

Mandatory mediation: An obstacle to access to justice?

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Summary

The article evaluates the efficacy of mandatory mediation in attaining access to justice, in particular with reference to the resolution of labour disputes in Mozambique and South Africa. First, what is meant by mediation, both voluntary and mandatory, and what is meant by 'access to justice' is ascertained. The advantages and disadvantages of mediation are highlighted. It is argued that mandatory mediation is the antithesis of mediation and that, therefore, it denigrates the process and can ultimately divest it of most, if not all, its advantages. It is concluded that, although mediation can be a quick, efficient and cost-effective means of resolving some disputes, it is not suitable to every dispute. Consequently, mediation should be encouraged, but it should not be made mandatory.

Key words: *Mandatory mediation; labour disputes; access to justice; ADR; dispute resolution*

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1 Introduction

The right of access to justice¹ is considered to be a fundamental right in many countries,² including South Africa³ and Mozambique.⁴ As such, it is worthy of fierce protection.⁵ In this context, the terms 'access' and 'justice' are difficult to define in concise terms. Furthermore, the phrase 'access to justice' may contain contradictions. This is so because access to a dispute resolution process does not necessarily mean justice. Many legal systems are plagued by high costs, delays, complexity and uncertainty. The result of these factors, many argue, is, at best, a retardation of access to justice and, at worst, a denial of the right of access to justice. The use of mediation is proposed as a method of overcoming these problems and securing access to justice. The argument, simplistically stated, is that mediation provides a quick, cheap and effective method of dispute resolution; in short, a solution to the crisis faced by many judicial systems.

The purpose of the article is to evaluate the efficacy of mandatory mediation in the attainment of access to justice, in particular with reference to labour disputes, in Mozambique and South Africa. What is meant by mediation, both voluntary and mandatory, and what is meant by 'access to justice' is ascertained. The advantages and disadvantages of mediation are highlighted. It is argued that mandatory mediation is the antithesis of mediation and that, therefore, it denigrates the process and can ultimately divest it of most, if not all, its advantages.

1 The precise meaning ascribed to this term is discussed hereunder, under the heading 'Access to justice'.

2 It is a right that is protected in terms of international instruments, eg, art 10 of the UN Declaration of Human Rights declares the right of an individual to a hearing by an 'independent and impartial tribunal'. The African Charter on Human and Peoples' Rights provides in art 7 for the right to an 'impartial tribunal'. This guarantee also appears in the International Covenant on Civil and Political Rights, the European Convention and the American Convention.

3 Sec 34 of the Constitution provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

4 Art 62(1) of the Mozambican Constitution provides: 'The state shall guarantee that citizens have access to the courts ...'

5 This sentiment was expressed by the Constitutional Court in *Chief Lesapo v North West Agricultural Bank & Another* [1999] ZACC16; 2000(1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) para 22 as follows: 'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation reasonable and justifiable.'

The article is limited to an evaluation of the law regarding mandatory mediation in the resolution of labour disputes in South Africa and Mozambique, with a view to determining whether mandatory mediation either promotes or acts as an obstacle to the constitutional right of access to justice.

Finally, the conclusion is reached that, under certain circumstances, mediation may assist in the attainment of the right of access to justice. However, it is also concluded that this is not the case where mediation is mandatory. When mediation is compelled, it is likely to create an obstacle to the attainment of access to justice.

2 Essence of the process of mediation

Mediation is a form of alternate dispute resolution (ADR). The reason it is termed 'alternate' is that it is a dispute resolution method that is perceived to be an alternative to the traditional system of court procedures. Mediation may be described as the continuation of a negotiation process between the disputants, with a third person, namely the mediator, assisting the disputants in, first, identifying and understanding their underlying concerns and needs and, based on these, in negotiating a settlement that is acceptable to both parties. Mediation has been defined as⁶

a flexible process conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The focus is on settlement. This differs from court procedures where the focus is on the attainment of justice. It follows that, if the parties are not willing to settle because, for example, the dispute concerns a matter of principle, or where there are no prospects of success in reaching a settlement, mediation is not an appropriate tool to deal with the dispute. This is one of the reasons why mediation should not be mandated for all disputes in a one-size-fits-all manner. Since the focus of mediation is settlement, a willingness of the parties to settle is of paramount importance. Mandatory mediation loses sight of the essence of mediation.⁷ Mediation is defined as a voluntary process, not only because it is a process that is undertaken voluntarily, but also

6 Definition published by the Centre for Effective Dispute Resolution (CEDR) in 2008.

7 See D Quek 'Mandatory mediation: An oxymoron? Examining the feasibility of a court-mandated mediation programme' in J Cardozo (ed) *Of conflict resolution* (2010) 484, where it is stated: 'The principal objection is that mandatory mediation impinges upon the parties' self-determination and voluntariness, thus undermining the very essence of mediation.'

because the outcome is voluntarily attained by the parties,⁸ that is, no outcome can be imposed on the parties as is the case with arbitration or adjudication by court process. Coercion as to entering the process as well as to the outcome represents the antithesis of the essence of mediation.

Furthermore, the fact that disputants are forced into pursuing a certain method of dispute resolution may contribute to their unwillingness to co-operate and reach a settlement.⁹ The result hereof is precisely the opposite of what proponents of mediation attribute to the process of mediation, namely, that mediation is an effective tool in the attainment of access to justice. The result is an extra, obligatory and futile step in the long journey of access to justice, imposing on the parties extra time delays and extra costs. In such a situation, mandatory mediation may be described as an obstacle to access to justice.¹⁰

Although there is a difference between coercion to enter the process of mediation and coercion to settle, coercion to enter a mediation process may lead to coercion to settle.¹¹ Other commentators argue that the distinction between coercion to enter the process of mediation and coercion to settle are distinct and independent, and that coercing parties to attempt conciliation is not necessarily tantamount to enforcing settlement.¹²

Another essential element of mediation is that it is a confidential process that is without prejudice. It follows that, if a mediation process can later be scrutinised by a court with the power to castigate a party with adverse costs, should the court be of the view that the particular party was unreasonable in either not entering into the process of mediation at all,¹³ or in not reaching settlement during the

8 The US Model Standards of Conduct for Mediators (2005), cited in J Nolan-Haley 'Consent in mediation' (2008) *Dispute resolution magazine* 4-5, emphasises voluntary decision making and focuses on self-determination as a controlling principle.

9 See RL Wissler 'The effects of mandatory mediation: Empirical research on the experience of small claims and common courts' (1997) 1 *Willamette Law Review* 581, where it was indicated that mandatory mediation resulted in lower rates of settlement than where mediation was voluntarily undertaken by the parties.

10 Dyson LJ stated as follows in *Halsey v Milton Keynes General NHS Trust* (2004) EWCA (Civ) 579 para 9: 'It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is quite another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on the right of access to the courts.'

11 See Quek (n 7 above) 485.

12 Quek 486.

13 In terms of the English Civil Procedure Rules 26:4 & 44, '[t]he court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR'.

process,¹⁴ there can be no confidentiality in the process. This is a means to mandate not only the use of mediation as a dispute resolution method, but ultimately also a means whereby to mandate settlement by the parties, who may settle despite an unfair settlement for fear of incurring a punitive costs order against them should they decide not to settle but to pursue their rights through the court process. In this manner, the distinction between a compulsion to enter into mediation and a compulsion to settle is blurred. When this happens, the traditional advantages of mediation are relinquished.¹⁵ In the English case of *Halsey v Milton Keynes General NHS Trust*,¹⁶ the courts were prohibited from compelling unwilling parties to refer their dispute to mediation. However, more recently, in *Wright v Wright*,¹⁷ the Court of Appeal expressed the view, *obiter*, that in light of developments in mediation practice in the past decade, perhaps a 'bold judge' may revisit the decision in the *Halsey* case and rule that a court may compel unwilling parties to attempt mediation. Nevertheless, compelling litigants to participate in a voluntary process by threat of sanction, such as adverse costs orders, is not only ironic, but also divests the process of its essence. In fact, mandatory mediation is an oxymoron. Worse, still, is a compulsion to settle. If the compulsion ends at entering the process, the parties are free not to settle and to pursue their rights in a court of law. If compelled to settle, however, justice is not only retarded, but denied.

3 Access to justice

According to the United Nations Development Programme (UNDP),¹⁸ access to justice is more than the ability to obtain legal representation and have access to the courts. It refers to the ability to seek and obtain a remedy to a grievance through an institution, be it formal or informal. The notion of access to justice has evolved from a rather narrow concept that refers merely to the ability to gain access to legal services and state services, such as courts and tribunals, to a wider concept that encompasses social and economic justice.¹⁹ The meaning ascribed to 'justice', for purposes of this article, is a narrow one. It does not refer to a universal kind of justice. It is simply the kind

14 The English Civil Procedure Rule 44.5 provides that the court, in determining adverse costs orders, must have regard to the conduct of the parties, including conduct before as well as during the proceedings and, in particular, the efforts made before and during the proceedings to resolve the dispute.

15 DS Winston 'Participation standards in mandatory mediation statutes: You can lead a horse to water, but it cannot be forced to drink' (1996) 11 *Ohio State Journal on Dispute Resolution* 193.

16 [2004] EWCA Civ 576.

17 [2013] EWCA Civ 243.

18 United Nations Development Programme, *Programming for Justice Access for all: A practitioner's guide to human rights-based approach to access to justice* (2005).

19 Open Society Foundation of South Africa 'Access to justice round-table discussion', Parktonian Hotel, Johannesburg, South Africa, 22 July 2003 5.

of man-made justice that one should expect from a civil justice system. It is the 'justice' that constitutions refer to when they protect, as a fundamental right, the right of 'access to justice'. This brand of justice may be called 'civil justice'. In order to ascertain how a civil justice system delivers this particular brand of justice, the starting point is that a civil justice system is a 'public good'.²⁰ As such, a civil justice system, in putting into practice the attainment of its ultimate goal, namely, justice, produces certain by-products, such as social order, certainty of the law and economic prosperity. In the words of Genn:²¹

My starting point is that the civil justice system is a public good that serves more than private interests. The civil courts contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good. In societies governed by the rule of law, the courts provide the community's defence against arbitrary government action. They promote social order and facilitate the peaceful resolution of disputes. In publishing their decisions, the courts communicate and reinforce civic values and norms. Most important, the civil courts support economic activity. Law is pivotal to the functioning of markets. Contracts between strangers are possible because rights are fairly allocated within a known legal framework and are enforceable through the courts if they are breached. Thriving economies depend on a strong state that will secure property rights – and investments.

In providing civil justice, a civil justice system also settles disputes. Dispute resolution, however, is not its primary objective or focus. It is merely a by-product of the main objective, namely, justice. With mediation, by contrast, the primary focus or objective is the resolution of disputes, not justice. Admittedly, it is possible for the mediation process to produce a just result, but this becomes less likely where mediation is mandated, either directly or indirectly. Mandatory or compulsory mediation relegates to private parties the job of attaining justice. But, as mentioned earlier, civil justice is a public service provided for by the civil justice system. As explained by Genn,²² '[t]he public courts and judiciary may not be a public service like health or transport systems, but the judicial system serves the public and the rule of law in a way that transcends private interests'.

Mediation cannot do this: Firstly, mediation is a confidential process which consequently cannot produce any publicised precedents which, in turn, are essential for the creation and maintenance of civic values and norms and, ultimately, legal certainty, on which both social justice and economic prosperity are dependent. The fact that the focus and ultimate objective of mediation is settlement, as opposed to justice, means that justice is not necessarily delivered, especially in

20 H Genn 'What is civil justice for? Reform, ADR, and access to justice' (2012) 24 *Yale Journal of Law and the Humanities* 397.

21 As above.

22 Genn (n 20 above) 398.

cases where litigants are compelled to mediate. Unlike the outcome of a judicial process (a judgment), which is available to the public and must be justifiable and contain justifiable reasons for the outcome, the outcome of mediation cannot be made public and no reasons need to be put forward to justify it. It is simply a settlement agreement which remains between the parties. It is a 'private interest' which remains confidential. Consequently, it cannot have a part to play in serving the public as a 'public good' in a state where the rule of law is applied.

Second, when mediation is mandatory it is less likely that settlement will ensue and, if it does, it is less likely to be just. This will be the case, for example, when compulsion to enter the process of mediation as well as to settle is indirectly imposed under threat of adverse costs, by empowering a court to impose an adverse order for costs after having due regard for the conduct of the parties, including conduct before as well as during the proceedings, and, in particular, the efforts made before and during the proceedings to resolve the dispute.²³ Litigants faced with such compulsion may settle on terms that are less than acceptable or fair and just for fear of adverse legal costs being imposed on them should the matter at a later stage be adjudicated by a court. This cannot be the same as access to justice.

Some commentators are of the view that mandatory mediation does not deny litigants access to justice.²⁴ They argue that mandatory mediation simply suspends access to the courts as disputants cannot be forced into agreement, and that, more often than not, unwilling participants in the mediation process settle.²⁵ If no settlement is reached, this argument seems rather strained, given the fact that those advocating mediation as an alternative to traditional adjudication see it as resolving the problems of high costs and delays associated with the judicial system and the consequent denial of access to justice. Where the mediation process does not achieve settlement, mediation is nothing more than an extra step exacerbating the traditional obstacles to access to justice associated with a judicial system. In the event that unwilling participants in a mandatory mediation process reach settlement, there is no guarantee that the settlement is fair or just. This cannot be access to justice.

23 Rule 44.5 of the English Civil Procedure Rules.

24 See speech given by Lord Phillips of Worth Matravers on 29 March 2008 in India, <http://www.cedr/news/item+Lord-chief-Justice-calls-for-greater-take-up-of-ADR> (accessed 9 July 2014).

25 'An analysis and evaluation of alternative means of consumer redress other than redress through the ordinary judicial proceedings' (2007) European Commission, SANCO, The Study Centre for Consumer Law, Centre for European Economic Law, Katholieke Universiteit, Leuven, Belgium, http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm (accessed 17 September 2014).

4 Advantages of mediation

The proponents of mediation often perceive the process as a viable alternative to court proceedings. In my view, mediation can only be perceived as an alternative to court proceedings in a very narrow sense, namely, in the sense that under certain circumstances a negotiated settlement can bring about a resolution rendering court proceedings unnecessary. Mediation cannot be an alternative to court proceedings in the sense that it can replace court proceedings. This is because, as discussed above, mediation cannot perform all the functions of court proceedings. At best, mediation can be a part or a component of the civil justice system. To argue that mediation is an alternative to court proceedings loses sight of the differences in the ultimate objective or focus of each process. The fact that the main objective of each process is very different obviously highlights the fact that the processes should not be viewed as alternatives. Rather, the different processes should be seen as acting in conjunction with each other to complement each other in the attainment of access to justice. Some disputes are better suited to the process of mediation and others should be dealt with by the courts. Furthermore, mediated settlements are often reached with reference to what would in all probability happen should the matter be determined by a court. Therefore, mediation should be perceived as a voluntary option if circumstances are ripe for a negotiated settlement. If mediation is perceived in this light, it has many advantages.

The idea of a negotiated settlement to avoid court proceedings, or even *in lieu* of court proceedings, is not a new one. Nobody is more acutely aware of the perils of court proceedings than those facing them. For this reason, most civil claims in most countries are settled between the parties and they do not reach the courts.²⁶ Obviously, disputants settle out of court because they want to avoid the costs and other adverse consequences of court proceedings. Mediation, as a continuation of the negotiation process, therefore, can assist in increasing the number of out-of-court settlements. If parties are unable between themselves to reach consensus at the negotiation stage, the assistance of a knowledgeable and competent mediator serves to bring down barriers to settlement that the parties alone cannot conquer.

Aside from cost savings, the mediation process offers other advantages. Usually a mediation that results in settlement brings about an end to the dispute in a far shorter period than court proceedings. The fact that the settlement is voluntarily agreed to by the parties, and the parties, themselves, control the outcome, usually

²⁶ According to Lord Phillips of Worth Matravers (n 24 above): 'Any sensible person who finds himself party to a dispute will wish to resolve it, if possible, by negotiation. Over 90% of actions that are commenced in England end in a negotiated settlement before trial.'

means that the parties are satisfied with the outcome. Mediated settlements are not restricted to remedies set out in law. The parties can be very creative in fashioning settlements as they are not confined by any limits imposed by law. This makes it possible to craft settlements that are more meaningful and acceptable to individual parties. An outcome imposed by a court, on the other hand, may leave neither party satisfied. Given the litigious and adversarial nature of court proceedings, any relationship between the parties is generally soured for good. With mediation, on the other hand, a settlement that is acceptable to both the parties may also result in a relationship between the parties being salvaged. Mediation can often cure a myriad of disputes between the parties, whereas a court decision usually deals with one narrow dispute only. Mediation processes are private and confidential. As mentioned above, judgments are public documents. In certain circumstances, the advantage of confidentiality may be considered essential by one or both parties in sensitive matters. Mediation takes away the risk and uncertainty associated with court proceedings because the parties themselves control the outcome.

5 Disadvantages of mediation

If mediation does not result in settlement, it is simply an extra step on the road to justice. Obviously, this entails a waste of time and wasted costs. Second, if mediation is undertaken for improper purposes and is not undertaken in good faith, it can result in the innocent party later being prejudiced in court proceedings because the party who acted in bad faith has become privy to information that would otherwise have been privileged. Examples of the tactical advantages that may be gained by a party who enters into mediation in bad faith include the following: Mediation is entered into for the purpose of making an illicit discovery; to test the opponent's resolve; or simply to intimidate the other party.

Not all matters are suitable for mediation. Mediation may not be appropriate in situations where there is a marked imbalance of power between the parties. In such a situation, the party in whose favour the balance of power lies can take advantage of the mediation process to manipulate and pressurise the other side to enter into an agreement which is blatantly unfair. In court proceedings, on the other hand, the judge, whose aim it is to achieve justice, determines the outcome. Imbalances of power between the parties may, therefore, influence the outcome in favour of the weaker party, or not at all. Chances of a fair solution are better in court proceedings than in a mediation settlement where the balance of power is skewed in favour of one of the parties.

In some cases, neither party wants a mediated settlement. They simply want a judicial determination of their rights. Issues that involve illicit or fraudulent behaviour are usually not suitable for settlement in

a mediation process. This is because the polarised positions of the parties do not allow for any type of negotiated settlement. Secondly, the matter might involve a matter of principle and one of the parties is simply not willing to negotiate and wants his or her rights vindicated.

It is obvious that if parties are compelled to enter into a mediation process in circumstances where a dispute is one not suitable for settlement by mediation, the result is either gross unfairness, if a settlement is reached, or unnecessary time delays and increased costs, the very ills mediation is supposed to cure, if there is no settlement.²⁷

Although a negotiated settlement achieved by means of mediation may produce justice for the individual parties, such a settlement is confidential and produces no precedent. Consequently, the settlement is of no use to the community at large. For example, if the dispute concerned racial inequality, and the parties settled the matter, the settlement does not generate a precedent for the community on the wider and important issue of racial discrimination. Another individual facing the same discrimination in the future cannot benefit from the mediated settlement. In other words, mediated settlements, unlike court judgments, do not create precedents that benefit society at large. In short, the justice achieved by mediated settlements is justice only for the individuals concerned, but mediation does not address civil justice issues for the community at large and it does not allow for the assertion of individuals' rights.

In conclusion, the attributes of mediation that result in benefits and advantages can usually be achieved only in circumstances where the process of mediation is voluntarily undertaken. Conversely, where mediation is voluntarily entered into by the parties, the disadvantages associated with mediation are less likely to be present. When mediation is compelled and at least one of the parties is an unwilling participant, it is likely that mediation will result in wasted costs and time.

6 Resolution of disputes by mediation²⁸ in South Africa

6.1 Labour Relations Act

In terms of the Labour Relations Act (LRA),²⁹ all legal disputes covered by that legislation must first be referred to conciliation before they can

27 In *Hurst v Leeming* [2002] EWHC 1051(Ch), Lightman J, whilst bemoaning the high costs and time delays associated with civil litigation, power and better party may with impunity refuse to proceed to mediation where there was no objective prospect of its succeeding.

28 This term is used synonymously with the term 'conciliation'.

29 Act 66 of 1995.

either be arbitrated or adjudicated or, if they are disputes of interest, industrial action can take place.

Unfair dismissals are dealt with in chapter VIII of the LRA. The following types of dismissal disputes must be referred to mediation or conciliation before they can be arbitrated or adjudicated: dismissal for misconduct³⁰ or incapacity;³¹ constructive dismissal;³² where the reason for dismissal is not known;³³ automatically unfair dismissals;³⁴ dismissal based on operational requirements;³⁵ dismissal for participating in an unprotected strike;³⁶ dismissal in the context of closed-shop;³⁷ dismissal as a result of the failure by an employer to renew a fixed-term contract of employment on the same or similar terms, where the employer offered to renew it on less favourable terms, or did not renew it, or the failure by an employer to retain the employee in employment on an indefinite basis, but otherwise on the same or similar terms as the fixed-term contract, in circumstances where the employee had a reasonable expectation of such indefinite renewal;³⁸ refusal by the employer to reinstate an employee after maternity leave;³⁹ selective non-re-employment;⁴⁰ dismissal in the context of transfer of employment contracts;⁴¹ dismissal because the employee made a protected disclosure in terms of the Protected Disclosures Act;⁴² and dismissal relating to probation.⁴³ In terms of section 191(5)(a) of the LRA, other unfair dismissals must also first be referred to conciliation or mediation.

In terms of the LRA, all unfair labour practices must also be referred to conciliation or mediation before any forum can have jurisdiction to either arbitrate or adjudicate a dispute. Unfair labour practices are dealt with in chapter VIII of the LRA. Unfair labour practices regarding promotion, demotion, training, the provision of benefits, disciplinary action short of dismissal, an employer's failure or refusal to reinstate already employing terms of any agreement,⁴⁴ an occupational detriment other than the dismissal in terms of the Protected Disclosures Act,⁴⁵ and unfair employer conduct relating to probation

30 Sec 188 LRA.

31 Sec 191(5)(a)(i).

32 Sec 186(1)(e).

33 Sec 191(5)(a)(iii).

34 Sec 191(5)(b)(i).

35 Secs 192(5)(b)(ii) & 191(12).

36 Sec 192(5)(b)(ii).

37 Sec 192(5)(b)(iv).

38 Sec 186(1)(b).

39 Secs 186(1)(c) & 187(1)(e).

40 Sec 186(d).

41 Sec 191(5)(b)(l).

42 Act 26 of 2000 and sec 191(5)(b)(l) LRA.

43 Sec 191(5A) LRA.

44 Sec 191(5)(a)(iv).

45 Act 26 of 2000 and secs 191 (5)(b) & (13) LRA.

(excluding dismissals related to probation)⁴⁶ must all be referred to conciliation as a first step in the dispute resolution process.

Section 191 of the LRA deals with disputes about dismissals and unfair labour practices, and provides as follows:

- (1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to -
 - (i) a council, if the parties to the dispute fall within the registered scope of that council; or
 - (ii) the Commission, if no council has jurisdiction.
 (b) A referral in terms of paragraph (a) must be made within -
 - (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

- (2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.
....
- (3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.
- (4) The council or the Commission must attempt to resolve the dispute through conciliation.
- (5) If a council or commission is satisfied that the dispute remains unresolved, or of 30 days had expired since the council or the commission received the referral and the dispute remains unresolved -
 - (a) the council or the Commission must arbitrate the dispute at the request of the employee if -
 - (i) the employee has alleged that the reason for the dismissal is related to the employees conduct or capacity...
 - (ii) the employee has alleged that the reason for the dismissal is that the employer made continued employment intolerable or their employer provided the employee was substantially less favourable conditions or circumstances at work after a transfer ...
 - (iii) the employee does not know the reason for the dismissal; or
 - (v) the dispute concerns an unfair labour practice; or
 - (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for the dismissal is ...

46 Sec 191(5A) LRA.

Collective labour law disputes, such as disputes regarding freedom of association,⁴⁷ organisational rights⁴⁸ and collective agreements,⁴⁹ must all be referred to conciliation or mediation before any forum can have jurisdiction to either arbitrate or adjudicate the dispute.

Disputes of interest,⁵⁰ be they individual or collective, also must be referred to conciliation or mediation as a first step in the resolution of the dispute. If conciliation fails, the dispute may be settled by the flexing of industrial muscle of the respective parties. In other words, the employees may embark on a protected strike and the employers may lock out employees, provided certain procedural requirements have been met. Matters including refusals to bargain,⁵¹ unilateral changes to terms and conditions of employment⁵² and matters concerning picketing⁵³ must all be referred to mediation.

The dispute resolution services provided for by the Commission for Conciliation, Mediation and Arbitration (CCMA) are free of charge. The CCMA receives its funding from government. However, if the parties elect to use the services of private mediators, this will obviously not be a free service.

On the face of it, therefore, most, if not all, labour disputes dealt with in terms of the LRA must be referred to mediation and conciliation as a first step in the dispute resolution process. There is case law to suggest that the mediation or conciliation process is mandatory and that, without it, no forum has jurisdiction to proceed with a further dispute resolution process,⁵⁴ be it by means of an arbitration process or adjudication by the courts. For example, in *Sambo & Others v Steytler Boerdery*,⁵⁵ the court, referring to *Intervale (Pty) Ltd v NUMSA*,⁵⁶ stated:

The Labour Appeal Court has made it clear that conciliation is a prerequisite for this Court to entertain a dispute before it. If it has not been conciliated, this court has no jurisdiction.

Also in *Caci Beauty Salon & Spa v Van Heerden & Another*,⁵⁷ the employee referred an unfair labour practice dispute to the CCMA for

47 Sec 9 LRA.

48 Secs 16, 21 & 22.

49 Secs 24, 26(11) & 33A.

50 Sec 64.

51 Sec 64(2).

52 Secs 64(1) & (4).

53 Secs 69(8) & (11).

54 See *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd* (2000) 21 ILJ 142 (LAC) 160A, where Zondo AJP (as he then was) stated: '[T]he wording of sec 191(5) imposes the referral of a dismissal dispute to conciliation is a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication.' See also *Intervale (Pty) Ltd, BHR Piping Systems (Pty) Ltd v National Union of Metalworkers* [2014] ZALAC 10.

55 (CS92/13 [2014] ZALCCT 33, para 18.

56 *Intervale* (n 54 above).

57 [2001] 7 BLLR 737 (LC).

conciliation. When the dispute remained unresolved, the employee referred an unfair dismissal dispute for arbitration at the CCMA. The Labour Court held that the CCMA lacked the jurisdiction to arbitrate the unfair dismissal dispute because the dispute had not been referred to conciliation first, as is required in terms of the section 191 of the LRA.

It is noteworthy that, in finding that the court had no jurisdiction to hear the matter as a result of non-compliance with the procedures set out in section 191 of the LRA, the Labour Appeal Court referred to the non-participation, not as a failure to take part in the conciliation process, but rather as not being cited as a party in the referral of the dispute for conciliation.⁵⁸ In other words, if the party had been cited in the referral for conciliation, even if conciliation had not taken place, the court may still have had jurisdiction. This is in line with the actual wording of the LRA which imposes only the referral of a dismissal dispute to conciliation as a precondition before the dispute can either be arbitrated or referred to the Labour Court for adjudication. This is evident from section 191(5) of the LRA, which provides that '[i]f a council or Commission is satisfied that the dispute remains unresolved, or if 30 days had expired since the council or the Commission received the referral and the dispute remains unresolved', the dispute may either be arbitrated or adjudicated, depending on the nature of the dispute. Therefore, even if the issue has not been mediated, as long as it was referred to mediation and 30 days have lapsed since the date of referral to mediation, it may then proceed either to arbitration or adjudication if it is a dispute of right. If it is a dispute of interest, the union may embark on a protected strike, provided all the other procedural requirements provided in the LRA have been adhered to.⁵⁹

6.2 Rules

In terms of the Rules for the Conduct of Proceedings before the CCMA, a party who avoids conciliation or mediation faces the possible consequence of forfeiting the right to have the dispute arbitrated or adjudicated by the relevant forums.

Rule 13, headed 'What happens if a party fails to attend or is not represented at conciliation', provides:

- (1) The parties to a dispute must attend a conciliation in person, irrespective of whether they are represented.
- (2) If a party is represented at the conciliation but fails to attend in person, the commissioner may -
 - (a) continue with the proceedings;
 - (b) adjourn the proceedings; or

⁵⁸ *Intervale (Pty) Ltd, BHR Piping Systems (Pty) Ltd v National Union of Metalworkers* Case JA24/2012 (LAC); *Driveline Technologies* (n 54 above) 160A.

⁵⁹ Sec 65 LRA.

- (c) dismiss the matter by issuing a written ruling.
- (3) In exercising a discretion in terms of subrule (2), a commissioner should take into account, amongst other things -
 - (a) where the party has previously failed to attend a conciliation in respect of that dispute;
 - (b) any reason given for that party's failure to attend;
 - (c) whether conciliation can take place effectively in the absence of that party;
 - (d) likely prejudice to the other party of the commissioner's ruling;
 - (e) any other relevant factors.
- (4) If a party to a dispute fails to attend in person or to be represented at the conciliation, the commissioner may deal with it in terms of rule 30.

Rule 30, headed 'What happens if a party fails to attend proceedings before the Commission', provides:

- (1) If a party to a dispute fails to attend or be represented at any proceedings before the Commission, and that party -
 - (a) had referred the dispute to the Commission, a commissioner may dismiss the matter by issuing a written ruling; or
 - (b) had not referred the matter to the Commission, the commissioner may -
 - (i) continue with the proceedings in the absence of that party; or
 - (ii) adjourn the proceedings to a later date ...

On a literal interpretation of the Rules for the Conduct of Proceedings before the CCMA, a party who refers a matter to the CCMA for conciliation and fails to attend the conciliation proceedings runs the risk of having the matter dismissed. That will then be the end of the matter and there will be no chance to have the matter either arbitrated or adjudicated. If the respondent fails to attend a conciliation proceeding which he or she has been notified to attend, he or she faces the risk of the conciliation taking place in his or her absence. Despite this, in *Premier Gauteng & Another v Ramabulana & Others*⁶⁰ the Labour Appeal Court held that the dismissal of a matter at conciliation stage was not permissible. The Court based its conclusion on section 138(5) of the LRA. This subsection regulates the powers of the Commission when a referring party does not attend a scheduled arbitration hearing. The subsection does not entitle a commissioner to dismiss a matter at conciliation stage. Therefore, if the referring party is not present at the conciliation proceedings, the commissioner may not, as is provided for in terms of the Rules for the Conduct of Proceedings before the CCMA, dismiss the matter. In these circumstances, the commissioner simply issues a certificate of non-resolution. It follows that, if a commissioner may not dismiss a

60 (2008) 29 ILJ 1099 (LAC).

matter if the referring party is not present at the conciliation, by the same token, a commissioner may not dismiss a matter if the respondent is absent at the conciliation.

It follows, therefore, that if parties are unwilling to participate in a mediation or conciliation procedure, they may avoid it by simply not attending the process. Since the commissioner may not dismiss the matter, and must issue a certificate of non-resolution, the parties will have abided by the procedures provided for in terms of section 191 of the LRA. Consequently, the parties may then proceed to either adjudication by the Labour Court or arbitration procedure. In this sense, conciliation or mediation is only theoretically mandated in terms of the LRA. In practice, the parties can avoid conciliation or mediation with impunity by simply not attending the procedure, and they will not be denied access to further dispute resolution procedures as a consequence of such non-attendance. All that needs to be done is that the matter be referred for conciliation by the applicant.

A party who avoids a conciliation or mediation process as described above is not denied access to further dispute resolution procedures, has not incurred costs because the mediation process is free, and no adverse costs or other orders can be made against that party on the basis of that party's non-attendance at the conciliation procedure. In these circumstances, it is difficult to argue that the conciliation or mediation process in terms of the LRA is mandatory.

6.3 The 'con-arb' process

Section 191(5A) of the LRA, introduced in terms of the 2002 amendments of the LRA, introduces a process called 'con-arb'. In terms of this process, if conciliation is unsuccessful, the commissioner must immediately commence with the arbitration process. All dismissals and unfair labour practice disputes that may be arbitrated by the CCMA are referred to the Commission for a con-arb process. This process must be applied if the dispute concerns the fairness of a dismissal during the probationary period or an unfair labour practice relating to probation, and parties may not object to the use of the process. It is compulsory. For disputes concerning any other unfair labour practice or dismissal that may be arbitrated by the CCMA, if neither party has objected to the process, the process is applicable. In terms of Rule 17(2) of the Rules for the Conduct of Proceedings before the CCMA, a party wishing to object to the con-arb process must do so in writing at least seven days prior to the scheduled con-arb date. If the referring party objects to the con-arb process, this may be done by simply signing the referral form. No reasons need to be provided for objecting to the process. A simple objection will suffice to prevent the process from being conducted.

A party wishing to avoid conciliation or mediation in situations where a con-arb process is applicable simply needs to object to the con-arb process (unless the matter concerns a dispute relating to the fairness of a dismissal during probation or an unfair labour practice

relating to probation), whereupon the usual procedure will be followed, and arbitration will not follow immediately after conciliation has taken place.

In summary, the only situation where a party cannot avoid the conciliation or mediation process with impunity is where the con-arb process is compulsory, namely, in the case of disputes about the fairness of a dismissal during the probationary period or an unfair labour practice relating to probation. In situations where the con-arb procedure has not been objected to or is obligatory, a party who fails to appear for the procedure does so at his or her own peril.

The conciliation procedure cannot produce settlement unless both parties are present. With only one party present, the inevitable result of the conciliation process is the issuing of a certificate of non-settlement. In terms of Rule 30 of the Rules for the Conduct of Proceedings before the CCMA, the commissioner may dismiss the matter if the referring party is absent. If the other party is absent, the commissioner may either continue with the proceedings in the absence of that party or adjourn the proceedings. What usually happens is that, after issuing the certificate of non-settlement, the commissioner will immediately commence with arbitration.⁶¹

A party who unwillingly enters into the mediation or conciliation process in a con-arb procedure simply because he or she wants to be present at the arbitration cannot be compelled to enter into a settlement agreement. Furthermore, any conduct that may be perceived as unreasonable during the conciliation or mediation process cannot be taken into account in the arbitration process. No adverse costs awards or any other punitive measures can be taken against a party who is perceived by the arbitrator to have been unreasonable in refusing to settle. In this sense, conciliation is only mandatory in the sense that the parties have to be present at the mediation or conciliation process. Nobody is obliged to settle. There are no cost implications or any other adverse consequences. The unwilling party simply has to be present at the conciliation.

In conclusion, the conciliation or mediation of labour disputes is mandatory in terms of the LRA in theory, but not in practice, unless the dispute concerns dismissal during a probationary period or an unfair labour practice relating to probation. In this case, an unwilling

⁶¹ There is contradictory case law as to whether or not a commissioner is permitted to proceed with arbitration in circumstances where one of the parties fails to appear at con-arb hearings. In *Inzuzu IT Consulting (Pty) Ltd v CCMA & Others* [2010] 12 BLLR 1288 (LC), the Labour Court held that rule 17 does not permit a commissioner to proceed with arbitration if one of the parties is absent. In *Pioneer Foods (Pty) Ltd t/a SASKO Milling and Baking (Duens Bakery v CCMA & Others* [2011] 8 BLLR 771 (LC), the Labour Court disagreed and held that arbitration should commence immediately after conciliation if one of the parties is absent and the other party has no objection thereto. The CCMA has issued a practice note to the effect that the *Pioneer Foods* judgment should be followed.

party is only obliged to attend the conciliation procedure, which will immediately be followed by an arbitration procedure.

6.4 Constitutional challenges to mandatory mediation in terms of the LRA

Given the fact that the mediation or conciliation of labour disputes in terms of the LRA dispensation is only mandatory in theory and not in practice, it is not surprising that there have been very few challenges to the constitutionality of the mandatory mediation as provided for in terms of the LRA, on the basis that the mandatory mediation breaches the constitutional right of access to courts.⁶² In *Intervale (Pty) Ltd & Others v NUMSA*,⁶³ such a challenge was made. In an appeal to the Labour Appeal Court, the applicants sought to set aside the order of the Labour Court joining them as respondent parties in an action instituted by the National Union of Metalworkers of South Africa (NUMSA). NUMSA had referred a dispute to conciliation and cited only one employer in the referral documents. At the conciliation it transpired that many of the members of NUMSA, on behalf of whom it referred the dispute, were not employed by the employer referred to in the referral document. It transpired that they were employed by other employers. Consequently, NUMSA made another referral for conciliation of the dispute. However, at the time it made this referral, the time period within which to make the referral had prescribed in terms of the LRA. An application for condonation of late referral was made. The condonation was refused. Thereafter, NUMSA filed a statement of claim at the Labour Court averring that its members had been unfairly dismissed. Again only one employer was cited. About seven months after filing this statement of claim, NUMSA brought an application to the Labour Court to join two other entities as respondent employers. The Labour Court granted the application joining the parties to the action. The employers who were joined launched an appeal to the Labour Appeal Court to set aside the order of the Labour Court joining them as respondent parties in the action instituted by NUMSA. The Labour Appeal Court held that NUMSA had failed to comply with section 191(1) read with section 191(5) of the LRA in that it had failed to refer the dispute against the respondent employers to conciliation on time. In the absence of conciliation, the Labour Appeal Court held that NUMSA was not entitled to refer its dispute to adjudication to the Labour Court as provided for in section 191(5). Consequently, the Court held that it did not have the jurisdiction to entertain the dispute.⁶⁴ NUMSA argued that to close the door to an action on the basis of non-compliance with section

62 Sec 34 of the Constitution provides: 'Everyone has the right to have any disputes that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

63 Case JA24/2012 (LAC).

64 Para 24.

191 of the LRA would represent 'an unbecoming approach to labour legislation and deny certain members of NUMSA from having the day in court'.⁶⁵ In response to this argument, the Court concluded:⁶⁶

Finally, on the issue of the constitutional right to have a day in court, this right is not to be exercised at a litigant's pleasure. The Act is clear. It makes provisions which must be complied with. There is nothing unconstitutional about that. One cannot fail to comply with the steps that are required to be followed to enforce a right and then complain that these steps which you have failed to follow now impinges on your constitutional right.⁶⁷

7 Resolution of labour disputes by mediation in Mozambique

7.1 Labour legislation

Article 184 of the labour legislation⁶⁸ provides:

- (1) All disputes must be referred to mediation before they are submitted to arbitration or to employment courts, except in cases involving provisional remedies.
- (2) Arbitration or judicial bodies that receive cases which have not first been submitted to conciliation mediation shall notify the parties to comply with the provision of the preceding paragraph.

Article 187(4) provides:

If the party that requested the mediation fails to appear on the day of the mediation hearing without justification, the mediator shall shelve the case, whereas if the other party fails to appear the mediator shall, of his own motion, refer the case to arbitration. In either case, the defaulting party shall have to pay a fine set by the mediation and arbitration centre.

Therefore, if the party who referred the dispute to conciliation fails to appear without justification, that is the end of the matter and the referring party will not have recourse to any other dispute resolution process. In short, access to justice is forfeited for failure to attend a mediation process. In addition, the referring party will pay a fine. If the other party fails to appear, the matter is referred to arbitration and that party will have to pay a fine.

All disputes have to be referred to mediation. Failure to attend by the referring party means that the matter is dispensed with. This renders mediation a compulsory step on the road to access to justice. Mediation is mandatory, both in theory and in practice, for a referring party. Failure to attend by the referring party will not only attract a

65 Para 19.

66 Para 23.

67 In *Imraahn Ismail Mukaddam v Pioneer Foods (Pty) Ltd & Others* Case CCT 131/12 [2013] ZACC 23 para 31, the Constitutional Court stated: 'However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute.'

68 Lei do Trabalho (Law of Work) 23 of 2007.

fine, but will also deny that party access to justice, since that party's absence from mediation renders the matter incapable of being referred to any other forum for the resolution of the dispute.

The fact that the consequence of a respondent failing to attend the mediation process is that the matter is referred to arbitration means that there will be an opportunity to have the matter resolved by another dispute resolution method. Therefore, access to justice in the strict sense is not denied. However, the fact that a failure to attend attracts a fine introduces an element of compulsion. Although this compulsion does not in a strict sense divest the respondent of his or her right of access to justice, it could be argued that the imposition of extra costs and the time wasted before having access to a further dispute resolution process constitute, if not a denial of the right of access to justice, at best, a retardation of access to justice. In addition, it could be argued that the monetary implications of the fine render access to justice unattainable for some.

Unlike the case in South Africa, where the mediation process is free of charge, Rule 20(4) of the Rules of the Labour Mediation and Arbitration Centre (COMAL)⁶⁹ provides that the parties referring a labour dispute to COMAL must pay for the mediation. Most applicants referring a dispute are employees and, more often than not, they cannot afford to pay the deposit.⁷⁰ Clearly, the fact that not all disputes are suitable for resolution by means of mediation simply means that the compulsory mediation and the obligatory deposit, in such cases, make the process nothing more than an unnecessary step in the acquisition of access to justice, serving only to waste more time and in the process incurring more costs for the applicant.

In short, section 184 of the labour legislation, combined with the procedural Rules of COMAL, can in certain circumstances limit, or at best retard, a citizen's exercise of his fundamental constitutional right of access to the courts.

7.2 Constitutional challenges to mandatory mediation in terms of the Mozambican Constitution

In a decision dated 7 October 2011,⁷¹ the Constitutional Court of Mozambique declared article 184 of the labour legislation adopted in 2007 (and entered into force in 2008), a violation of, among others, articles 70⁷² and 62(1)⁷³ of the Constitution of Mozambique, as it makes it mandatory for all labour disputes to be submitted to a

69 This is the Mozambican equivalent of the South African CCMA.

70 At present, the deposit payable is 9 000 Meticalis.

71 Case 03/CC2011.

72 Art 70 entitled 'Right of recourse to the courts' provides: 'Every citizen shall have the right of recourse to the courts against acts that violate the rights and interests recognised by the Constitution and the laws.'

73 Art 60(1) entitled 'Access to courts' provides: 'This date shall guarantee that citizens have access to the courts and that persons charged with a crime have the right to defence and the right to legal assistance in aid.'

mediation process. This compulsion, the Constitutional Court concluded, denied workers and various citizens the right of free access to justice as enshrined in the Constitution.

The action in this case emerged from a contract of employment. The Constitutional Court investigated the constitutionality of article 184 of the labour legislation. The final conclusion by the Constitutional Court, that article 184 is unconstitutional, is based on the following reasoning:

Article 3 of the Constitution provides that the Republic of Mozambique is a state governed by the rule of law. Article 212(1) of the Constitution provides:

It shall be the function of the courts to guarantee and strengthen the rule of law as an instrument of legal stability to guarantee respect for laws, to safeguard the rights and freedoms of citizens, as well as the vested interests of other bodies and entities that have legal existence.

Article 134 of the Constitution, in turn, provides for the principle of the separation of powers.⁷⁴ The essence of the right of access to courts is the assurance or guarantee of the rights and liberties of all citizens. The authority granted to government in terms of the Constitution to guarantee those rights in terms of article 62 must be in harmony with the principle of the separation of powers. The government guarantees the protection of rights and liberties within the limits of the exercise of governance and administration while respecting the function reserved for the judiciary. Unlike governance and administration, the judicial function is exercised by judges, as distinguished from government agents and administrators, for the sake of independence and impartiality.

The fact that it is the function of the courts to apply the law is typical of a democratic state and the principal of separation of powers. This, however, does not prohibit the existence of alternative mechanisms to resolve disputes. Juristic pluralism is recognised by the Constitution.⁷⁵ However, if an alternative method of resolving disputes imposes a conditional exercise of the fundamental right⁷⁶ of access to the courts as provided for in article 70, as is the case regarding article 184 of the labour legislation, such restriction is unconstitutional. This is because fundamental rights, such as the right of access to the courts, must be protected by ordinary legislation. It is not the fundamental rights that move within the ambit of the law, but

74 Art 134 provides: 'The sovereign public offices are established on the principles of separation and interdependence of powers enshrined in the Constitution, and shall owe obedience to the Constitution and the laws.'

75 Art 4 of the Constitution headed 'Legal pluralism' provides: 'The state recognises the different normative and dispute resolution systems that coexist in Mozambique in society, insofar as they are not contrary to the fundamental principles and values of the Constitution.' Also, Art 223(2) specifically provides for arbitration as a dispute resolution mechanism.

76 The right of recourse to the courts provided for in art 70 of the Constitution is a fundamental right because it appears in ch III of the Constitution.

it is the law that moves within the ambit of fundamental rights. Article 184 of the labour legislation creates a condition precedent to the exercise of a fundamental constitutional right. An analysis of article 184 of the labour legislation reveals that not only does it impose a restriction on the right of access to justice, but it also imposes a conditional exercise of that fundamental right. In other words, the exercise of the fundamental right of access to the courts is dependent on litigants abiding by the terms of article 184 of the labour legislation. This is contradictory and circular reasoning because it renders the right of access to courts conditional in order to guarantee that very right. Since the right of access to courts is a fundamental right, it should be directly applied⁷⁷ and cannot be conditional. Consequently, the imposition of a legal requirement to apply or found the right of access to courts does not enjoy a constitutional foundation.

The policy consideration for the promulgation of article 184 of the labour legislation was to speed up the dispute resolution process in labour disputes. The principle of direct applicability, however, does not always imply the immediate execution of these rights. Article 184 of the labour legislation attempts to speed up the process of dispute resolution in labour disputes by imposing alternatives to the judicial route. The Constitutional Court held that recourse to extrajudicial measures, such as mediation or arbitration, were not unconstitutional if the extrajudicial measures are optional and an alternative to judicial measures. This simply means that the citizen is not bound to call for the intervention of the courts. In other words, the citizen is reserved the authority to decide whether to go the extrajudicial or the judicial route in order to enforce his rights. However, article 184 of the labour legislation does not allow this option. In situations where the labour dispute is not suitable for resolution by means of mediation, article 184 of the labour legislation imposes obstacles to access to justice. By enacting this legislation, the state has failed to guarantee access to the courts to its citizens as it is required to do in terms of article 62 of the Constitution.

8 Conclusion

A one-size-fits-all approach to the resolution of labour disputes does not always result in justice, or access thereto. In fact, it can at times be a hindrance to justice. There is no denying that a mediation or conciliation can produce just results at a fraction of the price and in a much quicker time period than would have been the case had the

⁷⁷ As a fundamental right, the right of recourse to the courts is directly applicable in terms of art 56(1) of the Constitution, which provides as follows: 'Individual rights and freedoms shall be directly applicable, shall bind both public and private entities, shall be guaranteed by the state, and shall be exercised within the constitutional framework and the law.'

parties resorted to court procedures. On the other hand, however, under certain circumstances the process of mediation or conciliation can only serve to waste costs and time. This is the case where a matter is not suitable for mediation, or where at least one of the parties is unwilling to settle and prefers a third party to impose an outcome. Where not only the process of mediation is compelled, but where settlement is indirectly compelled by allowing a subsequent court to impose costs on a party whom it believes was unreasonable in its unwillingness to settle, the process of mediation cannot be said to improve access to justice. Fortunately, neither the South African nor the Mozambican system of labour dispute resolution provides for such coercion to settle in the mediation process.

Although there is no compulsion to settle in the Mozambican system, the process of mediation is mandated. If the referring party fails to appear at the mediation, that is the end of the matter. If the other party fails to appear, the matter is referred to arbitration. Fines are imposed on a party who fails to attend the mediation. Furthermore, the process of mediation is not free, even though it is compulsory. In a situation where either of the parties does not wish to settle, this results in an unnecessary increase in costs and time delays. In South Africa, although mediation or conciliation is mandatory in theory, in practice it is not. This is because there are no costs involved for the litigants (aside from transport costs and costs involved with time spent at the mediation), and the time delay is at most 30 days from date of referral to the CCMA. There are no repercussions for non-attendance or a failure to settle. In this way, litigants are provided with an opportunity to settle at a minimal cost. Mediation, therefore, is encouraged in a practical manner, resulting in quick and easy access to justice should the conditions be appropriate for a mediation settlement. Where conditions are not conducive to settlement, the mandated mediation does not hinder access to justice.

The South African system, therefore, strongly encourages mediation or conciliation without mandating the process, to the extent that the compulsion robs the mediation or conciliation process of its advantages. To impose a process of mediation where there is no chance of settlement serves only to waste time and money. Nobody is more acutely aware of the costs and other disadvantages of litigation in the courts than the litigants themselves. Therefore, in all probability, if there is a chance of settlement, the parties themselves will usually settle the matter without any legal compulsion to do so. Therefore, it is preferable to create a culture of mediated settlements through education of the public and to provide the means for the public to have easy access to such processes rather than to impose them on disputants.