

PROMOTING ACCESS TO JUSTICE THROUGH COURT-CONNECTED

MEDIATION IN NAMIBIA:

PROSPECTS, CHALLENGES AND OPPORTUNITIES

A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE

MASTER OF LAWS (LLM)

UNIVERSITY OF NAMIBIA

BY

ANÉ MAASS

221145729

APRIL 2025

SUPERVISOR: DR M AWARAB (UNAM)

CO-SUPERVISOR: DR K KARISEB (UNAM)

ABSTRACT

Applying a qualitative approach, this study aimed to evaluate the prospects, challenges and opportunities of court-connected mediation in promoting access to justice in Namibia. It found that there are many obstacles to access to justice in Namibia which include a lack of knowledge on the rights granted to Namibians, prolonged adjudication, locus standi, costly legal proceedings and lastly, case backlog. An evaluation was conducted by studying the right of access to justice in Namibia and how the predominantly adversarial Namibian civil justice system currently operates to specifically highlight the hindrances to access to justice. It further sets out the growth and development of alternative dispute resolution (ADR), which incorporates the different forms and purposes of ADR, mediation as a general form of ADR. It explained and elaborated on court-connected mediation in Namibia. Furthermore, a comparative study was conducted on court-connected mediation in Tanzania and India to draw differences and similarities between the jurisdictions. Moreover, it concluded with recommendations on how court-connected mediation in Namibia can be improved. From an access to justice perspective, this study emphasised the need for Namibia to adapt its civil justice system in order to meet the ever-changing needs of the community it serves. As a result of this evaluation, the study concluded that ADR, and more specifically that court-connected mediation, can have a significant impact on the promotion of access to justice by aiding in the solution to the hindrances of such access to justice since the process is less costly, less time consuming and allows the disputing parties to take part in the process to settle their dispute. However, the study also indicated the limitations and challenges of an ADR system premised on court-connected mediation given the technical and

adversarial nature of the Namibian legal system and the growing economic inequality between the rich and poor.

Keywords: access to justice, alternative dispute resolution (ADR), civil justice system, high court, mediation, Namibia, social justice

DEDICATION

This thesis is dedicated to the women who inspire me: My mother, Narenda Hoepfner; my grandmother, Rina van Wyk; and my mother-in-law, Erika Maass.

ACKNOWLEDGEMENTS

I would like to express my deepest gratitude to my husband who patiently supported and motivated me to finish this thesis.

A special thank you to my mother, my mother-in-law and my friends and family who listened to each and every high and low during the writing of this paper. Your words of motivation and encouragement kept me going until the end.

I am further highly indebted to my supervisor, Dr Kariseb and my editor, Dr Mukoroli. I could not have finished this thesis without your guidance, motivation, and supervision.

Lastly, I would like to thank the Registrar of the High Court of Namibia, Ms Schickerling and court-accredited mediator, Jenny Vermeulen for their guidance on this topic.

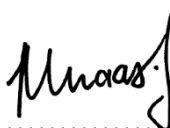
DECLARATION

I, Ané Maass, hereby declare that this study is my own work and is a true reflection of my research, that I have not used any other sources than those listed in the bibliography and/or quoted in the footnotes, and that this work, or any part thereof has not been submitted for a degree at any other institution.

No part of this thesis/dissertation may be reproduced, stored in any retrieval system, or transmitted in any form, or by means (e.g. electronic, mechanical, photocopying, recording or otherwise) without the prior permission of the author, or The University of Namibia in that behalf.

I, Ané Maass, grant The University of Namibia the right to reproduce this thesis in whole or in part, in any manner or format, which The University of Namibia may deem fit.

Ané Maass
.....
Name of Student


.....
Signature

APRIL 2025
.....
Date

SUPERVISOR'S CERTIFICATE

I, hereby certify that the research and writing of this research project was carried out under my supervision.



APRIL 2025

Dr. MR AWARAB

Date

CO-SUPERVISOR'S CERTIFICATE

I, hereby certify that the research and writing of this research project was carried out under my co-supervision.



APRIL 2025

Dr. K KARISEB

Date

LIST OF ABBREVIATIONS

ACHPR – African Charter on Human and People’s Rights

ADR – Alternative Dispute Resolution

CPD – Consolidated Practice Directions

ICCPR – International Covenant on Civil and Political Rights

JCM – Judicial Case Management

NHRAP – National Human Rights Action Plan

SWA – South-West Africa

UNDP – United Nations Development Programme

VDPA – Vienna Declaration and Programme of Action

UDHR – Universal Declaration of Human Rights

TABLE OF CONTENTS

ABSTRACT	i
DEDICATION	iii
ACKNOWLEDGEMENTS	iv
LIST OF ABBREVIATIONS	vii
CHAPTER 1:.....	1
INTRODUCTION AND BACKGROUND OF THE STUDY.....	1
1.1. Introduction.....	1
1.2. Statement of the Problem	4
1.3. Objectives of the study	6
1.4. Hypothesis.....	6
1.5. Significance of Study.....	7
1.6. Limitations of the Study	8
1.7. Theoretical framework.....	9
1.8. Literature review	14
1.9. Research questions.....	22
1.10. Research Methodology	23
1.11. Research Ethics.....	24
1.12. Chapter outline.....	25
CHAPTER 2:.....	27
THE ACCESS TO JUSTICE MOVEMENT	27
2.1. Introduction.....	27
2.2. Defining access to justice.....	28
2.3. The right to access to justice under Namibian Law.....	35
2.3.1. Namibian Constitution.....	35

2.3.2.	Legal Aid Act, 1990.....	39
2.3.3.	High Court Act, 1990 read with Rules of the High Court, 2014 40	
2.4.	The right to access to justice under international law	41
2.5.	Obstacles to access to justice	44
2.5.1.	Common law rules, stringent principles and its application on <i>locus standi</i>	45
2.5.2.	Lack of knowledge of rights	47
2.5.3.	Prolonged adjudication and costly proceedings.....	48
2.5.4.	Case backlog and overburdened court rolls	52
2.5.5.	Technical and bureaucratic nature of the adversarial legal system 53	
2.6.	Conclusion.....	54
CHAPTER 3:.....		56
GROWTH AND DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION AND THE IMPACT ON ACCESS TO JUSTICE.....		
3.1.	Introduction.....	56
3.2.	Definition and characteristics of ADR	58
3.2.1.	When is ADR appropriate?	60
3.3.	Different forms of ADR to be explored to promote access to justice	62
3.3.1.	Negotiation.....	62
3.3.2.	Arbitration.....	63
3.3.3.	Mediation	64
3.4.	Mediation as a general form of ADR	65
3.4.1.	Definitions and characteristics of mediation.....	65

3.4.2.	The mediator	67
3.4.3.	Characteristics of a competent mediator	69
3.4.4.	Advantages of mediation	73
3.4.5.	Disadvantages of mediation	80
3.5.	Conclusion.....	82
CHAPTER 4:	84
THE NAMIBIAN CIVIL JUSTICE SYSTEM AND ACCESS TO JUSTICE	84
4.1.	Introduction.....	84
4.2.	The history and background of the Namibian civil justice system.....	84
4.3.	The civil litigation procedure in Namibia	86
4.4.	Objectives of civil litigation to promote access to justice in the High Court of Namibia.....	91
4.5.	The shortcomings of the Namibian civil justice system and the impact on access to justice	92
4.6.	Conclusion.....	94
CHAPTER 5:	95
COURT-CONNECTED MEDIATION AS A FORM OF COMPULSORY MEDIATION	95
5.1.	Introduction.....	95
5.2.	The introduction of Court-connected mediation in Namibia.....	96
5.3.	Legislation in relation to the High Court which provides for, underlines and supports the purpose of court-connected mediation.....	98
5.4.	The process of court-connected mediation in Namibia.....	103
5.5.	Compulsory ADR in prescribed matters in the High Court of Namibia...	112

5.5.1.	Divorce, custody of, and access to minor children and spousal and child maintenance	114
5.5.2.	Defamation matters	120
5.6.	Evaluation of the success of court-connected mediation in Namibia and the impact on access to justice	124
5.6.1.	Saving costs	124
5.6.2.	Saving court time and lessening the burden on the court roll ..	125
5.6.3.	Assisting parties in settling disputes outside of the court	126
5.7.	Conclusion.....	127
CHAPTER 6:.....		129
COMPARISON OF COURT-CONNECTED MEDIATION IN DIFFERENT JURISDICTIONS		129
6.1.	Introduction.....	129
6.2.	Tanzania.....	130
6.2.1.	Introduction.....	130
6.2.2.	Court-annexed mediation in Tanzania	131
6.2.3.	Short-comings of court-annexed mediation in Tanzania	134
6.3.	India.....	135
6.3.1.	Introduction and History of the Mediation Act, 32 of 2023	135
6.3.2.	Important aspects of the Act	136
6.3.3.	Concerns and criticisms of the Act	141
6.3.4.	Summative insights	142
6.4.	Conclusion.....	142
CHAPTER 7:.....		144
CONCLUSION AND RECOMMENDATIONS		144

7.1. Conclusion	144
7.2. Recommendations	152
7.2.1. Continuous development and education of court accredited mediators	152
7.2.2. Court-connected mediations should be accessible country-wide 152	
7.2.3. Lawyers should be thoroughly educated.....	153
7.2.4. Inclusion of a comprehensive explanations at case plan and pre- trial stage	154
7.2.5. Sanctions for referral to mediation in bad faith	154
7.3. Final remark	155
REFERENCE LIST	157

CHAPTER 1:

INTRODUCTION AND BACKGROUND OF THE STUDY

1.1. *Introduction*

Firstly, the law is as old as humankind itself and stretches over a very wide spectrum. There is no country without a legal system and as a community grows, the law must grow with it. The late Chief Justice Innes¹ had the following view on the growth and expansion of the law:

*“There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas and to keep pace with the requirement of changing conditions.”*²

In addition, individuals interact more and more with new concepts and practices giving rise to novel legal rights and obligations. This inevitably leads to increased conflict. Conflict is a necessary and indispensable part of human interaction. Thus, it is important to empower the community to handle and manage conflict in a manner that prevents escalation and destruction. To achieve this, creative solutions to settle conflicts and disputes should be introduced. These solutions should be based on the

¹ Sir James Rose Innes KCMG PC KC (8 January 1855 – 16 January 1942) was the Chief Justice of South Africa from 1914 to 1927.

² *Blower v Van Noorden* 1909 TS 890, para 905.

needs of a community that is constantly changing and adapting.³ Moreover, legislation must make provision for the ever-changing needs of a developing community and is consequently inseparably linked to the community it serves.⁴

Through the influence of English law, Namibia subscribes to the adversarial civil justice system.⁵ In Namibian communities, most conflicts and disputes which arise between parties are usually settled in the conventional manner of the judicial practice, namely by litigation, since litigation is historically the more established method of dispute resolution. Since independence, Namibians have become more aware of their rights within the law and are keen to enforce those rights if they feel aggrieved.⁶ Furthermore, the civil justice system traditionally guarantees justice through law and the society turns to the courts to seek implementation of their rights as guaranteed under the Constitution, 1990.⁷ Recourse to court is, however, not always possible, despite a person's right to access thereto.⁸ There are many reasons for this which in combination, exclude underprivileged and uneducated people from accessing courts to uphold their rights.⁹ Equally important, access to justice has become unattainable for various reasons, some of which include the cost of litigation, complicated and

³ Shamir, Y. 2003. *Alternative Dispute Resolution approaches and their Application*. Israel Centre for Negotiation and Mediation contribution report from UNESCO's International Hydrological Programme to the World Water Assessment Programme. p 2.

⁴ Smuts, F. 2013. *Die Suid-Afrikaanse Reg – Wat elkeen moet weet*. Cape Town:Tafelberg, p 25.

⁵ Damaseb, P, T. 2020. *Court-Managed Civil Procedure of the High Court of Namibia*. Cape Town: Juta and Company (Pty) Ltd, p 73.

⁶ Damaseb, P, T. 2010. *Promoting access to justice in the High Court of Namibia: First Report – The Case for Judicial Case Management*. Windhoek: Ministry of Justice. Available at <https://ejustice.jud.na/High%20Court/Media/Pages/Publications.aspx>, p 9. Further references will be made as “Damaseb First Report (2010)”.

⁷ Constitution of the Republic of Namibia, Act 1 of 1990.

⁸ Article 5 read together with Articles 12, 18 and 25(2) of the Constitution of the Republic of Namibia, Act 1 of 1990.

⁹ This includes, amongst other things, people being uneducated on their rights and how the courts work, low-income or marginalized groups having a fear of court proceedings, the costly and time-consuming process of litigation and physical distances to the courts. This is discussed in detail in chapter 2.

prolonged delays in court proceedings and lastly, case backlog.¹⁰ Further impediments also include the rules on locus standi, the issue of class actions, the adversarial nature of the Namibian civil justice system and Namibians' lack of awareness of their rights, especially court-connected ADR mechanisms.

Fortunately, many disputes which arise between parties can be settled by alternative methods of dispute resolution, which may or may not be part of the judicial process.¹¹ These methods are imperative for ensuring broader access to justice. Between 1960 and 1970, access to justice- and alternative dispute resolution (“ADR”) movements became known in the global legal fraternity and shaped the way the role and function of the courts are perceived in society.¹² The major ADR movement emerged in the United States in the 1970s in an attempt to develop less expensive and time-consuming alternatives to litigation.¹³ ADR has been defined as a procedure other than the adjudication by a judge in court, where a neutral third party assists in or resolves the dispute.¹⁴

The increased popularity of ADR and the inclusion thereof in certain legislation and court proceedings, either voluntary or court mandated, has led to society's expectation for justice only through courts being suspended. Modern legal systems are

¹⁰ Ngcobo, S. 2011. “Enhancing Access to Justice: the Search for Better Justice”. Opening remarks speech given by the Chief Justice at the *access to justice conference: towards delivering accessible quality justice for all*. Johannesburg. Available at [Speech-of-the-Chief-Justice-2011.pdf \(constitutionallyspeaking.co.za\)](#), p 18.

¹¹ Crous, A, J. 2002. *Die Beslegtingsproblematiek in geval van medies wanpraktykgeskille met spesifieke verwysing na die “action for wrongful conception” en die “ADR proses”*. (Doctoral thesis, Potchefstroomse Universiteit vir Christelike Hoër Onderwys, South Africa). Available at https://repository.nwu.ac.za/bitstream/handle/10394/156/crous_alettaj.pdf?sequence=1: p 300.

¹² Nylund, A. 2014. “Access to Justice: Is ADR a Help or Hinderance?”. In Ervo, L & Nylund, A (eds). *The future of Civil Litigation – Access to Courts and Court-annexed Mediation in the Nordic Countries*, Switzerland: Springer International Publishing, p 325.

¹³ Shamir (2003: p 4).

¹⁴ Tahura, U, S. 2019. “Does mandatory ADR Impact on Access to Justice and litigation costs?”. *Australasian Dispute Resolution Journal*, Volume No. 30 (1), p 32.

increasingly embracing a model of justice that is influenced by individual preferences. This is evident in the allowance for litigants to exercise creativity and pursue their own subjective notions of fairness, drawing upon non-legal values such as cultural norms, moral principles, and personal ethics. Consequently, litigants are both obligated and empowered to assume the role of decision-makers in their own cases.¹⁵

To serve as a possible resolution to the hindrances mentioned above, the amended Rules of the High Court came into force on 16 April 2014¹⁶ and introduced court-connected mediation in the High Court of Namibia.¹⁷ This serves as a form of compulsory mediation in Namibia for certain and selected disputes.

In studying the implementation of court-connected mediation in Namibia, it is evaluated whether this programme can be said to act as a remedy for and promotion of access to justice in Namibia.

1.2. Statement of the Problem

It has become evident that litigation, and direct access to justice, is being impeded by several factors which interfere and restrain access to justice. These factors are inter alia, case backlog in the courts, costly trials and Namibians' lack of understanding of their rights and responsibilities. The common law on *locus standi* also impedes access to justice by limiting individuals' capacity to approach the courts to resolve issues in which they do not have a direct interest in the relief sought.¹⁸ Furthermore, Namibians find it challenging to associate with the ideal of access to justice as guaranteed within

¹⁵ Nolan-Haley, J. M. 1996. "Court Mediation and the search for Justice through Law". *Washington University Law Review*, Volume No. 74 (1), pp 63-64.

¹⁶ Government Notice 4 published in Government Gazette 5392 of 17 January 2014.

¹⁷ Damaseb, P, T. 2014. *Honourable Mister Justice Damaseb speech at the accreditation ceremony for court-connected alternative dispute resolution mediators*. Available at <https://ejustice.jud.na/High%20Court/Media/Pages/Speeches.aspx>. Further referenced to as "Damaseb Speech (2014)".

¹⁸ *Jacobs en 'n Ander v Waks en Andere*, 1992 (1) SA 521 (A) at 533J – 534C5.

the Constitution.¹⁹ With the implementation of court-connected mediation in 2014, it has become evident that many litigation matters can be settled by referring the matter to mediation.

Unfortunately, it can be observed in legal practice that most Namibians are not aware of the ADR processes available to be explored as a first step to litigation. Very often, disputing parties are not informed of the availability of this option and the advantages which these ADR procedures, which include court-connected mediation, pose and as such, these avenues are not explored. Further to this, some legal professionals hold the perspective that mediation is a relatively insignificant procedural step in the litigation process, which they tend to disregard or intentionally evade.²⁰ This perspective has become a common perception amongst legal practitioners. It can be concluded that many legal practitioners are not advocates for ADR processes, in addition, those that are readily willing to use ADR processes to resolve disputes are often not properly trained to assist their clients to pursue these procedures to its full benefit.

This study outlines the struggles experienced by Namibians in realising their right to access to justice and furthermore explores the various factors which hinders access to justice. The core research problem of this study is to investigate whether court-connected mediation can be instrumental in promoting the cumbersome access to justice in Namibia.

¹⁹ Act 1 of 1990.

²⁰ Palmeira, N. 2012. *Mediation in Divorce Matters*. Available at <https://www.mclarens.co.za/mediation-in-divorce-proceedings/>; last accessed on 12 January 2024.

1.3. Objectives of the study

The objectives identified and pursued in this study are:

- (1) To identify the challenges and various factors which hinder access to justice in Namibia, indicating that there is a lack of access to justice in Namibia being the core problem identified in this study;
- (2) To critically evaluate and analyse the court-connected mediation programme introduced in the High Court rules in 2014 and demonstrate the impact which this programme can have as a probable solution to the issue of a lack of access to justice in Namibia;
- (3) To propose possible recommendations to improve on the current court-connected mediation programme in Namibia; and
- (4) To investigate the prospects, challenges, opportunities and possible effects that the introduction of court-connected mediation may have on the promotion of access to justice in Namibia.

1.4. Hypothesis

ADR, specifically court-connected mediation, poses many advantages to dispute resolution. This study signifies that the introduction of court-connected mediation may substantially serve as a resolution to the hindrances to and lack of access to justice.

1.5. *Significance of Study*

In 2014, the implementation of court-connected mediation was introduced, under rules 38 and 39²¹ of the High Court Rules as a solution to address, *inter alia*, the burdens of case backlog on the High Court of Namibia,²² to reduce costs spent on legal fees and to expedite resolution of disputes, thereby promoting access to justice. The study aims to evaluate and demonstrate the impact of this implementation as a solution to the hindrances stated above.

Another significance of the study is to explore various other areas where this procedure can be applied with the aim of promoting access to justice in an affordable and timely manner. The recommendations of the study may be employed by the High Court to identify certain weaknesses in its mediation programme and to expand and improve thereon. Court-connected mediation can further be labeled as compulsory mediation. By proposing a form of compulsory mediation for certain types of disputes, the study seeks to set a framework that may be used by the Law Reform and Development Commission and eventually be proposed to Parliament.

The further significance of this thesis is that, within the extensive research done for this study, only one other Namibian publication which deals with court-connected and/ or compulsory mediation in the High Court could be identified. This publication was published by Justice Damaseb in the Namibian Law Journal under the topic ‘Court-Connected Mediation in the High Court of Namibia’.²³ Notwithstanding the existence of this article, this thesis remains unique in its execution since, while this

²¹ Rules of the High Court of Namibia: High Court Act, 1990 as in Government Notice 4 published in Government Gazette 5392 of 17 January 2014 (Further references will be made as “High Court Rules”).

²² Hereinafter referred to as only “the High Court”.

²³ Damaseb, P, T. 2019. “*Court-connected Mediation in the High Court of Namibia*”. *Namibia Law Journal*, Volume No. 11 (01), pp 29-46.

study builds on certain concepts discussed by Damaseb in his article, particularly regarding the operational aspects of court-connected mediation, this study offers a more comprehensive examination of the Namibian justice system's challenges, comparing Namibia's mediation framework to that of Tanzania and India²⁴ which provides innovative approaches to addressing challenges in the Namibian system and offers a detailed critique of obstacles like the lack of public knowledge and professional engagement. This comparative analysis, combined with a deeper exploration of socio-legal factors, marks this thesis as original in scope and content. This study further also extends beyond the technical aspects outlined by Damaseb and provides a more policy-oriented and reform-focused outlook.

Thus, the dissertation can be deemed original, as it not only synthesizes but expands upon the earlier findings by Damaseb, offering a broader context and deeper exploration of ADR's impact on access to justice in Namibia. This thesis therefore makes a meaningful contribution to legal scholarship by filling a gap in the literature on ADR and access to justice in Namibia.

1.6. *Limitations of the Study*

The base research for this study is limited to reviewing previous research papers and other academic writings on the limitations of access to justice and the introduction of court connected mediation to curb this limitation. Except for the reporting done by the High Court of Namibia and the feedback provided by the Honourable Justice Damaseb, not much Namibian literature is available for reference, which presented a major limitation in terms of research. There is no existing feedback on the implemented process of court-connected mediation in Namibia from court-accredited

²⁴ See discussion under Chapter 6.

mediators or attorneys who frequently engage in these proceedings. To extend the research field, this study therefore also focuses on discussions of court-connected mediation, not only in Namibia, but also other jurisdictions, to overcome the limited academic material available. The information gathered from international literature and academic writing on the subject of court-connected mediation was insightful to contribute to the recommendations recorded herein.

This study will be limited to ADR in civil matters and will not include criminal and labour matters.

Notwithstanding the timeous submission of an application for ethical clearance, the approval thereof was not granted in time for proper interviews to be conducted with parties whose contributions could have been of great value to this study. To overcome this limitation, guidance was simply sought from these parties on their proposals for certain main themes to explore and guidance on academic articles to be studied and referenced.

Lastly, the time in which this study was completed was also limited due to the change in supervisors. This limitation was navigated by continuing with research and writing of the thesis without proper guidance, while great reliance was placed on the co-supervisor to ensure that the study remained aligned with certain expectations.

1.7. *Theoretical framework*

Different legal theories have been developed over time and throughout different societies. For purposes of this study, two important theories were analysed and interpreted to reach the objectives of this study and address the problem statement. The theories used for this study theorises the solution to the research questions as

hypothesised in this study, being the use of court-connected mediation to promote access to justice. These theories include theories on natural law and a specific theory on justice.

Theories on natural law are the earliest of all law theories, which originated from the Greek and Roman philosophers such as Plato (427 – 347 BCE) and Aristotle (384 – 323 BCE).²⁵ These theories were later followed, commented on and developed by, *inter alia*, John Locke (1632 – 1704) and Jean-Jacques Rousseau (1712 – 78). These philosophers' studies, which lead to the formulation of their theories, was based on the relationship between nature and society.²⁶ This also includes the relationship between the perfect ideal of justice (the law of nature) and the imperfect reality of laws (society's man-made laws).²⁷

The Greek and Roman theories on natural law refused to yield final authority to laws imposed and made by man.²⁸ Plato argued that, if all members of a society fulfil their respective social functions satisfactorily there will be no need for a formal legal system.²⁹ Aristotle's theory aligned with Plato's, but he relays his important opinion on distinguishing civil law from natural laws as follows: "Natural law is that which has the same validity everywhere and does not depend on acceptance; civil law is that which in the first place can take on form or another indifferently, but which, once laid down, is decisive."³⁰ He was thus not opposed to man-made laws, but indicated that they should differ from society to society to fit its needs.

²⁵ Johnson, D, Peter, S, du Plessis, M. 2001. Jurisprudence – A South African Perspective. 5.

²⁶ Abyssinia Law. 2022. Introduction to Law and Law of Persons – *Major Theories of Law*. Available at <https://abyssinialaw.com/study-on-line/390-introduction-to-law-and-law-of-persons/7349-major-theories-of-law>; last accessed on 12 December 2023.

²⁷ Johnson et al. (2001: p 5).

²⁸ Ibid.: p 123.

²⁹ Ibid.: p 8.

³⁰ Ibid.: p 13.

John Locke's theory on natural law is important for purposes of this study since it was his perception that in the original state of nature, all should be equal amongst another without subordination or subjection and that human beings are essentially individuals who are competing for scarce resources.³¹ Jean-Jacques Rousseau bases parts of his theory of natural law on the social contract which emphasizes that individuals coming together to agree to a social compact will always precede hierarchies based on wealth and power.³² This is in line with Locke's view of equality.

Part of the purpose of this study is to interpret these theories and indicate the influence of natural law upon the procedures to be implemented to resolve disputes using alternative dispute resolution processes. Since access to justice is expressed in the Constitution,³³ the influence of natural law and social contract remain an important contribution to the concept of human rights.

The concept of justice appears notably in the exploration of natural law.³⁴ Various theories and principles have been developed to define and construct 'justice' and 'access to justice'. Throughout the study of law over many years, various theories on justice have been theorized and studied. For the purposes of this study, only one of these many theories of justice will be crucial to theorise the use of court-connected mediation to promote access to justice in Namibia. This theory will be the theory of "justice as fairness".

The American philosopher, Johan Rawls, may be seen as one of the most influential philosophers of the 20th century. Rawls' work mainly deals with justice as the basic

³¹ Ibid.: p 40 & 180.

³² Ibid.: p 47.

³³ Act 1 of 1990.

³⁴ Johnson et al. (2001: p 179).

structure of an organized society, and he presented his theory with the main idea being “justice as fairness” which took on the view of persons being free and equal.³⁵ He bases his approach on a group of equal and rational individuals who seek to secure their own best interests in negotiation with other members of the group. This theory aligns with Locke’s view of human nature.³⁶

His intention with this theory of justice was to generalize and carry the abstraction of the traditional conception of the social contract to a higher level and modifies this theory to include a hypothetical group of individuals confronted with the challenge of developing a theory of justice to regulate their society.³⁷ He based his theory on two main principles of justice which reads as follows:

“First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”³⁸

In his book ‘*A Theory of Justice*’,³⁹ Rawls also considers the rights of a person as protected by the principle of the rule of law. The author observes that the concept of formal justice, which entails the consistent and unbiased enforcement of public regulations, transforms into the principle of the rule of law when implemented within the legal framework. His comment on the rule of law is that one kind of unjust action

³⁵ Pomerleau, W. n.d. *Western Theories of Justice*. Internet Encyclopedia of Philosophy. Available at <https://iep.utm.edu/justwest/>; last accessed 2 June 2023 ; Dylag, M. 2023. “Theorizing Access to Civil Justice”. *Canadian Journal of Law & Jurisprudence*, Volume No. 36 (1), p 117.

³⁶ Johnson et al. (2001: p 180).

³⁷ Rawls, J. 2003. *A Theory of Justice*. Cambridge: Harvard University Press, p 3. ; Johnson (2001: p 180).

³⁸ Rawls (2003: p 53).

³⁹ Rawls. (2003: pp 206-207).

is the failure of judges to apply the appropriate rule or to interpret it correctly.⁴⁰ This comment can undoubtedly be applied to our current legal system which can lead to delayed justice.

The importance of Rawls' theory for this study is to indicate the ever-evolving definition of justice and how society develops same to fit its ever-growing needs. It is evident that, as a society grows, there is a need for the law and legislation to grow and evolve with it. This growth includes different types of conflicts and a society's need to be able to resolve their disputes in a way that serves the specific society best.

Mauro Cappelletti examined the theory of access to justice as a vision faithful to the complexity of human society.⁴¹ His theory included that the access to justice philosophy reflects the attempt to add a social dimension to the Rule of Law and describes the access to justice movement as a 'reform movement' which, as a theoretical approach, leans toward a vision more true to the complexity of human society, while still grounded in the realistic criticism of formalism and legal opinions.⁴² He further discusses the purpose of the access to justice movement in three different waves.⁴³

The first wave of this movement investigated the socioeconomic problems, wants, and demands of a society which required intervention and focused largely on addressing the economic obstacle to access to justice with the introduction of legal aid, since many people faced financial constraints which leads to little or no access to

⁴⁰ Ibid.

⁴¹ Cappelletti, M. 1993. "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement". *The Modern Law Review*, Volume No. 56 (3), p 283.

⁴² Ibid.

⁴³ Ibid.

appropriate and adequate information or legal representation for them.⁴⁴ The second wave is referred to as the organizational wave which attempts to reflect a legal response or solution which incorporates a design for a society to cope with these socioeconomic difficulties and demands.⁴⁵ Lastly, the third wave emphasises the very rationale of this access to justice philosophy, which includes the importance of alternative dispute resolution, and is referred to as the procedural wave since it proposes that, in some cases, standard procedures and traditional methods of dispute resolution seem to be insufficient.⁴⁶

This theoretical framework provides an overview of the origin of the concepts and understanding of natural law and justice and offers this study a clear understanding of how ADR fits into the upholding of these concepts which have been developed and adapted throughout the years.

1.8. Literature review

The notion of justice generally, including access to justice, has been the subject of considerable academic scholarship. These writings have both been general and particular. For example, Amoo⁴⁷ indicates that there is no separation between justice and law and that the concept of justice is just as complex as the law itself. Zongwe⁴⁸ writes in his article which explores “the price of justice in Namibia”, that societies cannot do without law in its broadest sense.⁴⁹ Justice requires defined rules and

⁴⁴ Ibid.

⁴⁵ Ibid.: p 284.

⁴⁶ Ibid.: p 284 & 295.

⁴⁷ Amoo, S, K. 2008. *An Introduction to Namibian Law – Materials and Cases*. Windhoek: UNAM Press, p 50.

⁴⁸ Zongwe, D, P. 2021. "Nobody can Really Afford Legal Services: The Price of Justice in Namibia". *Potchefstroom Electronic Law Journal*, Volume No. 24: p 4.

⁴⁹ Ibid.

concepts that govern societal behavior.⁵⁰ According to Tahura,⁵¹ the notion of justice has been present from the inception of human civilization.⁵² She further argues that justice can be characterized by emphasizing two fundamental foundations and that there are two primary criteria that must be met by the system. Firstly, it should ensure equal accessibility for all individuals. Secondly, it should yield outcomes that are fair both at the individual level and in terms of their impact on society.⁵³ Nolan-Haley refers to three types of justice being justice through law, individualised justice and a hit-or-miss justice.⁵⁴ This is elaborated on in chapter 2 of this study.

Zander⁵⁵ defines access to justice as the concept that incorporates the measures implemented by the government to guarantee that the general public, particularly those who lack financial resources, are able to avail themselves of the advantages provided by the utilization of law and the judicial system. Considering the complexity of our current world, it is no surprise that the needs of individuals have become equally complex. This complexity gave rise to many individuals becoming excluded from a fair determination of their rights which created huge social imbalances around us. Since the 1970's, the phrase access to justice started moving away from only being referenced to as access to courts. It gained a broader meaning which included a close link to the socio-economic situation at a particular moment in time.⁵⁶ This extension of this approach includes the aim of promotion of social inclusion of individuals who are experiencing difficulties in being included in the justice system.⁵⁷ This ultimately

50

Ibid.

51

Tahura (2019).

52

Ibid.: p 31.

53

Ibid.

54

Nolan-Haley (1996: p 51).

55

Zander, M. 2000. *The State of Justice*. London: Sweet & Maxwell, p 6.

56

Hurter, E. 2011. "Access to Justice: To Dream the Impossible Dream?" *The Comparative and International Law Journal of South Africa*, Volume No. 44. (3), p 408.

57

Ibid.

leads to the extension of the meaning of access to justice to include facilitating mechanisms for social inclusion.⁵⁸

Although access to justice and justice for all have been guaranteed by the Namibian Constitution since March 1990, this idealized and optimistic future for Namibian society looks unattainable at this point.⁵⁹ Amoo⁶⁰ confirms the constitutional promise of access to justice to all Namibians in that Namibia operates under the concept of constitutional supremacy and that equality before the law is included under the Bill of Rights and that all Namibians are afforded the opportunity to have their disputes tried by a competent court.⁶¹ Damaseb confirms that Namibia's procedural law is modelled on English law of procedure and evidence, which has the consequence that Namibia applies an adversarial system of trial and determination of civil disputes.⁶² In his book, *Court-Managed Civil Procedure in the High Court of Namibia*,⁶³ he states that a properly functioning legal system must strive to eliminate delay. He concludes by indicating that the continual delays in individual docket disposals often results in increased legal costs which does not only lead to 'justice delayed' for an individual, but also a congested court roll and case backlog, which impedes access to justice overall.⁶⁴

Several obstacles emerge from practice which prevents individuals from optimally implementing their right of access to justice. To name and discuss only a few, the first is perhaps the most obvious, that some, if not most, citizens do not know their rights

⁵⁸ Ibid.

⁵⁹ Zongwe (2021: p 2).

⁶⁰ Amoo (2008: p 324).

⁶¹ Article 12 of The Constitution of the Republic of Namibia, Act 1 of 1990.

⁶² Damaseb (2020: p 73).

⁶³ Ibid.: p 74.

⁶⁴ Ibid.

and cannot afford legal aid to advocate on their behalf and causes litigation to be in the reach of only a privileged few.⁶⁵ A second challenge is the complexity of adjudication which causes legal proceedings to be lengthy and costly. The third problem is case backlog and overburdening of court rolls. Ngcobo AJA expressed that excessive delays have become an obstacle on the effective functioning of the judicial system.⁶⁶ The involvement of courts is dependent upon the voluntary participation of the parties, rendering them passive agents in the legal process. In this context, the utilisation of procedural mechanisms intended to streamline legal proceedings and mitigate potential delays and associated biases is hardly observed.⁶⁷ It can be concluded that, without any doubt, that this overburdens court rolls and causes case backlog which, in its own way, excludes less educated and poorer Namibian citizens from enjoying their fundamental human rights of access to justice. Moreover, the costs of access to legal services seems to have become unaffordable for many Namibians with low or moderate incomes due to the high cost of legal services and thus, the Namibians who seek legal assistance on a daily basis do not have access to the necessary services and may view the constitutional promise of justice as futile and cynical.⁶⁸

Marnewick⁶⁹ proposes that litigation is not always the best way to resolve a dispute,⁷⁰ with which I concur. The author's sentiments are shared by Brand *et al* who identifies

⁶⁵ Nakuta, J & Chipepera, F. n.d. *The Justice Sector and the Rule of Law in Namibia – Management, Personnel and Access*. Namibia Institute for Democracy, Human Rights and Documentation Centre. Available at https://www.nid.org.na/images/pdf/democracy/FrameworK_Namibian_Justice_Sector.pdf, p 31.

⁶⁶ *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC), para 85.

⁶⁷ Ibid.

⁶⁸ Zongwe (2021: pp 2 & 14).

⁶⁹ Marnewick, C, G. 2002. *Litigation Skills for South African Lawyers*. Durban: Butterworths Publishers (Pty) Ltd.

⁷⁰ Marnewick (2002: p 43).

the significant limitations of litigation, which includes that litigation processes are often slow and expensive, that the outcome of litigation may be unpredictable and that the decision maker is usually limited to determining the dispute on terms of the pleadings placed before him.⁷¹ Litigation is backward looking, focusing more on what went wrong or what was or was not done in the past and fails to focus on the future relationship of the parties. Thus, litigation may cause significant harm to the relationship of parties and they conclude that litigation through courts is a public process, which may become the subject of public discussion and debate.⁷² Maclons⁷³ confirms this when he records that the adversarial system enhances the conflict between disputing parties and often results in permanently destroyed relationships between disputants and often an unsatisfactory outcome of the matter.⁷⁴

In line with Rousseau's theory of natural law, in which the social contract emphasizes that individuals should come together to agree to a social compact and that this should always precede hierarchies based on wealth and power,⁷⁵ ADR provides an opportunity for parties to set aside factors such as wealth and political status to find a way to resolve their disputes in an amicable fashion. ADR has been defined as a non-judicial procedure in which a neutral third party facilitates or settles a disagreement, as opposed to the traditional adjudication process conducted by a judge in a court of law.⁷⁶ Wiese identifies the best-known forms of ADR as negotiation, mediation and

⁷¹ Brand, J, Steadman, F & Todd, C. 2016. *Commercial Mediation – a User's Guide*. Cape Town: Juta and Company (Pty) Ltd, pp 13-14.

⁷² Brand et al. (2016: pp 13-14).

⁷³ Maclons, W. 2014. *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System*. (Masters thesis, University of the Western Cape, South Africa). Available at <http://hdl.handle.net/11394/4407>

⁷⁴ Ibid.: p 1.

⁷⁵ Johnson et al. (2001: p 47).

⁷⁶ Tahura (2019: p 32).

arbitration.⁷⁷ The benefits of mediation⁷⁸ were highlighted and recognised in the South Gauteng High Court of South Africa in the matter of *Brownlee v Brownlee*.⁷⁹ In chapter 3 of their book, Brand *et al* lists the key characteristics of mediation, which also serve as the advantages thereof as portrayed in the *Brownlee* matter, as voluntariness, flexibility and informality, confidentiality, without prejudice, impartiality, neutrality and independence of the mediator, parties determine the content and outcome of the dispute, cost saving, speed, opportunity for creativity, preserving ongoing relationships and experienced third party.⁸⁰ This view is supported by Havenga *et al*.⁸¹

However, there are also critics on the disadvantages of the use of mediation. Steyn⁸² argues that mediation always involves some kind of compromise which leaves neither party completely content.⁸³ Nolan-Haley raises the question as to what happens to the law and to justice when mediation occurs. Do they fail in the experience of self-determination and if so, what then happens to the promise of justice through law, particularly where one or all of the parties are not represented by lawyers?⁸⁴ She continues that court-connected mediation undercuts the voluntary characteristic of mediation. Unlike at private mediation where the parties consult a mediator because

⁷⁷ Wiese, T. 2019. *Alternative Dispute Resolution in South Africa – Negotiation, Mediation, Arbitration and Ombudsmen*. Cape Town: Juta and Company (Pty) Ltd, p 4.

⁷⁸ These benefits include assistance by an impartial and trained mediator, costs of mediation being much less than the costs for a trial, it saves time and the burden on the court rolls are lightened.

⁷⁹ *Brownlee v Brownlee* 2010 (3) SA 220 (GSJ) (also commonly referred to as *MB v NB*) para 50-54.

⁸⁰ Brand *et al*. (2016: pp 24-30).

⁸¹ Havenga, P, Havenga, M, Hurter, E, Kelbrick, R, Manamela, E, Manamela, T, Schulze, H & Stoop, P. 2013. *General Principles of Commercial Law*. Cape Town: Juta & Co Ltd, p 285.

⁸² Steyn, Y, C. 2015. *The role of court-based mediation in the resolution of divorce disputes*. (Masters thesis, North-West University, South Africa). Available at https://repository.nwu.ac.za/bitstream/handle/10394/21150/Steyn_YC_2016.pdf

⁸³ *Ibid.*: p 45.

⁸⁴ Nolan-Haley (1996: p 49).

they are stuck, court-connected mediation often provides the parties with a mediator.⁸⁵ Tahura complements the list of disadvantages that unsuccessful private ADR imposes an additional cost.⁸⁶ Mediation abuse has been on the rise where lawyers are unprepared for mediation sessions and in some instances simply using mediation sessions to buy some time. Although these proposed disadvantages cannot be ignored, this study aims to demonstrate that the implementation of compulsory mediation can override some of these factors and ultimately overcome these disadvantages.

Crous⁸⁷ posits the interpretation of the perception of ADR accurately when she quotes as follows: “*We have not turned away from the Courts, but on the contrary are providing and strengthening an adjunct to the work of civil justice, an integral part of a seamless whole.*”⁸⁸ Many courts have adopted an instrumentalist, rather than a transformative or peace-making approach, perceiving mediation as a manner to achieve greater efficiency and reduce dockets. Settlement is the goal of this enterprise, and many judges view mediation as a tool of good court management.⁸⁹

Zongwe⁹⁰ aligns with the notion that not all disputes require legal proceedings for the successful resolution thereof.⁹¹ He further states that, in traditional African societies, the idea of justice is to not set community members against each other through adjudication and litigation, but to reconcile people and restore harmony in society.⁹² Namibia has been familiar with this form of dispute settlement for decades through its customary justice systems. It can be concluded that customary justice systems do

⁸⁵ Ibid.: p 61.

⁸⁶ Tahura (2019: p 31).

⁸⁷ Crous (2002).

⁸⁸ Crous (2002: p 306).

⁸⁹ Nolan-Haley (1996: pp 62-63).

⁹⁰ Zongwe (2021).

⁹¹ Zongwe (2021: p 21).

⁹² Ibid.: pp 21-22.

not aim to resolve disputes through adjudication where it is decided who wins and who losses, but through mediation, seeking to facilitate a settlement that is acceptable to the parties.⁹³

Crous⁹⁴ is of the opinion that ADR is not a simplified version of litigation and is never supposed to act as a replacement for litigation but must serve to complement and supplement it.⁹⁵ This study concurs that ADR can never replace litigation, but can be incorporated as a tool to facilitate the process and address several hindrances to access to justice.

As a result of the problem statement and objectives of the study which this research aims to address, the researcher argues and concurs with literature and writers who advocate for the benefits of the use of ADR in promoting access to justice by introducing a way for individuals to resolve their disputes in a way which they have more control over and which suits their needs for a more expeditious and less costly resolution process.

As is evident from the reviewed literature above, reflections on ADR from a Namibian perspective, including on court-connected mediation, remains relatively limited since there was no available Namibian research on the prospects, challenges and opportunities presented by court-connected mediation in Namibia. This creates a specific knowledge gap on the influence which the introduction of court-connected mediation had on promoting access to justice in Namibia. Whilst cognisant of the emerging literature on ADR, access to justice and court connected mediation, this

⁹³ Peters, E, A & Ubink, J. 2015. "Restorative and flexible customary procedures and their gendered impact: a preliminary view on Namibia's formalization of Traditional Courts". *The Journal of Legal Pluralism and Unofficial Law*, Volume No. 47 (2), p 295.

⁹⁴ Crous (2002).

⁹⁵ Crous (2002: p 302).

research seeks to complement these academic commentaries by contextualising the question of access to justice from a Namibian perspective with a particular focus on court-connected mediation. This study will aim to bridge the gap created by a lack of academic literature and publications dealing with the impact of the introduction of court-connected mediation on the promotion of access to justice by identifying the factors which lead to a lack of access to justice, outlining the benefits of mediation and how the introduction of court-connected mediation can promote access to justice in Namibia.

1.9. *Research questions*

This study is broadly centred around the following central question: What are the challenges, prospects and opportunities, if any, of court-connected mediation in promoting access to justice in Namibia?

Given the broad nature of this questions, the study further considered the following sub-research question, in deducing the actual or potential role of court connected mediation in enhancing access to justice in the Namibian civil system

- 1) What is the legal framework pertaining to access to justice and court-connected mediation in Namibia?
- 2) What benefits and draw-backs, if any, does court-connected mediation have for access to justice as an alternative dispute resolution mechanism in the Namibian civil justice system?
- 3) What principles underly Namibia's civil justice system affecting access to justice in Namibia? and further

4) What comparable lessons, if any, can Namibia derive from other comparable jurisdictions relating to court-connected mediation in Namibia?

1.10. *Research Methodology*

The study employed a qualitative research methodology. Data was collected mainly through desk research from both primary and secondary sources, including but not limited to textbooks, academic articles and journal articles, statutes and subordinate legislation, reports on the activities of the High Court of Namibia and various online sources which may include web-articles, blog posts and institutional websites. This research may be used to study growth in ADR and how its application can benefit access to justice. Conclusions were drawn from the various theories and data collected to pursue the objectives of the study.

Insights and perspectives from selective Namibian court accredited mediators, as well as the Registrar of the High Court of Namibia, were sought in informal discussions and incorporated as a means for verifying the data gathered. This provided a profound understanding of the court-connected mediation system in its current form.

The study also incorporated as part of the qualitative research methodology, a comparative method. This was done in Chapter 6 of the study which analysed the court-connected mediation systems in India and Tanzania. This method of research allowed for a comparison to be drawn between the different jurisdictions on why the process was incorporated into its legal system, how the process is regulated and lastly, how it is similar or different from the process enforced in Namibia. This comparative study also highlighted the strengths and advantages of the Namibian process and formulated recommendations on how court-connected mediation in Namibia could be

improved. The purpose of these comparisons was to deduce possible differences and similarities, that may be used to inform possible proposals for Namibia's ADR architecture.

These specific jurisdictions were chosen for comparison since court-connected mediation was introduced in Tanzania to address the need for the optimization of the judicial process and in India as an attempt to reduce pendency before courts. These jurisdictions thus faced the same challenges as Namibia and similarly opted to introduce court-connected mediation as a solution thereto.

This study relied on the qualitative research methodology and considered it to be the most appropriate method to employ, since the research included findings conducted in various jurisdictions and analysis of recorded data and statistics. For the purposes of this study, this method of research holds an advantage above other forms, since it is based on theories, practical experience and not mere calculations and statistical data.

1.11. *Research Ethics*

This study is solely based on sources and information collected from desktop and academic research, which are all referenced according to the prescribed Namibian Law Journal referencing style. As a result, no questionnaires or individual interviews were employed as a study tool with the intention of facilitating discussions about any subjects or problems that might be delicate, humiliating, or distressing. Regarding the study, no unlawful or other disclosures that would have required legal action, or that could have put research participants at risk, were disclosed. Thus, there was no need to secure insurance and/or indemnification to cover the University of Namibia's

possible legal culpability for injuries sustained by participants as a result of the researcher's conduct.

1.12. *Chapter outline*

Chapter one is the introductory chapter which includes a general introduction relating to access to justice and ADR, the background to the study and the research objectives of the study. In this chapter, the problem statement, significance of the study, literature review and structure of the study are set out. It also includes an outline of the chapters of the study.

Chapter two is a discussion of the access to justice movement and includes a comprehensive definition thereof, what right to access to justice entails, and the obstacles and impediments it encounters in our modern society.

Chapter three sets out the growth and development of ADR and focuses on the definition and different forms of ADR. It continues to analyse and discuss general mediation as a form of ADR which includes definitions and application, characteristics of mediation, advantages and arguments against mediation. This serves to provide the reader with the opportunity to have a profound comprehension of the topic of investigation. This chapter serves as an introductory section to the entire mediation movement.

In Chapter four, the history and shortcomings of the Namibian civil justice system are discussed with an emphasis on the objectives of civil litigation, the introduction of case management thereto and how it informs and affects the access to justice movement.

Chapter five entails a discussion and analysis of court-connected mediation as a form of compulsory ADR. It covers the recent developments in the Namibian civil justice system in relation to court-connected mediation and the nature thereof, which includes Namibian statutes providing for court-connected mediation. The matters in which compulsory mediation can play a significant role and how court-connected mediation compliments litigation (and how compulsory mediation can increase the effectiveness) within a civil justice system is also discussed hereunder.

Chapter six is a comparative study on court-connected and compulsory mediation in Tanzania and India and the lessons to be drawn from these jurisdictions.

Chapter seven provides a summary of the study, records the probable recommendations and its relevance and practical effect in a Namibian context. This chapter most importantly draws conclusions from the study and determines whether the problem statement has been substantively addressed.

CHAPTER 2:

THE ACCESS TO JUSTICE MOVEMENT

2.1. Introduction

Access to justice is a universal and well known concept entrenched in the Namibian Constitution⁹⁶ as a means for people to protect and enforce their rights.⁹⁷ Sackville⁹⁸ accurately points out that access to justice is a popular phrase which conveys a message of both an ideal and an implied promise that this ideal is within a community's reach.⁹⁹ To comprehensively evaluate the meaning of access to justice, the discussion of a mere single definition thereof will not suffice. To be able to fully discuss this, it will be prudent to look at the definitions of "access" and "justice" and to evaluate some approaches employed to determine what access to justice entails. Access to justice is an independent right and provides a means for people to protect and enforce other rights.¹⁰⁰ This chapter will further discuss the fundamental principles of access to justice as a basic human right in Namibia and conclude by examining the challenges or obstacles faced by Namibians associated with access to justice.

⁹⁶ Act 1 of 1990.

⁹⁷ *Brink NO and Another v Erongo All Sure Insurance CC and Others* 2018 (3) NR 641 (SC), para 39.

⁹⁸ Sackville, R. 2004. "Some thoughts on access to justice". *New Zealand Journal of Public and International Law*, Volume No. 2 (1).

⁹⁹ *Ibid.*: p 86.

¹⁰⁰ Hinson, Z & Hubbard, D. 2012. "Access to justice as a human right". *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*. Paper No. 1. Windhoek: Legal Assistance Centre. Available at https://www.lac.org.na/projects/grap/Pdf/access2justice1_human_right.pdf, p 9. Further references will be made as "Hinson et al. Paper No. 1 (2012)".

2.2. *Defining access to justice*

The objective of the law is to achieve a state of harmony among multiple behaviours and to align the interactions between individuals in accordance with the prevailing societal norms.¹⁰¹ Importantly, justice can be defined as the optimal balance between the actions of individuals and the collective actions of society within a rapidly expanding global context.¹⁰²

Cappelletti opines that the concept of access to justice is not easily defined.¹⁰³ His conceptualisation of access to justice centers around the basic purposes of a legal system and identifies individuals' two fundamental pillars of needs when reference is made to access to justice.¹⁰⁴ The first need is that the system should ensure equal accessibility for all individuals and secondly, it should generate outcomes that are fair on both individual level and within the broader social context.¹⁰⁵ The concept of justice extends beyond a mere mechanism for resolving conflicts, regardless of whether it is implemented inside a formal legal framework or alternative dispute settlement mechanisms.¹⁰⁶ It can be summarised from the above, that justice should be comprised of equal access and proper remedy through an easily accessible process which holds litigant's satisfaction at its core. The absence of any of these components would alert to and raise the argument of whether justice has been ensured or not.¹⁰⁷

¹⁰¹ Nolan-Haley (1996: p 48).

¹⁰² Nolan-Haley (1996: p 48).

¹⁰³ Cappelletti, M, & Garth, B. 1978. "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective". *Buffalo Law Review*. Volume No. 27 (2), p 182.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Tahura (2019: p 31).

¹⁰⁷ Ibid.: p 32.

In her article, *Court Mediation and the search for Justice through Law*, Nolan-Haley refers to different types of justice.¹⁰⁸ For the purposes of exploring the definition of justice for this study, only the first two types will be discussed. The first type of justice is justice through law. This form of justice has its foundation upon adherence to legal rules that litigants often assume when they resort to the judicial system to resolve their conflicts.¹⁰⁹ This form of justice is the most well-known form of justice since there is a tendency that parties resort to the judicial systems to resolve their disputes because they want exactly what the courts have to offer, which is a resolution of their dispute based purely on legal principles.¹¹⁰ Individualised justice is the second type of justice. This is a type of justice which is based on each individual's subjective standards, which ADR programs purport to deliver.¹¹¹ This type of justice suspends the parties' original expectation of justice through law and includes a type of justice which results from each parties' individual preference rather than standards which are externally imposed on term.¹¹² With individualised justice, the parties can be creative and include their own perception of what is fair and equitable based on their own, non-legal values such as their ethics, individual cultures, morals and religious beliefs.¹¹³

In tandem with dissecting the term justice, access indicates the affordability to seek and obtain remedy and justice for grievances through formal or informal institutions.¹¹⁴

¹⁰⁸ Nolan-Haley (1996: p 51).

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.: p 63-64.

¹¹³ Ibid.: 64.

¹¹⁴ Tahura (2019: p 32).

Access to justice can have both a narrow and a broad approach.¹¹⁵ The narrow approach includes Nolan-Haley's first type of justice, justice through law, and Sackville's opinion that access to justice refers thereto that each individual should be treated equally before the law and is concerned exclusively with the operation of the civil justice system.¹¹⁶ This approach views access to justice simply as individual's equal opportunity to access courts, to make use of legal representation and mainly expects dispute resolution in a just, fair, speedy and cost effective manner through the civil justice system.¹¹⁷ When considering the interrelated definitions of justice and access, it becomes evident that access to justice is dependent on the fundamental concept that individuals ought to have the ability to depend on the proper implementation of legal norms.

This narrow approach to access to justice encompasses the capacity of individuals belonging to marginalised populations to proactively address and overcome conditions of human impoverishment by pursuing and attaining redress, via the legal system, for grievances in alignment with principles and standards of human rights.¹¹⁸ Access to justice's narrow approach and general meaning finds its basis in administering justice. Equality, especially within the ambits of the law, is an indispensable element of administering justice.¹¹⁹ Zander¹²⁰ defined access to justice

¹¹⁵ Nyenti, M. 2013. "Access to justice in the South African Social security system: Towards a conceptual approach". *De Jure*, Volume No. 4: p 902.

¹¹⁶ Sackville (2004: p 87).

¹¹⁷ Olivier, M. 2018. *The role of court-annexed mediation in providing access to justice in the resolution of commercial disputes*. (Masters thesis, North-West University, South Africa). Available at https://repository.nwu.ac.za/bitstream/handle/10394/31333/Olivier_M.pdf, p 9-10.

¹¹⁸ Sudarshan, R. 2003. "Rule of Law and Access to Justice: Perspectives from UNDP Experience". Unpublished paper presented to the European Commission Expert Seminal on Rule of Law and the Administration of Justice as part of Good Governance, Brussels, 3-4 July 2003.

¹¹⁹ Tahura (2019: p 31).

¹²⁰ Zander (2000).

as the term of art signifying the arrangements made by the state to ensure that the public at large, and especially those who are indigent, can obtain the benefits available through the utilisation of law and the legal system.¹²¹ In a Namibian context these arrangements by the state are entrenched in, amongst others, the Namibian Constitution and includes the right to access to justice as a means for people to protect and enforce their rights.¹²² Namibia has a progressive, modern constitution that guarantees a remarkable set of rights for individuals. Moreover, the Namibian Constitution contains numerous provisions relating to access to justice which includes Article 6 - Protection of Life; Article 7 - Protection of Liberty; Article 8 - Respect for Human Dignity; Article 10 - Equality and Freedom from Discrimination; Article 11 - Arrest and Detention and Article 12 - Fair Trial.

However, without practical means to enforce those rights, substantive guarantees can all too easily become unattainable.¹²³ The scope of access to justice should thus extend beyond a narrow perspective and include a broader approach, which goes beyond only access to courts. Nyenti argues that the notion of access to justice has undergone a transformation over time, encompassing not just the aforementioned narrow approach and limited interpretation¹²⁴ but also includes a wider scope that incorporates social justice, economic justice, and environmental justice.¹²⁵ Sackville argues that it is necessary to safeguard individuals' rights by means of effective legal mechanisms,¹²⁶ which also includes access to alternative dispute resolution mechanisms to resolve

¹²¹ Ibid.; Zander (2000: p 6).

¹²² *Brink NO v Erongo All Sure*, para 39.

¹²³ Hinson et al. Paper No. 1 (2012: p i).

¹²⁴ that refers to access to legal services and other state services (access to the courts or tribunals that adjudicate or mediate).

¹²⁵ Nyenti (2013: p 902).

¹²⁶ Sackville (2004: p 87).

civil disputes.¹²⁷ Nolan-Haleys' second type of justice, individualised justice,¹²⁸ can be interpreted under the broad approach of access to justice. The concept of access to justice encompasses more than just enhancements to an individual's ability to engage with the judicial system or the provision of legal representation.¹²⁹ The broad approach of access to justice can thus be explained as the capacity of individuals to pursue and attain redress for grievances, whether through formal or informal avenues of justice, while adhering to established human rights norms. UNDP considers access to justice as encompassing various components, including the provision of established legal safeguards, promotion of legal consciousness, facilitation of legal assistance and advice, facilitation of fair and impartial adjudication, enforcement of legal decisions, and the involvement of civil society in monitoring and ensuring accountability.¹³⁰

The public expects a judicial process that is affordable, transparent and accessible. It should be a process which dispenses justice within a reasonable time frame and is fair, impartial and easy to comprehend. This is the standard against which to measure the performance of the High Court, as well as the community's access to justice.¹³¹ The absence of access to justice is evident in situations where citizens, particularly marginalised populations, fear the legal system and perceive it as an unfamiliar construct. This lack of access is further compounded by financial barriers that render the justice system inaccessible for individuals who lack legal representation or the means to secure it. Additionally, limited awareness or understanding of one's rights,

¹²⁷ Olivier (2018: p 10).

¹²⁸ Reference to above paragraph.

¹²⁹ United Nations Development Programme. 2013. "*Analysis of the national studies on the capabilities of the judicial institutions to address the needs/demands of persons with disabilities, minorities and women*". Strengthening Judicial Integrity through Enhanced Access to Justice. Retrieved from <https://www.undp.org/sites/g/files/zskgke326/files/migration/eurasia/Access-to-justice.pdf>, p 6.

¹³⁰ United Nations Development Programme (2013: p 5).

¹³¹ Damaseb First Report (2010: p 20).

as well as the presence of a justice system that lacks character, contribute to the overall lack of access to justice.¹³²

Since Namibia gained independence in 1990, Namibia has demonstrated its commitment to human rights by signing, ratifying, or joining various significant international and regional human rights instruments, protocols, and treaties.¹³³ In 1993, the Vienna Declaration and Programme of Action (VDPA) was adopted at the World Conference on Human Rights in Vienna. Namibia was elected as a member of the UN Human Rights Council in 2013 which placed the responsibility on Namibia to engage the other member states in being a global positive example in matters relating to the respect and promotion of human rights.¹³⁴

The primary recommendation suggested by the VDPA was for each state to carefully assess the merits of developing a comprehensive national action plan. This plan would outline specific measures that the state would undertake to enhance the safeguarding and advancement of human rights within its jurisdiction. In accordance with this suggestion and in light of the request to enhance understanding and consciousness of human rights, the responsibility of formulating a National Human Rights Action Plan (NHRAP) was assigned to the Office of the Ombudsman that acts on behalf of the Government. This plan aims to establish and execute feasible and effective strategies for safeguarding and advancing human rights.¹³⁵

¹³² Lukmaan, I, A, S. 2021. *Access to justice under Legal Services Authority Act – Problems and Prospects*. Available at <https://blog.lukmaanias.com/2021/12/22/access-to-justice-under-legal-services-authority-act-problems-and-prospects/>

¹³³ Republic of Namibia. 2015. National Human Rights Action Plan (2015-2019). Available at <https://www.humanrights.dk/files/media/document/Namibia%20NHRAP%202015-2019.pdf>, p 4. Further references will be made as “NHRAP (2015)”.

¹³⁴ NHRAP (2015: p 4).

¹³⁵ Ibid.

The ultimate goal of this action plan was to fully translate the fundamental rights and freedoms entrenched in the Constitution into practical realities. This investigation was referred to as the Baseline Study on Human Rights in Namibia.¹³⁶ Focus area 6 of the NHRAP was based on the right of access to justice.¹³⁷ In the Baseline Study, access to justice is described as a human rights concept that promotes access to quality and affordable civil and criminal justice for everyone.¹³⁸ The concept of human rights encompasses an assortment of interconnected rights¹³⁹ rather than a singular right. Furthermore, it is interconnected with several other rights that necessitate commitment in order to safeguard the integrity of the legal framework and guarantee equitable and impartial treatment for all individuals within the justice system.¹⁴⁰ Although various international and regional instruments, along with the Constitution¹⁴¹ and legislation, aim to safeguard these rights, the Baseline Study identified various challenges encountered in several key domains, which included access to judicial systems and the right to a fair trial.¹⁴²

More specific to access to justice, the Baseline Study further identified several significant deficiencies pertaining to the right to access to justice.¹⁴³ These include insufficient infrastructure to support the administration of justice, such as a lack of courts and difficulties with the implementation of the Legal Aid scheme.¹⁴⁴ Additionally, there were concerns regarding the high cost of private legal services, an

¹³⁶ Hereinafter referred to as only the baseline study.

¹³⁷ NHRAP (2015: p 31).

¹³⁸ Ibid.

¹³⁹ the most important being equality before the law; the right to a fair trial; the rights of arrested and detained persons; the right to legal representation, and the right to legal aid and assistance.

¹⁴⁰ these include the rights to life, equality and freedom from discrimination, human dignity and the rights of vulnerable groups.

¹⁴¹ Act 1 of 1990.

¹⁴² NHRAP (2015: p 31).

¹⁴³ NHRAP (2015: p 32).

¹⁴⁴ Ibid.

outdated and inadequate legal and regulatory framework, ineffective procedures, guidelines, and systems that contribute to delays in the justice system.¹⁴⁵ Furthermore, there was limited awareness regarding access to justice, as well as challenges with labor arbitration and mediation.¹⁴⁶

The NHRAP vision for the right to justice in the long-term was “a Namibia where everyone has access to quality and affordable justice that is swift and fair”.¹⁴⁷

The discussion of the NHRAP highlights the significance of the right to access to justice in Namibia and underscores the importance placed on improving the quality and accessibility thereof to all Namibians.

2.3. The right to access to justice under Namibian Law

The right to access to justice is included in Namibian law under several legislations. For the purposes of this study, the Namibian Constitution¹⁴⁸, the Legal Aid Act, 1990¹⁴⁹ and the Rules of the High Court of Namibia, issued under section 39 of the High Court Act, 1990¹⁵⁰ will be discussed in the next section.

2.3.1. Namibian Constitution

Firstly, Amoo¹⁵¹ confirms the constitutional promise of access to justice to all Namibians. Namibia operates under the concept of constitutional supremacy.¹⁵² Within the Constitution, equality before the law is included under the Bill of Rights

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ NHRAP (2015: p 33).

¹⁴⁸ Act 1 of 1990.

¹⁴⁹ Act 29 of 1990.

¹⁵⁰ Act 16 of 1990 ; Government Notice 4 published in Government Gazette 5392 of 17 January 2014.

¹⁵¹ Amoo (2008).

¹⁵² Ibid.: p 324.

and the right that all Namibians are afforded the opportunity to have their disputes tried by a competent court is vested.¹⁵³

In addition, the Constitution provides a guarantee of access to justice in order to safeguard fundamental rights and freedoms, ensures the fair administration of justice, adjudicates criminal charges and defines civil rights and obligations.¹⁵⁴ Article 12¹⁵⁵ encompasses the provision that individuals possess the right to a just and fair trial by a Court or Tribunal that is independent, unbiased, and proficient. This right extends beyond criminal proceedings and also includes the resolution and enforcement of civil rights and responsibilities.¹⁵⁶ This provision provides an opportunity for disputes to be settled in any manner, which may or may not include litigation. In Namibia, the effectiveness of the judiciary is typically respected and all persons have an equal opportunity in court for a fair trial. The Constitution further also states that any trial must take place within a fair and reasonable time frame, failing which, the accused¹⁵⁷ should be released. It goes on to determine that any person charged with an offence shall be presumed to be innocent until proven guilty in accordance with the law, after having been granted the opportunity to call witnesses and to cross-examine any witnesses called against them. Such a person shall also be afforded sufficient time and facilities for the preparation and presentation of their defence, both before commencement as well as during the trial. It concludes by also granting such person the right to be represented by a legal practitioner of their choice.¹⁵⁸

¹⁵³ Article 12 of The Constitution of the Republic of Namibia, Act 1 of 1990.

¹⁵⁴ Hinson et al. Paper No. 1 (2012: p 1).

¹⁵⁵ Of Act 1 of 1990.

¹⁵⁶ Hinson et al. Paper No. 1 (2012: p 1).

¹⁵⁷ In a criminal trial.

¹⁵⁸ Namibia Superior Courts. n.d. *Fair Trial*. Available at <https://ejustice.moj.na/ABOUT%20US/Pages/FairTrial.aspx>; last accessed on 3 June 2023.

Similarly, Article 18¹⁵⁹ provides that administrative bodies and officials are obligated to act in a fair and reasonable manner, adhering to the obligations imposed on them by common law and applicable legislation. Individuals who are adversely affected by the actions and decisions of these bodies and officials have the right to seek legal remedy before a competent court or tribunal.¹⁶⁰

In addition to the aforementioned, Article 5¹⁶¹ pertains to the safeguarding of fundamental human rights and freedoms. It stipulates that the fundamental rights and freedoms outlined in the Constitution must be honoured and upheld by the Executive, Legislature, Judiciary and all branches of the Government, as well as its agencies. Furthermore, this obligation extends to all individuals, both natural and legal, in Namibia. The Courts are empowered to enforce these rights as prescribed within the constitution.

More specifically, Article 25(2)¹⁶² provides that individuals who feel wronged and claim that their fundamental right or freedom guaranteed by this Constitution has been violated or infringed, have the right to seek recourse from a competent judicial body in order to uphold or safeguard the said fundamental right or freedom.

It should be noted that this guarantee of access to the courts is not restricted to cases involving fundamental rights and freedoms but applies in any determination of an individual's civil rights and obligations.

Therefore, the right to access to courts serves not only as a mechanism for safeguarding and upholding certain substantive rights. Instead, it might be argued that

¹⁵⁹ Of the Constitution.

¹⁶⁰ Hinson et al. Paper No. 1 (2012: p 2).

¹⁶¹ Of the Constitution.

¹⁶² Of the Constitution.

the right to an "independent, impartial and competent court" is inherently significant, as it grants individuals the entitlement to have their rights determined. It is imperative to note that these provisions should be examined in conjunction with Article 10,¹⁶³ which stipulates that all individuals are to be treated equally before the law.¹⁶⁴

Other articles further strengthen the freedom to access courts. According to Article 80(2),¹⁶⁵ the High Court is entrusted with primary jurisdiction to examine and settle all civil disputes, encompassing cases that pertain to the interpretation, execution, and preservation of the Constitution as well as the fundamental rights and freedoms provided therein. Article 24(3)¹⁶⁶ explicitly prohibits any derogation or suspension of the fundamental rights and freedoms safeguarded by Articles 5, 12, and 18 of the Constitution and strictly prohibits the denial of any individuals' access to legal practitioners or a Court of law.

Article 95 of the Constitution¹⁶⁷ generally provides for the promotion of the welfare of the people. Article 95(h) specifically provides for a “... *legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State.*”

Notwithstanding the Constitutional promise of the right to access to justice, theory and reality do not always meet.

¹⁶³ Constitution of Namibia.
¹⁶⁴ Hinson et al. Paper No. 1 (2012: p 1).
¹⁶⁵ Of the Constitution.
¹⁶⁶ Of the Constitution.
¹⁶⁷ Act 1 of 1990.

2.3.2. Legal Aid Act, 1990

The costs of access to legal services has become unaffordable for many Namibians with low or moderate incomes due to the high cost of legal services and thus, the Namibians who seek legal assistance on a daily basis do not have access to the necessary services.¹⁶⁸ It is challenging to have a legal system that hinders or prohibits low- and middle-class claimants from accessing the courts. As already established, access to justice is a human right that is protected by Namibia's Constitution, as well as international agreements to which Namibia is a party. It is a violation of an individual's human rights to essentially prevent a significant segment of the populace from having access to the legal system due to financial strain.¹⁶⁹

It is even more concerning that the system essentially denies low income citizens the same access to the courts while permitting the wealthy individuals to use the courts to settle their disputes. Lower-class plaintiffs should not be discouraged or prevented from attempting to defend their rights against a stronger opponent by the court's regulations due to a lack of financial aid.¹⁷⁰

The Legal Aid Act, 1990¹⁷¹ supports and promotes the individual's right to access to justice in the sense of affordability thereof. The purpose of this Act is for the provision of legal aid in both civil and criminal cases to the individuals whose finances prevent them from hiring attorneys to represent and assist them in a legal dispute.¹⁷² The goal of Namibia's legal aid program is to address the issue as pointed out above.¹⁷³

¹⁶⁸ Zongwe (2021: pp 2 & 14).

¹⁶⁹ Hinson, Z & Hubbard, D. 2012. "Costs and Contingency Fees". *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*. Paper No. 3. Windhoek: Legal Assistance Centre. Available at https://www.lac.org.na/projects/grap/Pdf/access2justice3_costs.pdf, p 13. Further references will be made as "Hinson et al. Paper No. 3 (2012)".

¹⁷⁰ Hinson et al. Paper No. 3 (2012: p 14).

¹⁷¹ Act 29 of 1990.

¹⁷² Act 29 of 1990 at the purpose of the Act.

¹⁷³ Hinson et al. Paper No. 3 (2012: p 14).

In line with article 95 of the Constitution¹⁷⁴ and in terms of the Legal Aid Act¹⁷⁵ any person may apply for legal aid. However, such relief will only be provided if the applicant can prove that he either earns a minimal income or receives no income at all.¹⁷⁶

Legal aid in Namibia will be further discussed under section 2.5.3.

2.3.3. High Court Act, 1990 read with Rules of the High Court, 2014

The Rules of the High Court of Namibia is issued under section 39 of the High Court Act, 1990¹⁷⁷ to prescribe the manner in which proceedings should be conducted in the High Court of Namibia.

In terms of rule (1)(2),¹⁷⁸ the rules are implemented to give effect to Article 12(1) of the Constitution and rule 3¹⁷⁹ prescribes that the overriding objective of these rules is to facilitate the real issues in dispute between disputing parties and that the resolution of disputes must be done in a just, expeditious, efficient and cost-effective manner. The rules of the High Court are the basis for judicial case management¹⁸⁰ which was implemented in Namibia to promote access to justice by, *inter alia*, addressing case backlog,¹⁸¹ decreasing postponements of cases,¹⁸² encouraging early trial preparation¹⁸³ and introducing a form of court-annexed mediation.¹⁸⁴

¹⁷⁴ Act 1 of 1990.

¹⁷⁵ Act 29 of 1990.

¹⁷⁶ Namibia Superior Courts. n.d. *Access to Justice and Legal Representation*. Available at <https://ejustice.jud.na/ABOUT%20US/Pages/AccessToJusticeandLegalRepresentation.aspx>

¹⁷⁷ Act 16 of 1990 ; High Court Rules.

¹⁷⁸ of the High Court Rules.

¹⁷⁹ of the High Court Rules.

¹⁸⁰ Damaseb First Report (2010: p 5).

¹⁸¹ Damaseb First Report (2010: p 15).

¹⁸² Ibid.: p 17.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

2.4. The right to access to justice under international law

Article 144 of the Constitution provides that all international agreements which are binding upon Namibia under the Constitution, forms part of Namibian law. This essentially means that all international covenants, declarations and conventions to which Namibia subscribes and adheres, is incorporated, under the Constitution, into the common laws of Namibia and must be enforced and adhered to in Namibia.

Moreover, access to justice is a vital human right. The Universal Declaration of Human Rights (UDHR)¹⁸⁵ which was ratified by the United Nations General Assembly on 10 December 1948, includes numerous articles which emphasise the importance of access to justice.

According to Hinson and Hubbard,¹⁸⁶ a declaration is only regarded as encouraging and recommendatory, rather than being considered binding. However, over the years, the UDHR has gained significant legal status since it has been regarded and referred to as “the grand statement of the human rights movement”. In addition, it is also considered relevant to the development of different norms and influence on state policies. The UDHR, to the degree that it comprises customary international law, is applicable in Namibia under Article 144 of the constitution.¹⁸⁷

Article 8 of the UDHR makes provision for the right to a successful remedy from the appropriate national tribunals when an individual’s rights have been violated by the constitution or any other law. Moreover, article 10 of the UDHR states that every individual has an equal right to a fair and public trial before an impartial, independent tribunal in determining their rights and obligations, as well as any criminal accusations

¹⁸⁵ The Universal Declaration of Human Rights (1948).

¹⁸⁶ Hinson et al. Paper No. 1 (2012).

¹⁸⁷ Hinson et al. Paper No. 1 (2012: p 4).

brought against them. Consequently, challenges to a fair and public hearing, or to an effective remedy for the violation of an individual's rights, violate human rights as outlined in the UDHR.

The notion of universal access to justice under international law was strengthened on 23 March 1976, when the International Covenant on Civil and Political Rights (ICCPR)¹⁸⁸ came into effect, in which the right to access to courts is guaranteed.¹⁸⁹

Article 2 of the ICCPR stipulates that each State Party to the ICCPR will ensure that any individual whose rights and freedoms, as recognised in the ICCPR, have been compromised or violated, shall be granted an effective remedy to such violation.¹⁹⁰ It further includes the obligation to ensure that any individual seeking such remedy has their right determined by competent judicial, administrative, or legislative authorities, or by any other competent authority specified under the specific State's legal system.¹⁹¹

Further to the above, article 14 of the ICCPR reflects the express guarantee of article 12 of the Constitution in which “all persons shall be equal before the courts and tribunals”. Article 14 of the ICCPR also provides that each individual shall be entitled to a fair and public hearing before a qualified, impartial, and independent tribunal established by law when determining any criminal charge or dispute in terms of their rights and obligations in a legal matter.¹⁹²

The most explicit provision of an individual's guarantee of access to courts is entrenched in article 7(1) of the African Charter on Human and People's Rights

¹⁸⁸ International Covenant on Civil and Political Rights (1966).

¹⁸⁹ Article 14.

¹⁹⁰ Article 2(a).

¹⁹¹ Article 2(b).

¹⁹² Hinson et al. Paper No. 1 (2012: p 3).

(ACHPR).¹⁹³ This article states that each person has the right to have their matter heard. Article 7(1) follows to provide that this right also entails the right to appeal to relevant national organs against actions of infringing his fundamental rights as recognised and guaranteed by the conventions, laws, regulations, and customs in force;¹⁹⁴ the right to be deemed innocent until proven guilty by a competent court or tribunal;¹⁹⁵ the right to defend any matter brought against a person, which includes the right to be represented by a legal counsel or representative of each person's choice;¹⁹⁶ and the right to have a matter go to trial within a reasonable time and be heard by an impartial court or tribunal.¹⁹⁷

Article 7(1) must be read in conjunction with Article 3 of the ACHPR, which provides that every individual has the right to equal protection under the law. Similar to this provision, the Namibian Constitution¹⁹⁸ also provides for the guarantee of equality before the law.¹⁹⁹ Unfortunately, in both local and international instances some people are denied equal protection under the law by a judicial system that does not provide everyone in such society, regardless of their financial situation, meaningful access to the courts.²⁰⁰

Moreover, Article 1 of the ACHPR is one of the most important articles of the charter. This article conveys an obligation onto the parties to the current Charter to acknowledge the rights, obligations, and liberties outlined therein and required these parties to take legislative or other action to put them into effect. As a positive result

¹⁹³ African Charter on Human and People's Rights (1981).

¹⁹⁴ Article 7(1)(a).

¹⁹⁵ Article 7(1)(b).

¹⁹⁶ Article 7(1)(c).

¹⁹⁷ Article 7(1)(d).

¹⁹⁸ Act 1 of 1990.

¹⁹⁹ Article 12 of the Constitution.

²⁰⁰ Hinson et al. Paper No. 1 (2012: p 3).

of this article and Namibia's adoption of the ACHPR, the Namibian government is tasked not only to recognise the right to access to courts but also to take proactive steps to give effect to this right, such as adopting legislation or other measures.²⁰¹

2.5. *Obstacles to access to justice*

In capturing the definition and approaches to access to justice above, Ngcobo J's statement made in his speech delivered at the Access to Justice Conference on 6 July 2011 in Johannesburg, introduces this section on the obstacles in attaining access to justice when he states that:

*“access to justice suffers...when the costs of litigation are prohibitive; when the procedures and processes are unduly complicated or burdensome; and when delays are too long for the average person.”*²⁰²

Several problems with access to justice emerge from practice since there is often not a procedure offering accessible and appropriate assistance to solve the disputes between parties or legal issues of individuals.²⁰³ The list of these obstacles is unlimited, but for purposes of this study, the following obstacles will be examined. The first obstacle is locus standi, with reference to common law rules and the stringent principles applicable to the principle of locus standi. The next is perhaps the most obvious, that some citizens do not know their rights. Namibians are not adequately educated about their rights and responsibilities and do not have the knowledge or information to understand when their rights are being infringed and to know what can be done about it. Thirdly, legal proceedings are lengthy and costly which infringes the

²⁰¹ Hinson et al. Paper No. 1 (2012: p 3).

²⁰² Ngcobo (2011: p 18).

²⁰³ Nolan-Haley (1996: p 4).

fairness of access since it is common cause that many Namibians cannot afford legal aid to advocate on their behalf.²⁰⁴ Lastly, and probably the main challenge faced by Namibian Courts, is case backlog. Because of these listed obstacles, Namibians find it difficult to access justice as promised in, *inter alia*, Articles 5 and 12 of the Constitution.

2.5.1. Common law rules, stringent principles and its application on *locus standi*

Locus standi is a Latin term which means “a place to stand”.²⁰⁵ In a legal perspective, *locus standi* refers to the entitlement of a person or entity to bring a matter before court.²⁰⁶ Since the rules on *locus standi* determine whether an individual can seek redress in court, it has a profound impact on an individual’s ability to uphold, protect and enforce his or her fundamental rights and possibly defend the rights of others. Progressive legislation and the effective enforcement of constitutional rights can be impeded by these restrictive standing rules.²⁰⁷

Namibia’s existing laws on *locus standi* are very stringent. It requires that the applicant must be able to prove that they have an immediate and significant interest in the subject matter and result of the matter brought before court.²⁰⁸

Emphasis is placed on Articles 18 and 25(2) of the Constitution which confers the right to “aggrieved persons” to approach the courts when their fundamental rights and

²⁰⁴ Nakuta et al. (n.d.: p 35).

²⁰⁵ Martin, E, A (Ed). 2003. *A Dictionary of Law*. Market House Books Limited: Oxford University Press, p 296.

²⁰⁶ Hinson, Z & Hubbard, D. 2012. “Locus Standi: Standing to bring legal action”. *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*. Paper No. 2. Windhoek: Legal Assistance Centre. Available at https://www.lac.org.na/projects/grap/Pdf/access2justice2_locus_standi.pdf, p ii. Further references will be made as “Hinson et al. Paper No. 2 (2012)”.

²⁰⁷ Ibid.

²⁰⁸ Ibid.: p i.

freedoms have been violated²⁰⁹ or to seek redress from the courts when aggrieved by the acts of administrative bodies.²¹⁰ The term “aggrieved person” is not defined in the Constitution.

In the matter of *Arthur Frederick Uffindell t/a Aloe Hunting Safaris v Government of Namibia*,²¹¹ Maritz J recorded that, for an individual to be able to bring a matter before court, there must be a connection between the contested administrative action and the applicant's purportedly violated constitutional rights and legal interests.²¹² He further noted that the connection must be sufficiently direct and substantial to give the applicant the legal right to challenge the action under Article 25(2) of the Constitution as an "aggrieved person."²¹³

Botha AJ clarified the requirements of locus standi in *Jacobs en 'n Ander v Waks en Andere*²¹⁴ to add that the most common way of describing the requirement is to state that a claimant or applicant must have a direct interest in the relief sought and the interest must not be too remote.²¹⁵ It can also be stated that, depending on the context of the facts, that there must be a real interest, not abstract or academic, or it must be a present interest, meaning it should not be a hypothetical interest.²¹⁶ Inevitably, such restricted standing requirements may hinder even progressive laws from adequately protecting individuals' rights and interests.²¹⁷

²⁰⁹ Article 25(2) of the Constitution.

²¹⁰ Article 18 of the Constitution.

²¹¹ *Arthur Frederick Uffindell t/a Aloe Hunting Safaris v Government of Namibia and 4 others* 2009 (2) NR 670 (HC).

²¹² *Ibid.*: para 11.

²¹³ *Ibid.*

²¹⁴ *Jacobs v Waks*.

²¹⁵ *Ibid.*: p 24.

²¹⁶ *Ibid.*

²¹⁷ Hinson et al. Paper No. 2 (2012: p 3).

Namibia's common law standing provisions also apply to seeking declaratory relief. One of the primary issues with these restricted standing rules is that they might protect certain provisions or laws from being challenged on their validity or constitutionality.²¹⁸ The argument is made that common law standing does not provide proper access to justice as required by Namibia's Constitution.

It is thus evident that the common law principles and the stringent principles which are applied to locus standi can impede an individual's access to justice since there may be cases where the issue of locus standi can exclude individuals from bringing a matter before court, even though they may be affected by the underlying issues of the matter.

2.5.2. Lack of knowledge of rights

In Namibia, there is seldom a separation and differentiation made between justice and law, making the concept of justice just as complex as the law itself.²¹⁹ It is common cause that the content and procedural working of the law is not simple and straightforward, which leads to the vast majority of the population not being aware of their legal rights or which procedures to use.²²⁰ A large percentage of the population lacks awareness of their legal rights, resulting in an inability to identify instances when their rights are being violated. Equally important, as the demands of modern societies grow increasingly complex, the Namibian legal system is following suit and developing an abundance of new forms of legal expression.²²¹ As the laws of the country are being adapted to serve the needs of its community, it can be argued that

²¹⁸ Hinson et al. Paper No. 2 (2012: p i).

²¹⁹ Amoo (2008: p 50).

²²⁰ Nolan-Haley (1996: p 3).

²²¹ Shamir (2003: p 2).

the laws have become increasingly inaccessible as they become too detailed, too open for own interpretation and too technical.²²²

Many people also experience discomfort while appearing in court without legal representation, due to their limited understanding of court procedures and unfamiliarity with utilising the judicial system. This discomfort is particularly prevalent among those who perceive the courts and legal system as primarily serving the interests of the privileged, fortunate and affluent, rather than safeguarding the rights of all individuals.²²³

When the fairness of this right is jeopardised, when the legally "correct" solution may not be the preferred as the best solution for the parties, a more fundamental barrier to access to justice prevails.²²⁴ Uneducated and uninformed individuals are not in a position to distinguish between the different forms of dispute resolution. Moreover, they do not know the processes and procedure available to them when their rights are being violated.

2.5.3. Prolonged adjudication and costly proceedings

The crucial components for achieving access to justice are timeliness and affordability.²²⁵ Ngcobo AJA stated that inordinate delays have become a blemish in the administration of justice.²²⁶ Regardless of the value of the claim or the complexity of the matter, constant postponements results in many cases being only partly-heard and thus the case needs to be re-enrolled for completion, which inevitably causes the tendency of trials in Namibian to be long and drawn out.²²⁷ Coupled with this, the

²²² Nolan-Haley (1996: p 3).

²²³ Hinson et al. Paper No. 1 (2012: p 8).

²²⁴ Nolan-Haley (1996: p 3).

²²⁵ Sackville (2004: p 87).

²²⁶ *Aussenkehr v Namibia Development Corporation*, para 85.

²²⁷ Damaseb First Report (2010: p 9).

overburdened court rolls²²⁸ detrimentally effect the timely resolution of civil disputes and directly excludes the poorer communities from securing their right to access to justice.²²⁹

Since the time span it takes from the commencement to the finalisation of litigation is inseparably linked to the cost of the litigation, many prospective litigants refrain from filing lawsuits because of the high cost involved. Due to the instruction and inclusion of legal counsel to assist individuals in most civil litigation cases, the costs of litigating in Namibia is relatively high. In Namibia, individuals have the right to self-representation.²³⁰ Nevertheless, the successful pursuit of a civil case necessitates the engagement of a private attorney, which incurs significant financial costs. This scenario presents a significant challenge for persons who lack financial resources and are unable to engage the services of a legal representative of their preference.²³¹ It is certain that individuals who are already struggling to survive financially cannot afford to spend the little money they have on filing lawsuits and instructing legal counsel to act on their behalf.²³² The Legal Aid Act²³³ makes provision for:

*“ the granting of legal aid in civil and criminal matters to persons whose means are inadequate to enable them to engage practitioners to assist and represent them. ”*²³⁴

It is important to note that such relief will only be provided if a litigant earns a minimal income or is without any income.²³⁵ According to the official website of Namibia’s

²²⁸ Which will be discussed in more detail when dealing with case back log in this thesis.

²²⁹ Maclons (2014: p 1).

²³⁰ Namibia Superior Courts *Access to Justice and Legal Representation* (n.d.).

²³¹ Namibia Superior Courts *Fair Trial* (n.d.).

²³² Hinson et al. Paper No. 1 (2012: p 8).

²³³ Act 29 of 1990.

²³⁴ Act 29 of 1990 at the purpose of the Act.

²³⁵ Namibia Superior Courts *Access to Justice and Legal Representation* (n.d.).

Legal Aid, legal aid is available to all Namibian citizens who are unable to afford legal representation in either civil or criminal matters.²³⁶ Upon application by an individual to receive legal aid, a ‘means test’ will be applied to the person’s financial situation to establish the value of their movable or immovable property and any other sources of income they may receive.²³⁷ A further provision for such application to be successful is that the individual should not, if employed, earn a monthly income exceeding N\$ 3,500.00.²³⁸

In addition to the financial implications associated with litigation and legal professionals, individuals residing in rural areas may encounter challenges in accessing legal services due to the costs associated with transportation to urban areas where attorneys' offices are typically located. This includes expenses related to commuting for the purpose of filing a lawsuit, as well as the potential need to stay in the urban area for the duration of the litigation, particularly during trials that can extend beyond a week without certainty of a timely resolution.

In civil litigation, it is practice to include a prayer for an order that the opposing party must pay the legal costs of the other party. It is the generally accepted rule that costs follow the event.²³⁹ This implies that the party that is unsuccessful in a legal dispute is obligated to cover a certain share of the legal expenses incurred by the successful party. This approach impedes the ability of individuals with public interest lawsuits and low-income litigants to obtain access to justice.²⁴⁰ A litigant who is experiencing financial challenges is likely to face difficulty in affording legal representation and

²³⁶ Republic of Namibia Legal Aid. n.d. *Legal Aid – How it Works*. Available at <https://legalaid.gov.na/how-it-works>; last accessed 2 May 2024.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Damaseb (2020: pp 348-349).

²⁴⁰ Hinson et al. Paper No. 1 (2012: p 17).

may be deterred from pursuing litigation, even if they have a valid claim. This is primarily due to the fear and potential consequences of a cost order being issued against them, which would require them to pay a portion of the opposing party's legal fees, as well as the expense of their own.²⁴¹ To provide some form of support to litigants receiving a cost order against them, the courts have established fixed costs that can be reimbursed to the prevailing party.²⁴² These prescribed fees form part of the Rules of the High Court.²⁴³

In *Afshani and Another v Vaatz*²⁴⁴ the court expressed itself on the purpose of awarding of costs. Maritz JA states it as follows:

*“...the purpose thereof is to create a legal mechanism whereby a successful litigant may be fairly reimbursed for the reasonable legal expenses he or she was compelled to incur by either initiating or defending legal proceedings as a result of another litigant’s unjust actions or omissions in the dispute.”*²⁴⁵

In contrast thereto, it was argued in the South African case of *Greenspan Bros (Pvt) Ltd v Commissioner of Taxes*²⁴⁶ that in the event where two parties have a legitimate dispute which qualifies for adjudication by a competent court of law, it is challenging to understand why the unsuccessful party should be liable for payment of all the legal fees since it is uncommon that this issue of fault falls to only one side.²⁴⁷

²⁴¹

Ibid.

²⁴²

Namibia Superior Courts *Fair Trial* (n.d.).

²⁴³

In terms of Rule 122 of the High Court Rules, the court fees payable in respect of the court are contained in Annexure B.

²⁴⁴

Afshani and Another v Vaatz 2007 (2) NR 381 (SC).

²⁴⁵

Ibid.: para 27.

²⁴⁶

Greenspan Bros (Pvt) Ltd v Commissioner of Taxes 1960 (1) SA 454 (SR).

²⁴⁷

Greenspan Bros v Commissioner of Taxes, para 463.

Nonetheless, it remains the general rule in Namibian law that costs follow the outcome of the matter and that the decision thereon remains within the court's discretion.²⁴⁸

2.5.4. Case backlog and overburdened court rolls

The number of cases filed in the High Court has grown considerably since Namibia gained independence. There is no doubt that this has increased the workload of the judges of the High Court.²⁴⁹ The Registrar of the High Court noted at a stakeholders' conference held in 2010 that at that time, during the past 5 to 7 years, litigation in the High Court increased to double the number of cases.²⁵⁰ Since then, the situation has not changed much. During 2022, the High Court²⁵¹ issued 673 substantive civil and labour applications and 5 517 summonses. In comparison to the 2021 legal year, these statistics showed an increase of 40%.²⁵²

In 2023, the same division of the High Court issued 5544 summonses and 647 substantive civil and labour applications and reviews, of which 117 were brought as urgent applications.²⁵³ The 2023 legal year, in comparison to the 2022 legal year, saw a decrease by 4% between the numbers of substantive applications issued and a 15%

²⁴⁸ *AM v Minister of Home Affairs, Immigration, Safety and Security* 2022 (3) NR 778 (HC), para 36.

²⁴⁹ Damaseb First Report (2010: p 9).

²⁵⁰ Damaseb, P, T. 2010. *Promoting access to justice in the High Court of Namibia: Second Report – The Case for Judicial Case Management, held at Midgard Country Estate, 8-9 October 2010*. Windhoek: Ministry of Justice. Available at <https://ejustice.jud.na/High%20Court/Media/Pages/Publications.aspx>, p 20. Further references will be made as “Damaseb Second Report (2010)”.

²⁵¹ Main division.

²⁵² Namibia Superior Courts. 2022. High Court of Namibia Main Division 2022 Legal Year Report. Available at <https://ejustice.jud.na/High%20Court/Media/Publications/NAHCMD%202022%20Legal%20Year%20Report.pdf>, p 6. Further references will be made as “Legal Year Report (2022)”.

²⁵³ Namibia Superior Courts. 2023. High Court of Namibia Main Division 2023 Legal Year Report. Available at <https://ejustice.jud.na/High%20Court/Media/Publications/NAHCMD%202023%20LEGAL%20YEAR%20REPORT.pdf>, p 6. Further references will be made as “Legal Year Report (2023)”.

decrease in urgent applications issued.²⁵⁴ However, a 5% increase in the number of actions issued during the 2023 legal year can be observed compared to 5 517 summonses issued in 2022.²⁵⁵

Taking the above into consideration, the calendar of the High Court makes provision for 15 weeks of administrative breaks during which trials are not set down for hearing, leaving an estimate of 189 court days per year to conduct trials and hear matters.²⁵⁶

These statistics strengthen the argument that overburdened court rolls cause unnecessary delay in the hearing and finalisation of legal proceedings. Moreover, the statistics also indicate that there are not as many days in a year to conduct mediations.

2.5.5. Technical and bureaucratic nature of the adversarial legal system

Through the influence of English law, Namibia subscribes to the adversarial civil justice system.²⁵⁷ An adversarial justice system stands in contrast to the inquisitorial system.²⁵⁸ The most salient characteristic of the adversarial system is that the disputing parties engage in a legal battle, with the court only serving as an unbiased referee. As long as the parties follow the court's guidelines, the court does not involve itself in the dispute or instruct parties on how to conduct their respective cases.²⁵⁹ This means that the judge has a passive role in calling and interrogating witnesses.²⁶⁰ In contrast, thereto, the inquisitorial system generally aims to get the truth of the matter through extensive investigation and examination of all evidence. The judge is the

²⁵⁴ Legal Year Report (2023: pp 6-7).

²⁵⁵ Legal Year Report (2023: p 7).

²⁵⁶ Damaseb (2020: p 266).

²⁵⁷ Damaseb (2020: p 73).

²⁵⁸ Schmidt, C, W, H. 1989. *Bewysreg*. Durban: Butterworths, p 13.

²⁵⁹ Peté, S, Hulme, du Plessis, Palmer & Sibanda. 2012. *Civil Procedure: A Practical Guide*. Cape Town: Oxford University Press Southern Africa (Pty) Ltd, p xxxv.

²⁶⁰ Schmidt. (1989: p 13).

master of the trial in the sense that he actively guides and controls the search for the truth by dominating the questioning of the witnesses.²⁶¹

The present adversarial system in Namibia is based on the notion that it is the litigants who drive the process of litigation. Litigants and their legal representatives dictate the pace and intensity of litigation²⁶² and if litigants do not take steps necessary to advance the process, the judge may not force them to do so. The litigants can therefore stall the process if they choose and only at the instance of either party may the judge intervene.²⁶³ The role of the judge is that of a neutral and passive umpire with no real power or tools to expedite proceedings. The parties to litigation define the ambit of the dispute and decide what evidence to lead to prove or disprove a case. The rules of court and practices underpinning the adversarial system thus place emphasis on litigants and their legal advisers as the prime drivers of litigation. Because of this emphasis on the interests of the litigants, even the most committed supporters of the adversarial system will recognise that the system is easily manipulated to frustrate the opponent and achieve delay.²⁶⁴

The adversarial justice system in Namibia will be discussed in detail under chapter 4.

2.6. Conclusion

The submission is made that the definition of access to justice should include both the narrow and the broad approach thereto and should consider an individual's right to have their dispute resolved by either a competent court, or by any means of alternative dispute resolution in a fair, just, speedy and cost-effective manner. The improvement

²⁶¹ Bekker, P, M, Geldenhuys, T, Joubert, J, J, Swanepoel J, P, Terblanche, S, S & Van der Merwe, S, E. 2009. *Strafprosesreg.* Cape Twon: Juta and Company (Pty) Ltd, p 22.

²⁶² Damaseb First Report (2010: p 14).

²⁶³ Ibid.: p 15.

²⁶⁴ Damaseb (2020: p 79).

of access to justice should be essential to the development of the Namibian civil justice system.

The Namibian legislation, as outlined and explained above, makes adequate provision for access to justice in Namibia. However, reality does not always meet the ideals captured in legislation. The obstacles to access to justice as discussed in this chapter excludes the poor and uneducated people from using the courts to vindicate their rights. It can be concluded from the above that access to justice becomes a right which can only be enforced by the rich, informed and educated.

Addressing each of these barriers presents a formidable challenge, and while they may necessitate distinct solutions, the implementation of court-connected mediation has been offered as a comprehensive approach to address these impediments.²⁶⁵ The following chapter will analyse ADR in general as a preface to the introduction of court-connected mediation as a catalyst to promote access to justice in Namibia.

²⁶⁵ Damaseb (2020: p 250.)

CHAPTER 3:

GROWTH AND DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION AND THE IMPACT ON ACCESS TO JUSTICE

3.1. *Introduction*

“²⁵Settle matters quickly with your adversary who is taking you to court. Do it while you are still together on the way, or your adversary may hand you over to the judge, and the judge may hand you over to the officer, and you may be thrown into prison. ²⁶Truly I tell you, you will not get out until you have paid the last penny.”²⁶⁶

Because there are limited resources available to accommodate the number of cases filed in the High Court of Namibia and thereby resolve disputes through litigation, it is almost impossible for the court system to deal with all the cases that need to be resolved quickly and competently.²⁶⁷ This results in either a reduced quality of justice or an inevitable delay thereof. Additionally, it is unrealistic to expect that the same amount of time and judicial resources should be allocated to every case that comes before the court, regardless of how complex or expensive the claim or underlying dispute may be.

In almost every justice system that operates on the adversarial system, it is self-evident that most of the cases are settled at the door of the court. Given this, why not seek

²⁶⁶ *The Holy Bible. 2010. New International Version. Michigan: Zondervan, Mathew 5: 25-26, 879.*

²⁶⁷ Damaseb First Report (2010: p 9).

settlement earlier and save costs? Damaseb states that litigation is a zero-sum game.²⁶⁸ This means that there is always a winner and a loser and that even the successful party does not always win on his or her terms and relates to the expression that a negotiated settlement is better than an unfavourable judgment.²⁶⁹

Alternative Dispute Resolution (ADR) has been part of our communities for generations. As illustrated above, it was already referred to and practiced in biblical times.²⁷⁰ The major ADR movement made its appearance in the United States in the 1970s in an effort to develop less expensive and time-consuming alternatives to litigation.²⁷¹ Today, ADR is still expanding and thriving throughout the world due to its demonstrated benefits, since litigation is not always the best way to resolve a dispute.²⁷²

ADR is based on the principle that by offering disputing parties a confidential, voluntary, adaptive, and party-controlled process, a more satisfactory, long-lasting, and effective resolution of disagreements can be accomplished.²⁷³ This chapter provides a concise discussion on the growth and development of ADR and focuses on the definition and different forms of ADR.²⁷⁴ It then moves on to analyse and discuss general mediation as a form of ADR which will include definitions and characteristics of mediation, advantages as well as arguments against mediation.

²⁶⁸ Damaseb (2020: pp 250).

²⁶⁹ Damaseb (2020: pp 250-251).

²⁷⁰ *The Holy Bible* (2010: p 879).

²⁷¹ Shamir (2003: p 4).

²⁷² *Ibid.* ; Marnewick (2002: p 43).

²⁷³ Weston, M, A. 2001. "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality". *Indiana Law Journal*, Volume No. 76 (3), p 592.

²⁷⁴ For purposes of this study limited to negotiation, arbitration and mediation.

3.2. *Definition and characteristics of ADR*

The primary purpose of the law is to assist in regulating relationships between members of society. Where a person fails to comply with a legal rule, the courts may be approached to grant relief but, judicial processes are not the only way of resolving disputes²⁷⁵ and fortunately, there is a wide spectrum of ways to resolve disputes. Somewhere on this spectrum, between agreements reached by the parties through direct dialog and based on mutual understanding²⁷⁶ and a binding decision issued by a neutral third party,²⁷⁷ there are several different ways to resolve disputes. With the aim of eliminating a potential source of conflict, preventing it from escalating into a dispute and reestablishing a constructive cooperative and potentially fruitful future working relationship, these options and possibilities create "a menu" of alternative or appropriate dispute resolution that parties may choose to employ.²⁷⁸

ADR has been defined as a procedure, other than the adjudication by a judge in court, where a neutral third party assists disputing parties in resolving their disputes.²⁷⁹ Justice can be encompassed in ADR in two forms, namely in an individual form and in a form to include the broader community. Individuals who choose to avoid conflict in order to save time and money would obtain justice in a flexible manner through ADR, which would in turn, guarantee accessibility and affordability for the larger community.²⁸⁰

ADR is a general term that refers to a collection of methods and strategies for addressing, resolving and settling disputes in a non-confrontational manner. The

²⁷⁵ Havenga et al. (2013: p 285).

²⁷⁶ Through negotiation.

²⁷⁷ Through arbitration.

²⁷⁸ Shamir (2003: p 4).

²⁷⁹ Tahura (2019: p 32).

²⁸⁰ Ibid.

concept comprises a variety of approaches, ranging from direct negotiations between parties as the most forthright approach to achieving a mutually agreed-upon settlement, to the involvement of an external party in the form of arbitration or adjudication, when a solution is imposed. Mediation is a method that involves the intervention of a neutral third party to assist the disputing parties in achieving a mutually agreed-upon resolution, thereby bridging the gap between the two contrasting perspectives.²⁸¹

The term ADR represents much more than merely an alternative to litigation. It includes the choice and design of a process that is most suitable or appropriate for a specific dispute, as well as for the disputing parties.²⁸² Many legal academics and lawyers have different views on the meaning of ADR. Some prefer to refer thereto as “appropriate” dispute resolution, rather than “alternative” dispute resolution, as all cases and matters differ and the two cannot simply be reconciled. For purposes of this study, ADR will be referred to as it is most commonly known and used as a dispute resolution process, which is an alternative to litigation.

The characteristics of ADR in general is summarised by Havenga *et al.*²⁸³ as being a more informal process in comparison to the litigation process, making it more flexible to include different practical processes depending on the type of dispute and requirements of the parties involved.²⁸⁴ ADR is a voluntary process since the parties themselves decide to follow this process of dispute resolution which largely also makes this process consensual because the result of the process is reached by

²⁸¹ Shamir (2003: p 2).
²⁸² Crous (2002: p 300).
²⁸³ Havenga et al. (2013: p 285).
²⁸⁴ Ibid.

agreement between the parties. ADR is also an interest-based approach because it prioritises the needs of the parties over their legal rights.²⁸⁵

3.2.1. When is ADR appropriate?

Every dispute differs in character, merits and facts.²⁸⁶ Notwithstanding the dispute itself, it is vital to also consider the relationship between the disputing parties and the rationale behind the need for a matter to be heard and adjudicated upon by a judge. When considering whether to refer a matter to ADR, it is important to consider whether a specific dispute is more suitable to refer to ADR, or more suitable for trial in court.

ADR may be more appropriate in situations where the parties know each other well, there is an established relationship between the parties²⁸⁷ and/or the disputants would need to continue some form of contact or relationship in the future. Disputing parties often have a misconception of their rights in law and their personal emotional state of their right to something. ADR has shown increasing benefits for disputes where a resolution of the dispute needs to be reached expeditiously to enable the continuation of a commercial relationship. Damaseb employs the example where a claim between business partners may seem like a breach of contract, but in reality, may have been a simple miscommunication between the disputing parties.²⁸⁸ These matters can be further expanded to include disputes where parties intend to avoid the issue being made public and deem the matter to be highly confidential.²⁸⁹

²⁸⁵ Ibid.

²⁸⁶ Damaseb P, T. n.d. *Court-Connected Mediation in the High Court of Namibia*. Available at [Court Connected Mediation in the High Court of Namibia - Hon. PT Damaseb \(2\).pdf](#), p 4.

²⁸⁷ This may include, *inter alia*, a business or commercial relationship or parents going through a divorce.

²⁸⁸ Damaseb (n.d.: p 4).

²⁸⁹ Article 14(1)(a) of the Constitution states that every trial must be in public.

The law does not necessarily always provide a solution or outcome which would satisfy a disputant's real need. Again, Damaseb postulates the example where a party files for defamation, with the real need being a simple apology to the aggrieved party, which is not a usual remedy given by the courts.²⁹⁰ Lastly, but certainly not least, ADR would be appropriate for the resolution of disputes where parties want to save legal costs and time by circumventing unnecessarily long litigation.²⁹¹ ADR may also be beneficial in matters where there are small and insignificant issues within a larger dispute, which can be settled during an ADR session to limit or minimise the issues to be argued and decided on during a trial.

It also indicates that there are some disputes that may not be suitable for ADR. Further in this chapter, the nature of ADR and the different forms thereof will be discussed and it will be highlighted that ADR is based on the decisions of the disputing parties. It is therefore not appropriate to refer a matter to ADR where there is a need for the parties to create a binding legal pronouncement on the matter since there is no judge or formal court order in an ADR proceeding.²⁹² When it is evident that one or more of the parties are simply referring a matter to ADR to gain insight into the other party's defence, to use that information to its advantage or to prejudice his or her opponent and thus will be engaging in bad faith, ADR would not be appropriate and beneficial to the dispute at hand.²⁹³

It is evident that when parties contemplate on whether or not to refer their dispute to ADR, the above should be carefully considered and analysed to ensure that the ADR process will serve its purpose.

²⁹⁰ Damaseb (n.d.: p 5).

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

3.3. *Different forms of ADR to be explored to promote access to justice*

Notwithstanding the fact that this study demonstrates how using the practice of mediation can promote access to justice, it is imperative to briefly look at the other forms of ADR, to provide background as to why mediation, in specific, was introduced into the Namibian legal system.

ADR can take many different forms. The general and well-known forms of ADR include negotiation, arbitration and mediation.²⁹⁴

3.3.1. Negotiation

Within the framework of ADR, negotiation is defined as a private, voluntary and consensual process whereby parties attempt to resolve their differences personally by agreement²⁹⁵ and since people employ negotiating skills on a daily basis to acquire what they want or to resolve a dispute, whether at home, at work, or in commercial transactions, negotiation is the most frequently used ADR process.²⁹⁶ Through the process of negotiation, disputing parties directly discuss potential resolution of the dispute with each other. The conversation goes back and forth between the parties until an agreement is reached or an impasse is proclaimed.²⁹⁷

All forms of negotiations are forms of dispute resolution and can take place between two parties or multi-parties.²⁹⁸ Where a dispute arises, engaging in negotiations as a resolution is frequently the first course of action and a successful negotiation will result in the dispute being settled by agreement.²⁹⁹ Negotiation may also take place within and form part of court litigation where litigants negotiate on the dispute prior

²⁹⁴ Wiese (2019: p 4). ; Damaseb (2020: p 250).

²⁹⁵ Havenga et al. (2013: p 285).

²⁹⁶ Wiese (2019: p 5).

²⁹⁷ Shamir (2003: p 6).

²⁹⁸ Havenga et al. (2013: p 285)

²⁹⁹ Ibid.

or during the litigation process, which leads to the settlement thereof.³⁰⁰ One advantage of this procedure is that, unless bargaining is in the public interest, both the conversations and the result are kept private.³⁰¹ Through negotiation, the parties attempt to resolve their disagreement amicably without the involvement of a third party. This is the main distinction between negotiation and mediation or arbitration since in both the latter instances, a third party is involved.³⁰²

3.3.2. Arbitration

Arbitration refers to a procedure whereby the disputing parties voluntarily and jointly request a third party, known as the arbitrator, to listen and consider both sides of their arguments on the dispute and render a decision, known as the arbitration award. Arbitration differs from mediation and negotiation in that the arbitrator resolves the dispute by issuing a decision which is binding on the parties. For this reason, arbitration is more similar to litigation since in both processes the parties are presented with a decision by a third party which is imposed on them. This differs from negotiation and mediation where the parties reach a mutual agreement, making these two processes consensual in nature. However, in contrast to litigation, the arbitrator's award arises from the consent of parties to accept the award, not from the power of the court to impose an order.³⁰³

Notwithstanding its similar characteristics to litigation, arbitration is still classified as an ADR process since arbitration allows parties more control over the process than litigation. The arbitration process possesses a few noteworthy attributes. Firstly, this process proceeds from an agreement between the parties. In this agreement, the parties

³⁰⁰ Ibid.

³⁰¹ Ibid.: p 286.

³⁰² Ibid.

³⁰³ Havenga et al. (2013: p 285).

consent to the arbitration process and undertake to be bound by the arbitrator's award. Secondly, arbitration provides for a process whereby substantive rights of the parties are determined and thirdly the arbitrator is chosen by the parties, alternatively, sets out a method to select and appoint the arbitrator to which the parties have consented. Lastly, the rights of the parties are determined in an impartial manner in respect of a dispute which is formulated at the time that the arbitrator is appointed.³⁰⁴ In Namibia, arbitration is also statutorily regulated under the Arbitration Act, 1965³⁰⁵ and Namibian law provides for a comprehensive system of arbitration in labour disputes³⁰⁶ which is regulated under the Labour Act, 2007.³⁰⁷

3.3.3. Mediation

The process of mediation is a mid-point between negotiation and arbitration. In this process, the parties employ an independent third party, known as the mediator, to assist them during their negotiations, however, unlike with arbitration, the mediator does not issue a binding award on the outcome of the matter.

The concept of mediation in general will be discussed extensively in the next part of this chapter, as it forms the basis of court-connected mediation which is discussed in detail in chapter 5.

³⁰⁴ Ibid.: p 287.

³⁰⁵ Act 42 of 1965.

³⁰⁶ Damaseb (2020: p 250).

³⁰⁷ Sections 85 and 86 of the Labour Act 11 of 2007.

3.4. *Mediation as a general form of ADR*

3.4.1. **Definitions and characteristics of mediation**

Through the application and development of mediation through the years, many different definitions of mediation have been developed. Essentially, all these definitions surmise the same roles and opinions.

Mediation is defined as a private and voluntary process to which the disputants consented, whereby parties attempt to resolve their differences by involving a neutral third party.³⁰⁸ It is an ancient, private and non-legal dispute resolution process and the neutral third party assists the disputants to reach an amicable agreement which is, without being made an order of court or incorporated into a valid settlement agreement, non-binding on the parties. The process in itself is an informal and consensual process.³⁰⁹ The choice, design and application of the process is determined by the type of dispute and the need, demands and interests of the parties to the dispute.³¹⁰ Damaseb opines that an important element to the definition of mediation is to include the assistance of a neutral third party to assist the disputants in settling their dispute without going to trial.³¹¹ Because of the comprehensiveness of the definition of mediation, Damaseb further includes his preferred definition of this form of ADR from an American source³¹² as follows:³¹³

“Mediation is a flexible, nonbinding dispute resolution procedure in which a neutral third party – the mediator – facilitates negotiations between the parties to help them settle. A hallmark of mediation is its capacity to help parties expand traditional

³⁰⁸ Havenga et al. (2013: p 286).

³⁰⁹ Nolan-Haley (1996: pp 48 & 53).

³¹⁰ Crous (2002: p 303).

³¹¹ Damaseb (2020: p 250).

³¹² Plapinger, E & Stienstra, D. 1996. *ADR and Settlement in the Federal Courts: A sourcebook for Judges and Lawyers*. Washington, DC: Federal Judicial Centre and CPR Institute for Dispute Resolution.

³¹³ Damaseb (2020: p 250).

settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy. Mediation sessions are confidential and structured to help parties communicate – to clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options.”³¹⁴

According to Fuller,³¹⁵ the core quality of mediation is the ability to redirect the parties towards one another without imposing specific rules on them. Instead, mediation assists the parties in developing a new and shared understanding of their relationship, which changes their attitudes and dispositions towards one another.³¹⁶ Mediation benefits both parties to a dispute, as well as the legal profession as a whole, since it has led to a gradual improvement in how people think and behave during dispute resolution.³¹⁷

A mediation process does not involve the negotiation of the parties' legal positions as outlined in court documents. The objective is to resolve the deadlock by considering alternative methods that may not directly address the current concerns in court but will effectively resolve them in a non-adversarial manner.³¹⁸

From the various definitions and understandings of the concept of mediation above, the characteristics of mediation include autonomy, self-determination, personal recognition, voluntary process, assistance by a neutral third party and being a consensual process. The various characteristics of mediation differentiate mediation

³¹⁴ Plapinger et al (1996: p 65).

³¹⁵ Fuller, L. 1971. “Mediation – Its Forms and Functions”. *Southern California Law Review*, Volume No. 44 (305).

³¹⁶ Ibid.: p 325.

³¹⁷ Nolan-Haley (1996: p 62).

³¹⁸ *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* Case No.12468/2020, para 21.

from other forms of ADR and essentially emphasise the advantages thereof. This will be discussed in detail under section 3.4.3.

3.4.2. The mediator

Whenever disputing parties are unable to reach an agreement on certain issues which may cause conflict between the parties, they can agree to refer their dispute to mediation and enroll the services of an independent third party to facilitate a solution and assist them in settling the dispute.³¹⁹ This neutral third party is referred to as the mediator.³²⁰

Moreover, a mediator is an impartial, neutral and independent person who acts as a facilitator between the parties, however, unlike a trial judge, does not determine who is at fault and does not make a decision about the matter.³²¹ A mediator is not a judge, advisor or a representative of the parties.³²² In the judgement handed down in *Kalagadi Manganese v Industrial Development Corporation*,³²³ Spiling J noted the mediator is not part of the proceedings to decide what is fair. The mediator's goal is simply to facilitate a possible resolution of the dispute between parties without providing advice or his own judgment in any way or form.³²⁴

The mediator can be seen as the manager of the process and assists both sides until the parties themselves come to an agreement. In the event that the mediator senses an impasse in the negotiation process, it may become necessary to terminate the mediation session and present a proposal to the parties regarding the mediator's

³¹⁹ Wiese (2019: p 5).

³²⁰ Ibid.

³²¹ Damaseb (n.d.: p 6).

³²² Brand et al. (2016: p 25).

³²³ *Kalagadi Manganese v Industrial Development Corporation*.

³²⁴ Ibid.: Para 21.

perspective on the appropriate course of action for the way forward. Subsequently, the involved parties will be required to identify an alternative method for the resolution of their dispute.³²⁵

The primary responsibility of a mediator is to facilitate and maintain effective communication among the parties involved in a negotiation, while also ensuring ongoing collaboration between such parties. In order to execute this task effectively, the mediator must establish and maintain the trust and confidence of all sides, ensuring objectivity throughout the process. When the parties convene, the mediator must advise both sides to adopt a realistic perspective regarding their expectations from the opposing party and their willingness to make concessions.³²⁶

Even in the most unfavorable situations, mediation can achieve notable outcomes when it is facilitated by a mediator who had obtained the necessary training.³²⁷ In the matter of *Brownlee*³²⁸ the role of a competent mediator was noted as follows:

“The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs

³²⁵ Brand et al. (2016: p 26).

³²⁶ Access to Justice – Paralegal Manual. 2012. DLA Piper: New Perimeter. Available at <https://www.lac.org.na/projects/sjp/Pdf/npamanual-small.pdf>, p 19.

³²⁷ *Brownlee*, para 50.

³²⁸ *Brownlee*.

and practical consequences of continued litigation, particularly if the case is a loser.”³²⁹

It is evident from this judgment that the competency and skills of the mediator who facilitates the mediation process are imperative to ensure a successful mediation session, even if the dispute is not settled. It provides a guideline for mediators to follow to ensure that they can provide mediation services which is of a high standard. Furthermore, this judgment also defines the characteristics of a competent mediator.

3.4.3. Characteristics of a competent mediator

The most salient characteristics of a competent mediator can be summarised from the Code of Conduct for Namibian court-accredited mediators.³³⁰ This includes impartiality, avoidance of conflict of interest, competence, confidentiality, the duty to terminate the mediation if the process no longer serves its purpose or is being abused and lastly the duty to disclose his or her fees.³³¹

3.4.3.1. Impartiality

A mediator must at all times during the mediation process remain impartial and avoid being prejudiced towards a specific party. Should a mediator at any point be unable to remain impartial, it is the duty of the mediator to stop the mediation session and withdraw as mediator from the matter.³³² To avoid the appearance of partiality towards a certain party, a mediator should not become personally involved in the matter and remain objective. Notwithstanding their own views on matters such as

³²⁹ Ibid.: para 50.

³³⁰ Code of Conduct for court-accredited mediators. n.d Available at <https://ejustice.jud.na/High%20Court/Mediation/Pages/Directives.aspx> Hereinafter referred to in the text as only “the Code of Conduct”.

³³¹ Ibid.: p 1-5 ; Damaseb (n.d.: pp 10-11).

³³² Damaseb (n.d.: p 10).

religion, general values and beliefs, a mediator should ensure that these views do not influence the manner in which the parties are addressed.³³³

In addition, even if the parties request the mediator to express his or her opinion on the matter, a personal or legal opinion by the mediator should be avoided at all costs. The mediator should limit his or her opinion based on the neutral strengths and weaknesses of the parties' respective cases and should be discussed with them separately and in private.³³⁴

3.4.3.2.Avoidance of conflict of interest

It is the duty of the mediator to disclose to the mediating parties any actual or potential conflicts of interest he or she may have in a specific matter. This includes all conflicts prior to and any conflicts which may arise during the mediation session.³³⁵ These conflicts of interest may include any circumstance that may be seen to influence the mediator's impartiality or independence or any relationship, current or prior, to any of the parties who will partake in the mediation session. The mediator should not be influenced by any external factors or pressures and his or her commitment should remain with the parties and the process.³³⁶

As a general rule, if any current or possible conflicts of interest are declared by the mediator, the mediation session should not continue under the guidance of such specific mediator. The parties may, however, agree thereto that the mediator may continue the mediation session if the parties and the mediator are satisfied that the

³³³ Code of Conduct for court-accredited mediators (n.d.: para 2(a)).

³³⁴ Code of Conduct for court-accredited mediators (n.d.: para 2(c)).

³³⁵ Damaseb (n.d.: p 11).

³³⁶ Code of Conduct for court-accredited mediators (n.d.: para 3(b)).

disclosed conflict of interest will not prevent the mediator from effectively conducting their duties as a mediator and evidently negatively influence the mediation session.³³⁷

3.4.3.3. Competence

The mediator must possess the relevant competence, acquired through education, training and experience, to adequately assist the parties with the resolution of their dispute through mediation. He or she must have the necessary skills which would normally be expected from a competent mediator on the subject matter of the dispute. It can also be reasonably expected that the mediator presents to the parties, upon enquiry therefor, proof of his or her training, education and experience which renders him or her a competent mediator.³³⁸ It is also a mediator's responsibility to remain conscious of their social responsibility which comes with being an accredited mediator. They should remain updated and educated in matters and training relevant to the position held as a mediator and make continuous and substantive effort to remain a competent mediator.³³⁹

3.4.3.4. Confidentiality

It was established in *Standard Bank v Muukua*³⁴⁰ that mediation is simply an alternative form of dispute resolution and that it is imperative that the parties who participate in the mediation session must be assured that the discussions and conversations which take place during this session will be kept private and confidential.³⁴¹ Without this certainty and expectation of confidentiality, parties are unlikely to contribute meaningfully and productively during the mediation session and

³³⁷ Ibid.: para 3.

³³⁸ Damaseb (n.d.: p 11) ; Code of Conduct for court-accredited mediators (n.d.: para 4(a) & (b)).

³³⁹ Code of Conduct for court-accredited mediators (n.d.: para 4).

³⁴⁰ *Standard Bank Namibia Limited v Muukua* [2019] NAHCMD 245.

³⁴¹ Ibid.: para 14.

mediation may fail in the long term if reasonable confidentiality expectations are not met.³⁴²

As confidentiality is one of the most prominent characteristics of mediation, it is the duty of the mediator to ensure that all discussion and documents exchanged during the mediation session should be kept confidential. This confidentiality includes details of *inter alia*, the identity of the parties, any agreements reached during the session, the conduct and actions of the parties, the merits of the matter and any outcomes of the mediation session. There are, however, exceptions to this characteristic and includes, but is not limited to, instances where the mediator is compelled by law to disclose the information³⁴³, where the mediator is convinced that a minor requires protection³⁴⁴ or where evidence is produced of child abuse which was not previously disclosed.³⁴⁵

3.4.3.5.Termination of mediation

Since the mediator acts as the manager of the mediation session,³⁴⁶ it is the responsibility of the mediator to terminate the mediation session in certain circumstances. These circumstances include instances where the mediator is convinced that one, or both of the parties, is abusing the process³⁴⁷ and where there is no reasonable prospect of settlement of the matter.³⁴⁸ Further to these circumstances, it is also the duty of a mediator to inform the parties, and thereafter terminate the

³⁴² Ibid.: para 14.

³⁴³ Code of Conduct for court-accredited mediators (n.d.: para 5(c)(ii)).

³⁴⁴ Ibid.: para 5(c)(iv).

³⁴⁵ Ibid.: para 5(c)(iii).

³⁴⁶ Brand et al. (2016: p 26).

³⁴⁷ Code of Conduct for court-accredited mediators (n.d.: para 6.1 (i)).

³⁴⁸ Ibid.: para 6.1 (ii).

mediation session, if he or she is convinced that the settlement agreement includes any illegal or improper terms.³⁴⁹

3.4.3.6. Fees of the mediator

As early as possible and preferably before the mediation session commences, a mediator is required to fully disclose his or her fee expense for the service to act as a mediator and any other related expense to the parties.³⁵⁰ This also includes by whom and how these expenses should be paid. It is also preferred, and good practice, that the fee structure, other expenses and acceptance thereof by the disputing parties is recorded in writing.³⁵¹

According to the Code of Conduct for court-accredited mediators in Namibia, a court-accredited mediator is not permitted to base his or her fee on the outcome of the mediation or on any amount or percentage of an amount of the settlement, if the settlement includes a monetary value.³⁵² The probable rationale behind this could be to ensure that the mediator remains impartial during the mediation process. Should a mediator's fee become dependent on the outcome of the mediation, the mediator may influence the outcome of the mediation to suit their own need, instead of facilitating a result in favour of the disputing parties.

3.4.4. Advantages of mediation

Mediation holds many benefits when compared to litigation, negotiation and arbitration. The benefits of mediation are not limited to what is discussed below. The benefits discussed in this study are believed to be the benefits that ultimately convince

³⁴⁹ Ibid.: para 6.2 (i).

³⁵⁰ Damaseb (n.d.: p 11).

³⁵¹ Damaseb (n.d.: p 11) ; Code of Conduct for court-accredited mediators (n.d.: para 9.2 (b)).

³⁵² Code of Conduct for court-accredited mediators (n.d.: para 9.2(c)).

parties to attempt to resolve their dispute through the mediation process. It was Wayne Brazil³⁵³ who wrote an essay titled: “*When ‘getting it right’ is what matters most, arbitrations are better than trials.*”³⁵⁴ By exploring the benefits that mediation poses, Brazil’s sentiment can be shared with those who advocate for mediation.

3.4.4.1. Cost-saving procedure

It is apparent that the costs of litigation in Namibia are relatively high. Since the legal fees charged for the services rendered by members of the legal profession are under no statutory regulation, the government continues to have little control over the fees charged by attorneys which an individual litigant must pay to have a matter brought before court.

In the *Brownlee* matter the court ordered that the fees claimable by the attorneys will be limited and shall not exceed the costs recoverable on a party-party scale since the court’s discontentment should be reflected in the attorney’s reluctance and failure to have had this matter referred to mediation at an early, or at least an earlier, stage of the litigation of this matter.³⁵⁵ The benefit of reducing legal fees by referring a matter to mediation will largely depend on the timing of the referral. Mediation and settlement of the matter at a relatively early stage of a dispute will naturally result in saving on legal fees since the legal process will be shortened.³⁵⁶

Judge Brassey AJ indicated in the opening paragraphs of the *Brownlee* judgement that the process by which that case had been resolved had been a tragedy. Not so much

³⁵³ Former Magistrate Judge in the United States District Court.

³⁵⁴ Brazil, W, D. 2017. “When "Getting It Right" Is What Matters Most, Arbitrations Are Better than Trials”. *Cardozo Journal of Conflict Resolution*, Volume No. 18 (2), p 227.

³⁵⁵ *Brownlee*, para 60.

³⁵⁶ Brand et al. (2016: p 27).

because of the time taken to resolve the issues but because of the legal costs that the parties had to incur since nothing was done by the parties or the legal representatives to mitigate the escalation of legal fees. From the evidence in this matter, it seemed to emerge that the cumulative costs thereof would be a minimum of R500 000 and may have escalated to as much as R750 000.³⁵⁷

The costs of resolving a dispute through a court process includes more than just direct legal fees payable to attorneys.³⁵⁸ Costs related to travel expenses, productivity costs for time spent in court when a matter goes to trial, emotional costs associated with attending court proceedings and reputational costs for damaged personal and business relationships should also be taken into consideration.³⁵⁹

Mediation allows the parties to save costs, even when represented by an attorney, where there are no prolonged court proceedings or pleadings which must be drafted and filed. The parties do not need to attend to trial proceedings which can take up a significant amount of time if considered that an average trial³⁶⁰ can take up to four days and longer from start to disposal.³⁶¹ It is evident from the statistics provided above that referring a dispute to mediation can have huge impact on total legal costs to have a dispute resolved.

3.4.4.2. Expeditious and saving court time

Legal proceedings instituted in the High Court can take a considerable amount of time to be finalised. In addition to the matter proceeding to trial, it takes time for a judgment

³⁵⁷ *Brownlee v Brownlee*, para 48.

³⁵⁸ Wiese. (2019: p 52).

³⁵⁹ Brand et al. (2016: p 28).

³⁶⁰ For an action proceeding commenced by way of combined summons.

³⁶¹ Damaseb (2020: p 266).

to be written and handed down whereafter, the judgment can also be taken on appeal to a higher court.³⁶² In Namibia, the High Court's civil stream consists of both civil and labour cases and is further divided into residual court cases and cases subject to JCM.³⁶³

The statistics referred to below were already touched on in section 2.5.4. and will be expanded on to fully comprehend why it is so pertinent to implement a procedure which can assist the High Court in expediting matters and simultaneously decreasing the time spent on matters before court.

In 2022, the main division of the High Court issued 673 substantive civil and labour applications and reviews and 5 517 summonses.³⁶⁴ In 2023, the same division of the High Court issued 5544 summonses and 647 substantive civil and labour applications and reviews.³⁶⁵

The calendar of the High Court makes provision for 15 weeks of administrative breaks during which trials are not set down for hearing, leaving an estimate of 189 court days per year to conduct trials and hear matters.³⁶⁶

In the comparison on the performance and statistics between the legal years 2019-2023,³⁶⁷ the statistics indicate that the successful mediations resulted in less matters being set down for trial and saved approximately 948 days in 2023.³⁶⁸ This estimate is based on the number of days which would have been spent in court if the matters which was successfully settled during mediation would have been set down for a full

³⁶² Wiese. (2019: p 53).

³⁶³ Legal Year Report (2023: p 6).

³⁶⁴ Legal Year Report (2022: p 6).

³⁶⁵ Legal Year Report (2023: p 6).

³⁶⁶ Damaseb (2020: p 266).

³⁶⁷ Legal Year Report (2023: p 114).

³⁶⁸ Legal Year Report (2023: p 116).

trial before a judge. Overburdened court rolls cause unnecessary delay in the hearing and finalisation of legal proceedings since it is evident that there are not as many days in a year as the amount of court days saved by removing the matters which have been settled at mediation from the court roll.

When a matter is referred to mediation, either before legal proceedings are instituted or during the legal process, the number of days and time spent by and in court on this matter is radically decreased. This form of ADR can be arranged as quickly as the parties require and is usually completed and finalised in a short period of time.³⁶⁹ Mediations are typically scheduled for and finalised within one day.³⁷⁰ The scheduling of mediation sessions is not dependent on the Court's administrative breaks or any other external influences and can be scheduled for a time and place convenient to the parties and the mediator.

Notwithstanding the benefit of time saving for the disputing parties, a considerable amount of Judges' time is saved, which would have been spent on case management hearings, general court administration, preparation and judgment writing.³⁷¹

3.4.4.3. Voluntary and consensual

Another advantage of mediation is that it is ideally a voluntary process engaged in freely by both parties since no party can be forced to partake in this process. The parties are typically very motivated to participate and reach an agreement to settle the matter when they choose to mediate the dispute freely.³⁷² However, in some cases legislation provides that certain matters must be referred to mediation,³⁷³ but even in

³⁶⁹ Wiese (2019: p 53).

³⁷⁰ Brand et al. (2016: p 28).

³⁷¹ Damaseb (2020: p 266).

³⁷² Brand et al. (2016: p 24).

³⁷³ As in the High Court Practice Directions: Rules of High Court of Namibia, 2014, PD 19.

these cases, the parties are not compelled to settle the matter and the parties may withdraw from this process at any time if they are of the opinion that the matter will not be settled.³⁷⁴ The process thus remains voluntary in its continuance.³⁷⁵

3.4.4.4. Self-determination, flexibility and informality

Critics avoid mediation due to the absence of law in the process, while the supporters thereof appreciate mediation's freedom from the impediments of the law.³⁷⁶ When parties elect to resolve their dispute through mediation or the court refers litigants to mediation, the litigants themselves are required to become the decision makers.³⁷⁷ Unlike decision making by a neutral third-party, like a judge in the adjudication process, decision making in mediation rests solely with the disputing parties.³⁷⁸ This will ultimately result in litigant satisfaction, which does not necessarily occur in judicial adjudication of disputes.

During a mediation session, the parties choose which factors should influence the process in resolving the dispute and can build their own solution according to their needs.³⁷⁹ Where a Court is bound by legislation, outcomes of previous similar matters and rules to make its ultimate decision, parties to a mediation can opt to include factors such as ethics, culture, customary beliefs and other community values which are often defeated by the objective framework provided by the law. Disputing parties have the ability to resolve their problems in a wider framework than the limited confines of the

³⁷⁴ Wiese. (2019: p 45).

³⁷⁵ Brand et al. (2016: p 24).

³⁷⁶ Nolan-Haley (1996: p 50).

³⁷⁷ Ibid.: p 63.

³⁷⁸ Ibid.: p 55.

³⁷⁹ Lovenheim, P & Guerin, L. n.d. *Mediate, Don't Litigate- Strategies for Successful Mediation*. Nolo, p 2/5.

legal system. Mediation does not silence the parties in ways that the law does with rules of evidence and procedure.³⁸⁰

A mediated agreement is dependent on the consent of the parties and cannot be enforced by the mediator. For this reason, it is not binding on the parties and, at most, could be legally enforced in terms of the law of contract.³⁸¹ This is probably the greatest advantage of mediation since, if a party does not believe that the proposed settlement is fair to him, he does not have to agree thereto.³⁸²

3.4.4.5. Mediation is not final

When a matter is referred to mediation, the significance of the law is not lessened and does not undermine the importance of law and legal principles for those parties who already instituted action and brought their dispute before a competent court.³⁸³ In many cases, the disputing parties may feel that by referring their already court-instituted matter to mediation, they forfeit their right to have their matter heard by a judge and they remain with the strong belief that they have a solid case before court.³⁸⁴ Mediation places no obligation on any party to settle their dispute during the course of mediation. The parties remain free to choose whether they are able to settle the matter during the mediation session, or to either institute litigation or continue with litigation if the same was already instituted.³⁸⁵ Further to the above, mediation can also be used to settle only some of the issues between the parties. This will ultimately

³⁸⁰ Nolan-Haley (1996: p 56).

³⁸¹ Havenga et al. (2013: p 286).

³⁸² Lovenheim et al. (n.d.: p 2/5).

³⁸³ Nolan-Haley (1996: p 64).

³⁸⁴ Ibid.

³⁸⁵ Civil Justice Council. 2021. *Compulsory ADR*, p 29.

contribute to shorten the trial process through adjudication of only the remainder of the issues.

As already stated above, as opposed to an arbitrator, a mediator does not have the authority to issue an order or an award but merely encourages parties to negotiate, compromise and reach a settlement. At all times during the mediation process, the parties remain free to choose whether this matter should be finalised and settled, or whether they wish to continue their dispute in court.

3.4.4.6. Confidentiality

An advantage of the mediation process is the privacy of both the discussions and the outcome.³⁸⁶ In contrast to the majority of courtroom proceedings and documentation being publicly available,³⁸⁷ all discussions and documents used during mediation remains private and confidential.³⁸⁸ Should the parties approach mediation while legal proceedings were already instituted and the matter becomes settled at the mediation session, the parties may ask the court that the terms of the settlement be made an order of court. This is the only exception to the privilege nature of mediation and will, when being made an order of court, become a public document unless the parties agree otherwise.³⁸⁹

3.4.5. Disadvantages of mediation

Although mediation holds many benefits for the resolution of a dispute, it also has some potential weaknesses. In many cases brought before court, there is a clear winner

³⁸⁶ Havenga et al. (2013: p 286).

³⁸⁷ Section 13 of the High Court Act requires all proceedings to be conducted in open court.

³⁸⁸ Lovenheim et al. (n.d.: p 2/5).

³⁸⁹ *Standard Bank Namibia Limited v Muukua*, para 21.

and a clear loser. The advantages of mediation should not be oversold and exaggerated to apply to all disputes.

As already established, in most cases mediation is a process chosen by the parties themselves. There are, however, circumstances where mediation is not voluntary. This emerges in the cases where mediation is court mandated³⁹⁰ or when the parties are referred to mediation in terms of an agreement. This may lead to one or both parties not actively taking part in the mediation session and not being open to any form of settlement, which defeats the purpose of mediation. Parties may enter a mediation with pre-existing notions and ideas that may remain unchanged. If there is a mutual lack of trust between the parties involved and the mediator is unable to overcome this obstacle, it is unlikely that any amount of reassurance or the provision of alternative forms of security to ensure performance will have an impact. However, recognising the potential drawbacks of not finding an alternative solution may have an effect.³⁹¹

Equally important, when there is a power imbalance between the parties, the outcome of the mediation session tends to lose its fairness where one party is coerced into a settlement.³⁹² One of the key elements of mediation is that the parties should be open to compromise. This means that the outcome of the matter may lead to either both parties being unhappy with the outcome, both parties being happy therewith or one party being more satisfied than the other.³⁹³

In many instances, the parties are not able to separate their emotions or bruised egos from the matter at hand and the parties may agree to be legally represented at the mediation session. There are various factors that lead to unsuccessful mediation,

³⁹⁰ Which will be discussed in chapter 5.

³⁹¹ *Kalagadi Manganese v Industrial Development Corporation*, para 17.

³⁹² Lovenheim et al. (n.d.: p 2/9).

³⁹³ Steyn (2015: p 45).

which may include lawyers being unprepared. The session may then be postponed or cancelled, which may lead to unnecessary costs and a waste of time for the parties, the mediator and the lawyer.³⁹⁴ It is also common for lawyers to propose that the matter be referred to mediation to delay the litigation process and as an approach to buy some time.³⁹⁵ This is generally referred to as mediation abuse.

The mediation process is not a one size fits all procedure and is not designed to resolve all types of disputes. When a dispute is referred to mediation, the issues at hand and the underlying principles must be considered. For example, mediation is not the process to follow where the parties intend to set a precedent or where a constitutional issue is in dispute. In these matters, the question arises as to what happens to the law. ADR cannot be a simplified version of litigation and is never supposed to act as a replacement thereof. The advantage of self-determination indicates that there is no formal and standardised procedure which means that not every mediation session with similar issues will result in the same outcome and may therefore be unpredictable.

3.5. Conclusion

In the previous chapters of this study, it is evident that the Namibian court system is under pressure and that settlement of disputes outside of the courts has become a popular movement amongst disputants. With the ever-growing popularity of ADR, ADR processes are simultaneously developing and adapting to serve an ever-growing community. It is clear from this chapter that ADR accommodates not only various types of disputes, but also various types of disputants. With the different forms of ADR available, parties are free to assess the characteristics, advantages and

³⁹⁴ Tahura (2019: p 31).

³⁹⁵ *Kalagadi Manganese v Industrial Development Corporation*, para 31.

disadvantages of each type of ADR process and make their own decision on which form of ADR will be appropriate for their dispute. Mediation as a form of ADR has received many commendations for its success in promoting access to justice. Although this form of ADR also has its benefits, this study submits that the advantages of compulsory mediation can supersede a big part of the disadvantages if implemented and applied correctly. From the discussion of case law in this chapter, it is also evident that the courts are leaning toward the promotion of ADR, especially mediation. The following chapter will be an in-depth discussion of court-connected mediation in Namibia and how this can be perceived and developed as compulsory mediation for the promotion of access to justice in Namibia.

CHAPTER 4:

THE NAMIBIAN CIVIL JUSTICE SYSTEM AND ACCESS TO JUSTICE

4.1. *Introduction*

In the conclusion of chapter 2 it was submitted that the improvement of access to justice should be essential to the Namibian justice system. Looking at the comprehensive interpretation of access to justice, it is imperative to discuss the Namibian civil justice system by exploring the history and background thereof, having an in-depth discussion of the evolution and current working and shortcomings thereof, with specific emphasis on the objectives of civil litigation, the introduction of case management and how it fits into and affects the access to justice movement. Furthermore, it is imperative to understand the Namibian civil justice system and appreciate the rationale behind the introduction of court-connected mediation in the Namibian High Courts, since this process forms part of the legislation which governs the procedures of the civil justice system.

4.2. *The history and background of the Namibian civil justice system*

Before Namibia gained independence on 21 March 1990, it was in fact a fifth province of the Republic of South Africa,³⁹⁶ that was at that time known as South-West Africa (SWA), who ultimately determined the constitutional arrangements in the SWA territory. Even in defiance of international law and the world public opinion, South Africa nevertheless imposed its will on SWA, made and unmade laws for its

³⁹⁶ Hereinafter referred to as only South Africa.

governance and in practice created a legal order of its own. When SWA gained independence in 1990 under the name of Namibia, it simultaneously implemented its own Constitution. Nevertheless, it was ensured that any laws that were effective before the date of independence would continue to be in effect until they are either repealed or modified by an Act of Parliament, or unless they are deemed unconstitutional by a competent Court.³⁹⁷ As a result thereof, the law of procedure that applied in Namibia before its independence, continued to apply after 21 March 1990. Since then, Namibia's Judge-President of the day introduced custom rules for the High Court. Shivute CJ observed in his judgment in *Attorney-General of Namibia v Minister of Justice and others*³⁹⁸ that the Namibian courts have built an inventory of uniquely Namibian law based on its Constitution and Namibian legislation.³⁹⁹ This essentially entails that, on the basis of the Constitution and the laws of Namibia, the Namibian courts have built up a collection of precedents that is unique to Namibia and the laws that it follows.

In 2011, a radical departure from the shared practice with South Africa began to emerge where the old rule 37,⁴⁰⁰ dealing with the curtailment of proceedings, was substituted with the new rule 37⁴⁰¹ which introduced judicial case management (JCM) in the High Court of Namibia.⁴⁰² This substitution brought a radical change to the process to be followed in the Namibian civil justice system which, for the first time

³⁹⁷ Article 140(1) of Act 1 of 1990.

³⁹⁸ *Attorney-General of Namibia v Minister of Justice and others* 2013 (3) NR 806 (SC).

³⁹⁹ *Ibid.*: para 8.

⁴⁰⁰ Of the Rules of the High Court of Namibia published under the High Court Act 16 of 1990 in the Government Gazette no 90 on 10 October 1990.

⁴⁰¹ Of the Amendment of Rules of High Court of Namibia: High Court Act, 1990, published in the Government Gazette number 57 on 13 May 2011.

⁴⁰² Damaseb (2020: p 4).

in Namibian history, placed the responsibility for guiding the litigation process in the hands of the judges.⁴⁰³

4.3. The civil litigation procedure in Namibia

An adversarial justice system is applied in Namibia for the determination of civil disputes. Since court-connected mediation was one of the new innovations introduced into the Namibian legal system through JCM, it is important to include a brief discussion on what exactly JCM entails, how it was introduced in Namibia, the role of the High Court judges therein and how it assists the courts in promotion of access to justice. The centre of JCM is that judges control the litigation as soon as it becomes opposed, in motion proceedings or defended, in action proceedings.⁴⁰⁴

Before May 2011, the High Court practiced the top-down centralised system of cultural administration wherein individual judges were not responsible for determining the pace of the matter and the running of their own trial diaries. The Judge-President, assisted by the registrar of the High Court, assigned trial dates for a particular term and distributed the files amongst the judges. If, for any reason, the matter did not proceed to trial, the matter's court file was returned to the registrar who would then consult with the parties and assign another trial date. Very often, when the matter returned to Court and was again set down for trial, it was assigned to another judge who would have to start with it afresh. This resulted in duplication in the hearing of the matter and a waste of court time.⁴⁰⁵

⁴⁰³ Ibid.: p 72.

⁴⁰⁴ As in the case of action proceedings. Damaseb (2020: p 80).

⁴⁰⁵ Ibid.: p 10.

As far back as 2010, it became apparent that case backlog has become an impediment to access to justice in Namibia.⁴⁰⁶ In May 2010, a High Court delegation research team conducted a familiarisation visit to the jurisdictions of South Africa, Botswana, Malaysia and Singapore, aimed at primarily addressing the problem of case backlog in Namibia.⁴⁰⁷ This delegation comprised of the Honourable Justice Petrus Damaseb who is the Judge President of the High Court,⁴⁰⁸ Ms Elsie Schickerling who is the Chief Registrar of the High and Supreme Court of Namibia, the Honourable Justice Muller as a judge of the High Court of Namibia and Advocate Geier (as he was then⁴⁰⁹) who was at that time the president of the Law Society of Namibia.⁴¹⁰ It was concluded by this research team that reliance on the formal court system for the resolution of all civil disputes is unrealistic.⁴¹¹ Additionally, it was discovered that the appointment of additional judges, unless perceived as a component of a comprehensive reform initiative, may not be the ideal solution for addressing the issue of case backlog.⁴¹² This conclusion brought about the JCM system in Namibia which includes and combines some form of voluntary court-connected alternative dispute resolution in civil trials. JCM constitutes the core principle that litigants and their lawyers should not dictate the pace of litigation which is the main complaint against the adversarial civil justice system of Namibia.⁴¹³ The current backlog of cases and the High Court's inability to reduce it, has led to inevitable consequences, including a loss of public confidence in the administration of justice. This is due to the system's

⁴⁰⁶ Damaseb First Report (2010: p 9).

⁴⁰⁷ Ibid.: p 11.

⁴⁰⁸ And the Deputy Chief Justice of the Supreme Court of Namibia.

⁴⁰⁹ Advocate Geier was since appointed as a Judge of the High Court.

⁴¹⁰ Damaseb First Report (2010: p 10).

⁴¹¹ Ibid.: p 14.

⁴¹² Ibid.

⁴¹³ Ibid.: p 15.

failure to ensure a timely and cost-effective trial procedure.⁴¹⁴ This directly impacts and limits Namibians' right to access to justice.

Together with attempting to solve the problem of case backlog, JCM also aims to address the public's frustration with delays in finalising of cases filed in the High Court. The research team also records in their report that the early disposition of litigation should always be seen as a strategic objective of great public importance.

In October 2010, a stakeholders' conference was held to discuss the recommendations contained in the first report⁴¹⁵ on promoting access to justice in the High Court which was published at the end of August 2010 and to chart the way forward.⁴¹⁶ According to Damaseb, it was observed that the conference effectively conveyed the idea that while JCM is not originally inherent to the adversarial litigant-driven litigation process of the Roman Dutch tradition, its incorporation into Namibian jurisprudence will have a positive impact on the legal system, enhancing its strength rather than diminishing it.⁴¹⁷ The consensus reached at this stakeholders' conference was to keep the good in the old Rules and improve it with good practices associated with JCM. In her opening remarks to this conference, the Registrar of the High Court summarised that towards the end of 2008 and the beginning of 2009, the High Court realised that a long-term plan should be implemented to serve not only the existing public demand, but also any future public demand. As an end result of this, the High Court adopted the vision of the Ministry of Justice – “timeous and accessible justice for all”.⁴¹⁸

⁴¹⁴ Ibid.: p 34.

⁴¹⁵ Damaseb First Report (2010).

⁴¹⁶ Damaseb Second Report (2010: p 6).

⁴¹⁷ Ibid.

⁴¹⁸ Damaseb Second Report (2010: p 20).

In May 2011, the rules of the High Court of Namibia were amended to place the control and management of civil cases filed at the court in the power of the judges.⁴¹⁹ The organisation and management of the role of the High Court has undergone significant changes since the implementation of docket allocation. As the centralised process for monitoring case rolls has been eliminated, each judge is now in charge of overseeing the dockets that are assigned to them , organising and maintaining their own diary.⁴²⁰ When a judge is assigned dockets, those files stay with that judge until the case is ready to proceed to trial and the judge is expected to gain a thorough understanding of the proceedings relevant to the matter at hand through their administration of the case.⁴²¹ One advantage of the implementation of this judge specific docket allocation is that, if this process is properly utilised, it will avoid wasting court time because judges do not need to re-acquaint themselves with the file frequently, which ultimately leads to matters being finalised quicker.⁴²²

Since the introduction of the new Rules of the High Court on 16 April 2014, cases have been moving forward at a much faster pace, which ultimately results in cases being finalised quicker and within certain prescribed periods.⁴²³ The rate of finalisation of cases in the first year of JCM increased by more than 200%.⁴²⁴ As stated above, the present adversarial system in Namibia is based on the notion that it is the litigants who drive the process of litigation. Litigants and their legal representatives dictate the pace and intensity of litigation⁴²⁵ and if litigants do not take steps necessary to advance the process, the judge may not force them to do so. The litigants can

⁴¹⁹ Damaseb (2020: p 72).

⁴²⁰ Damaseb (2020: p 10).

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ High Court Practice Directions: Rules of High Court of Namibia, 2014 – practice direction 62, “High Court disposal benchmark and policies”.

⁴²⁴ Damaseb (2020: p vii).

⁴²⁵ Damaseb First Report (2010: p 14).

therefore stall the process if they choose and only at the instance of either party may the judge intervene.⁴²⁶ JCM is the very antithesis of the adversarial system. It acknowledges the public interest in ensuring that once litigation has begun, it proceeds in a timely manner in order to reach a final resolution and thereby alleviate the accumulation of pending cases.⁴²⁷ So, with the introduction of JCM in Namibia, the Judges have encouraged the litigating parties to be more conscious of the benchmarks of the rules of the High Court. Already at an early stage of litigation the litigating parties' attention is drawn to Practice Directive 62 and proposes to the parties that, when considering the timelines proposed for the taking of any steps in their suggested case plan, the parties are to also have regard to the High Court Disposal Benchmarks set in Practice Direction 62 (1).

Although, in a JCM environment, the judge is no longer a passive actor in the trial process, he/she remains a neutral and impartial judge of fact and law. In a JCM setting, it is expected of judges to apply caution in order to avoid favoring any particular party or creating the perception of doing so. Judges are specifically required to refrain from assuming the roles of mediators or arbitrators, as these roles are deemed incompatible with their judicial responsibilities. The judges' function as the "manager" of the case is limited to effectively identifying and separating the factual and legal issues that require resolution through adjudication. This entails ensuring that the areas of disagreement, both in terms of facts and laws, are appropriately focused on what is necessary for decision-making during the trial process.⁴²⁸

⁴²⁶ Damaseb First Report (2010: p 15).

⁴²⁷ Ibid.

⁴²⁸ Damaseb First Report (2010: p 16).

4.4. Objectives of civil litigation to promote access to justice in the High Court of Namibia

Rule 1(2)⁴²⁹ governs the procedural aspects of legal proceedings in Namibian courts and serves to implement the provisions outlined in article 12(1) of the Constitution.⁴³⁰ The fundamental objectives outlined in subrule (3) dictate the implementation of these regulations, aiming to enable the fair and efficient resolution of actual disputes in a timely and cost-effective manner, to the extent possible, by the following means:

- (a) Ensuring equitable treatment among the parties involved;⁴³¹
- (b) Reducing expenses by, among other methods, restricting interlocutory proceedings to only what is essential for achieving a just and prompt resolution of the case or issue;⁴³²
- (c) Addressing the cause or approach in manners that are proportionate with the following factors:⁴³³
 - (i) The amount or value of the monetary claim at hand;
 - (ii) The significance of the cause;
 - (iii) The intricacy of the matters and the financial circumstances of the interested parties.
- (d) ensuring that cases are handled promptly and impartially;⁴³⁴

⁴²⁹ Amended Rules of the High Court of Namibia: High Court Act 1990.

⁴³⁰ The right to a fair trial.

⁴³¹ Rule 1(3)(a) of the High Court Rules.

⁴³² Rule 1(3)(b) of the High Court Rules.

⁴³³ Rule 1(3)(c) of the High Court Rules.

⁴³⁴ Rule 1(3)(d) of the High Court Rules.

(e) by acknowledging that judicial time and resources are constrained, thus necessitating the allocation of an appropriate portion of the court's time and resources to each case. This allocation must also consider the need to allocate resources to other cases;⁴³⁵ and

(f) taking the public interest into account by minimising contentious issues and promoting early resolution of disputes through mutual agreement between the involved parties.⁴³⁶

According to Rule 17(1),⁴³⁷ it is mandated that the court should strive to uphold the overarching purpose mentioned in Rule 1⁴³⁸ when exercising any authority granted to it under these regulations or when interpreting any other procedural rule or practice directive that is applicable in the court. The major duty for the control and management of cases filed before the court lies with the court itself. It is imperative that the parties involved, along with their legal practitioners, collaborate with the court in order to effectively accomplish the overarching purpose.⁴³⁹

4.5. The shortcomings of the Namibian civil justice system and the impact on access to justice

Nims explains two different distinct methods of approaching the resolution of disputes. One is the “conference method”, where two parties seek to find agreement or disagreement, and the other is the adversary system, which instead promotes conflict between the parties. The later escalates litigation costs.⁴⁴⁰ Damaseb opines that the main complaint against our civil justice system is the dominance of the

⁴³⁵ Rule 1(3)(e) of the High Court Rules.

⁴³⁶ Rule 1(3)(f) of the High Court Rules.

⁴³⁷ the High Court Rules.

⁴³⁸ the High Court Rules.

⁴³⁹ Also see Rule 19.

⁴⁴⁰ Tahura (2019: p 32).

litigants and their lawyers in the litigation process in comparison to the courts' passive role.⁴⁴¹ The most prominent characteristic of the orthodox adversarial justice system is that the parties to litigation define the ambit of the dispute and decide what evidence to lead to prove or disprove a case. The role of the judge is that of a neutral and passive umpire with no real power or mechanisms to expedite proceedings. The rules of court and practices underpinning the adversarial system thus place emphases on litigants and their legal advisers as the prime drivers of litigation. Because of this emphasis on the interests of the litigants, even the most committed supporters of the adversarial system will recognise that the system is easily manipulated to frustrate the opponent and achieve delay.⁴⁴²

Unnecessary and excessive delays have become a flaw in the administration of justice.⁴⁴³ One of the primary elements contributing to these delays is the delegation of control over the pace of litigation to the litigants themselves, with only a limited number of exceptions. This issue is further intensified by the prevailing adversarial system inside the Namibian judicial system. The courts are unable to initiate action independently but rather rely on the submission of an application by one of the involved parties. The involvement of courts is reliant upon the voluntary participation of the parties, rendering them passive entities in the legal process. In the current context, there is a limited utilisation of procedural mechanisms aimed at expediting litigation and mitigating delays and their associated biases.⁴⁴⁴ As a result of litigants pacing the way of their own litigation and the courts not being able to act of their own motion but only on the application of the parties, litigation has become time

⁴⁴¹ Damaseb (2020: p 73).

⁴⁴² Damaseb (2020: p 79).

⁴⁴³ *Aussenkehr v Namibia Development Corporation*, para 85.

⁴⁴⁴ *Ibid.*

consuming and costly in nature. In his judgment delivered in the *Aussenkehr Farms* matter,⁴⁴⁵ Ngcobo AJA observed that the involved parties constantly afford one other ample extensions of time and proceed with the litigation at their own pace.⁴⁴⁶ It can be concluded that without any doubt, that this overburdens court rolls and causes case backlog which, in its own way, excludes less educated and poorer Namibian citizens from acquiring their fundamental human rights of access to justice. In addition, it might be argued that the adversarial system worsens the dispute between opposing parties, frequently leading to irreparable damage to their relationships and often yielding an unsatisfactory resolution to the issue at hand.⁴⁴⁷

4.6. Conclusion

The duty of the civil justice system is to facilitate and improve access to justice in Namibia. This can be achieved by legislative review to include acceptable and accessible processes for individuals whose rights have been violated. In light of the problems experienced at the High Court, it was inevitable and unavoidable for Namibia to adopt JCM for the conduct of litigation. It is clear that access to justice, as discussed in chapter 2, cannot be limited to access to court and must include access to some form of alternative manner for individuals to resolve their disputes. By adapting legislation to suit the needs of an ever-growing community, renewed confidence in the judicial system can be achieved, which is a vital requirement in the legitimacy of a modern judicial system.⁴⁴⁸ It is with the introduction of JCM, where Namibians were also introduced to court-connected ADR as a means to settle disputes.

⁴⁴⁵ *Aussenkehr v Namibia Development Corporation*.

⁴⁴⁶ *Ibid*, para 85.

⁴⁴⁷ Maclons (2014: p 1).

⁴⁴⁸ Damaseb Second Report (2010: p 15).

CHAPTER 5:

COURT-CONNECTED MEDIATION AS A FORM OF COMPULSORY MEDIATION

5.1. Introduction

As previously stated, mediation is not foreign to the Namibian civil justice system, compulsory mediation even less so. This is further evident in the introduction of court-connected mediation as a possible remedy for the challenges faced by the Namibian civil justice system. In addition to conventional voluntary mediation discussed in chapter 3, which allows parties to withdraw at any point without facing negative repercussions, there exists a judicially approved procedure known as court-connected mediation.⁴⁴⁹ This procedure aims to compel parties to consider a non-adversarial resolution to a dispute in which litigation has already commenced.⁴⁵⁰

Mediation as a form of ADR has been analysed in chapter 3. Since court-connected mediation is the only form of compulsory ADR in Namibia,⁴⁵¹ it is prudent for this study to discuss court-connected mediation in detail. This chapter will outline the recent developments in the Namibian legislation and processes, which introduced court-connected mediation into its civil justice system. The nature and concept of court-connected mediation is discussed to include Namibian statutes providing for court-connected mediation and in which matters compulsory mediation can play a significant role.

⁴⁴⁹ Rule 38 and 39 of the High Court Rules read with Practice Directive 19.

⁴⁵⁰ *Kalagadi Manganese v Industrial Development Corporation*, para 28.

⁴⁵¹ High Court Rules: “alternative dispute resolution” referred to in these rules as ‘ADR’ means conciliation or mediation.

This chapter will form the analytical core of the study by providing in-depth dissection of court-connected mediation in Namibia, expanding on the process of court-connected mediation and will conclude by emphasising how court-connected mediation can complement litigation (and how compulsory mediation can increase the effectiveness) within a civil justice system and the impact it can have in alleviating the shortcomings of the Namibian civil justice system outlined and discussed in chapter 4.

5.2. The introduction of Court-connected mediation in Namibia

In May 2010, the High Court appointed a delegation research team⁴⁵² who conducted a familiarisation visit to the jurisdictions of South Africa, Botswana, Malaysia and Singapore. The visit was aimed at addressing the problem of case backlog and other hindrances caused and faced by litigation in Namibia. This research team concluded that the reliance on the formal court system for the resolution of all civil disputes is unrealistic.⁴⁵³ Moreover, this led to the creation of the judicial case management system in Namibia which includes and combines some form of voluntary and compulsory court-connected ADR in civil trials. It was opined that ADR should at the initial stage of litigation be voluntary and optional but must ultimately become compulsory through legislative intervention.⁴⁵⁴

The need for diversionary measures from the ordinary court adjudication process, as a means of relieving pressure on the court system, was a key principle on which the reform of the High Court's regulations was based.⁴⁵⁵ Since the introduction of court-

⁴⁵² This research team comprised of the Judge President of the High Court, Petrus T. Damaseb; The Honourable Mr. Justice Louis C Muller; Justice Louis C Muller, Judge of the High Court; Mrs Elsie Schickerling, the Chief Registrar of the High and Supreme Courts of Namibia and Advocate (as he was at that time) Harald Geier.

⁴⁵³ Damaseb First Report (2010: p 14).

⁴⁵⁴ Ibid.: p. 4.

⁴⁵⁵ Damaseb (2020: p 253).

connected mediation the success rate of cases resolved in court-connected mediation has seldom decreased below 60% and in 2018 increased to 67%.⁴⁵⁶

Since the implementation of court-connected mediation, it has become evident that the encouragement of litigants to attempt to settle their disputes outside of court is an acceptable governmental objective which aligns with the public policy rationale which it serves. Rule 1(3)(f)⁴⁵⁷ requires that disputes be resolved speedily and efficiently, with a focus on limiting the matters at hand and encouraging early settlement through agreement between the parties. This rule prioritises the resolution of disputes as a primary objective.⁴⁵⁸ It can be inferred that this process was introduced in Namibia as a possible remedy for the challenges faced by the Namibian civil justice system, which will ultimately have a positive outcome on access to justice under the Namibian justice system.

The amended Rules of the High Court came into force on 16 April 2014⁴⁵⁹ and thus Rules 38 and 39 of the new High Court Rules, read with Practice Directive 19, introduced court-connected mediation in the High Court, which are now law.⁴⁶⁰ ADR was established as a necessary component of litigation. In the High Court, ADR is restricted to mediation⁴⁶¹ and as such, mediation is now employed and compelled, in some instances, by the High Court as a major instrument for settling disputes and resolving issues before the matter goes to trial. It can be concluded that the process of court-connected mediation has become a permanent fixture in Namibia.

⁴⁵⁶ Ibid.: p vii.

⁴⁵⁷ Of the High Court Rules.

⁴⁵⁸ Damaseb (2020: p 251).

⁴⁵⁹ GN 4 published in GG 5392 of 17 January 2014.

⁴⁶⁰ Damaseb speech (2014).

⁴⁶¹ Damaseb (2020: p 250).

Since court-connected mediation is only provided for matters instituted in the High Court, it is important to outline the provisions contained in the Rules of the High Court.

5.3. *Legislation in relation to the High Court which provides for, underlines and supports the purpose of court-connected mediation*

By virtue of section 39 of the High Court Act,⁴⁶² the Judge-President, with the approval of the President, may create rules for regulating the conduct of the proceedings in the High Court. Section 39(1)(d) of the Act⁴⁶³ further empowers the Judge-President to include in these rules any provisions to regulate compulsory ADR in certain cases and various matters brought before the court. It is further prescribed in this section that a judge may order the parties to refer their dispute to any of the prescribed ADR mechanisms and that it is only when the ADR is unsuccessful and the certificate confirming same is issued, that the matter may be set down for hearing of trial. The Rules of the High Court of Namibia⁴⁶⁴ thus emanates from the above-discussed Act.⁴⁶⁵

To effectively comprehend the purpose of the introduction of court-connected mediation, it is imperative to evaluate and comprehend the reason, purpose and origin thereof. The Rules must be read and understood as a whole, and not only be interpreted rule for rule. It is therefore important to start at the beginning of the Rules and work one's way through to comprehend the importance and impact of court-connected mediation on access to justice in Namibia.

⁴⁶² 16 of 1990, as amended.

⁴⁶³ 16 of 1990, as amended.

⁴⁶⁴ For purposes of this chapter 5.3, the Rules of the High Court of Namibia will be referred to as only "the Rules".

⁴⁶⁵ Act 16 of 1990, as amended.

Rule 1 of the Rules explores the definitions and overriding objectives of the Rules. Rule 1(2) states that these Rules are implemented to provide for the conduct of proceedings in the High Court and for providing effect to the provisions of article 12 (1) of the Namibian constitution.⁴⁶⁶ Rule 1 (3) further has the overriding objective to govern the application of these Rules.

Rule 1(3) clearly states that the overriding objective of these Rules is to facilitate the resolution of the actual matters in dispute justly, speedily, effectively and cost-effectively as far as reasonably possible. It is evident from this Rule that not all parts of a dispute would necessarily be classified as a “real issue”. Which means that there can be certain parts of a dispute which is only secondary to the real issue in dispute. It is illustrated later in this chapter how court-connected mediation can assist disputing parties to limit the matters and facts brought before court to be decided on during a trial to focus only on the “real issues”. It is imperative to keep in mind the legal term *de minimis non curat lex*, which means that the law does not concern itself with trifling matters. Rule 1(3) thus enables the court to ensure that it only handles real issues in dispute and does not get involved in minor or insignificant disagreements.

Rule 1(3) is probably one of the most important Rules to remember when dealing with the resolution of disputes. It goes on to list the important objectives which must be ensured when resolving a dispute. These include to: ensure that all the parties are on equal standing;⁴⁶⁷ save costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of cause or matter;⁴⁶⁸ dealing with the cause or method in ways which are proportionate to: the

⁴⁶⁶ As already discussed in chapter 2.3.

⁴⁶⁷ Rule 1(3)(a) of the High Court Rules.

⁴⁶⁸ Rule 1(3)(b) of the High Court Rules.

amount or value of the monetary claim involved, the importance of the cause and the complexity of the matters and the financial position of the parties;⁴⁶⁹ ensure that cases are dealt with expeditiously and fairly;⁴⁷⁰ recognise that judicial time and resources are limited and therefore allotting to each cause an appropriate share of the court's time and resources, while at the same time taking into account the need to allot resources to other causes;⁴⁷¹ and it is important to acknowledge the significance of prioritising the public's interest in minimising the number of unresolved matters and promoting the prompt resolution of conflicts through mutual agreement among the involved parties.⁴⁷²

The objectives outlined in Rule 1(3) not only facilitates access to justice, but access to *fair* justice. Merely from what is evaluated above, it is already evident that the amended Rules places emphasis on ADR when it is stated that, *inter alia*, it should be ensured that all parties are on equal standing and that early settlement of disputes should be considered. Furthermore, Rule 17 deals with the application of these overriding objectives by the court. Rule 17(1) poses an obligation on the court to "... seek to provide effect to the overriding objective referred to in Rule 1 when it exercises any power conferred to it under these rules or in interpreting any other rule of procedure or practice direction applicable in the court." The obligation placed on the court is thus to ensure the facilitation of the resolution of the actual matters in dispute justly and speedily, effectively and cost-effectively as far as reasonably possible, while being guided by the objectives listed above.⁴⁷³ Later in this chapter, it

⁴⁶⁹ Rule 1(3)(c)(i)-(iii) of the High Court Rules.

⁴⁷⁰ Rule 1(3)(d) of the High Court Rules.

⁴⁷¹ Rule 1(3)(e) of the High Court Rules.

⁴⁷² Rule 1(3)(f) of the High Court Rules.

⁴⁷³ Rule 1(3) of the High Court Rules.

is discussed how court-connected mediation can contribute to achieving these objectives.

Rule 19, in addition to Rule 17, imposes specific responsibilities on the litigating parties and their legal counsel, if applicable, prior to appearing in court. For purposes of this study, all these obligations will not be listed, but the most significant obligations include: collaborating with the court and the managing judge to achieve the primary objective;⁴⁷⁴ aiding the court in reducing proceedings;⁴⁷⁵ restricting interlocutory proceedings to what is strictly necessary for a fair and prompt resolution of a case;⁴⁷⁶ making reasonable efforts to resolve a dispute through agreement between the parties involved;⁴⁷⁷ ensuring that costs are reasonable and proportionate⁴⁷⁸ and acting promptly to minimise delays.⁴⁷⁹ From the advantages of ADR which were discussed under chapter 3, it becomes evident that these provisions in the rules pave the way for ADR to be implemented as a way to promote access to justice in Namibia.

Rules 1, 17 and 19 sets out the objectives of the Rules and what is expected from the Court and the disputing parties to achieve these objectives. Further Rules make provision for the processes and procedures to be considered and followed, to consider and achieve the objectives. Rules 23, 25 and Rule 26 deals with the case planning, case management and pre-trial conferences.

In terms of Rule 23(1), a managing judge must, as soon as the docket of a case has been allocated to him or her, inform the disputing parties that a case planning

⁴⁷⁴ Rule 19(a) of the High Court Rules.
⁴⁷⁵ Rule 19(b) of the High Court Rules.
⁴⁷⁶ Rule 19(c) of the High Court Rules.
⁴⁷⁷ Rule 19(g) of the High Court Rules.
⁴⁷⁸ Rule 19(h) of the High Court Rules.
⁴⁷⁹ Rule 19(i) of the High Court Rules.

conference will be held for the consideration of a case plan on how this matter will proceed. In this case plan, the parties are to allocate how they intend to proceed with the matter and include timelines for filing of various pleadings and/or further documents. When drafting a case plan and considering the timelines proposed for the taking of any steps in their suggested case plan, the parties are to also have regard to the High Court Disposal Benchmarks set in Practice Direction⁴⁸⁰ 62 (1). With the implementation, demand and high success rate of court-connected mediation, some of the high court judges include a guideline in their case plan order which reads as follows:

*“Alternative Dispute Resolution: Should the parties in their case plan indicate that they wish to have the matter referred to alternative dispute resolution, before taking any further steps in the case, they are to indicate, in their case plan their reason(s) for wishing to do so and whether they desire court-accredited or private mediation, and also provide necessary and further information prescribed by Practice Directive Note 65(6) relating to the referral of matters to alternative dispute resolution, to enable the court to issue an initial referral to mediation order out of chambers.”*⁴⁸¹

Therefore, it is evident that the judges actively strive to notify the parties involved in a dispute about the option of ADR, even in cases when mediation is not mandatory.⁴⁸²

⁴⁸⁰ Rule 3(3) states that the Judge-President may, for the orderly conduct of proceedings in any cause or matter, issue or cause to be issued practice directions or repeal and replace the practice directions or amend a provision of a practice direction. The Practice Directions will hereinafter be referred to as “PD”.

⁴⁸¹ *Fischer Seelenbinder Associated CC v Henning Asmus Seelenbinder*, Case Planning Conference Notice dated 12 February 2021, accessible at <https://ejustice.jud.na/ejustice/f/caseinfo/publicsearch> under case number HC-MD-CIV-ACT-OTH-2020/05086.

⁴⁸² Matters which are mandatory to be referred to court-connected mediation will be discussed under 5.5.

After the proposed timelines for filing of further pleadings and/or documents and initial processes to be followed has been complied with, the matter before court is set down for a case management conference.⁴⁸³ According to Rule 25(2)(o), the case management conference must consider the potential for settlement discussions or the potential for resolving issues through alternative methods of dispute resolution.

Rule 26(1) provides that a pre-trial conference must be held before the trial or hearing of any matter and during this conference, the issues set out in the pre-trial order must be addressed. According to Rule 26(6), the proposed pre-trial order must address specific matters, including the likelihood of reaching a settlement in the case and whether the parties have engaged in any alternative methods of resolving their disagreement.

Should the managing judge, either on their own initiative or at the request of a party, decides to refer a part of the proceeding or a matter to an alternative dispute resolution (ADR) process in order to resolve it, the process will be regulated by Rules 38 and 39, along with the relevant procedural directions (PDs). The forthcoming section of this chapter will encompass a thorough examination and integration of these Rules.

5.4. The process of court-connected mediation in Namibia

The process and procedures for court-connected mediation in Namibia are set out and governed by Rules 38 and 39,⁴⁸⁴ PD19,⁴⁸⁵ the Registrar's Note issued in terms of PD65 incorporating the Judge President's practice notes⁴⁸⁶ and the Code of Conduct for Court-Accredited Mediators.⁴⁸⁷

⁴⁸³ Rule 25(1) of the High Court Rules.

⁴⁸⁴ Of the High Court Rules.

⁴⁸⁵ High Court Practice Directions: Rules of High Court of Namibia, 2014.

⁴⁸⁶ Judge President's Practice Note 1/2014 issued in terms of the Registrar's Note 2(4) issued in terms of Practice Direction 65

⁴⁸⁷ Code of Conduct for court-accredited mediators (n.d.)

Court-connected mediation provides that whenever a notice to defend is filed in action proceedings, or a notice of intention to oppose is delivered in application proceedings, the matter may be referred to court-connected mediation in an attempt to settle and resolve the dispute outside of court. In terms of Rule 38, the referral to mediation is ordered by the managing judge, either of his or her own accord or at the request of the parties in dispute. In the latter cases, the matters are voluntarily referred to mediation. PD 19(5), however, prescribes certain matters in which mediation is compulsory. These matters and the rationale behind the referral of these specific matters are discussed at a later stage in this chapter.

According to PD 19(1), which mandates the consideration of ADR at the earliest point in court proceedings, mediation referrals typically occur at the outset of litigation. This allows for the resolution of the matter prior to the submission of additional pleadings, discovery documents, or witness statements. By referring the matter to mediation at the commencement stage of the litigation thus saves court time and legal fees since these pleadings do not have to be prepared. However, Rule 35(1) makes provision for matters not listed under PD 19(5) to be referred to ADR at any stage of the proceedings. When the overriding objective of ADR is considered i.e. saving unnecessary legal fees, it is recommended that the matter be referred to ADR before further pleadings and/or documents are filed. However, in some instances, it is beneficial to the parties to have insight of the facts pleaded by the other party which will allow the parties to construct a more comprehensive claim or defence and will allow them to mediate with more facts and knowledge of the other parties' case to allow effective communication during the mediation proceedings.

When the managing judge is informed by the parties of their intention to refer their matter to mediation, an initial mediation referral order⁴⁸⁸ is issued by the court. If the need of the parties is to refer the matter to court-connected mediation, the matter may only be referred as such if both parties are legally represented.⁴⁸⁹ This requirement's clear justification is to prevent unrepresented litigants from being forced or persuaded to settle cases to their disadvantage without the benefit of sound advice from any legal counsel.⁴⁹⁰ In the absence of legal representation, parties may fail to distinguish the subtle distinctions between the act of referring a case to mediation, the imposition of mandatory mediation, and the use of persuasive strategies to encourage a mutually agreed settlement.⁴⁹¹

Upon being notified of the parties' wish to pursue court-connected mediation, the managing judge is obligated, as per Rule 38(1), to provide instructions regarding the scope of the mediation, the location and method of conducting it, and, if the parties cannot agree, the person responsible for overseeing the ADR process.⁴⁹² Additionally, the managing judge must specify the timeframe for the mediation and the deadline for the mediator to submit a report to the court.⁴⁹³ The parties will receive these instructions in the form of an initial mediation referral order.⁴⁹⁴ No further actions should be taken until the managing judge issues an order about the ADR procedure, based on the mediator's report.⁴⁹⁵

⁴⁸⁸ Registrar's Notes: Example 1.

⁴⁸⁹ Registrar's Notes: 4(4)

⁴⁹⁰ Damaseb (2020: p 256).

⁴⁹¹ Nolan-Haley (1996: p 62).

⁴⁹² Rule 38(1)(a) of the High Court Rules.

⁴⁹³ Rule 38(1)(b) of the High Court Rules.

⁴⁹⁴ JP Practice note 1 of 2004 read in conjunction with the Registrar's Notes: 3 (6).

⁴⁹⁵ Rule 38(3) of the High Court Rules.

The initial mediation referral order referred to above directs the parties to approach the mediation office of the High Court to reserve a date and specific mediator to lead the mediation.⁴⁹⁶ Further to this and as prescribed by the Judge-President’s practice note,⁴⁹⁷ the initial mediation referral order must clearly state: “whether the matter will be referred for court-accredited private mediation or court-connected mediation; the identity of the legal practitioner who will accompany each of the parties; if the matter will be referred for court-connected mediation and any one or more of the parties will require the services of an interpreter, the interpretation language(s) so required and if the matter will be referred for court-accredited private mediation, the order must state that if any one or more of the parties will require the services of an interpreter, such party will be responsible to arrange and pay his or her own interpreter and the next court appearance date and time, hereinafter referred to as the mediation referral proceedings.”

Once the parties have complied with the orders of the initial mediation referral order, the court will convene on the set return date and, if the managing judge is satisfied that the terms of the initial order have been complied with, a mediation referral order will be issued which sets down the date for the mediation to take place, confirms the identity of the mediator, parties and their legal practitioners, the venue where the mediation session will take place, dates for the exchange of certain documents and whether or not an interpreter is required for the session.⁴⁹⁸ The matter is then, by virtue of the mediation referral order, referred to mediation and will stipulate a date, after

⁴⁹⁶ The list and available dates of court accredited mediators is available on the High Court of Namibia’s website at <https://ejustice.moj.na/High%20Court/Mediation/Pages/Diary.aspx>

⁴⁹⁷ 1 of 2014, which is incorporated by the Registrar’s notes issued in terms of PD 65.

⁴⁹⁸ Damaseb (n.d.: p 13).

the completion of the mediation session, on which the parties must return to court to indicate the outcome of the mediation session.

Rule 39 prescribes the obligations of the parties where a matter is referred to ADR. In terms of Rule 39(1), the parties are tasked with the exchange of written settlement proposals to each other.

The written settlement proposals from the plaintiff should contain a concise overview of the evidence and legal concepts upon which they rely,⁴⁹⁹ a short explanation of the plaintiff's perspective on the potential success of the relief sought during the trial,⁵⁰⁰ a detailed list of the damages and other remedies they feel can be proven during the trial, together with a brief overview of the evidence and legal concepts that support these damages or other remedies.⁵⁰¹ Additionally, a concise settlement proposal should be included.⁵⁰²

In response thereto, the defendant's brief should set out any aspects of the plaintiff's brief that the defendant concurs with⁵⁰³ and contests⁵⁰⁴ and should conclude with a clear proposal for a settlement.

PD 19(6) provides for the mediation sessions to be conducted on a "without prejudice" basis. This means that written settlement proposals should not be shown to the managing judge, court, or any party involved in the proceedings.⁵⁰⁵ These proposals should also not be used in any related or unrelated legal proceedings. These settlement ideas are not included in the official court filings and are maintained as private and

⁴⁹⁹ Rule 39(1)(a)(i) of the High Court Rules.

⁵⁰⁰ Rule 39(1)(a)(ii) of the High Court Rules.

⁵⁰¹ Rule 39(1)(a)(iii) of the High Court Rules.

⁵⁰² Rule 39(1)(a)(iv) of the High Court Rules.

⁵⁰³ Rule 39(1)(b)(i) of the High Court Rules.

⁵⁰⁴ Rule 39(1)(b)(ii) of the High Court Rules.

⁵⁰⁵ Rule 39(2) and (9) of the High Court Rules.

secret. Prior to the commencement of the set-down mediation session, the legal representatives of the parties are required to furnish their respective clients with the settlement plan put forth by the opposing side.⁵⁰⁶

After the exchange of the written settlement proposals, the set-down mediation session will take place before the reserved mediator.⁵⁰⁷ Since the inception of court-connected mediation in Namibia, these sessions were only conducted in Windhoek, via the High Court Main Division and at facility situated at the High Court building, Northern Local Division. On 21 February 2024, the Judge President issued a practice note to include court-connected mediations to be conducted at the Walvis Bay Magistrates' Court, which will be referred to as the coastal court-connected mediations.⁵⁰⁸

The mediation session requires the presence of a representative from any party involved in the court proceedings who possesses complete settlement authority.⁵⁰⁹ This representative must have the power and authority to make a final and binding settlement without consulting anyone who is not present at the settlement conference.⁵¹⁰

Court-connected ADR may only be conducted by a mediator duly accredited by the Judge-President appointed as mediators in court-connected ADR, except that the

⁵⁰⁶ Rule 39(4) of the High Court Rules.

⁵⁰⁷ Rule 39(3) of the High Court Rules.

⁵⁰⁸ Judge President's Practice Note 1/2024 issued in terms of the Registrar's Note 2(4).

⁵⁰⁹ Rule 39(6) states that a party with full settlement authority is a party that is – (a) a natural person, must be represented by that natural person or if that natural person is under a disability by his or her legal representative; (b) a juristic person, must be represented by a person duly authorised in writing by that juristic person, other than the legal practitioner of record; (c) a regional or local authority council, must be represented by the chief executive officer of that council or his or her duly authorised representative who is not the legal practitioner of record; (d) insured and will in the cause or matter claim immunity from an insurer under an insurance policy, must be represented by a duly authorised representative of the insurer with settlement authority, together with the person representing the insured party.

⁵¹⁰ Rule 39(7) of the High Court Rules.

parties may appoint a mediator in the case of a private ADR.⁵¹¹ If the dispute was referred to mediation through a court order, the mediation session will be overseen by a court-accredited mediator chosen by the parties involved. In the event that the parties are unable to reach a mutual agreement about the selection of a mediator, the court will designate and assign one on their behalf.⁵¹²

At the beginning of the mediation session, the mediator will provide an explanation of the process to the parties and assist them identify the actual matters at hand. Additionally, the mediator will present the parties with various options for moving forward. The primary goal of the mediator will be to facilitate and motivate the conflicting parties to achieve a mutually agreed-upon resolution of the matter through voluntary means. While a mediator cannot ensure that each party has made an informed decision when agreeing to settle a matter, it is advisable for the court-accredited mediator to inform the parties about the importance of seeking advice from other professionals, if necessary, to enable them make decisions. Prior to reaching a settlement and concluding the session, the mediator will engage in a discussion with the parties regarding any occurrences of fraud, false statements, and dishonesty.⁵¹³

Court-accredited mediators are guided by the court-enforced Code of Conduct for Court-Accredited Mediators. The mediator will conduct the mediation session with the aim and purpose of guiding the disputing parties to a possible settlement by providing the parties with a neutral evaluation of the strengths and weaknesses of their individual cases.⁵¹⁴ At all times during the mediation session, the mediator should keep in mind that ADR aims at allowing the parties to resolve their disputes

⁵¹¹ PD 19(4).

⁵¹² Damaseb (2020: p 257) ; PD 19(3).

⁵¹³ Code of Conduct for court-accredited mediators (n.d.: comment at para 1).

⁵¹⁴ Damaseb (2020: p 257).

expeditiously and cost-effectively and should conduct the mediation session in such a way that these goals are likely to be achieved.⁵¹⁵

In terms of the Code of Conduct, the mediator's role is to facilitate communication, enhance the parties' comprehension of the process and facts, aid the disputing parties in identifying their needs and interests, and employ innovative problem-solving techniques to enable the parties to independently determine whether they are willing to resolve the matter or not.⁵¹⁶ This complements the advantage of referring a dispute to mediation since the strict legal process is removed from the proceedings. The mediator constantly ensures that the actual matters in dispute are being handled and that all parties involved remain conformable with the process followed. This also provides the parties with an understanding that they are truly being heard and that their concerns with a certain process is addressed in a way they understand.

The Code of Conduct further empowers the court-accredited mediator to terminate the mediation session on his or her own accord where it is clear that any party is abusing the process or that there is no reasonable prospect that this matter will become settled, either in total or only some of the issues. Where the proposed settlement of the matter appears to be illegal or against public policy, having regard to the circumstances of the matter, or where it is considered that the continuation of the mediation is unlikely to result in any settlement agreements, the court-accredited mediator has the obligation to inform the parties thereof and terminate the mediation session with immediate effect.⁵¹⁷

⁵¹⁵ PD 19(2).

⁵¹⁶ Code of Conduct for court-accredited mediators (n.d.: para 1).

⁵¹⁷ Code of Conduct for court-accredited mediators (n.d.: para 6).

After the conclusion of the mediation session, there are three possible outcomes. First, the matter could be settled in totality. Secondly, the matter can be partially settled or lastly, the parties were unable to come to any agreement concerning settlement of the matter.

If the mediation results in a settlement between the parties, the court-accredited mediator should encourage the parties to continue the mediation until the parties have addressed any enforceability issues and recorded the terms of the settlement in writing.⁵¹⁸ By consent between both parties or upon the application to the court by any of the parties, the settlement agreement can be made an order of court.⁵¹⁹ The parties inform the court that the matter was settled, whereafter the managing judge will issue an order to that effect and the matter will be removed from the court roll.

However, in the event that the dispute remains unresolved after ADR and the disputing parties are unable to reach a settlement agreement, the managing judge will provide the necessary directions for the matter to proceed and the matter will be returned to the traditional process of litigation.⁵²⁰ The same process will be followed where the matter was only partially settled. This essentially entails that there were some issues that were resolved and settled and some issues which must be referred back to the court to be resolved by the court through hearing of the matter.⁵²¹

The status and outcome of the court-connected mediation session is recorded in a mediation report compiled by the court-accredited mediator who conducted the mediation session.⁵²² In the event that the court-connected mediation does not result

⁵¹⁸ Ibid.: para 7.

⁵¹⁹ Maclons (2014: pp 119-120).

⁵²⁰ PD19(8).

⁵²¹ Maclons (2014: pp 119-120).

⁵²² Rule 38(1)(b) of the High Court Rules.

in settlement of the matter, the mediator's report should solely indicate the failure of the settlement discussions.⁵²³ As mediation sessions are conducted on a "without prejudice" basis,⁵²⁴ the court-accredited mediator is not required to disclose the cause for the failure to reach a settlement, unless it is necessary to advise the court about the potential imposition of sanctions.⁵²⁵ The mediator's report must not disclose any information, communication or documents exchanged during the court-connected mediation session.⁵²⁶ The managing judge has the discretion to disregard the mediator's proposal or conclusion and can issue any order that they consider suitable.⁵²⁷

At this junction, it is important to pause and reflect thereon that in Namibia, the public expects a judicial procedure which is affordable, transparent, accessible to all and, most importantly, is fair to all. Such process should further be easy to grasp and should be able to deal with a dispute between the parties in a reasonable time. This is ultimately the standards against which the effectiveness of the High Court is measured.⁵²⁸ From the above exploration of the process of the court-connected mediation program in Namibia, it can be concurred that the process availed to individuals as an alternative attempt to settle their disputes opens an additional channel that allows for better access to justice in Namibia.

5.5. Compulsory ADR in prescribed matters in the High Court of Namibia

In terms of PD 19(5), unless a managing judge directs otherwise, mediation is compulsory in the following cases: insurance claims; medical negligence;

⁵²³ Rule 38(4) of the High Court Rules.

⁵²⁴ PD 19(6).

⁵²⁵ Rule 38(4) of the High Court Rules.

⁵²⁶ PD 19(7).

⁵²⁷ Rule 38(5) of the High Court Rules.

⁵²⁸ Damaseb First Report (2020: p. 20).

professional negligence against legal practitioners; building contract claims; divorce, custody of, and access to minor children; spousal and child maintenance; loan default claims; motor vehicle accident claims and defamation.⁵²⁹

As already outlined and discussed in chapter 3, every dispute differs in facts, merits and character which must be considered when deciding whether a particular dispute is suitable for mediation instead of trial in court.⁵³⁰ The type of matters set out in PD 19(5), are the matters identified to be the most suitable to be referred to ADR.

It can be concurred that the matters set out in PD 19(5) positively reflect the characteristics of matters that are suitable to be referred to ADR. It would be beneficial to all parties involved in these matters that the dispute be resolved quickly and in most of these matters the parties may have a personal relationship or, at the very least, have some form of relationship with each other. In matters such as defamation claims, loan default claims and motor vehicle accident claims, an agreed settlement may be far more suitable to the parties than an order made by the court.

On the contrary, these matters do not concern the establishment of a legal precedent, it is unlikely that parties in these types of disputes wish to draw public attention to the matter and that the parties may rather want to retain these proceedings and information private and confidential.

For purposes of this study, compulsory court-connected mediation for defamation, divorce, custody of, and access to minor children, and spousal and child maintenance are discussed. These matters were identified as being the most suitable to be referred to ADR. The nature and reasoning behind this are set out and discussed below.

⁵²⁹ PD19(5)(a) – (i).
⁵³⁰ Damaseb (2020: p 251).

5.5.1. Divorce, custody of, and access to minor children and spousal and child maintenance

*“Marriage is, typically, born out of such love and solemnized with such hope that its termination by divorce cannot but be tragic. But the death of this marriage, or at least the manner in which the last rites have been pronounced over it, represents a tragedy of an especially painful sort.”*⁵³¹

A divorce proceeding is by its very nature a traumatic event.⁵³² When parties enter into divorce proceedings, it creates more than just a legal problem. In addition, divorce proceedings originate from family breakdown which in turn creates a social problem where non-legal issues prevail.⁵³³

In the South Gauteng High Court of Johannesburg, Brassey, AJ observed that parties experience a wide range of emotions, including greed, anguish, and vengefulness. He further stated that divorce proceedings often concern the rights of both minor and major children who can become confused and feel scared at the breakdown of their family structure of love and support on which they have become dependent.⁵³⁴ The judge also included in his judgment that in divorce proceedings, the division of the parties’ estates is already a complex matter and can frequently be made even more complex by the parties’ deceit and hatred.⁵³⁵ Furthermore, the legal fees usually are paid for out of the family's common funds which creates a further source of concern and anxiety since the resources that could be utilised for family members' progress are being depleted.⁵³⁶

⁵³¹ *Brownlee*, para 1.

⁵³² *Clemson v Clemson* [2001] 1 All Sa 622 (W) at 627.

⁵³³ Steyn (2015: p 49).

⁵³⁴ *Brownlee*, para 52.

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*

From what is stated above, it is evident that divorce proceedings tend to be some of the most complex and sensitive legal matters to be experienced. Coupled with the complexity thereof, Namibians identify divorce proceedings with costly litigation and it is believed that the reasoning behind this infamous label is due to attorneys who may identify too closely with their client's interest, and find it difficult to differentiate between the legal issues and the social issues a divorce matter creates.⁵³⁷

Furthermore, lawyers adopt strategies which give the impression that clients carry exclusive accountability for the positions taken during legal proceedings. However, it is evident that the guidance provided by lawyers significantly impacts and shapes the objectives pursued and the methods employed to attain them.⁵³⁸

Litigation in itself is of a confrontational and adversarial nature⁵³⁹ and unfortunately, litigation has always been the most common way to resolve family disputes and finalise divorce proceedings. Lately, however, there has been a conscious attempt to promote and encourage divorcing parties to settle their family issues through ADR processes.⁵⁴⁰

At this junction, it is important to reiterate an understanding and mention of what is understood under the definition of ADR, specifically as it relates to divorce mediation. Boulle⁵⁴¹ records his understanding of ADR "*to include dispute resolution processes in which parties have opportunities to make decisions on their rights, interests and remedies and interveners are precluded from making binding determinations for the*

⁵³⁷ Palmeira (2012).

⁵³⁸ *Brownlee v Brownlee*, para 54.

⁵³⁹ Marumoagae, M, C. 2016. "Does collaborative divorce have a place in South African divorce law?". *De Jure*, Volume No. 49 (1), p 41.

⁵⁴⁰ *Ibid.*: p 56.

⁵⁴¹ Boulle, L. 2012. "Promoting Rights Through Court-Based ADR?". *South African Journal on Human Rights*, Volume No. 28 (1).

parties – known variously as facilitation, mediation, conciliation, case appraisal and neutral evaluation.”⁵⁴²

From Boulle’s understanding above, it can be concluded that mediation aims to assist the parties in negotiating their differences in a more conducive environment that is suitable to their expectations, unlike the environment they may be exposed to if they were engaged in litigation. Constructive communication between the divorcing parties is tremendously improved due to their active involvement in the mediation and decision-making process.⁵⁴³

It is imperative to acknowledge that the practice of mediation provides parties with a significant opportunity to participate in a systematic dialogue aimed at resolving contentious matters pertaining to their divorce. These matters may encompass, among others, the equitable distribution of assets, the establishment of child custody and visitation arrangements, and the determination of financial support. Throughout the mediation session, this process is driven by the mediator who, as already established, is an impartial and unbiased individual with no personal stake or interest in the matter at hand. Their sole role in the mediation proceedings is to facilitate an environment where the parties can work towards resolving their marital matters.⁵⁴⁴

During the mediation session, the parties participate in interest-based rather than positional bargaining to mutually resolve their conflicts. Avoiding positional bargaining allows partners to negotiate more openly and regard each other's and their children's interests. Such an approach enables partners comprehend one other's requirements and negotiate for individual interests without being unreasonable.

⁵⁴² Ibid.: p 3.

⁵⁴³ Marumoagae (2016: p 52).

⁵⁴⁴ Ibid.: p 53.

Depending on the parties' financial circumstances, in addition to their separate legal counsel, they may also agree to engage the services of one or more specialists based on their specific requirements. To illustrate, individuals have the option to engage child development specialists, accountants, or real estate appraisers to obtain comprehensive guidance pertaining to matters concerning their children, financial affairs, or real estate holdings. To uphold a desired degree of equity, it is imperative that the specialists enlisted to assist parties in achieving a mutually agreeable conclusion and possible settlement must exhibit impartiality and neutrality.⁵⁴⁵

One significant benefit of mediation in a divorce matter is that, when executed effectively, it may specifically address the needs of children.⁵⁴⁶ Family law mediation, as an alternative to litigation, has received much judicial approvals in South Africa.⁵⁴⁷

Due to the lack of Namibian case law which deals with ADR in divorce disputes, some of the most significant case law in South Africa will be discussed below.

5.5.1.1. South African case law on mediation in divorce proceedings

In the *Brownlee* matter, Brassey AJ held that mediation can yield remarkable outcomes, even in the most unfavourable situations, when conducted by one of the several individuals who were trained to facilitate the process.⁵⁴⁸ The process's inherent qualities are what makes it successful because, in contrast to the often successful settlement negotiations between legal advisers, the process is overseen by an impartial expert who can, under strict confidentiality, identify common ground, isolate underlying interests, and, using his or her own legal and other knowledge, sensitively

⁵⁴⁵ Ibid.: 44.

⁵⁴⁶ Steyn (2015: p 45).

⁵⁴⁷ Marumoagae (2016: p 53).

⁵⁴⁸ *Brownlee* para 23.

encourage an assessment of the case's chances of success as well as a consideration of the costs and practical ramifications of continuing the litigation, especially if the case has the potential to fail.⁵⁴⁹

In *Van den Berg v Le Roux*,⁵⁵⁰ Kgomo JP obligated the parties to refer their matters to mediation and that the parties may only approach a competent court to adjudicate on their dispute after the finalisation of the mediation proceedings.⁵⁵¹

Following the court's decision in *Van den Berg*, the Zimbabwe High Court, in *G v G*⁵⁵² emphasised the benefits of mediation in divorce proceedings and found unequivocally that when mediation is employed instead of an adversarial strategy, there seems to be a higher level of satisfaction among parents and children.

In 2004, the South African High Court seemed to follow the *Van den Berg* decision in *Townsend-Tuner and Another v Morrow*⁵⁵³ and ordered the parties to refer the matter to mediation with regards to the issues in dispute. The judge further ordered that the parties had to continue with such mediation for 3 months or for at least 4 mediation sessions before this matter would be allowed to return to court.⁵⁵⁴

As a result of the aforementioned determinations, the majority of legal practitioners commenced the recommendation and guidance to clients to explore the option of mediating their divorce dispute prior to the initiation of litigation. However, some legal professionals hold the perspective that mediation is a relatively insignificant procedural step in the litigation process, which they tend to disregard or even

⁵⁴⁹ Ibid.

⁵⁵⁰ *Van den Berg v Le Roux* [2003] ALL SA 599 (NC).

⁵⁵¹ Ibid.

⁵⁵² *G v G* (2003) (5) SA 396 (Z).

⁵⁵³ *Townsend-Tuner and Another v Morrow* [2004] ALL SA 235 (C).

⁵⁵⁴ Ibid.

intentionally evade.⁵⁵⁵ This perspective became a common perception amongst legal practitioners, which led to the judgement handed down by Brassey AJ in the *Brownlee* matter.

Brassey AJ found that conflict between legal counsel can continue from one case to the next and can cause a hyper-identification with a client's matter to create a 'win-at-all-costs' attitude.⁵⁵⁶ He further found that attorneys must appreciate that the advice which they offer to their clients can have a significant impact and shape the expectations of the client, as well as the strategies and techniques which must be applied to fulfill these expectations. Attorneys should thus not function under the illusion that clients are solely responsible for the stances adopted in litigation.⁵⁵⁷ In this case, the judge took the opportunity to remind not only legal practitioners, but also the parties before court, that where a matter can be possibly resolved through mediation, long and drawn-out litigation should be avoided.

Brassey AJ continued to opine that the fees claimable by attorneys in matters where they have failed to advise or insist that the parties mediate, shall not exceed the costs recoverable on a party and party basis as taxed. The decision is a firm warning to all legal practitioners to avoid litigation in unnecessary circumstances and to advise and insist that clients at least attempt to resolve the disputes through divorce mediation.⁵⁵⁸

5.5.1.2. Observations and remarks

The use of mediation is now widely acknowledged as a feasible option for the inherent conflict present in matrimonial litigation. From the case law discussed above, it is

⁵⁵⁵ Palmeira (2012).

⁵⁵⁶ *Brownlee*, para 54.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Palmeira (2012).

evident that the courts have established a definite stance that parties who neglect to engage in mediation when it is deemed suitable will be met with limited empathy by the courts, and their legal counsel will demonstrate even less understanding.⁵⁵⁹

It can be argued that compulsory court-connected mediation in divorce matters was introduced into the Namibian civil justice procedure because it is most suited to handle matters regarding divorce. In order for court-connected mediation in divorce matters to succeed in Namibia, ongoing training should be provided to court-accredited mediators and legal practitioners who handle these matters.⁵⁶⁰

5.5.2. Defamation matters

As an introduction to this part of the chapter and to better comprehend the advantages mediation can provide in resolving defamation disputes, it is prudent to explore the nature and complexity of pleading and defending a defamation case.

5.5.2.1. The definition and nature of defamation

Defamation laws ordinarily aim to protect an individual's right to an unimpaired reputation and a good name.⁵⁶¹ Reputation can be defined as "*the estimation in which a person is held.*"⁵⁶² Defamation is, in short, "*the publication of a statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community or to make them shun or avoid him. Defamation is usually in words, but pictures, gestures, and other acts can be defamatory.*"⁵⁶³

⁵⁵⁹ Palmeira (2012).

⁵⁶⁰ Marumoogae (2016: p 56).

⁵⁶¹ *Geingos v Hishoono* (HC-MD-CIV-ACT-OTH-2021/00538 [2021] NAHCMD 48 (11 February 2022), para 38.

⁵⁶² Martin (2003: p 427).

⁵⁶³ *Ibid.*: p 140.

The action for defamation is also known as the *action iniuriarum* and has, in relation to defamation, certain distinct characteristics.⁵⁶⁴ In *Trustco Group International Ltd and Others v Shikongo*⁵⁶⁵ the Supreme Court of Namibia has set out the law of defamation as follows:

*“To succeed in a defamation action, a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (animo injuriandi). In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion. The list of defences is not exhaustive. If the defendant can establish any of these defences on a balance of probabilities, the defamation claim will fail.”*⁵⁶⁶

In *Geingos v Hishoono*,⁵⁶⁷ the High Court set out the test for defamation. This entails an objective test to determine if, from the perspective of a rational individual with average intellect, the language employed affects an individual's positive reputation, standing, or regard within the community. Reasonable readers evaluate not just the explicit meaning of the words employed, but also the implicit meaning.⁵⁶⁸

The fundamental human rights and freedoms enshrined in the Constitution⁵⁶⁹ create major uncertainty in the field of defamation, since they protect conflicting rights. On

⁵⁶⁴ Harms, L, T, C. 2003. *Amler's Precedents of Pleadings*. Durban: LexisNexis Butterworths. p 134.

⁵⁶⁵ *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC).

⁵⁶⁶ *Ibid.*: para 24.

⁵⁶⁷ *Geingos v Hishoono*, para 38.

⁵⁶⁸ *Ibid.*: para 55.

⁵⁶⁹ The Constitution of the Republic of Namibia. Chapter 3.

the one hand, it protects the right to dignity⁵⁷⁰ and privacy⁵⁷¹ and on the other hand, it protects the freedom of speech and expression (including the freedom of press and other media)⁵⁷² and political rights. To balance these rights and to determine their ranking in the field of defamation, is challenging.⁵⁷³

It is evident from the above that both the action for and defence against defamation is a complicated one. A trading corporation has the right to seek compensation for both general and specific damages resulting from defamatory statements that harm its reputation as a business entity. In the context of non-trading corporations, it is generally possible for them to pursue legal action for defamation if a remark made about their operational practices is intended to result in financial harm.⁵⁷⁴ Notwithstanding the factual case to be pleaded, the cost for damage suffered seems to be a tricky calculation. Sibeya J confirmed this statement when he noted in his judgement that “...it is a mammoth task, even for the injured, to quantify the damages arising from a defamation claim. The court is also not better placed.”⁵⁷⁵

Since defamation claims are very unique in nature, civil litigation can be costly and time-consuming, and typical solutions are often ineffectual.⁵⁷⁶ In order to ensure successful and meaningful settlement of a defamation dispute, it is essential to revisit the fundamental question for the aggrieved party – what do they want from this complaint/dispute. Based on the answer thereto, a connection can be made to the advantages provided through alternative methods of dispute resolution.⁵⁷⁷

⁵⁷⁰ Article 8.

⁵⁷¹ Article 13.

⁵⁷² Article 21 (1)(a).

⁵⁷³ Harms (2003: p 133).

⁵⁷⁴ Harms (2003: p 133).

⁵⁷⁵ *Geingos v Hishoono*, par 66.

⁵⁷⁶ Laidlaw, E, B. 2019. “Re-Imagining Resolution of Online Defamation Disputes”. *Osgoode Hall Law Journal*, Volume 56(1): 162-202, p 162.

⁵⁷⁷ Ibid.

5.5.2.2. Mediation in defamation matters

In order for an infringement of the right to dignity to be established, it is necessary for the subjective experience of dignity to have been violated. In other words, it is necessary for the plaintiff to have genuinely experienced feelings of insult.⁵⁷⁸ The solutions for a successful defamation action can include a claim for satisfaction (*action iniuriarum*), a damage claim for any financial loss suffered due to the defamatory statement or publication, an interdict to prevent a threatening or continuing infringement of a person's right and/or a retraction, apology or a right for the plaintiff to respond to the statement or publication.⁵⁷⁹

By incorporating the advantages of mediation as dealt with under chapter 3, paragraph 3.4.4⁵⁸⁰ mediation can be extremely beneficial in attempting to solve a defamation dispute in that the discussions will remain private and confidential. Since a defamation dispute involves a notion of insult and in many events slander of a name and dignity, keeping these proceedings private could preserve the good name of both parties since negative publicity is considered to be one of the most detrimental consequences of a defamation lawsuit.

Mediation also allows for the parties to meet in person which provides an opportunity for the parties to communicate freely. This can eliminate any speculation or assumptions made by any of the parties and offers the opportunity to the parties to state exactly what their issues and expectations as to a solution may be.⁵⁸¹ During the

⁵⁷⁸ Neethling, J, Potgieter, J, M, Visser, P, J. 2005. *Law of Personality*. Durban: LexisNexis, p 194.

⁵⁷⁹ Ibid.: pp 168-171.

⁵⁸⁰ Of this study.

⁵⁸¹ The Alternative Libel Project. 2012. *Final Report on the problems created by defamation procedure with recommendations for change*. London: English PEN and Index on Censorship. Available at [Alternative Libel Project FinalMarch2012.pdf](http://Alternative_Libel_Project_FinalMarch2012.pdf) (nuffieldfoundation.org), p 10.

mediation session and under the facilitation of the mediator, the parties can focus on finding a solution to the matter rather than having to focus on the required steps to bring their dispute before a competent court.⁵⁸²

Unlike judicial proceedings, mediation does not necessitate parties to present the most compelling argument. Although this provides context for the case, the mediation process is not concentrated on adhering to a formal procedure or evaluating rights in accordance with the law.⁵⁸³ As stated above, the calculation for compensation and damages in a defamation matter is challenging. In many defamation cases, the plaintiff simply feels insulted and hurt by the statement or publication made and receives it as a personal attack to which they only expect an apology or a statement, which sets the record straight, to be made.⁵⁸⁴ By simply keeping the required solutions in mind, it is evident that mediation can and has demonstrated significant efficacy within the realm of defamation due to a multitude of factors.

5.5.2.3. Final remarks and observations

5.6. Evaluation of the success of court-connected mediation in Namibia and the impact on access to justice

5.6.1. Saving costs

In the 2023 legal year report of the High Court of Namibia,⁵⁸⁵ a comparison was done on the performance and statistics between the legal years 2019-2023.⁵⁸⁶ Included in this report is a comparison between the approximate total costs saved for litigants by referring their disputes to mediation as opposed to engaging the court until the matter

⁵⁸² Ibid.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ Main division.

⁵⁸⁶ Legal Year Report (2023).

is tried by a judge and a judgment handed down. The statistics in this report records that the approximate saving in litigation costs for 2023 amounted to N\$ 23,700,000; N\$ 28,500,00 for 2022 and N\$38, 000,000 for 2021.⁵⁸⁷

5.6.2. Saving court time and lessening the burden on the court roll

Some of these statistics were already discussed in section 2.5.4 and 3.4.4.2, however, will be expanded on below.

In 2022, the main division of the High Court issued 673 substantive civil and labour applications and reviews, of which 137 were brought as urgent applications and 5 517 summonses.⁵⁸⁸ In 2023, the same division of the High Court issued 5544 summonses and 647 substantive civil and labour applications and reviews, of which 117 were presented as urgent applications.⁵⁸⁹

Comparing the 2022 legal year to the 2021 legal year, an increase of 40% was observed between the numbers of substantive applications issued. Furthermore, an increase in the number of actions issued during the 2022 legal year was also observed compared to 4 954 summonses issued during the 2021 Legal Year.⁵⁹⁰ On 1 January 2022, a total number of 2 129 cases subjected to JCM were brought forward from the previous legal years. In addition, thereto, 2 808 matters became subjected to JCM during the 2022 legal year and in total, 4 937 matters were under JCM during the 2022 legal year.⁵⁹¹

⁵⁸⁷ Legal Year Report (2023: p 116).

⁵⁸⁸ Legal Year Report (2022: p 6).

⁵⁸⁹ Legal Year Report (2023: p 6).

⁵⁹⁰ Legal Year Report (2022: p 6).

⁵⁹¹ Legal Year Report (2022: p 7).

The 2023 legal year, in comparison to the 2022 legal year, saw a decrease by 4% between the numbers of substantive applications issued and a 15% decrease in urgent applications issued.⁵⁹² There was, however, a 5% increase in the number of actions issued during the 2023 legal year compared to 5 517 summonses issued in 2022.⁵⁹³

Taking the above into consideration, the calendar of the High Court makes provision for 15 weeks of administrative breaks during which trials are not set down for hearing, leaving an estimate of 189 court days per year to conduct trials and hear matters.⁵⁹⁴

5.6.3. Assisting parties in settling disputes outside of the court

One of the main objectives of mediation is to facilitate settlement between the parties.⁵⁹⁵ It is recorded by independent mediators and mediation services that four out of five matters referred to mediation are settled to the satisfaction of the parties involved.⁵⁹⁶

In the comparison on the performance and statistics between the legal years 2019-2023,⁵⁹⁷ the statistics indicate that the successful mediations resulted in less matters being set down for trial and saved approximately 948 days in 2023, 1140 days in 2022 and 1520 days in 2021.⁵⁹⁸ This estimate is based on the number of days which would have been spent in court if the matters which were successfully settled during mediation would have been set down for a full trial before a judge.

For the legal year ending 16 December 2022, the High Court of Namibia recorded a total of 727 mediations scheduled for the 2022 legal year, of which 131 mediation

⁵⁹² Legal Year Report (2023: pp 6-7).

⁵⁹³ Legal Year Report (2023: p 7).

⁵⁹⁴ Damaseb (2020: p 266).

⁵⁹⁵ Steyn (2015: p 53).

⁵⁹⁶ Lovenheim et al. (n.d.: p 2/6).

⁵⁹⁷ Legal Year Report (2023: p 114).

⁵⁹⁸ Legal Year Report (2023: p 116).

sessions were canceled before the mediation could take place.⁵⁹⁹ 285 of the 596 mediations remaining were successful while 311 failed, which indicates that 47.8% of all mediations were thus successful.⁶⁰⁰

In comparison to the above, 611 mediation sessions were scheduled during the 2023 legal year, of which only 51 was cancelled.⁶⁰¹ Of the 561 remaining mediation session, 316 were successful and 245 unsuccessful.⁶⁰² 51.7% of all mediations were thus successful.⁶⁰³

It is thus evident that the introduction of court-connected mediation has a positive impact on the accessibility of justice by providing an alternative process in which parties can attempt to settle their disputes. The data provided above indicates that the process is being used and that the outcome thereof seems to be positive since, in the last two legal years of the High Court of Namibia, an average of 50% of the matters referred to mediation were successfully settled outside of court.

5.7. Conclusion

Court-connected mediation is different from most forms of mediation (private and voluntary mediation) because it occurs under the protection of the legal system.⁶⁰⁴ In court-connected mediation, there is a dialectical relationship between legal and nonlegal values. It is thus important for parties in court-connected mediation to understand their legal rights and at the same time be able to acknowledge how their individual and community interest find expression in or outside of these rights.⁶⁰⁵ It is imperative to still balance legal rights and nonlegal interests. The focus of mediation

⁵⁹⁹ Legal Year Report (2022: p 9).

⁶⁰⁰ Ibid.

⁶⁰¹ Legal Year Report (2023: p 9).

⁶⁰² Legal Year Report (2023: p 10).

⁶⁰³ Ibid.

⁶⁰⁴ Nolan-Haley (1996: p 65).

⁶⁰⁵ Ibid.: p 66.

must still remain what the parties are either entitled to or obligated to do or deliver to another party, with just a suggestion of preparedness of “give-and-take”. This will ultimately assist in achieving justice through court-connected mediation.

As a conclusion to this chapter, Brassey AJ perfectly summarises how mediation can complement litigation when he states that the mandatory referral of matters to mediation in England has significantly enhanced the dispute settlement process since parties are able to resolve their disputes in a far more affordable manner which has, in return, greatly reduced the load and pressure placed on the judicial system.⁶⁰⁶ He further opines that the parties would have greatly benefited from referring their matter to mediation, even if it was only to eliminate the issues on which they agree, which would not have been referred to adjudication by the court.⁶⁰⁷

From this judgment it can be argued that the process of dispute resolution has profoundly been impacted by the referral of disputes to mediation. Not only does it save the parties costs on legal expenses, but also lightens the burden on the court rolls. It is also eminent that the success of a mediation session is not only linked to whether the dispute as a whole was settled, but it can be immensely supportive to the parties to settle at least some of the disagreements and refer the remainder of the matters in dispute to be adjudicated on by the court.

⁶⁰⁶ *Brownlee*, para 55.
⁶⁰⁷ *Ibid.*

CHAPTER 6:

COMPARISON OF COURT-CONNECTED MEDIATION IN DIFFERENT JURISDICTIONS

6.1. Introduction

To explore the practicality, effectiveness and implementation of mandatory mediation in Namibia, it is prudent to study other jurisdictions, where court-connected mediation has been implemented, to establish the effect and implementation thereof and ultimately provide recommendations to the implementation and practicality thereof in Namibia. Moreover, it is imperative to study different jurisdictions to gain insight into the successes and failures of these jurisdictions.

For the purposes of this study, the jurisdictions of Tanzania, where court-connected mediation was introduced to address the need for the optimisation of the judicial process and India, where court-connected mediation was included in its civil justice system as an attempt to reduce pendency before courts⁶⁰⁸ will be evaluated to draw a conclusion on the impact of mandatory mediation and formulate possible recommendations for the Namibian civil justice system.

⁶⁰⁸ Lakshmikumaran & Sridharan Attorneys. 2023. *What, How, Where, When and Why of the Mediation Act, 2023*. Available at <https://www.lakshmisri.com/newsroom/news-briefings/what-how-where-when-and-why-of-the-mediation-act-2023/#>; last accessed on 7 January 2024.

6.2. Tanzania

6.2.1. Introduction

Court-annexed mediation was introduced in the United Republic of Tanzania's⁶⁰⁹ legal system as early as 1994 and court-annexed mediation in Tanzania is a mandatory method of resolving disputes, supported by both constitutional and statutory provisions.⁶¹⁰ The aim of introducing court-annexed mediation in Tanzania revolved around and was to enhance certain principles enshrined in Article 107A of the Constitution of Tanzania, 1977.⁶¹¹ Article 107A discusses the dispensation of justice in Tanzania and states that, in delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe certain principles which include, *inter alia*, not to delay dispensation of justice without reasonable ground,⁶¹² to promote and enhance dispute resolution among persons involved in the disputes⁶¹³ and to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice.⁶¹⁴

The need for the introduction of court-annexed mediation into the civil justice system of Tanzania was ultimately initiated by a number of factors.⁶¹⁵ One of the primary concerns was the need for the optimisation of the judicial process. The aforementioned circumstance can be linked to the high cost associated with the legal process, which is further aggravated by the complex and burdensome norms of procedure.

⁶⁰⁹ Herein after only referred to as "Tanzania".

⁶¹⁰ Hamisi, H, T. 2022. "Court-Annexed Mediation in Tanzania: Successes, Challenges and Prospects". *International Journal of Innovative Research and Advanced Studies*, Volume No. 9 (11), p 6.

⁶¹¹ Lukumay, Z, N. 2016. "A reflection on Court-annexed mediation in Tanzania". *The Law School of Tanzania Law Review Journal*, Volume No. 1 (1), p 51.

⁶¹² Article 107A(2)(b) of the Constitution of the United Republic of Tanzania, 1977.

⁶¹³ Article 107A(2)(d) of the Constitution of the United Republic of Tanzania, 1977.

⁶¹⁴ Article 107A(2)(e) of the Constitution of the United Republic of Tanzania, 1977.

⁶¹⁵ Hamisi (2022: p 6).

Furthermore, the judicial system had a significant burden due to the high volume of cases. Therefore, a need arose for the establishment of conflict settlement mechanisms capable of diverting cases away from the traditional court system. This would serve to alleviate case backlogs and offer more efficient avenues for ensuring access to justice. Moreover, there is a persistent demand for enhanced procedural efficiency and improved results within the realm of the judiciary. This phenomenon can be attributed to the inadequacy of the court system in facilitating ongoing social relationships between parties involved in specific problems, such as family, tenancy, or work disputes. Therefore, it became necessary to adopt a consensual strategy rather than an adversarial one, and to implement processes that were characterised by increased accessibility, greater participation, reduced formality, lower costs, and decreased time requirements. Hence, the primary objective of its implementation was to enhance the efficiency of the judicial system by allowing the court to expedite the resolution of pending cases through the exploration of potential amicable settlements between the involved parties. In this capacity, the court assumes the role of a facilitator rather than an adjudicator.⁶¹⁶

6.2.2. Court-annexed mediation in Tanzania

ADR was officially incorporated into the civil justice system of Tanzania in 1994 through the introduction of Orders VIII B⁶¹⁷ and VIII C under the first schedule of the Civil Procedure Code, 2019.⁶¹⁸ Court-annexed mediation is presently offered in accordance with the provisions outlined under rules 24 to 34 in Order VIII C of the CPC.

⁶¹⁶ Ibid.

⁶¹⁷ Order VIII B section 22(3).

⁶¹⁸ Civil Procedure Code, Chapter 33, revised edition of 2019. Hereinafter referred to as "the CPC".

Rule 24 of the CPC deals with negotiation, conciliation, mediation and arbitration procedures. In terms of the CPC, every civil action is referred by the court for either negotiation, conciliation, mediation or arbitration (or similar alternative procedure) before the matter may proceed to trial.⁶¹⁹ In contrast to Namibian court-annexed mediation, in Tanzania, it is compulsory that all civil suits, with a few specific exceptions, must be referred to court-annexed mediation. Failure to comply with this requirement carries significant legal consequences, as it may result in the declaration of the entire proceedings as null and void.⁶²⁰

The rules further clearly state that after a civil suit is filed, the matter is brought before a judge or magistrate and then referred to mediation within 14 days from *litis contestatio* where the parties are required to appoint a mediator of their choice.⁶²¹ If the parties are unable to agree on a mediator, the court will appoint one on their behalf and notify the parties accordingly.⁶²² Namibian legislation does not make specific reference to when certain matters must be referred to court-connected mediation but merely states that a judge has the authority to refer a matter to ADR either on their own initiative or upon the request of the involved parties⁶²³ and that it must be considered at the earliest possible stage of the proceedings.⁶²⁴

Rule 25(6) of the CPC sets out the qualified individuals who may be appointed to act as mediators and includes a judge, a registrar or deputy registrar, a magistrate, a person with the relevant qualifications and experience in mediation appointed by the Chief Justice, a retired judge or magistrate or a person with the relevant qualifications and

⁶¹⁹ For purposes of discussions in this chapter, reference will only be made to mediation.

⁶²⁰ Hamisi. (2022: p 6).

⁶²¹ Rule 25(1).

⁶²² Rule 25(2).

⁶²³ Rule 38(1) of the High Court Rules.

⁶²⁴ PD 19(1).

experience in mediation chosen by the parties. If the parties elect to make use of a private mediator, not appointed by the Chief Justice, the parties shall be responsible for payment of the mediator. In Namibia, the High Court has appointed court-accredited mediators who are available to conduct court-connected mediation sessions⁶²⁵ and since court-connected mediation is a court-operated service, the court accredited mediators are also paid by the High Court.⁶²⁶ However, in Namibia, ADR can be either court-connected (where the overseeing judge orders the parties to participate in ADR or where the parties choose court-connected ADR) or private (when the parties choose ADR and agree to select a private mediator),⁶²⁷ in which case, the parties must establish private arrangements for the mediator's fees.⁶²⁸

Within seven days of the appointment of the mediator, the Court will inform the parties of the commencement of the mediation session⁶²⁹ and, similarly to the mediation brief filed in the Namibian court-connected mediation process, the parties also provide the mediator with a statement of their issues in dispute at least 7 days before the mediation session is set to take place.⁶³⁰ While the Namibian procedure has a prescribed format for the mediation brief, the Tanzanian CPC provides for the inclusion of the pleadings and “*any documents of importance which identify the issues in dispute and the parties’ positions and interests thereon.*”⁶³¹

In Namibia, the parties attend to the mediation office at the High Court and selects an available date from the provided mediation diary. In Tanzania, the date of the first

⁶²⁵ Jude President’s Practice Note 1/2014.

⁶²⁶ Damaseb, P, T. 2014. *The Mediation programme of the High Court of Namibia*. Outreach paper No. 1. Available at <https://ejustice.jud.na/High%20Court/Mediation/Pages/Registers.aspx>, p 12.

⁶²⁷ Practice Directive 19(3).

⁶²⁸ Damaseb (2014: p 12).

⁶²⁹ Rule 25(3).

⁶³⁰ Rule 25(4).

⁶³¹ Rule 25 (4).

mediation session will be set by the mediator within 7 days of his or her appointment, which shall not be more than 21 days from the date of his or her appointment.⁶³² Thereafter, the duration of the mediation process shall not surpass a span of thirty days commencing from the initial session of mediation⁶³³ and upon the termination of the mediation process, the mediator is required to promptly deliver the official documentation to the trial court, either immediately or within a maximum timeframe of forty-eight hours.⁶³⁴

6.2.3. Short-comings of court-annexed mediation in Tanzania

While the CPC outlines the objectives and characteristics of court-annexed mediation,⁶³⁵ it lacks a formal, standardised document that delineates the procedural guidelines for conducting mediation in Tanzania. A singular training manual has been compiled by Judges and Magistrates who participated in a brief course in the United States of America. The manual outlines the prescribed protocols that mediators are expected to adhere to during the mediation process, as well as the necessary skills and ethical considerations that should be considered.⁶³⁶ This manual is not part of any authority in Tanzania and as such has no force of law.⁶³⁷

Certain judges and mediators possess insufficient abilities required for effective mediation, resulting in a reliance on the parties themselves to direct the mediation process rather than providing guidance toward a mutually agreeable resolution.⁶³⁸ This particular approach to mediation is deemed inappropriate since it reinstates the responsibility of resolving the dispute to the parties who were unable to achieve a

⁶³² Rule 25(5).

⁶³³ Rule 32.

⁶³⁴ Rule 34.

⁶³⁵ Rule 26(1).

⁶³⁶ Lukumay (2016: p 56).

⁶³⁷ Ibid.: p 57.

⁶³⁸ Ibid.: p 56.

mutually acceptable agreement prior to initiating legal proceedings.⁶³⁹ Consequently, a significant number of mediation cases do not reach a successful resolution, not due to a lack of willingness on the part of the involved parties to reach a settlement, but rather due to the absence of well-trained mediators who can effectively facilitate the process.⁶⁴⁰

6.3. India

6.3.1. Introduction and History of the Mediation Act, 32 of 2023⁶⁴¹

While mediation as a means of dispute resolution was always ingrained in Indian jurisprudence, the parliament, for the first time, has attempted to streamline mediation and legitimise its increasing relevance in the life of a dispute, by codifying mediation as a process of ADR.⁶⁴² Mediation was introduced in Indian legislation in an attempt to decrease the amount of cases pending in courts, to lower the costs of expensive and drawn-out litigation and to strengthen India's ADR system.⁶⁴³

The journey of the Act began with its introduction in 2021. The Mediation Bill 2021⁶⁴⁴ was introduced in the Rajya Sabha⁶⁴⁵ on 20 December 2021 with the main objective to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, and enforce mediated settlement agreements. Moreover, it also aimed to provide for a body for registration of mediators, encourage

⁶³⁹ Ibid.

⁶⁴⁰ Ibid.

⁶⁴¹ Hereinafter referred to as "the Act".

⁶⁴² Tidke, P & Doshi, N. 2023. *Salient Features of India's New Mediation Law*. Available at <https://www.lexology.com/library/detail.aspx?g=c8bce204-3b73-498d-8018-6586febbd955>; last accessed on 4 February 2024.

⁶⁴³ Lakshmikumaran & Sridharan Attorneys (2023).

⁶⁴⁴ Bill XLIII of 2021. Hereinafter referred to as "the Bill".

⁶⁴⁵ The Upper House of the Indian Parliament.

community mediation and make online mediation an acceptable and cost-effective process.⁶⁴⁶

It was subsequently referred to a Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice to frame the rules, regulations and standards relating to the Bill which would form the basis of the Act.⁶⁴⁷ After thorough examination, the committee submitted its report containing the proposed rules, regulations and standards, which featured a practical strategy and a long-term vision of making India a center for mediation,⁶⁴⁸ to the Rajya Sabha chairperson on 13 July 2022. The Bill finally was passed by Rajya Sabha on 1 August 2023 and thereafter by the Lok Sabha⁶⁴⁹ on 7 August 2023.⁶⁵⁰ On 14 September 2023, the President of India gave her assent, and the Act came into being.⁶⁵¹

6.3.2. Important aspects of the Act

6.3.2.1. Mandated prelitigation mediation

The primary foundation of this legislation is in the stipulation that parties involved in a dispute must first partake in mediation before pursuing resolution through the judicial or administrative adjudication process.⁶⁵² This type of mediation is referred to in the Act as pre-litigation mediation⁶⁵³ and is defined as “*a process of undertaking mediation, as provided under section 5, for settlement of disputes prior to the filing of*

⁶⁴⁶ Preamble of the Act.

⁶⁴⁷ Working Group/ Committee for drafting the rules/regulations and standards of Mediation in India. 2023. Report of the Working Group/Committee Constituted for Drafting of Rules, Regulations and Standards of Mediation in India under the Mediation Bill, 2023. Available at [https://legalaffairs.gov.in/sites/default/files/Mediation CommitteeReport.pdf](https://legalaffairs.gov.in/sites/default/files/Mediation%20CommitteeReport.pdf), p 3.

⁶⁴⁸ Working Group/ Committee for drafting the rules/regulations and standards of Mediation in India. (2023: p 4).

⁶⁴⁹ The Lower House of the Indian Parliament.

⁶⁵⁰ Tidke et al. (2023).

⁶⁵¹ Ibid.

⁶⁵² Ibid.

⁶⁵³ Section 5 of the Act.

a suit or proceeding of civil or commercial nature in respect thereof, before a court or notified tribunal under sub-section (2) of section 5".⁶⁵⁴

In accordance with the provisions of the Act, the parties involved in any civil or commercial disputes, whether a mediation agreement exists or not, must engage in pre-litigation mediation voluntarily and with mutual consent.⁶⁵⁵ The objective of this strategy is to mitigate the strain on the Indian legal system and facilitate expedited resolution of disputes.⁶⁵⁶ However, pre-litigation mediation in commercial disputes of Specified Value shall be conducted in adherence to the regulations outlined in section 12A of the Commercial Courts Act, 2015,⁶⁵⁷ and the corresponding rules established thereunder.⁶⁵⁸

6.3.2.2. Types of matters and exemption

The Act is applied to a wide range of disputes.⁶⁵⁹ However, mediation proceedings conducted under the Act are prohibited from being utilised for the purpose of resolving any conflict or issue outlined in the comprehensive inventory specified in the First Schedule.⁶⁶⁰ Subject to the provisions of the Act, it is acknowledged that courts retain the discretion to refer any dispute pertaining to compoundable offenses, including marriage offenses that are compoundable and pending between the involved parties, to the process of mediation, should they perceive it suitable. Furthermore, it should be noted that the result of the mediation shall not be recognised as a formal judgment or decree of a court as mentioned in sub-section (2) of section 27. Instead,

⁶⁵⁴ Section 3(u) of the Act.

⁶⁵⁵ Section 5(1) of the Act.

⁶⁵⁶ Anonymous. 2023. *Mediation Act, 2023: Mandatory Pre-Litigation Mediation in India*. Available at <https://taxguru.in/corporate-law/mediation-act-2023-mandatory-pre-litigation-mediation-india.html>; last accessed on 2 February 2024.

⁶⁵⁷ Act 4 of 2016.

⁶⁵⁸ Section 5(1) of the Act.

⁶⁵⁹ Tidke et al. (2023).

⁶⁶⁰ Section 6 (1) of the Act. Also see the first schedule of the Act for a complete list of types of matters which are prohibited from being referred to mediation.

it shall be subject to further examination by the court in accordance with the currently applicable legislation.⁶⁶¹

Section 2 of the Act sets out the matters to which the Act will be applied and includes mediation concluded in India for matters where, firstly both parties involved in the dispute are either residents or have their place of business in India.⁶⁶² Secondly, a mediation agreement between the disputing parties explicitly states that any dispute will be resolved in accordance with the provisions of the Act⁶⁶³ and thirdly, if the dispute involves international mediation.⁶⁶⁴ It further includes matters where one of the parties involved in the dispute is either the Central Government, a State Government, or related entities such as public bodies, corporations and local bodies controlled or owned by the government where the dispute pertains to a commercial matter.⁶⁶⁵ Section 2 concludes with the provision that any matter where the Central Government or a State Government has deemed it appropriate and notified that other types of disputes can be resolved through mediation under the Act, where the government or related entities are involved, may be referred to prelitigation mediation under the Act.⁶⁶⁶

Further to the above, the Act also incorporates the notion of community mediation, which mandates the prior consent of the parties implicated. This provision facilitates the resolution of disputes that has the ability to disturb the state of peace, harmony,

⁶⁶¹ Section 6 (1) of the Act.

⁶⁶² Section 2(i) of the Act.

⁶⁶³ Section 2(ii) of the Act.

⁶⁶⁴ Section 2 (iii) of the Act.

⁶⁶⁵ Section 2(iv) of the Act.

⁶⁶⁶ Section 2 (v) of the Act.

and calm among individuals or households within a particular geographical area or community.⁶⁶⁷

6.3.2.3. Online Mediation

The Act allows for pre-litigation mediation to be conducted online thereby eliminating geographical barriers for the parties involved. However, this is subject to the parties ensuring the confidentiality of such mediation and must be preferred by the parties.⁶⁶⁸

6.3.2.4. Timely Resolution

In the present-day context, expeditiously resolving conflicts not only preserves the limited resources of the interested parties but also cultivates an environment that promotes the enforcement of agreements and, subsequently, the advancement of business. The legislation has been formulated with consideration for the current demand.⁶⁶⁹ The Act establishes a specific timeframe for the mediation procedure and states that the mediation session must be finalised within a period of 120 days from the date of first appearance before the mediator.⁶⁷⁰ Nevertheless, it is possible to extend this time frame provided that all parties concerned reach a consensus on the extension. The extension of the period may not exceed 60 days.⁶⁷¹

6.3.2.5. Mediation Council of India

Possibly one of the most significant introductions of the Act, is that of the establishment of a Mediation Council of India,⁶⁷² which is intended to provide oversight and regulation of the mediation process. The aforementioned council will,

⁶⁶⁷ Section 43 of the Act.

⁶⁶⁸ Tidke et al. (2023).

⁶⁶⁹ Ibid.

⁶⁷⁰ Section 18(1) of the Act.

⁶⁷¹ Section 18(2) of the Act.

⁶⁷² Section 31(1) of the Act.

inter alia, assume the responsibility of overseeing the registration of mediators, acknowledging mediation service providers and accrediting mediation institutes.⁶⁷³ These functions are of utmost importance as they contribute significantly to the training and certification of mediators.⁶⁷⁴

6.3.2.6. Binding mediation settlement agreements

One of the fundamental aspects of this Act entails that settlement agreements arising from effective mediation will possess finality, legal enforceability and binding nature, akin to a court-issued judgment or decree⁶⁷⁵ and subject to the provisions of section 28 of the Act, the mediated settlement agreement shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908.⁶⁷⁶ Consequently, the agreement may be utilised by any of the involved parties or individuals asserting a claim through them, either as a defense, set off, or in any other legal proceeding.⁶⁷⁷ The inclusion of this element enhances the level of confidence in the efficacy of the mediation procedure.⁶⁷⁸ It is important to note that a mediation settlement agreement can be challenged by any of the parties by filing an application before a court or tribunal of competent jurisdiction.⁶⁷⁹ However, the legislation outlines specific reasons for such challenges, including instances of fraud, corruption, impersonation, and situations where the dispute or matter was not suitable for mediation.⁶⁸⁰

⁶⁷³ Section 38 of the Act.

⁶⁷⁴ Anonymous (2023).

⁶⁷⁵ Section 27(1) of the Act.

⁶⁷⁶ Section 27(2) of the Act; Code of Civil Procedure, Act 5 of 1908.

⁶⁷⁷ Section 27(2) of the Act.

⁶⁷⁸ Anonymous (2023).

⁶⁷⁹ Section 28(1) of the Act.

⁶⁸⁰ Section 28(2) of the Act.

6.3.3. Concerns and criticisms of the Act

Although the Act has been associated with numerous benefits, it has also encountered criticism from various perspectives. A significant issue of concern pertains to the transition from the voluntary characteristic of mediation to obligatory involvement, a fundamental aspect of conventional mediation practices. It has been argued by critics that this may have a discouraging effect on parties, leading them to be less willing to participate in the process.⁶⁸¹

Another notable concern pertains to the makeup of the Mediation Council of India. In contrast to the Bar Council of India and similar professional regulatory bodies, the Mediation Council is perceived to have insufficient representation of seasoned practitioners, hence raising concerns regarding its efficacy in overseeing the mediation profession. Moreover, the stipulation that the Council must secure prior authorisation from the Central government for its regulations has elicited concerns regarding the prospective inclusion of the government as a participant in mediations, therefore potentially compromising impartiality.⁶⁸²

The enactment of this legislation marks the commencement of a novel era in the realm of conflict resolution under the Indian jurisdiction. The introduction of mandatory prelitigation mediation is anticipated to expedite the resolution of civil and commercial disputes. However, there are legitimate worries over its implementation and the possibility of government meddling. As the implementation of this legislation commences, the manner in which these obstacles will be confronted and resolved, so guaranteeing an impartial and efficient mediation procedure for all stakeholders, is

⁶⁸¹ Anonymous (2023).
⁶⁸² Ibid.

yet to be determined.⁶⁸³ The effectiveness of the Act in the future will undoubtedly be determined by its execution. However, it is widely regarded as a progressive component of legislation that has the ability to create mutually beneficial outcomes and facilitate the growth of enterprises.⁶⁸⁴

6.3.4. Summative insights

Namibia can learn much from India's compulsory court-annexed mediation procedure, especially the pre-litigation mediation. An obligatory system of this kind can compel the parties to engage in at least one round of mediation prior to initiating litigation. In such instances, a highly skilled mediator can facilitate the parties in reaching a resolution for their conflicts in a manner that is both more economical and expeditious, so enhancing the accessibility to justice for all parties involved. The impact on future business relationships will be favourable, and in the event that a disagreement cannot be settled, the parties still have the option to resort to litigation, thus not restricting a party's ability to seek legal recourse but facilitating the fulfilment of a party's right to access justice.⁶⁸⁵

6.4. Conclusion

The legislation implemented in Namibia which governs and prescribes the procedures of court-connected mediation in Namibia was implemented in 2014, with, to date, no further amendments thereto. It was recorded in this study that we live in an ever-growing world and that legislation must make provision for the ever-changing needs

⁶⁸³ Ibid.

⁶⁸⁴ Tidke et al. (2023).

⁶⁸⁵ Olivier (2018: p 81).

of a developing community and is consequently inseparably linked to the community it serves.⁶⁸⁶

From studying the process and procedures implemented in Tanzania and India, there are various insights and several recommendations which can be made to improve the legislation governing court-connected mediation in Namibia. This follows in chapter 7.

⁶⁸⁶ Smuts (2013: p 25).

CHAPTER 7:

CONCLUSION AND RECOMMENDATIONS

7.1. Conclusion

The purpose of this conclusion is to properly develop, test and define the hypothesis of this theses as outlined in XXX. Further to this, the conclusion will discuss the findings of this study and address the objectives of the study and research questions outline under chapters **XXXXX**.

ADR poses many advantages to dispute resolution. In this study, it was argued that the introduction of court-connected mediation substantially contributes and serves as a resolution to the hindrances to access to justice in Namibia and to promote access to justice by improving the processes used to resolve disputes in Namibia.

In restatement of the objectives of this study, the purpose of this study was to identify the various factors which hinder access to justice in Namibia, to critically evaluate the court-connected mediation programme introduced in the High Court rules in 2014, if it is found that the court-connected mediation programme of the High Court is inadequate, to propose the necessary recommendations; and to investigate the possible effect that the introduction of compulsory mediation, together with court-connected mediation, can have on the promotion of access to justice in Namibia.

Equally important, this study focused primarily on the introduction of court-connected mediation to remedy the hindrances to access to justice in Namibia, it considered the unique form of mediation conducted within the context of the Namibian civil justice system and briefly discussed how court-based mediation is implemented in Namibia,

Tanzania and India. This study was further broadly centred around what the challenges, prospects and opportunities, if any, of court-connected mediation is, or would be, in promoting access to justice in Namibia. Given the broad nature of this question, the study further considered the sub-research questions as outlined under part 1.9 of this study, in deducing the actual or potential role of court connected mediation in enhancing access to justice in the Namibian civil system. These questions will be outlined throughout this conclusion.

The first chapter contained a brief introduction and problem statement and the second discussed the worldwide access to justice movement. Chapter two addressed the sub-research question on what the legal framework pertaining to access to justice in Namibia looks like. In a Namibian context, the right to access to justice finds its origin in the Namibian Constitution and the rule of law and the submission was made in chapter two that the definition of access to justice should include both the narrow and the broad approach thereto. It further concluded that the phrase ‘access to justice’ essentially focuses on an individual’s right to have their dispute resolved by either a competent court or by any means of ADR in a fair, just, speedy, and cost-effective manner. Therefore, the conclusion was drawn that the right to access to justice refers to the provision of an affordable, impartial, fair and accessible means of dispute resolution for all.

Moreover, it was established that ADR is based on the principle that by offering disputing parties a confidential, voluntary, adaptive, and party-controlled process, a more satisfactory, long-lasting, and effective resolution of disagreements can be accomplished.⁶⁸⁷ Chapter three highlighted the important characteristics of ADR, the

⁶⁸⁷ Weston (2001: p 592).

most important being that ADR accommodates not only various types of disputes but also various types of disputants. ADR was defined as a procedure, other than the adjudication by a judge in court, where a neutral third party assists in or resolves the dispute.⁶⁸⁸ The chapter continued to investigate when ADR is most appropriate, and which specific form of ADR is most suitable to which type of dispute or the disputants. The different forms of ADR, being negotiation, arbitration and mediation was discussed, with a specific focus on mediation in general. Mediation was defined as a private and voluntary process to which the disputants consented, whereby parties attempt to resolve their differences by involving a neutral third party⁶⁸⁹ and the general principles of mediation as well as the key characteristics thereof such as the fact that it is voluntary, confidential and a multi-disciplinary process was explored.

Additionally, the various benefits to mediation such as settlement of matters outside of court, cost and time saving, improved communication, confidentiality and flexibility were also emphasised in chapter three under section 3.4.4. From the discussion of the benefits and advantages of mediation, it is clear that parties who are in dispute with one another can certainly benefit from the mediation process. Mediation is future-oriented and improves communication and understanding between the disputing parties. Within this discussion under chapter three, the sub-research question of what benefits and draw-backs court-connected mediation have for access to justice as an alternative dispute resolution mechanism in the Namibian civil justice system was addressed.

⁶⁸⁸ Tahura (2019: p 32).

⁶⁸⁹ Havenga et al. (2013: p 286).

There are, however, also a few disadvantages to mediation in an attempt to resolve disputes as discussed under section 3.4.5.⁶⁹⁰ Mediation is not always appropriate where there is unequal bargaining power and in these cases litigation proceedings might be more appropriate. A further disadvantage to mediation is that there is no formal procedure. Should the parties not be satisfied with the outcome of the mediation proceedings, there is no review or appeal procedure available to them as in litigation proceedings. Notwithstanding the disadvantages discussed in chapter 4, it seems that the advantages of mediation, at least in some cases, outweigh the disadvantages thereof and that the referral of disputes to mediation has received an incline over the years.

Chapter three indicated that it is evident that the Namibian court system is under pressure and that settlement of disputes outside of the courts has become a popular movement amongst disputants. It has become evident that litigation, and therefore also access to justice, is being hindered by several different factors and thus interfere with and restrain access to justice. Under the statement of the problem in section 1.9, it was stated that litigation is hindered by case backlog in the courts, costly trials and Namibians lacking full appreciation of their rights and responsibilities. These hindrances were discussed under section 2.5. As a direct result thereof, Namibians find it difficult to associate with the ideal of access to justice as promised under the Constitution. With the implementation of court-connected mediation in 2014, it has become evident that many litigation matters can be settled by mediation and it may be proposed that mediation should be compulsory in certain matters, even before the matter is brought to court.

⁶⁹⁰ On page 77.

To overcome these hurdles posed by the hindrances to access to justice and to ensure effective and affordable dispute resolution between parties, ADR methods are being implemented. With the ever-growing popularity of ADR, ADR processes are simultaneously developing and adapting to serve an ever-growing community. Unfortunately, most Namibians are not aware of the ADR processes that are available to be explored as a first step to litigation. Disputing parties are not informed of the availability and several advantages which these ADR procedures pose and evidently, these avenues are not explored. Further to this, it seems that many legal practitioners are not advocates for ADR processes and those that are readily willing to employ ADR processes to resolve disputes are often not properly trained to assist their clients to pursue these procedures to their full benefit.

Chapter four discussed the Namibian civil justice system and the various impediments to access to justice that exist within this system. This chapter addressed the sub-research question on what the principles underlying Namibia's civil justice system which affects access to justice are. It was apparent that access to justice, as discussed in chapter two, cannot be limited only to access to courts and must include access to some form of alternative manner for individuals to resolve their disputes. By adapting legislation to suit the needs of an ever-growing community, renewed confidence in the judicial system can be achieved, which is a vital requirement for the legitimacy of a modern judicial system.⁶⁹¹ It is with the introduction of JCM, that Namibians were also introduced to court-connected ADR as a means to settle disputes.

Chapter five expanded the discussion of court-connected mediation as a form of compulsory ADR. The comprehensive exploration in this chapter highlighted court-

⁶⁹¹ Damaseb Second Report (2010: p 15).

connected mediation in Namibia as the main focus of this study and addressed the sub-research question on what the legal framework is which pertains to court-connected mediation in Namibia. It encompassed the recent developments in the Namibian civil justice system concerning court-connected mediation and the nature thereof. Mediation in divorce and defamation matters in particular was investigated. Most importantly, chapter five explored case law which presented evidence that the courts are leaning toward the promotion of ADR, especially mediation. In this chapter, it was outlined and discussed that court-connected mediation is different from most forms of mediation (private and voluntary mediation) because it occurs under the protection of the legal system.⁶⁹²

In court-connected mediation, there is a dialectical relationship between legal and nonlegal values. It is thus imperative for parties in court-connected mediation to understand their legal rights and concurrently be able to acknowledge how their individual and community interest find expression in or outside of these rights.⁶⁹³ The focus of mediation must remain that the parties are either entitled or obligated to do or deliver to another party, with just a suggestion of preparedness of “give-and-take”. This will ultimately assist in achieving justice through court-connected mediation.

An important component of chapter five was the discussion on how court-connected mediation compliments litigation and how compulsory mediation can increase the effectiveness of a civil justice system. Collectively, it therefore addressed the sub-research question on what the benefits and/or drawbacks court-connected mediation may have for access to justice as an alternative form of dispute resolutions in the Namibian civil justice system.

⁶⁹² Nolan-Haley (1996: p 65).

⁶⁹³ Ibid.: p 66.

From the analysis of the statistics recorded in the various legal year reports of the High Court of Namibia,⁶⁹⁴ it was substantiated how the referral of matters to mediation can benefit not only the disputing parties, but also the court. The benefit of saving on legal costs was discussed under 3.4.4.1⁶⁹⁵ and the statistics of saving court time was recorded under section 3.4.4.2.⁶⁹⁶ From the statistics analysed under section 3.4.4.7, it can be concluded, that at times only half of the matters which are referred to mediation can be settled during the process, the direct effect thereof is enormous.

The statistics discussed under section 5.6 clearly indicates that the introduction of court-connected mediation to the High Court of Namibia directly supports and upholds the objectives outlined in Rule 1 (3) of the Rules of the High Court as discussed under section 4.4⁶⁹⁷ in that it saves valuable court time, reduces expenditure on costly legal proceedings and promotes early resolution of disputes.

Crous supports the conclusion of this research study perfectly when she states that ADR is not a simplified version of litigation and is never supposed to act as a replacement for litigation but must serve to complement and supplement it.⁶⁹⁸ It is imperative for this study which concurs that ADR can never replace litigation, but can be incorporated as a tool to facilitate the process and address several impediments to access to justice.

Chapter six analysed the process of court-connected mediation in Tanzania and India, which addressed the sub-research question on comparable lessons which can be derived from other comparable jurisdictions relating to court-connected mediation in

⁶⁹⁴ Main division.

⁶⁹⁵ On page 69.

⁶⁹⁶ On page 70.

⁶⁹⁷ On pages 85-87.

⁶⁹⁸ Crous (2002: p 302).

Namibia. It expanded over the origin, nature and implementation thereof and allowed this study to draw comparisons and differences between the process and rules prescribed in those jurisdictions in comparison to Namibia.

It was noted that in Tanzania, it is compulsory that all civil suits, with a few specific exceptions, must be referred to court-annexed mediation and that the failure to comply with this requirement carries significant legal consequences, as it may result in the declaration of the entire proceedings as null and void.⁶⁹⁹ In contrast thereto, Namibian legislation prescribes only mandated referral of a few and certain matters⁷⁰⁰ and it was proposed that the list under PD 19(5) should either be expanded to include more matters, or it be amended to include all civil matters (with a few exceptions thereto) to be referred to some form of mediation before it can be brought before the court. As in both Tanzanian and Indian legislation, clearer and stricter timelines must be set in Namibian legislation for setting the matter down for mediation, filing of relevant documents to commence the proceedings, postponing the matter and ultimately referring the matter back to the Managing Judge. Moreover, the implementation of pre-litigation mediation in Namibia with the included option of online mediation, as borrowed from the proceedings in India, can pave a dynamic way forward for mediation in Namibia.

This chapter concluded with the outcome that Namibia can benefit from studying and incorporating some of the provisions adopted in other jurisdictions.

⁶⁹⁹ Hamisi (2022: p 6).
⁷⁰⁰ PD 19(5).

7.2. Recommendations

7.2.1. Continuous development and education of court accredited mediators

ADR, and more specifically mediation, has developed significantly over the last few years. Mediators execute a significant role in the outcome of the mediation process by facilitating negotiations between the disputing parties through the exercise of peaceful conflict resolution skills. It is therefore prudent to ensure that court accredited mediators remain trained in these skills and ensure that they improve and evolve as mediators.

It is recommended that revision sessions be presented to court accredited mediators on an annual, or at least a regular basis, and that it should be a requirement for the court accredited mediator to attend these sessions to remain effectively accredited to facilitate court-connected mediations.

The training of court-accredited mediators should also include some form of emotional intelligence training to enable the mediators to handle disputes where there are not only factual differences, but also some form of empathy included in a certain dispute, such as divorce and defamation matters.

7.2.2. Court-connected mediations should be accessible country-wide

With the inclusion of court-connected mediation sessions at the coastal region of Namibia,⁷⁰¹ it is clear that there is a need to expand the accessibility of court-connected mediation throughout Namibia. Firstly, this will address the hindrance to access to justice by lowering costs of disputing parties to travel to the capital, the northern region or the coastal region of Namibia.

⁷⁰¹ Registrar's Notes issued in terms of Practice Direction 65. 8A (1).

Secondly, together with expanding the locations and accessibility of court-connected mediation, Namibia could learn from India's Mediation Act to also include a form of online mediation, which may enable court accredited mediators to assist disputing parties through online mediums from any location within Namibia. This may allow the reach of court-connected mediation to expand over the whole country without having to incur the expense to set up court-connected mediation locations and staff throughout the country.

7.2.3. Lawyers should be thoroughly educated

Legal Practitioners should be thoroughly educated on not only the advantages of court-connected mediation, but also on how the process should be conducted and how legal practitioners can facilitate a successful outcome of a court-connected mediation procedure. This may allow legal practitioners to confidently propose this procedure to their clients and to adequately explain the process to their clients, which could result in better co-operation from the disputing parties during the mediation session since they would be better prepared on what could be expected from the session and how their participation may positively contribute to the amicable and successful settlement of their clients' disputes.

Lawyers who are better educated in the advantages of proposing mediation to their clients would indirectly result in legal practitioners who appreciate and prioritise the current economic situation for more efficient dispute resolution.

7.2.4. Inclusion of a comprehensive explanations at case plan and pre-trial stage

Under the provision for the proposal of a case plan to be filed in terms of Rule 23(1),⁷⁰² it should be expected from the disputing parties to provide explicit and concise justifications for each party's stance regarding the potentiality or impracticability of mediating the dispute. The managing judge should be able to confer from the case plan filed that the parties actively considered the probable outcome of mediating the dispute and should be satisfied that the arguments and outcome thereof is sufficient to determine that the matter is not suitable to be referred to mediation, or any other form of ADR. In the pre-trial report which must be filed in terms of rule 26(6),⁷⁰³ the managing judge should be provided with a comprehensive explanation on why the mediation session did not occur, or why the dispute could not have been settled during the session, without disclosing confidential information or revealing discussions conducted without prejudice.

In terms of these reports, which already form part of the Rules of the High Court, the managing judge should be required to review the actions of the parties during the mediation process to be able to determine whether the mediation failed because of the conduct of one or all of the parties, or whether mediation failed because of the impossibility of the parties to come to a mutual agreement to settle the dispute. The recommendation below follows this proposal.

7.2.5. Sanctions for referral to mediation in bad faith

If it becomes apparent that either, or both of, the parties engaged in mediation in bad faith, the rules of the High Court should prescribe a form of sanction, possibly in the

⁷⁰² Of the High Court Rules.
⁷⁰³ Of the High Court Rules.

form of an adverse cost order. This recommendation stems from the statement made in the US judgement in *Outar v Greno Industries*⁷⁰⁴ that the Court possesses the capacity to exhibit leniency in certain matters, however, not to the degree of permitting a litigant to decline adherence to the established rules of the Court.⁷⁰⁵ In another US matter, *Del Fuoco v Wells*,⁷⁰⁶ the plaintiff and his counsel were penalised by the court for acting in bad faith by seeking to manipulate the mediation process in order to coerce a settlement.⁷⁰⁷

However, it is important that this recommendation be understood in line with recommendation under section 7.2.4 where it states that the managing judge should be required to investigate the behavior of the parties during the mediation process when deciding on a suitable cost order. It is likely that concerns about bad faith mediation will arise and must be considered with the reasons for the outcome of the mediation.

7.3. Final remark

As a final remark and in conclusion to this study, the following extract from the *Kalagadi Manganese* matter is highlighted, which summarises the significance and essence of this thesis.

“Mediation accepts that parties may come with intractable positions which may be rooted in something quite unrelated to the legal or factual issues they have chosen to define, or which have arisen, in the actual litigation between them. The mediation process seeks to help the parties find each other and move away from the cause of the litigation. The process may take quite imaginative

⁷⁰⁴ *Outar v Greno Industries Inc* 2005 WL 2387840.

⁷⁰⁵ *Ibid.*: para

⁷⁰⁶ *Del Fuoco v Wells* 2005 WL 2291720, para 1.

⁷⁰⁷ *Kalagadi Manganese v Industrial Development Corporation*, para 32.

*forms, may still involve one party outmanoeuvring the other or using its superior bargaining position which in turn results in the other submitting to a poor settlement, albeit preferable to a possible adverse court outcome.*⁷⁰⁸

⁷⁰⁸ *Kalagadi Manganese v Industrial Development Corporation*, para 21.

REFERENCE LIST

Statutes, Legislative enactments and Government Publications

Namibian Statutes, Legislative enactments and Government Publications

Arbitration Act 42 of 1965

Constitution of the Republic of Namibia Act 1 of 1990

High Court Act 16 of 1990

High Court Amendment Act 14 of 2011

High Court Amendment Act 12 of 2013

Labour Act 11 of 2007

Legal Aid Act 29 of 1990

Rules of the High Court of Namibia: High Court Act, 1990

High Court Practice Directions: Rules of High Court of Namibia, 2014

Namibian Government Publications

Judge President's Practice Note 1/2014 issued in terms of the Registrar's Note 2(4 issued in terms of Practice Direction 65)

Government Notice 59 published in Government Gazette 90 of 10 October 1990

Government Notice 57 published in Government Gazette 4709 of 13 May 2011

Government Notice 4 published in Government Gazette 5392 of 17 January 2014

International Statutes, Legislative enactments and Government Publications

Civil Procedure Code Chapter 33 of 2019

The Code of Civil Procedure Act 5 of 1908

Commercial Courts Act 4 of 2016

Constitution of the United Republic of Tanzania 1977

Mediation Bill XLIII of 2021

Mediation Act 32 of 2023

Treaties and International Instruments

Universal Declaration of Human Rights (1948)

International Covenant on Civil and Political Rights (1966)

African Charter on Human and People's Rights (1981)

Case Law

Namibian Case Law

Afshani and Another v Vaatz 2007 (2) NR 381 (SC)

AM v Minister of Home Affairs, Immigration, Safety and Security 2022 (3) NR 778
(HC)

Attorney-General of Namibia v Minister of Justice and others 2013 (3) NR 806 (SC)

Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd 2012 (2) NR
671 (SC)

Brink NO and Another v Erongo All Sure Insurance CC and Others 2018 (3) NR 641
(SC)

Geingos v Hishoono [2022] NAHCMD 48 (11 February 2022) [HC-MD-CIV-ACT-
OTH-2021/00538]

Standard Bank Namibia Limited v Muukua [2019] NAHCMD 245

Trustco Group International Limited and Others v Shikongo 2010 (2) NR 377 (SC)

*Arthur Frederick Uffindell t/a Aloe Hunting Dafaris v Government of Namibia and 4
others* 2009 (2) NR 670 (HC)

International Case Law

Blower v Van Noorden 1909 TS 890

Brownlee v Brownlee 2010 (3) SA 220 (GSJ)

Clemson v Clemson 2001 (1) ALL SA 622(W)

Del Fuoco v Wells 2005 WL 2291720

G v G (2003) (5) DA 396 (z)

Greenspan Bros (Pvt) Ltd v Commissioner of Taxes 1960 (1) SA 454 (SR)

Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A)

Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others (2020/12468) [2021] ZAGPJHC 127 (22 July 2021)

Outar v Greno Industries Inc 2005 WL 2387840

Townsend-Tuner and Another v Morrow (2004) ALL SA 235 (C)

Van den Berg v Le Roux (2003) ALL SA 599 (NC)

Books

Martin, E, A (Ed). 2003. *A Dictionary of Law*. Market House Books Limited: Oxford University Press.

Amoo, S, K. 2008. *An Introduction to Namibian Law – Materials and Cases*. Windhoek: UNAM Press.

- Bekker, P, M, Geldenhuys, T, Joubert, J, J, Swanepoel J, P, Terblanche, S, S & Van der Merwe, S, E. 2009. *Strafprosesreg.* Cape Town: Juta and Company (Pty) Ltd.
- Brand, J, Steadman, F & Todd, C. 2016. *Commercial Mediation – a User’s Guide.* Cape Town: Juta and Company (Pty) Ltd.
- Damaseb, P, T. 2020. *Court-Managed Civil Procedure of the High Court of Namibia.* Cape Town: Juta and Company (Pty) Ltd.
- Harms, L, T, C. 2003. *Amler’s Precedents of Pleadings.* Durban: LexisNexis Butterworths.
- Havenga, P, Havenga, M, Hurter, E, Kelbrick, R, Manamela, E, Manamela, T, Schulze, H & Stoop, P. 2013. *General Principles of Commercial Law.* Cape Town: Juta & Co Ltd.
- The Holy Bible.* 2010. New International Version. Michigan: Zondervan.
- Johnson, D, Peter, S & du Plessis, M. 2001. *Jurisprudence – A South African Perspective.* Durban: Lexis Nexis.
- Lovenheim, P & Guerin, L. n.d. *Mediate, Don’t Litigate- Strategies for Successful Mediation.* Nolo.
- Marnewick, C, G. 2002. *Litigation Skills for South African Lawyers.* Durban: Butterworths Publishers (Pty) Ltd.
- Neethling, J, Potgieter, J, M, Visser, P, J. 2005. *Law of Personality.* Durban: LexisNexis.

Plapinger, E & Stienstra, D. 1996. *ADR and Settlement in the Federal Courts: A sourcebook for Judges and Lawyers*: Washington, DC: Federal Judicial Centre and CPR Institute for Dispute Resolution.

Peté, S, Hulme, du Plessis, Palmer & Sibanda. 2012. *Civil Procedure: A Practical Guide*. Cape Town: Oxford University Press Southern Africa (Pty) Ltd.

Rawls, J. 2003. *A Theory of Justice*. Cambridge: Harvard University Press.

Schmidt, C, W, H. 1989. *Bewysreg*. Durban: Butterworths.

Smuts, F. 2013. *Die Suid-Afrikaanse Reg – Wat elkeen moet weet*. Cape Town: Tafelberg.

Wiese, T. 2019. *Alternative Dispute Resolution in South Africa – Negotiation, Mediation, Arbitration and Ombudsmen*. Cape Town: Juta and Company (Pty) Ltd.

Zander, M. 2000. *The State of Justice*. London: Sweet & Maxwell.

Book Chapters

Nylund, A. 2014. “Access to Justice: Is ADR a Help or Hinderance?”. In Ervo, L & Nylund, A (eds). *The future of Civil Litigation – Access to Courts and Court-annexed Mediation in the Nordic Countries*, Switzerland: Springer International Publishing, pp 325-344.

Papers in Journals

Boulle, L. 2012. “Promoting Rights Through Court-Based ADR?”. *South African Journal on Human Rights*, Volume No. 28 (1), pp 1-17.

- Brazil, W, D. 2017. "When "Getting It Right" Is What Matters Most, Arbitrations Are Better than Trials". *Cardozo Journal of Conflict Resolution*, Volume No. 18 (2), pp 277-280.
- Cappelletti, M., & Garth, B. 1978. "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective". *Buffalo Law Review*. Volume No. 27 (2), pp181-292.
- Cappelletti, M. 1993. "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement". *The Modern Law Review*, Volume No. 56 (3), pp 282-296.
- Damaseb, P, T. 2019. "Court-connected Mediation in the High Court of Namibia". *Namibia Law Journal*, Volume No. 11 (01), pp 29-46.
- Dylag, M. 2023. "Theorizing Access to Civil Justice". *Canadian Journal of Law & Jurisprudence*, Volume No. 36 (1), pp 113-145.
- Fuller, L. 1971. "Mediation – Its forms and Functions". *Southern California Law Review*, Volume No. 44, pp 305-339.
- Hamisi, H, T. 2022. "Court-Annexed Mediation in Tanzania: Successes, Challenges and Prospects". *International Journal of Innovative Research and Advanced Studies*, Volume No. 9 (11), pp 5-15.
- Hurter, E. 2011. "Access to Justice: To Dream the Impossible Dream?" *The Comparative and International Law Journal of South Africa*, Volume No. 44 (3), pp 408-427.

- Laidlaw, E, B. 2019. "Re-Imagining Resolution of Online Defamation Disputes".
Osgoode Hall Law Journal, Volume 56(1), pp 162-202.
- Lukumay, Z, N. 2016. "A reflection on Court-annexed mediation in Tanzania". *The Law School of Tanzania Law Review Journal*, Volume No. 1 (1), pp 51-60.
- Marumoagae, M, C. 2016. "Does collaborative divorce have a place in South African divorce law?". *De Jure*, Volume No. 49 (1), pp 41-57.
- Nolan-Haley, J, M. 1996. "Court Mediation and the search for Justice through Law".
Washington University Law Review, Volume No. 74 (1), pp 47-102.
- Nyenti, M. 2013. "Access to justice in the South African Social security system: Towards a conceptual approach". *De Jure*, Volume No. 4, pp 901-916.
- Sackville, R. 2004. "Some thoughts on access to justice". *New Zealand Journal of Public and International Law*, Volume No. 2 (1), pp 85-111.
- Tahura, U, S. 2019. "Does mandatory ADR Impact on Access to Justice and litigation costs?". *Australasian Dispute Resolution Journal*, Volume No. 30 (1), pp 31-38.
- Peters, E, A & Ubink, J. 2015. "Restorative and flexible customary procedures and their gendered impact: a preliminary view on Namibia's formalization of Traditional Courts". *The Journal of Legal Pluralism and Unofficial Law*, Volume No. 47 (2), pp 291-311.
- Weston, M, A. 2001. "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality". *Indiana Law Journal*, Volume No. 76 (3), pp 591-645.

Zongwe, D, P. 2021. "Nobody can Really Afford Legal Services: The Price of Justice in Namibia". *Potchefstroom Electronic Law Journal*, Volume No. 24, pp 1-42.

Theses

Crous, A, J. 2002. *Die Beslegtingsproblematiek in geval van medies wanpraktykgeskille met spesifieke verwysing na die "action for wrongful conception" en die "ADR proses"*. (Doctoral thesis, Potchefstroomse Universiteit vir Christelike Hoër Onderwys, South Africa). Available at https://repository.nwu.ac.za/bitstream/handle/10394/156/crous_alettaj.pdf?sequence=1

Maclons, W. 2014. *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System*. (Masters thesis, University of the Western Cape, South Africa). Available at <http://hdl.handle.net/11394/4407>

Olivier, M. 2018. *The role of court-annexed mediation in providing access to justice in the resolution of commercial disputes*. (Masters thesis, North-West University, South Africa). Available at https://repository.nwu.ac.za/bitstream/handle/10394/31333/Olivier_M.pdf

Steyn, Y, C. 2015. *The role of court-based mediation in the resolution of divorce disputes*. (Masters thesis, North-West University, South Africa). Available at https://repository.nwu.ac.za/bitstream/handle/10394/21150/Steyn_YC_2016.pdf

Reports and other sources

Access to Justice – Paralegal Manual. 2012. DLA Piper: New Perimeter. Available at <https://www.lac.org.za/projects/sjp/Pdf/npamanual-small.pdf>

Civil Justice Council. 2021. *Compulsory ADR*. Available at [Civil-Justice-Council-Compulsory-ADR-report.pdf](https://www.civil-justice-council.org.uk/Compulsory-ADR-report.pdf) (judiciary.uk)

Code of Conduct for court-accredited mediators. n.d. Available at <https://ejustice.jud.na/High%20Court/Mediation/Pages/Directives.aspx>

Damaseb, P, T. 2010. *Promoting access to justice in the High Court of Namibia: First Report – The Case for Judicial Case Management*. Windhoek: Ministry of Justice. Available at <https://ejustice.jud.na/High%20Court/Media/Pages/Publications.aspx>

Damaseb, P, T. 2010. *Promoting access to justice in the High Court of Namibia: Second Report – The Case for Judicial Case Management, held at Midgard Country Estate, 8-9 October 2010*. Windhoek: Ministry of Justice. Available at <https://ejustice.jud.na/High%20Court/Media/Pages/Publications.aspx>

Damaseb P, T. n.d. *Court-Connected Mediation in the High Court of Namibia*. Available at [Court Connected Mediation in the High Court of Namibia - Hon. PT Damaseb \(2\).pdf](#)

Damaseb, P, T. 2014. *The Mediation programme of the High Court of Namibia*. Outreach paper No. 1. Available at <https://ejustice.jud.na/High%20Court/Mediation/Pages/Registers.aspx>

Hinson, Z & Hubbard, D. 2012. “Access to justice as a human right”. *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*. Paper No. 1. Windhoek: Legal Assistance Centre. Available at https://www.lac.org.na/projects/grap/Pdf/access2justice1_human_right.pdf

Hinson, Z & Hubbard, D. 2012. “Locus Standi: Standing to bring legal action”. *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*. Paper

- No. 2. Windhoek: Legal Assistance Centre. Available at https://www.lac.org.na/projects/grap/Pdf/access2justice2_locus_standi.pdf
- Hinson, Z & Hubbard, D. 2012. “Costs and Contingency Fees”. *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*. Paper No. 3. Windhoek: Legal Assistance Centre. Available at https://www.lac.org.na/projects/grap/Pdf/access2justice3_costs.pdf
- Nakuta, J & Chipepera, F. n.d. *The Justice Sector and the Rule of Law in Namibia – Management, Personnel and Access*. Namibia Institute for Democracy, Human Rights and Documentation Centre. Available at https://www.nid.org.na/images/pdf/democracy/Framework_Namibian_Justice_Sector.pdf
- Namibia Superior Courts. 2022. High Court of Namibia Main Division 2022 Legal Year Report. Available at <https://ejustice.jud.na/High%20Court/Media/Publications/NAHCMD%202022%20Legal%20Year%20Report.pdf>
- Namibia Superior Courts. 2023. High Court of Namibia Main Division 2023 Legal Year Report. Available at <https://ejustice.jud.na/High%20Court/Media/Publications/NAHCMD%202023%20LEGAL%20YEAR%20REPORT.pdf>
- Republic of Namibia. 2015. National Human Rights Action Plan (2015-2019). Available at <https://www.humanrights.dk/files/media/document/Namibia%20NHRAP%202015-2019.pdf>
- Shamir, Y. 2003. *Alternative Dispute Resolution approaches and their Application*. Israel Centre for Negotiation and Mediation contribution report from UNESCO’s International Hydrological Programme to the World Water

Assessment Programme. Available at <https://documents.pub/document/alternative-dispute-resolution-approaches-dispute-resolution-approaches-and.html>

The Alternative Libel Project. 2012. *Final Report on the problems created by defamation procedure with recommendations for change*. London: English PEN and Index on Censorship. Available at https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Alternative_Libel_Project_FinalMarch2012.pdf

United Nations Development Programme. 2013. “*Analysis of the national studies on the capabilities of the judicial institutions to address the needs/demands of persons with disabilities, minorities and women*”. Strengthening Judicial Integrity through Enhanced Access to Justice. Retrieved from <https://www.undp.org/sites/g/files/zskgke326/files/migration/eurasia/Access-to-justice.pdf>

Working Group/ Committee for drafting the rules/regulations and standards of Mediation in India. 2023. Report of the Working Group/Committee Constituted for Drafting of Rules, Regulations and Standards of Mediation in India under the Mediation Bill, 2023. Available at [https://legalaffairs.gov.in/sites/default/files/Mediation CommitteeReport.pdf](https://legalaffairs.gov.in/sites/default/files/Mediation%20CommitteeReport.pdf)

Speeches

Damaseb, P, T. 2014. *Honourable Mr Justice Damaseb speech at the accreditation ceremony for court-connected alternative dispute resolution mediators*. Available at <https://ejustice.jud.na/High%20Court/Media/Pages/Speeches.aspx>

Ngcobo, S. 2011. “Enhancing Access to Justice: the Search for Better Justice”.
Opening remarks speech given by the Chief Justice at the access to justice conference: towards delivering accessible quality justice for all.
Johannesburg. Available at [Speech-of-the-Chief-Justice-2011.pdf](#)
(constitutionallyspeaking.co.za)

Conference papers

Sudarshan, R. 2003. “Rule of Law and Access to Justice: Perspectives from UNDP Experience”. Unpublished paper presented to the European Commission Expert Seminal on Rule of Law and the Administration of Justice as part of Good Governance, Brussels, 3-4 July 2003.

Internet references and websites

Abyssinia Law. 2022. *Introduction to Law and Law of Persons – Major Theories of Law*. Available at <https://abyssinialaw.com/study-on-line/390-introduction-to-law-and-law-of-persons/7349-major-theories-of-law>; last accessed on 12 December 2023.

Anonymous. 2023. *Mediation Act, 2023: Mandatory Pre-Litigation Mediation in India*. Available at <https://taxguru.in/corporate-law/mediation-act-2023-mandatory-pre-litigation-mediation-india.html>; last accessed on 2 February 2024.

Lakshmikumaran & Sridharan Attorneys. 2023. *What, How, Where, When and Why of the Mediation Act, 2023*. Available at <https://www.lakshmisri.com/newsroom/news-briefings/what-how-where-when-and-why-of-the-mediation-act-2023/#>; last accessed on 7 January 2024.

Lukmaan, I, A, S. 2021. *Access to justice under Legal Services Authority Act – Problems and Prospects*. Available at <https://blog.lukmaanias>.

com/2021/12/22/access-to-justice-under-legal-services-authority-actproblems-and-prospects/; last accessed on 4 August 2023.

Namibia Superior Courts. n.d. *Access to Justice and Legal Representation*. Available at <https://ejustice.jud.na/ABOUT%20US/Pages/AccessToJusticeandLegalRepresentation.aspx>; last accessed on 5 June 2023.

Namibia Superior Courts. n.d. *Fair Trial*. Available at <https://ejustice.moj.na/ABOUT%20US/Pages/FairTrial.aspx>; last accessed on 3 June 2023.

Namibia Superior Courts. n.d. *High Court Mediation Diary*. Available at <https://ejustice.moj.na/High%20Court/Mediation/Pages/Diary.aspx>; last accessed 8 June 2023.

Palmeira, N. 2012. *Mediation in Divorce Matters*. Available at <https://www.mclarens.co.za/mediation-in-divorce-proceedings/>; last accessed on 12 January 2024.

Pomerleau, W. n.d. *Western Theories of Justice*. Internet Encyclopedia of Philosophy. Available at <https://iep.utm.edu/justwest/>; last accessed 2 June 2023.

Republic of Namibia Legal Aid. n.d. *Legal Aid – How it Works*. Available at <https://legalaid.gov.na/how-it-works>; last accessed 2 May 2024.

Tidke, P & Doshi, N. 2023. *Salient Features of India's New Mediation Law*. Available at <https://www.lexology.com/library/detail.aspx?g=c8bce204-3b73-498d-8018-6586febbd955>; last accessed on 4 February 2024.