PART NINE: COURT-ANNEXED MEDIATION IN LESOTHO

Challenges To Mediation

Over the span of two months, we have published a series of articles describing the philosophy and process of Mediation, and analyzing its advantages and benefits as a simple, speedy, inexpensive and transparent method of dispute resolution in our society.

The Court-Annexed Mediation (CAM) Programme is one of the new initiatives that has been introduced in the High Court of Lesotho under the Civil Legal Reform Project (CLRP), with the support of the Millennium Challenge Account – Lesotho (MCA-Lesotho) and the International Law Institute – African Centre for Legal Excellence (ILI-ACLE).

In this article, we reflect on the Challenges that can beset mediation – particularly so, at this early stage of the new reform effort in Lesotho.

First, is the challenge of **Knowledge** and **Information** about the reform. How does the ordinary citizen get to know about this reform measure, and to internalize the details of its processes, procedure and practice? To address that particular challenge, MCA-Lesotho through ILI-ACLE did design a comprehensive strategy for Outreach – aimed at publicizing the judicial reforms now taking place in the Country – including, in particular, the introduction of the CAM. The strategy has used, and continues to use the radios, the TV, the print media and other avenues of transmitting the necessary information and knowledge to the public. In this regard, plans are afoot to enhance the blitz with suitable public outreach campaigns going beyond the confines of Maseru, into the outer countryside.

Second, is the challenge of grappling with the **Transition** - namely grafting the new Mediation branch, onto the existing vine of Litigation. A delicate surgical procedure was needed for this operation – to introduce the new tissue of Mediation into the main body of Litigation, without the new tearing apart the old, or the old rejecting the new. From the outset, the design provided for a two-tier track. All new cases those filed in the High Court after the commencement of CAM (i.e. May 2011), would automatically follow the Mediation track – in accordance with the applicable procedural requirements for triggering the mediation process. On the other hand, the timing for referral of all cases filed prior to the commencement of CAM (i.e. before May 2011), is left to the discretion of the allocated/presiding Judge. This was intended, among other things, to minimize swamping either track with an avalanche of caseload: namely, to take the new medicine in manageable doses, so to speak.

The third Challenge and the most formidable remains the **Acceptance** of the new dispensation by all Stakeholders. These Stakeholders are many – each having a different interest in the reform. There is the Court system in general, and the High Court, in particular – whose overall interest in the reform is to minimize its burdensome case backlog (the judicial gridlock), and to minimize its case disposal

(unclog the judicial traffic): and to do so with speed and justice. The Courts have fully embraced Mediation. The second Stakeholder is the general public – whose interest is in an efficient, well-functioning, confidence-giving judicial system to which they look as the fortress and refuge for the protection of their rights. From all available evidence, particularly so the public response to the Mediation outreach program, members of the public have welcomed the mediation reform.

The third and most critical Stakeholder is the litigant: the one whose case is either in litigation or in mediation. It is the litigant who stands to enjoy the rapture and benefits of winning or to bear the agony and burden of losing a dispute. Mediation seeks to bring a **win-win** result to both disputants through the medium of their own negotiation and mutual settlement, aided by a skilled impartial facilitator.

The fourth Stakeholder, a key one for the acceptance of Mediation, is the litigants' Lawyer. His immediate interest is to make a living like all professionals do and are entitled to do. A few lawyers may get carried away with this myopic interest, and attempt to maximize their take by selfishly prolonging litigation. These are the few bad apples in the basket that short-change the profession and themselves, by provoking a perception of a rotten reputation to the learned fraternity. The real enduring interest of the lawyer, the one that will sustain or fail him/her in the long run, is to see justice done; to see that it is done speedily, efficiently, cost-effectively and humanely. Only then, will the lawyer win more cases, win more clients, redouble his work profile and multiply his intake of fees. The clients, individually and collectively, will perceive of such a lawyer as having their interests as paramount. To date, many lawyers, including eminent ones, have embraced mediation and are serving the interests of their clients well. However, a few lawyers are still unsure of which track to take for their clients. But the clients have raised issues with that stance – to the extent of even falling out with their own lawyers, and openly reporting such fall-out. This is lousy publicity for the lawyer. It sows the seeds of an unflattering future reputation for such a lawyer from – of all people – the lawyer's own clients. The moral of the story is that lawyers must show and appear to show fidelity to the paramount interest of their client. In matters of Mediation versus Litigation, it is quite evident that the Parties' uppermost interests are best vindicated through Mediation – with Litigation as the choice of last resort.

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