procedure, parties are usually bitter with one another and whatever cordial relationship existed is destroyed. Take for instance in a divorce case, the parties are made to reveal all about their marriages and all the nasty negative elements of the parties involved are brought to the fore. As one writer notes, even in the face of the legal system being efficient, not all turns out well. "The emphasis of courts and other traditional forums of pronouncing right and wrong and naming winners and losers necessarily destroys almost any pre-existing relationship between people involved. Whether the parties are a divorcing husband and wife who must continue shunning the parenting of their children, businesses that want to retain their customers and suppliers, or employers and employees who want to keep their jobs, it is virtually impossible to maintain a civil relationship once people have confronted one another across a court room.

Due to the aspect of finger pointing, pronouncement of loser or winner, litigation will not enhance and is more likely to harm the parties' relationship. Another reason why litigation should not be the only resort is that there has been an increased in commercial disputes, which have been fuelled by the rapid changes in the Zambian economy especially with the privatization of industries due to the liberalization of the economy. This has led to loss of jobs for a large number of people and creation of new contracts of service.

In ADR, the faces and masks of law are personalised⁸ whereas in litigation, parties may continuously be referred to as "plaintiff" and "defendant". In an ADR method such as mediation, the names and feelings of the disputants are important and so is the notion of fairness in arbitration, which notion may not be considered in litigation. Our courts are courts of law and not courts of fairness. A decision is based on what is law and not what is fair.

Another advantage is that ADR is a private procedure. Not everyone would want their laundry washed in public. In ADR, only the parties relevant to the dispute will be present. The main aim of ADR is to come up with a resolution that is satisfactory to both parties involved in the dispute.

⁸ Jacqueline M. Dolan-Haley, *Alternative Dispute Resolution* (1993)

It is extremely difficult to maintain a cordial relationship after litigation. In the adversarial system of dispute resolution, there is the assumption of one side being wrong and the other right. It operates on a "winner takes all basis" and makes no attempt to find a way to help the loser adjust to his loss or reduce the impact of frustration on the part of the loser.

ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION

Having outlined and explained the reasons why litigation isn't the best and only option of resolving disputes, it is imperative that we look at the positive aspects of the alternative resolutions to the disputes we face.

In the first instance, not all cases that go to trial deserve to do so. Most of the law can be resolved amicably and in a quicker mode. It is such cases, that are suitable for the ADR process. It was earlier alluded to that litigation can at times tend to be lengthy and costly in the event and this isn't so in the case of ADR. Resolution of disputes through ADR is fast and this consequently saves time and money on the part of the disputants. One does not have to face the usual court-blues-of adjournments or the lengthy period of waiting for judgement to be delivered. In short, ADR rids of unnecessary delays caused by adjournments and the usual backlog in litigation process. It also cuts down on expenses incurred in the event of litigation.

ADR is friendlier in that it does not foster a long-standing or permanent residue of hostility between the parties. Due to the manner in which the resolution of disputes is conducted, and how the cases are concluded, it is possible for parties to maintain and preserve whatever relationship existed prior to the dispute. This aspect is so very important especially among business associates. ADR offers a for a where parties can resolve disputes amicably. The proceedings in ADR are less formal and less protracted than the court battles and the proceedings are less binding.

CONCLUSION

Having outlined the various reasons for taking a matter for resolution through the various modes of ADR to be outlined in the next chapter, it is important to note that ADR isn't here to oust litigation or any other judicial process. Rather, it is encouraged as an alternative for deserving cases, which fall within the stipulated advantages as well as a complimentary process to the judicial process. The issue to be considered when deciding whether or not litigation or ADR is the appropriate channel for resolution of the particular dispute is one of appropriateness of the matter in question.

CHAPTER TWO

2. INTRODUCTION

Having explained in the preceding chapter what ADR is, this chapter shall proceed to give a brief description of the various ADR processes with special emphasis on those processes applicable to our Zambian system.

Having given a brief historical background on the genesis of ADR in Zambia as a concept which has its roots in our culture as evidenced by the manner in which disputes were resolved, it is only imperative that we enlighten ourselves with regards the international development of ADR, taking note of how some institutions have embraced it.

This chapter shall be incomplete if the role of the lawyer in alternative dispute resolution is not highlighted. A brief outline of what considerations a lawyer should take into account when selecting a process shall be included.

2.1 INTERNATIONAL DEVELOPMENT OF ADR

As was stated in the Zambian scenario, settlement of disputes outside court is not a new phenomenon. The same applies for society's world over. Non-judicial indigenous methods have long been used to resolve conflicts. Rather, the new phenomena have been the extensive proliferation and promotion of ADR models⁹ and the increasing use of ADR as a tool to realize goals broader than the settlements of specific disputes.

⁹ Judge Philip Musonda, the role of registries in the administration of arbitration, paper presented to a judicial workshop 26-30th June, Siavonga.

In the United States of America, the movement promoting ADR was launched in the 1970's. It began as a social movement to resolve community wide civil rights dispute through the process of mediation and as a legal movement to address increased delay and expense in litigation arising from an over crowded court system.¹⁰

This period has seen the growth of the ADR movement in the USA from experimentation to institutionalization. There has been a lot of support received from the American Bar Association, academics, courts, the US Congress and state governments. One well-known contribution in the search for alternatives was that of Chief Justice Warren Burger of the United States. He convened the Roscoe E Pound conference on the causes of popular dissatisfaction with the Administration of Justice in Minnesota. This conference attracted lawyers, members of the judiciary and public interest lawyers and from here emerged classic papers such as the "Varieties Of Dispute Resolution" by Professor Frank Sanders, which paper has formed the basic understanding of dispute resolution today.

1976 saw the proposal of a multi door house where individual disputes would be matched to appropriate ADR processes. Professor Frank Sanders made this proposal. The American Bar Association adopted the idea and established three multi door courthouses¹¹. This success led to an increase of such programmes. To crown it all, USAID contracted the American Bar Association in conjunction with the District of Columbia to establish mediation in Malawi, Tanzania, Uganda and Zambia.

¹⁰ Ibid page. 4

¹¹ The role of registries in the administration of arbitration, paper presented to a judicial workshop 26-30th June at Siavonga by judge Phillip Musonda

SOME INSTITUTIONS THAT HAVE EMBRACED ADR METHODS AND WHY

2.2 USAID

The USAID has over the last two decades supported programmes throughout the world to facilitate the development of legal systems and promote civil society. They seek to stabilize developing societies and facilitate economic development by strengthening civil structures, improving access to justice and referring judicial systems¹².

In its developmental programmes, the USAID has been trying to promote the rule of law in developing and transitional society and this has inevitably led to an increased interest, in the use of ADR. The USAID has identified ADR as more efficient and more effective in the provision of justice especially in countries where the judiciary has lost the trust and respect of the citizens. USAID has identified the need to promote ADR especially in places where the population cannot or will not use the court system to address conflicts due to the loss of confidence by the populace in the judicial system.

To ensure the above, USAID has convened an advisory group of ADR and conflict management experts who manage ADR programmes around the world.

2.3 PROFESSIONALS AND BUSINESSMEN

Business and professional relationships are enduring and have to survive after the resolution of the dispute at hand. As such, caution has to be taken when resolving their disputes such that the already existing relationship will survive. Litigation is not very friendly in this respect and the pronouncement of loser and winner does nothing to hold the

¹² Alternative dispute resolution practitioners guide, at 1
ibid

bond. As such, professionals and businessmen have to resort to other forms of dispute resolution that will not hamper the continuance of their working relationship.

2.4. THE WORLD BANK

The investment by foreigners especially in developing countries is not totally risk free.

The global mandate of the World Bank is to: -

“Promote private foreign investment by means of guarantees of participants in loans and other investments made by private investors, and when private capital is not available on reasonable terms to supplement private investment by providing on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources”¹³

The 1950s and 60s saw the expropriation of foreign capital by newly independent states as was evidenced in Iran where Mosadeq expropriated oil refineries in 1953, and nationalizations in countries such as Zambia. Foreign investors flee, which action resulted in the absence of foreign direct investments or portfolio investment. The investors were at a loss because the expropriation occurred could not stand up to their governments pursuant to the above stated, the World Bank, in line with its global mandate set up an institution which could assist in settling disputes of this nature. The International Centre for Settlement of Investment Disputes (ICSID) came into force on 14th October 1966 through a convention following approval by twenty countries.¹⁴ The president of the World Bank is the Chairman of ICSID's governing body called the Administrative Council. ICSID, though an independent body is closely linked to the

¹³ Stephen Zamora and Ronald a brand (1990) basic documents of international economic laws;

¹⁴ Patrick matibini, USA and Africa, paper on legal professional development phase two, 30th may –27th June 1998, Washington DC.

World Bank. ISCID is the arbitrator between the nationalizing state and the nationalized or expropriated corporate entity. The rationale for the creation of this center is that even if the state involved does not attend arbitration, the World Bank will recover on behalf of the investor what has been assessed as the bank can seize the assets of the state wherever located to compensate the victim.

2.5. WHAT ROLE DOES A LAWYER PLAY IN ADR

Since the lawyer is a key player in the adjudication of disputes, it is important to look at his/her role in ADR and what considerations have to be taken when allocating a particular case to an ADR process because of the education of lawyers which involves rigorous and stressful training which focus mainly on legal analysis and argumentation of thinking like a lawyer, it is not surprising therefore, that most lawyers think that the 'natural' way of resolving disputes is through adjudication by defining issues, marshalling arguments and counter arguments and manipulating precedent to determine their clients rights legally. The increased use of ADR processes has minimized this attitude. However, a lawyer must be able to select an appropriate process to suite the dispute at hand.

The most important factors to be considered one firstly, the importance of the courts in the processing of the dispute. This is a very important factor in process determination. For instance, a criminal matter such as murder must be dealt with by the courts in accordance with the statutes. Another factor to consider is how privately the parties are not keen on publicizing their private lives and such would opt for ADR processes, which are more private.

Another factor is how quickly the parties would like to resolve the dispute and how much they are ready to spend. Some disputants would want their cases resolved in the fastest and shortest way and as such an analysis has to be made as to whether the matter will be resolved quicker and cheaper in a court of law or through an ADR process.

The relationship of the parties to the dispute is very fundamental in deciding which route to be adopted when resolving a dispute. Factors such as whether the relationship is an on going one or not is very important. You also have to consider whether there is an expectation in the future¹⁵. This is especially essential in family relations or communities as well as employment. If the relationship is an on going one, it may be an incentive to both parties to use an ADR process even though it lacks the coercive effects of the court system.

In a continuing business relationship, potential benefits from future contracts may urge the parties to seek a process that will restore and maintain satisfying patterns of personal interactions¹⁶. Adjudication seems ill suited to such a task since it can easily sour future relations by escalating conflict and focusing on symptoms rather than an underlying causes.

The role of the parties, who are at the center of the conflict, is an important factor. It is important to consult the parties to the dispute so that they are able to make an informed decision with regards their choice of process.

¹⁵ John Murray processes of dispute resolution, the role of lawyers, pg 71.

Lawyers, when choosing a process, must make their choice based upon the needs of their client and with awareness of the needs of others¹⁷. Lawyers, when seeking solutions to a problem must take into account the interests of the other parties and regard them as more than a mere adversary. As Friedman aptly puts it “my responsibility as a lawyer cannot exclude my responsibility as a citizen or a person to the human dilemma that underlies not only my clients situation, but the total human situation.”¹⁸

2.6 BROAD DESCRIPTION OF THE FOREGOING ALTERNATIVE DISPUTE RESOLUTION PROCESSES

A. NEGOTIATION

This is a process which two or more parties hold discussions, without a third party, in an attempt to develop an agreement on a matter of mutual concern.¹⁹ It is the most basic and informal method of dispute resolution²⁰ and occurs in its broadest form at almost every level of human interaction – in the simplest relationships between family and friends, commercial disputes of various magnitudes and all sorts of disputes that arise in our societies.

It is a process of communication, which involves a give and take situation of ideas in an attempt to arrive at a common understanding, which is the basis of every non-adjudicative dispute resolution procedure.

¹⁶ Ibid pg 70

¹⁷ Leonard L Riski and James & West – Brook, Dispute Resolution and lawyers (1987).

¹⁸ Gary Friedman, comment on the war prayer

¹⁹ Warren Burger, isn't there a better way?

B. CONCILIATION

This is a process, which involves bringing a neutral third party into the process of Negotiation. Conciliation may be conducted either in a private setting or in a court setting. When conciliation is conducted in a private setting, a neutral third party called a conciliator assists the parties to settle their dispute by acting as a go between and communicating the opinion of one side to the other and what the options and settlements of the other party are.

Conciliation may be conducted in a court setting. It can be part of court based resolution process. In such an instance, a retired judge or a neutral is appointed by the courts and holds a conciliation conference with litigants and their lawyers early in the litigation process. The parties to this process of conciliation are required to submit summaries of their cases and lists of witnesses and evidence in advance of the conference to enlighten the conciliator on the matter.

The conciliator also acts as a litigation advisor answering questions about discovery and other issues which may consequently help each party to prepare a case for trial should an attempt to settle the matter prove to be unsuccessful.

C. MEDIATION

This is a form of ADR in which settlement of disputes is facilitated by the introduction of a neutral third party called a mediator. The role of the mediator is not to give an evaluation or opinion of the case. This role is to facilitate the exchange of information, ideas and alternatives for settlement between disputing parties. Apart from

²⁰ Paul Mitchard A Summary of Dispute Resolution options, Martinadale Hubbel International Arbitration and dispute resolution directory 1997, pg 13.

communicating the position of the parties to each other, a mediator also assists by exploring possible solutions of settlements.

The mediation process usually begins with all the parties to the dispute telling their side of the story in face-to-face negotiations. After this, the mediator may break into private caucus sessions. The confidentiality also makes it safe for the parties to give information. It creates a safe space where parties can share their needs and interests without fear of reprisals.²¹

Mediation has been fast growing due to its pros. It is a relatively quick process, which avoids the backlog of the court system, which has been alluded to already. Mediation is cheaper, which is an advantage especially at the international level where costs of arbitration are higher and the logistics more complex.²² Mediation tends to preserve relationships, which would otherwise be severed in the face of a dispute. As such, it is a likely choice where parties have continuing business or professional relationships or personal interaction.

Mediation is an appropriate process for emotionally charged disputes, though less complex like child custody, maintenance etc.

D. EARLY NEUTRAL EVALUATION (ENE)

This involves case evaluation by an impartial person or panel of experienced advocates whose evaluation is non-binding on the disputants. ENE is a procedure, which

encourages the settlement of civil disputes whilst at pre-trial stage. A confidential forum is provided to the disputants. This procedure involves the presentation of the case by advocates to evaluators or a panel in the absence of disputants.

After analysis of the presentation, the advocate or panel of advocates identifying areas of agreement and assess the case by evaluating its merits and weaknesses. They also assist in the development of a plan for conducting discovery. This evaluation may be of use in further negotiations. Early neutral evaluation has not yet been established in Zambia.

E. MED ARB

This is a two-step dispute resolution process involving both mediation and arbitration. In this process, parties attempt to resolve their disputes through mediation with the understanding that where there is failure to resolve, the remainder will be submitted to binding arbitration.

The neutral in this process must be skilled both in mediation and arbitration in order to guide the parties through mediation as well as preside over the arbitration and consequently render a final binding decision.

This process combines both the agreements reached in mediation as well as the award in the arbitration phase.

²¹ *ibid* page 25

²² *ibid* page 30

Med – Arb offers parties an opportunity to take control of the dispute resolution process and to design their own agreement through mediation, with the knowledge that if they fail to resolve a dispute themselves, an arbitrator will deal with it on their behalf. Parties are also assumed that there will be no need to resort litigation due to the binding nature of arbitration.

F.PRE TRIAL SETTLEMENT

This procedure is aimed at pre-trial settlement. The judge who is to try the case although in some instances the conference may be referred to a court official may perform it. This procedure is resorted to as a means of disposing of cases as expeditiously as possible.

The procedure of a settlement conference is that a judge hears a summary of the facts, legal issues and evidence that will be presented at trial by the lawyers. He then evaluates the positions of each side i.e. the merits. He then explains to the lawyers and disputants how he or she arrives at those conclusions and offers an opinion of how they would decide the case. The judge will then try to convince the parties to the dispute to agree to a compromise settlement.

This procedure should not be linked to mediation as they differ fundamentally. To begin with, in a settlement conference, the parties do not have the control over the outcome as they do in mediation and may in fact be pressured by the judge to accept a settlement.

Another fundamental distinction is that what judges tend to regard as the concept of what constitutes a fair and equitable settlement is different from that of mediators. Their solutions are mostly based on evidence and applicable Law. On the other hand, a mediator is more likely to facilitate a creative solution not exactly grounded in law. They,

in so doing take into account the working relationship as well as emotional and financial interests of the parties to the dispute some judges will formulate their own solutions and attempt to persuade the parties to accept it while others will prefer using mediation skills to facilitate communication between the parties and assist them arrive at a mutually agreeable solution.

G. MINI TRIAL

This involves presentations by advocates to the parties a summary of their case. This is to enable the parties assess the strengths and weaknesses of both sides of the case and assist them in deciding whether or not the matter should proceed to trial or be settled out of court.

This is a hybrid procedure combining characteristics of both consensual and adjudicative processes. The parties have a powerful hand in this procedure in fact they can terminate it only time.

Parties resort to a mini trial usually when a dispute is contemplated or they are already in litigation. Disputes will usually resort to a mini trial when they realize that the problem is more business oriented than legal and as such will be expediently settled by a panel of executives who understand the ethics of that business better. This may also work well in that it cuts down in litigation losses in time and money as well as restoring of business relations.

Mini-trials usually involve chief executives who are the chief decision makers in complex business associations and as such keep the business interests in the foreground of the discussions. The procedure is such that the parties argue their cases before a panel of senior decision makers comprising a senior executive from each organization involved in the dispute. A neutral is usually appointed to chair and facilitate the proceedings. The panel seeks to negotiate a settlement after listening to presentations by both parties.

Summary Jury Trial (SJT). This is a non-binding advisory trial which offers litigants a judicial reality check. Litigants awaiting trial can participate in SJT just to get a sense of how a jury might view their case and as a way to facilitate settlement.

In this procedure lawyers present an abbreviated version of their client's case to the jury which after deliberation will render an advisory verdict which they will discuss with the lawyers and the client. The jury will give each party an opinion on the strengths and weaknesses of their cases. They will also give an analysis of the lawyers' presentations and how it affected their deliberation. The parties to a dispute may then use his opinion to enter a settlement or they may proceed to trial. The jurors are not informed of the process until after they render their final verdict. This process is inapplicable in Zambia due to the absence of the jury in our adjudicatory procedure.

H. ARBITRATION.

This is a process in which one or more neutrals render a decision after having arguments and reviewing evidence. This is an adjudicative process where a tribunal consisting of arbitrators issues a ruling known as an award.

This is an alternative to court litigation where the parties are represented by lawyers who argue their clients case before a tribunal comprising of a single arbitrator or a panel of arbitrators who may be three in number.

Arbitration is especially useful where parties seek case evaluation by experts coupled with an enforceable and specific award.

Arbitration can be entered into either voluntarily or as a consequence of arbitration contained in a contract.

The outcome in arbitration as has already been alluded to is binding upon the parties to the arbitration. In court annexed arbitration, a neutral third party or panel meets with the parties to a dispute and hears their presentations both of fact and of law. The arbitrators thereafter conduct an independent evaluation of the case before them and then come up with an award.

This award is enforceable since the parties stipulate in advance that the decision of the arbitrators is binding upon them or not.

The most traditional and commonly resorted to model of arbitration is that private tribunal. This consists of private individuals chosen voluntarily by the parties to a dispute. The disputants give them the power to 'hear' and 'judge' their case.

In arbitration proceedings, each party has an opportunity to present evidence to the arbitrator(s) in writing or through a witness.

This procedure is more informed than in court proceedings and adherence to judicial rules of evidence is usually not required.

In arbitration, parties relinquish their decision making right to a neutral that makes decisions for them. The decision by a neutral may or not be binding depending on prior arrangements made by the parties²³.

A non-binding decision is advisory in aid of a settlement. An arbitrator doesn't take sides and is neutral in the proceedings.

CONCLUSION.

International organizations such as the USAID and World Bank have made substantial effects to spread and encourage the use of ADR processes and their programmes have been well received in developing countries. This receipt may be due to the fact that the concept is not new to most developing countries that have been resolving disputes in their communities in a similar fashion, only that there were no proper institutions set up.

The World Bank also found it necessary to protect the investor who would have significant difficulties in dealing with the country on a one-on one basis. There are

²³ John w Cooley, mediation advocacy, national institute for trial advocacy, Indiana, 1996, pg 1.

various ADR processes but inspite of these alternatives, it is important to bear in mind that adjudication may just be the best way of resolving certain disputes. That is why it is important for a lawyer to understand the factor to be taken into consideration when choosing a mode of resolving dispute and apply the choice accordingly.

CHAPTER THREE

3. NECESSARY BACKGROUND CONDITIONS FOR THE SUCCESS OF ADR PROGRAMMES

3.1 ADEQUATE POLITICAL SUPPORT

The level and source of political support for dispute resolution programmes is an important factor in determining the potential success of an ADR programme. It also plays a part in the choice of an appropriate design for an ADR system. It is important to have adequate political support in order to secure legislative support to ensure jurisdiction as well as authority for the programme. The legislative support has already been rendered in Zambia as evidenced by the passing of legislature such as the Arbitration Act, no 19 of 2000, which is the legal framework within which Arbitration must be conducted.

Programmes with political support also find it easier to obtain financial support for their for their sustenance. A programme enjoying political support will usually enjoy popularity and this will enhance use of the system and also assist in over coming opposition of vested interest. The source level and strength of political support must be sufficient to neutralise opponents of ADR who may have the political power to block it. The opposition may come from lawyers and judges who may be benefiting from the existing institutional frame work who may oppose the programme either directly or indirectly and frustrate its growth rate. For instance, a lawyer may opt to take a matter to court, which may easily be resolved through the ADR processes, to ensure that they are paid handsomely in terms of lawyers' fees at the end of the day.

There are a number of constituencies whose support may be necessary to ensure the success of an ADR programme such as the local community leaders whose support is most critical because people look up to them. The support of the bar and the bench cannot be over emphasised and is very cardinal. Support is also needed from the government, donors as well as advocates and representatives of user groups.²⁴

3.2 SUPPORTIVE CULTURAL NORMS

In order to ensure the success of ADR programmes the cultural norms of the community should support the concept of informal dispute settlement.²⁵ Traditional and cultural norms should be considered carefully as a prerequisite background condition for the success of an ADR programme. If these do not exist, they are difficult to build. It is easier to implement an ADR programme where parties are willing to submit their disputes to an impartial third party in a court setting. For instance it has already been stated in the first chapter that disputes were, before and after the introduction of the formal court setting, settled through informal ways through the chiefs, headmen and village counsellors. Against this background, it can be said that people would be very willing to submit their disputes for resolution through the various ADR processes.

The cultural norm against corruption can lead to the success of ADR programmes. If there is corruption in the formal legal system, it may encourage use of non- formal ways of resolving disputes. This can ensure success of ADR programmes especially where the formal judicial system is proving to be very unreliable. What must be ensured therefore is that there ought not be corrupt practices in the various ADR programmes.

²⁴ IBID PAGE 24

²⁵ IBID PAGE 27

It is important to have supportive cultural norms to ensure the success of ADR programmes in order to have user acceptance of the informal process. Cultural norms are very important especially in rural programmes where the customs and traditions play a very important role.

3.3 ADEQUATE HUMAN RESOURCE

Adequate numbers of well-qualified and well-supervised ADR staff are essential in the success of a programme.²⁶ The quality of staff is very important to participant satisfaction with ADR outcomes than ADR costs, the time it takes or its specific procedures.²⁷

Selection of staff should be on merit and not on political or other unnecessary reasons.

Adequate human resource is an important factor as a sufficient pool of skilled and respected mediators or Arbitrators are able to manage the case load effectively and efficiently. Unskilled labour will lead to a backlog in cases and inefficiency as the saying goes “cheap is expensive” in that people will begin to shun the use of the programme.

Some important elements of human resource are that they should be community members and leaders who have the respect of the community and have been trained.

They must possess a quality of honesty and a sense of community service. This is an important element especially for potential mediators. A mediator who the community views as having selfish tendencies will hardly attract users of the system. They must however be drawn from the educated brood such as lawyers, teachers and other respected members of the community. To ensure the success of the ADR programmes especially among the rural based users, there must be a reasonable level of literacy in the intended

²⁶ IBID PAGE 29

community, especially with regards mediation. Sufficient number of personnel is important to avoid over burdening the staff, which may lead to frustration and burn out. This may have an adverse effect on they conduct their work. Such an impact may erode the people's confidence in the system.

3.4 FINANCIAL RESOURCES

Compared with the formal process, ADR programmes are cheaper than the formal court process.²⁸ There is need for financial resources to foot administration costs, third party evaluation as well as case evaluation. Outreach programmes are a vital component in ensuring success of the programmes and these outreach programmes have to be financed. Out reach programmes are intended to sensitise the population. Where the government is unwilling or unable to finance the programme, it must at least provide a framework within which the programme can become self-sustaining. This can be done for instance through charging of fees for the use of these programmes.

3.5 PARITY IN THE POWER OF THE DISPUTANTS

ADR systems are unlikely to overcome wide disparity in the power of the disputants or to redress discrimination unless they can be specifically designed to do so.²⁹ Informal processes are less likely to produce fair outcomes in cases of wide power disparity. It is important to have parity between disputants to avoid coercive results and to persuade participants to use the process. The ADR processes are mostly voluntary apart from where the judge can order the parties to go for mediation like in the Zambian case of court annexed mediation or where an Arbitration clause is inserted into a contractual agreement and by which the parties have to adhere to settle a dispute. Due to this

²⁸ IBID PAGE 36

²⁹ IBID PAGE 36

involuntary nature more powerful parties may shun the process if they feel the outcome if they feel the outcome will not be in their favour. Even if they agree to an ADR process, the stronger parties may coerce a weaker party in the instance mediation for example for example to accept an unfair statement.

In order to attain parity among or between disputants, it is important to have balanced legal rights for disputants as a context for ADR. A fairly balanced legal framework defining disputant's rights may allow ADR programmes to deal with disputes despite power imbalances. An example can be given of the independent Mediation Service of South Africa (IMSSA), which was founded to resolve Labour Management Disputes. There were obvious discriminations against black and coloured workers but there was put in place a relatively strong legal frame protecting the rights of workers. This legal framework helped to balance the otherwise unequal power of the disputants and helped balance the otherwise unequal power of the parties leading to effective mediation. There must be procedural protection for parties in a weaker bargaining position. This will ensure that there are no undue disparities in power between the parties. For instance a procedure can be put in place to allow a weaker party to a dispute to withdraw from, for instance, a commercial arbitration and resort to the formal legal system.

CONCLUSION

One might wonder why it's necessary to bring out the background conditions necessary for ensuring the success of the ADR programmes when we already have ADR programmes in place. To begin with, a random interview of both students and community members showed that they know very little if anything about the ADR programmes.

Besides the widely used ADR programmes are Mediation and Arbitration and they are widely used in commercial transactions. ADR programmes are not only intended for commercial programmes. They should also be there to address the daily disputes faced by community members. For instance there is no court - annexed mediation with regards matrimonial disputes and child maintenance cases.

4 LEGAL FRAME WORK RELATING TO ADR

Apart from the arbitration act there is in place other legislature providing for the use of ADR processes. These are the legislature relating to the creation of the small claims court, the High Court (amendment) rules of 1997 as well the commercial registry.

4.1 SMALL CLAIMS COURT

Pursuant to the desire to create alternatives to the traditional litigation and to decongest the main courts dealing with civil cases, the legislature creating the small claims court has been enacted.³⁰ The preamble states that it's an act to provide for the establishment, constitution jurisdiction, powers and procedures of the small claims court, and to provide for matters connected with or incidental to the foregoing.

4.2 THE ESTABLISHMENT OF SMALL CLAIMS COURT

The small claims court shall be situated in any such area that the chief justice wishes to have it established depending on the needs of a particular area.³¹ It shall constitute of one arbitrator sitting alone. The mandate to appoint arbitrators to conduct the sittings in a

³⁰ SMALL CLAIMS COURT, CAP 47 OF THE LAWS OF ZAMBIA

³¹ IBID SECTION (3)

small claims court lies with the judicial service commission. Only legal practitioners of not less than five years standing shall qualify to be so appointed.³²

4.3 SITTINGS

The sitting at the small claims courts shall be at the convenience of the parties. They will be conducted at the times and places where they will be convenient for the disputants where a speedy dispatch of business will be achieved. This best emphasises the use of small claims courts to avoid the much slower main courts.

4.4 PROCEEDINGS IN A SMALL CLAIMS COURTS

This is provided for in part three of the small claims court act. The proceedings shall be held in open court and shall be conducted in an informal manner. A party shall not be allowed to appear before the court with counsel. The court will however allow a spouse, guardian of member of the family to appear with if they can show that they have authority from the party to so appear.

The primary aim of the small claims court shall be to reconcile the parties and at the same time do substantive justice between the parties.³³ In its proceedings, the court shall not be bound by the rules of evidence. It shall instead apply law and equity.³⁴

4.5 POWERS OF THE SMALL CLAIMS COURTS

The general powers of the small claims court involve hearing of the facts before it and receiving any documents necessary in the dispensation of justice in the matter it is seized

³² IBID SECTION (7)

³³ IBID SECTION (14)

with. It has the power to issue summons to any person who is defendant in the matter before it, which cost of service of the writ shall be borne by the recipient of the writ.

Upon conclusion of the hearing, the small claims court shall have power to

- 1 Dismiss the claim
- 2 Make an award with or without interest
- 3 Order restitution of any property
- 4 Order the specific performance of a contract other than a contract of personal service between the parties before the courts
- 5 Make any other order, which the justice of the matter requires.

Every award or dismissal that an arbitrator shall make shall be registered in the high court registry and it shall contain all the relevant information pertaining to the judgement. With regards awards, it must be noted that the small claims court shall have the powers to enforce any award it makes including the issuing of a warrant of distress. The awards made are final and an appeal shall only lie to the high court on a point of law.

4.6 THE COMMERCIAL REGISTRY

The rules pertaining to the commercial list were put in place as far back as March 1999 where as the actual commercial court came into being on the 3rd of April 2000. This was made possible by statutory instrument number 29 of 1999, which made the provision for a commercial court in which commercial actions brought before the high court would be entertained. A number of factors prompted the creation of the commercial court. To begin with it was the usual reason of decongesting the high court and reducing the ever-increasing backlog. Another reason was the agitation by the business community for a

³⁴ IBID SECTION 16 (1)

system that would address their business set backs effectively. Businessmen and women work against time and as such the usual adjournments of the normal court settings works to their disadvantage.

The commercial court is intended for only for commercial transactions as well as cases, which are referred to it by the judge for mediation which in the judge's view do not need to go for litigation. The reference of a commercial matter to mediation by the judge leading to a quicker way of resolving disputes has given confidence to both Zambian businessmen as well as foreign investors.

4.7 THE LEGAL REGIME RELATING TO MEDIATION

The 28th of may saw the ushering in the legal system in a formal way, the use of mediation as an alternative dispute resolution. This was by the passage of statutory instrument number 11 of 1997, which are the High Court (amendment) rules of 1997.

This instrument makes mediation as a means of resolving disputed both voluntary and mandatory. It is voluntary in the sense that order 31 of the High Court rules provides that the trial judge may upon the action being set down for trial, refer a case for mediation.

Exceptions on cases to be referred to mediation are cases involving the personal liberty of an individual, an injunction or any case, which the trial judge considers unsuitable for referral.

The mediation is involuntary in the sense that the parties are not compelled to resolve dispute at the mediation session. Mediation between the parties may fail after which the trial judge will summon the parties to fix a date of hearing for the case. To ensure the success of court-annexed mediation, only trained mediators conduct the mediation

sessions. A person shall qualify to be a mediator only after being trained and certified as so. They must also have not less than seven years working experience in their field of expertise. The list of experienced mediators and their field of expertise shall be kept by the mediator's office.

4.8 PREPARATION FOR MEDIATION BY THE MEDIATOR

In preparing for a particular mediation case, the mediator shall sign for and collect from the mediation office or proper office the records or bundles of documents consisting of the writ, all pleadings all interlocutory orders together with one copy of any requests or orders for particulars. He must also collect interrogatories ~~with~~ answers thereto copies of settled issues and any other documents likely to be required.

This is the process of discovery. It is important for the mediator to know the status of the case before he embarks on the mediation. The mediator must also establish whether expert reports and depositions have been made, whether disputes exist over critical documents, the nature of the discovery remaining to be done and the date set for discovery or trial.³⁵

4.9 TIME LIMIT

The mediator is expected to complete the mediation process in less than sixty days from the date of collecting the records.³⁶ He is expected to contact the parties during this period and give them dates for the time and venue of the mediation. Mediation is mostly successful where the parties are given a time frame work within which to settle their

³⁵ COOLEY J.W MEDIATION ADVOCACY, 1996, AT 104 NATIONAL INSTITUTE FOR TRAL AND ADVOCACY

disputes failure to which the matter will go to trial. An experienced mediator knows that the best allies in resolving a dispute are time limitations.³⁷ Make the parties realise that they do not have all the time in the world and it will help them arrive at a conclusion in a relatively short period of time.

5. THE ROLE OF THE MEDIATOR IN COURT ANNEXED MEDIATION

The mediator at the commencement of the mediation session shall read and explain to the parties, the statement on the role of the mediator and shall require the parties to sign the form.³⁸ The mediator shall act as a neutral in these proceedings. He is impartial and keeps order while facilitating communication. He clarifies issues that have been raised and assists participants to move to an agreements. The mediator does not decide the case on behalf of the disputants. As the person in control of the mediation session, the mediator interprets concerns raised but the disputants, relays information between the parties, frames issues and re-focuses problems.

5.1 CONFIDENTIALITY

Confidentiality is a very important element in mediation and as such the mediator is not required to keep any records of failed proceedings and any documents prepared during the process and these have to be destroyed in the presence of the parties.³⁹ To this effect the mediator will not communicate with the trial judge about the proceedings at the

³⁶ THE HIGH COURT (AMMENDMENT) RULES ORDER 31 RULE 7

³⁷ COOLEY J.W MEDIATION ADVOCACY, 1996 AT PAGE 40

³⁸ THE HIGH COURT (AMMENDMENT) RULES, ORDER 31 RULE 7

³⁹ IBID ORDER 31, RULE 9

mediation. Everything said by the parties at the proceedings is confidential and privileged and will not to this effect, be used as evidence in a court of law.

Confidentiality is an important element in ensuring the success of the mediation. Without it, the parties are reluctant to speak openly about the issue at hand for fear that the statements will haunt them in the future if the mediation breaks down. Advocates may be reluctant to encourage encouraging their clients to freely participate in the mediation process for fear that the opposition is using the mediation process as a discovery fishing expedition.⁴⁰

To ensure success of the process, the parties shall appear in person at the meeting.⁴¹ Their advocates shall accompany them if they have one. It is important that a person who has authority to settle the dispute appears in person to expedite the process. This is so because a proxy might accept terms that are not agreeable with the person having the authority to settle the dispute. Where it is not possible for the person with the authority to attend the session, it is important that the limits for the settlement are spelt out in writing before the mediation sessions so that the proxy knows his limits.

5.2 THE SETTLEMENT

Where the parties have reached a settlement, they must put this in writing.⁴² Such settlement is inclusive of the terms of settlement and shall have the same force and effect as a judgement and shall be enforced in the same manner.

⁴⁰ IBID ORDER 31, RULE 10

⁴¹ MATIBINI .P. MEDIATION, AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, LAW ASSOCIATION OF ZAMBIA JOURNAL VOLUME 2, 1999/2000

⁴² THE HIGH COURT(AMMENDMENT) RULES, ORDER 31 RULE 8

The mediator shall ensure that all the parties to the dispute have participated fully in order for them to achieve psychological, procedural as well as substantive satisfaction. These are necessary factors in ensuring compliance with the settlement agreement.

5.3 THE INSTITUTIONAL FRAMEWORK RELATING TO THE ADR PROCESSES

Some institutions offering ADR services as well as regulating the conduct of Arbitrators have been set up. These have made the use of ADR processes such as mediation and Arbitration possible.

5.4 ZAMBIA CENTRE FOR DISPUTE RESOLUTION

The Zambia Centre For Dispute Resolution (ZCDR) was incorporated in the year 2000. It is a non- profit making organisation with fourteen organisations as guarantors. It is basically a company limited by guarantee in accordance with the companies act. The centre received recognition as an arbitral institution as required under the Act.⁴³ The minister of legal affairs gave this recognition on the 23rd of November 2001. It was created pursuant to the recognition in 1998 at the National Convention on ADR to create and popularise ADR. Thus the main aim of the creation of the ZCDR was to popularise the use of ADR through the provision of various services.

5.5 MANAGEMENT

The ZCDR is managed by a board of directors constituted from representatives appointed from the fourteen organisations acting as guarantors for the centre. The task of the board

⁴³ ARBITRATION ACT, NUMBER 19 OF 2000

is to provide strategic direction to ZCDR management, which management team comprises of full time members headed by a managing director.

5.6 SERVICES PROVIDED BY ZCDR

It is necessary for the centre to provide certain services in it's move to popularise the ADR process in Zambia.

A. MANAGEMENT OF ARBITRATION PROCEEDINGS

The centre has the duty of managing Arbitration proceedings by providing or securing the venue for the hearing. The centre also records and transcripts the proceedings on behalf of the disputants as well as offer secretarial services.

B. OFFER OF ADVICE

The centre also offers advice to lawyers as well as business persons on the drafting of arbitration agreements as well as the selection of arbitration rules. Lawyers and business persons are advised on the choice of venues to use for the arbitration as well as which arbitration institutions to go to.

C. The centre also maintains database on arbitrators, which is readily available to assist parties to reach an informed decision on an appropriate arbitrator to adjudicate on their particular dispute.

D. The centre also maintains a publication and circulates a newsletter on current and topical ADR issues.

E. The centre also conducts training courses in arbitration and other ADR mechanisms to popularise and broaden the practice of ADR in Zambia.

The training of more Arbitrators is regarded by the centre as a market creation tool in that practitioners will ensure that arbitration agreements are embodied in any contract, which they participate in drafting. This is especially useful for lawyers and engineers, architects and quantity surveyors as well as real estate agents.

5.7 STRENGTHS OF ZCDR

At its inception, 40 persons had been trained in an entry course to the membership of the Chartered Institute Of Arbitrators

Of the United Kingdom and 18 persons had participated in a special member course. The centre has since had more people trained without the assistance of expatriates, which in itself is a cost saving measure.

Another strength lies in the guarantors of the centre. These are professional and business organisations from a wide spectrum of the Zambian economic and social sphere. These organisations have rendered credence to the services provided by the ZCDR by including Arbitration in their contract clauses.

Another strength is that Zambia is a politically stable country in the region and this in turn gives her the advantage to service the region in arbitration of commercial disputes. Political stability encourages investment and investment disputes are usually to be resolved through arbitration.

5.8 OPPORTUNITIES

The success of the centre lies in the opportunities that it has. Following the liberalisation of the Zambian economy, industrial and commercial disputes have increased. This has led

to a large number of cases to pend before the high court. Such congestion can consequently lead to loss of investor confidence in the country. An investor always wants a quick and effective way of resolving disputes. This scenario means that a number of such cases will find their way at the ZCDR for a quick and efficient way of resolving disputes. The commercial registry at the high court also distributes cases for mediation and arbitration to the centre.

The greatest opportunity for the centre lies in the political and legal will by the disputants to expedite the resolution process of their commercial disputes through arbitration and mediation by a competent person. There is a desire among the public and corporate bodies to resolve disputes expeditiously to promote investment. The aforementioned simply means that the centre has a major role in resolving most of these commercial disputes thereby promoting the use of ADR.

5.9 THREATS FACED BY ZCDR

The major threat lies in the attitude of most lawyers and the public at large. Most lawyers still prefer litigation as opposed to processes such as arbitration. This may have a lot to do with their training and most are unwilling to change their attitudes to embrace ADR. Some times lawyers are money driven and would rather take the matter to court where they will make more money in terms of lawyers fees since court cases take longer.⁴⁴ With regards the public, what is needed is more outreach programmes to sensitise them of the benefits of ADR programmes. Corporate bodies also need further encouragement to include arbitration clauses in their contracts.

⁴⁴ THIS IS THE AUTHORS PERSONAL OPINION

6. ZAMBIA ASSOCIATION OF ARBITRATORS⁴⁵

The Zambia Association Of Arbitrators was created pursuant to the Arbitration Act no 19 of 2000 under section 23 that gives the minister powers to recognise an arbitral institution (read together with section 4 of the Arbitration recognition of arbitral institutions) regulations of 2001. This provision also sets out the procedure of applying for recognition by the minister. The minister has to screen an institution before granting recognition in order to protect the public. The minister must be satisfied that the institution has good intentions and the arbitrators, mediators are people of good standing in society who have the necessary qualifications. The association was recognised on the 16th of November 2001 pursuant to gazette notice number 599 of 2001. It is registered under the societies act. It is an association of arbitrators, mediators and conciliators.

The Zambia Association of Arbitrators (ZAA) is the body regulating the practice of arbitrators in the same way that LAZ regulates the conduct of lawyers. The practice of arbitrators is currently governed by the judicial code of conduct.⁴⁶ However there is a draft regulatory code of conduct prepared by Z.A.A, which has been submitted, to the minister of legal affairs. Once adopted, this will govern the conduct of the Arbitrators.

6.1 SERVICES PROVIDED BY Z.A.A

The main reason why Z.A.A was created was mainly to offer protection to the public against scrupulous people offering arbitral services. The Z.A.A provides, in conjunction with the Z.C.D.R training for Arbitrators Mediators as well as Conciliators. Arbitration is an international practice and as such the training offered conforms to international standards. The association is recognised by and affiliated to international institutions.

⁴⁵ THIS PART OF THE PAPER IS MAINLY BASED ON AN INTERVIEW WITH THE PRESIDENT OF ZAA, MR NIGEL MUTUNA, WHICH TOOK PLACE ON THE 29TH OF OCTOBER 2003

This is important in that it ensures that the arbitrators have international exposure. The association also disseminates information on the aforementioned. The association also maintains a panel of arbitrators that it makes available to members of the public with disputes upon their request. The association also maintains a newsletter through which they disseminate information regarding the foregoing.

6.2. MEMBERSHIP

Membership of the association is currently at 80 people. The prerequisite for membership is that one must have gone through training and qualified either as an Arbitrator, mediator or Conciliator. Training is only offered to people who have been in their respective professions for seven years or more. According to the arbitration act,⁴⁷ any person regardless of colour, religion sex or creed qualifies to be an arbitrator. The association has added these further qualifications to protect innocent members of the public which may be taken in by bourgeois people offering arbitration services. Membership to the association is discretionary and some applicants have actually been turned down.

6.3 ACHIEVEMENTS

The major achievement of the Z.AA has been the decongestion of the courts. The association has been sensitising the courts to send any cases with an arbitration clause to it where after it will assist the parties choose an arbitrator. The association has also managed to uphold their standards by regulating the arbitrators' code of conduct. Another achievement is the drawing up of the arbitrators' code of conduct pending the minister's approval.

⁴⁶ THE ARBITRATION ACT, SECTION 29

⁴⁷ IBID SECTION 12 (1)

Another achievement is that it has as an association multi disciplinary composition. It draws its membership from various professions such as Doctors, Lawyers, Architects, Accountants and many other professions. This has ensured a wide range of experts who can offer advice or settle a dispute in their area of expertise since they know the field very well. For instance an architect arbitrator will ably handle a dispute involving architectural designs and a contract to that effect. The centre also provides in house training by way of seminars.

6.4 SETBACKS

The major set back being experienced by the association is that there are not many arbitration cases to deal with. The business community has not yet fully comprehended the benefits of arbitration or mediation and as such do not include arbitration clauses in their contracts. The attitude of lawyers towards A.D.R has not improved very much over the years and most of them still prefer the matter to go for litigation even where it can be resolved otherwise.

To encourage the use of the services provided by the centre, the centre has been conducting outreach programmes. There was a thirteen series television programme discussing A.D.R and the president of the association has been giving talks at various fora. There has also been increased liaison between the judiciary and the association where the association is encouraging the judiciary to send cases with arbitration clauses as well as those requiring mediation to the association.

CONCLUSION

There has been as can be noted serious efforts to encourage the use of A.D.R to resolve disputes. This has helped in the decongestion of the main court system. The international

recognition of the arbitral institutions will also give investors confidence to submit their disputes before these institutions. The legislature relating to the creation of the small claims court shows that there is a willingness to make arbitration available in small commercial transactions that take place in the community involving small amounts of money. The problem is that these small claims courts have not been set up yet and no proper explanation has been given by the persons in authority as to why the courts have not been set up.⁴⁸ It is only hoped that the courts will be set up soon.

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⁴⁸ THIS IS THE WRITERS OPIION

7. CONCLUSION AND RECOMMENDATIONS

One cannot over emphasise the advantages that are derived from the use the various A.D.R programmes. The population increase in Zambia is making it increasingly difficult for the already understaffed courts. The number of Judges mandated to conduct the litigation cannot be matched to the number of litigants seeking justice from the courts.

The change of government from a one party system to a multi-party system also brought with it a change in the economic policies. The multi-party era brought with it a liberalised economy and an increase in the private sector business. This move has consequently invited foreign investors seeing that Zambia is one of the countries that is politically stable in the Southern region. With such an increase in commerce, there is the likelihood of an increase in the number of commercial disputes hence the need for an effective and efficient mode of resolving these disputes. In view of the afore mentioned, it must be stated that the vigour with which the legislative and institutional framework has been set up is more than timely. It is worthy noting that the law fraternity has spearheaded the establishment and implementation of these A.D.R programmes.

The success of the ADR programmes is dependent on how widely the population uses the programmes. Wide usage is mostly achieved after people have seen the fruits of the programmes. To achieve the above, it is imperative the following be done:

1. Change the training of potential dispute resolution facilitators, especially lawyers.

The training of lawyers both at the university level and at ZIALE has played a major role in the manner in which the lawyers view the ADR process. The attitude of lawyers is vital to the success of ADR in Zambia. As some associations such as the ZCDR

stated it's biggest threat is the attitude of lawyers. The introduction of ADR as a course in the school of law will broaden the views of potential lawyers and not limit their minds to the litigation process and their famous positions as warriors in court, intent on combating their opponents on the opposing side.

Gauging the success of the ADR course in the school of law, it can consequently be introduced in other schools as well such as the school of medicine, veterinary medicine engineering and so on and so forth. This is relevant because as can be noted from the composition of the Zambia Association of Arbitrators, membership is not limited to lawyers. It is inter-disciplinary in that it is composed of Architects, Doctors, Engineers and so on. Lawyers are not experts on all matters and to ensure an expert opinion on a particular matter, an expert arbitrator in that field should be made available to the disputants.

7.1 OUTREACH PROGRAMMES

A lot more needs to be done in the area of outreach to ensure maximum sensitisation of the ADR programmes seeing that very few people know of these alternatives to litigation. Apart from conducting television programmes and giving talks at select public fora, it is important to take the idea of ADR to the communities that harbour potential ADR users and explain the concept of ADR in their local language to make them understand.

3. There is need to introduce processes such as community mediation to address the disputes encountered in communities on a daily basis as these are part of the reason why there is a backlog of cases at the courts. Most community member's end up taking community disputes at the victim support units of their various police stations due to lack of a better alternative.

4. The failure to open small claims courts by the chief justice in the areas he deems fit is a growing concern seeing that the legal framework governing the small claims court was put in place as far back as 1992. All that is required is for the chief justice to designate the locations of these small claims courts. The coming into being of these courts will render a great service to the communities I that they will facilitate the resolution of disputes involving small claims which cannot be brought before the ordinary court. An informal investigation as to why the small claims courts have not been set up did not yield any positive results. The officials in the know-how were reluctant to divulge the real reasons behind the failure by the judiciary to set up the small claims courts. It is certainly hoped that they shall be made operational sooner than anticipated.

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