GUIDING NOTES ON MEDIATION

Prepared by Dr. Julius Clement Mashamba

Tanganyika
Law Society

FIRST EDITION

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FOREWORD

Among the objects of the Tanganyika Law Society (TLS) as enshrined in the Tanganyika Law Society Act is to facilitate the acquisition of legal knowledge to the members of legal profession and others. The TLS through the Research and Publication Committee has pioneered different legal materials for the legal professional, especially its members. Through the years, the TLS has published thousands of publications that are disseminated to the advocates, stakeholders and the public for the purpose of creating and raising awareness of the legal knowledge in different areas of law. With such a longstanding and consistent background on publishing legal materials for the legal profession and public, the TLS has now decided to develop and publish Guiding notes for members of the legal profession especially young lawyers to provide guidance in specific practice areas of law. It is my strong belief that the Guiding Notes will be one of the means of ensuring continued provision of legal education to the TLS Members and the public at large.

My sincere thanks go to all contributors, the Editorial Board and the Secretariat for the job well done.

Prof. Dr. Alex B. Makulilo
Chairperson

Research and Publication committee

Chapter One

INTRODUCTION TO THE CONCEPT OF DISPUTES AND THEIR SETTLEMENT THROUGH MEDIATION

1.1 Introduction

An understanding of what disputes or conflicts are is a prerequisite to anyone striving to acquire and apply the skills in any branch of dispute resolution. In these Notes we preface an analysis of disputes and the need to manage them. This is principally because disputes are endemic to, and form an integral part of, human life; thus, society should always look at ways to manage or contain them. From time immemorial, societies around the world have grappled with conflicts or disputes and have come up with different approaches to managing them. From such endeavours normative laws evolved.[1]

Therefore, this Chapter briefly explains the concept, dimension and nature of disputes. It also highlights the causes and functions disputes in society. The Chapter will also introduce the reader to how disputes should be analysed to find positive solutions to them.

1.2 Understanding Disputes and Conflicts

There are many definitions of, and approaches to understand and address, conflicts or disputes worldwide. An interesting definition of conflicts or disputes is one offered by the Danish Centre for Conflict Resolution, which states that: 'Conflicts are disagreements that lead to tensions within and between people.'

Therefore, as long as human beings 'have conscience and intellect to think about the future, definitely there will be conflicts.'[2] For that matter, conflicts and disputes are made by human beings and methods

[1] *See* particularly Mashamba, C.J., *Alternative Dispute Resolution in Tanzania: Law and Practice* (Dar es Salaam: Mkuki na Nyota Publishers, 2014), p. 3.
[2] Ibid.

to solve them 'must be created through human intelligence.'[3] The Dalai Lama suggests that it is 'wise to solve the conflict through dialogue, not through weapons.'[4]

1.2.1 The Dimension and Nature of Disputes

Viewed in the above sense, disputes result from a 'relationship between two or more parties (individuals or groups) who have, or think they have, incompatible goals.' Looking at their very nature, disputes and conflicts are 'a fact of life, inevitable and often creative. Conflicts happen when people pursue goals which clash. Disagreements and conflicts are usually resolved without violence and often lead to an improved situation for most or all of those involved.' In human relations, imbalances may give rise to disputes. These imbalances may be reflected in unequal social status, unequal wealth and access to resources, and unequal power, which leads to 'problems such as discrimination, unemployment, poverty, oppression, crime.'

Disputes are an integral and inevitable part of society, which affects life and our relationships with each other.[5] The challenge facing human society is not to eliminate or run away from disputes, but to seek effective ways to *positively* address them. The "management" of conflicts/disputes can be done both positively and negatively: *negative management* can be done through avoidance or use or threat to use force; and *positive management* is done through mediation, conciliation or negotiation, which results in joint problem-solving and consensus-building.[6] Positive dispute resolution helps to build and sustain constructive relationships with others.

1.2.2 Positive Functions of Disputes

Is dispute necessary in our life? If negatively managed, disputes may degenerate into devastating human calamities such as violations of individuals' legal rights. But, if positively managed, disputes may help to: (*i*) build and sustain relationships, (*ii*) foster communication, and

[3] Ibid.
[4] Ibid.
[5] Mashamba, op. cit, p. 4.
[6] Centre for Conflict Resolution, *The Human Rights and Conflict Management Training Programme: Induction Workshop* (Cape Town: Centre for Conflict Resolution, 2000), pp. 9-10.

(*iii*) create coalitions in society. It may also strengthen institutions, foster ideas and enhance rule of law and observations of human rights in society emerging from well-managed conflict.[7]

Therefore, where positively managed or resolved, disputes serve the following *positive functions* in society:

(i) Disputes help to establish our identity and autonomy;
(ii) Intensity of disputes demonstrate the closeness and importance of relationships;
(iii) Disputes can build new relationships;
(iv) Disputes can create coalitions;
(v) Disputes serve as a safety-valve mechanism, which helps to sustain harmonious relationships;
(vi) Disputes help parties to assess each other's power and can work to redistribute power in a system conflict;
(vii) Disputes establish and maintain group identities;
(viii) Disputes enhance group cohesion through issue and belief clarification; and
(ix) Disputes create or change rules, norms, laws and institutions.

In fact, disputes are inherent in human life; and disputes function to make people aware of problems, promote necessary change, improve solutions to addressing them, raise morale, foster personal development, increase self-awareness, and enhance psychological maturity.[8]

1.3 Causes of Disputes

There are six major theories on the causes of conflicts[9], each of which points to different methods and goals, summarised below.

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[7] Mashamba, op. cit, p. 4.

[8] Fisher, *et al.*, p. 4 (pointing out that: 'Without [disputes], you might imagine, individuals would be stunted for lack of stimulation, groups and organisations would stagnate and die, and societies would collapse under their own weight, unable to adapt to changing circumstances and altering power relations. It is commonly said, for example, that the Roman Empire collapsed because it was not able to adapt and change.'). *See* also Tjosvold, D., *The Conflict-Positive Organisation: Stimulate Diversity and Create Unity* (Addison Wesley, 1992).

[9] This list of theories of causes is adapted from Working with Conflict course notes on "Conflict Theories" by Hugo van der Merwe, Johannesburg, South Africa, 1997, and from a paper by Ross, M., "Creating the Conditions for Peacemaking: Theories of Practice in Ethnic Conflict Resolution*," Ethnic and Racial Studies,* 2000.

(i) Community Relations Theory: This theory presupposes conflict is caused by ongoing *polarization*, *mistrust* and *hostility* between different groups within a community. Accordingly, the goals of this theory are:

(i) to improve communication and understanding between conflicting groups;[10] and
(ii) to promote greater tolerance and acceptance of diversity in the community.[11]

(ii) Principled Negotiation Theory: This theory presumes disputes are caused by 'incompatible positions and a "zero-sum"[12] view of conflict being adopted by the conflicting parties.[13] This theory has the following goals:

(i) to assist disputing parties to separate personalities from problems and issues, and to negotiate on the basis of their interests rather than fixed positions;[14] and

(ii) to facilitate agreements that offer mutual gain for both/all parties.[15]

(iii) Human Needs Theory: This theory presupposes that deep-rooted disputes are caused by 'unmet or frustrated basic human needs– physical, psychological and social. Security, identity, recognition, participation and autonomy are often cited.'[16] The goals of this theory are:

(i) to assist disputing parties to identify and share their unmet needs, and generate options for meeting those needs;[17] and,

(ii) to assist the parties to reach agreements that meet the basic human needs for all the sides.[18]

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[10] Fisher, *et al*., op. cit, p. 8.
[11] Ibid.
[12] "*Zero-sum*" is a situation in game theory in which one person's gain is equivalent to another's loss, so the net change in wealth or benefit is *zero*. *See* Kenton, W., "Zero-Sum Game," available at https://www.investopedia.com/terms/z/zero-sumgame.asp (accessed 18 September 2020).
[13] Fisher, *et al*., op. cit.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.

(iv) Identity Theory: This theory assumes that disputes are caused by feelings of 'threatened identity, often rooted in unresolved past loss and suffering.'[19] Its goals are:

(i) To identify threats and fears embedded in the disputing parties through facilitated workshops and dialogue (This helps each party to feel and build empathy and reconciliation between themselves.); and to jointly reach agreements that recognize the core identity needs of all disputing parties.[20]

(v) Intercultural Miscommunication Theory: This theory posits that disputes are caused by incompatibilities between different cultural communication styles.[21] It aims at:

(i) increasing the disputing parties' knowledge of each other;

(ii) Weakening negative stereo-types the parties have of each other; and

(iii) ultimately enhancing effective intercultural communication.[22]

(*vi) Conflict Transformation Theory:* This theory assumes that disputes are caused by real problems of inequality and injustice expressed by competing social, cultural, and economic frameworks. The goals of this theory are:

(i) to change structures and frameworks that cause inequality and injustice, including economic redistribution;

(ii) to improve longer-term relationships and attitudes among the disputing parties; and

(iii) to develop processes and systems that promote empowerment, justice, peace, forgiveness, reconciliation, and recognition.[23]

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[18] Ibid.
[19] Ibid.
[20] Fisher, *et al*., op. cit, p. 8.
[21] Ibid.
[22] Ibid.
[23] Ibid, pp. 8-9.

1.4 Approaches to Handling Disputes

As elaborated in Parts II and III of these Guiding Notes, there several approaches adopted in handling disputes by different actors in different settings. But the following are the most common approaches: (*i*) negotiation; (*ii*) conciliation; (*iii*) mediation; (*iv*) arbitration; (*v*) litigation; and (*vi*) legislation.

(i) Negotiation: This is a strategic discussion process that resolves an issue in a way that both parties find acceptable. Through negotiation, all involved parties try to avoid arguing, but *amicably* agree to reach some form of compromise. As elaborated in these Guiding Notes, the negotiation process involves some give and take, which means that the end result will be a win-win situation to all parties.

(ii) Conciliation: This is a dispute settlement mode that involves an independent "conciliator" who facilitates communication or discussions between two disputing parties with the aim of achieving an *amicable* settlement or resolution of a dispute between them.

(iii) Mediation: This is a form of alternative dispute resolution, whereby parties attempt to resolve their differences through a third party ("a mediator") without going to court. In principle, the mediator works, as a facilitator, to find points of agreement between the parties and make those in conflict agree on a fair result.

(iv) Arbitration: This is a private process where disputing parties agree that one or several individuals ("arbitrator" or "arbitrators") can make a decision about the dispute after receiving evidence and hearing arguments. Arbitration is different from mediation because the neutral arbitrator has the authority to make a binding decision about the dispute.[24]

(v) Litigation: This is a situation where a dispute is referred to a court of law for its determination in accordance with the substantive and procedural law relating to the subject matter of the litigation.

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[24] https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ (accessed 19 September 2020).

(v) Legislation: In certain (often rare) cases, certain disputes may only require the adoption of legislation to bring them to an end.

Approaches to Handling Disputes: Diagrammatic Summary

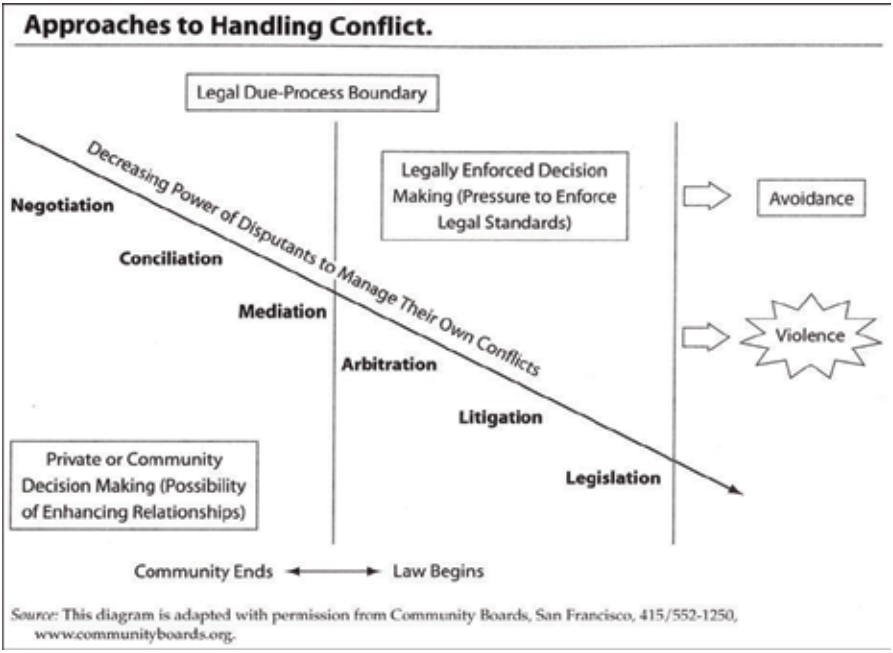

Figure 2: Approaches to Resolving Disputes

1.5 The Concept of Alternative Dispute Resolution (ADR)

To date, "alternative dispute resolution" or "appropriate dispute resolution"[25] (ADR) is increasingly becoming a common practice in many judicial processes around the world. This is because of its many benefits as compared to other judicial mechanisms of dispute resolution.

[25] Shamir, Y., *Alternative Dispute Resolution Approaches and the Application* (New York: UNESCO, 2003), p. 2. *See* also Kimei, M.C., "Alternative Schemes for Resolving Banking and Financial Disputes," *The Tanzania Lawyer*. Vol. 1 No. 2, 2012, pp. 46-71; and Street, L., "The Language of Alternative Dispute Resolution," *Alternative Law Journal*, Vol. 66, 1992.

Some benefits of ADR include its capability to reduce litigation costs, and less time involved in the determination of disputes.

1.5.1 What is Dispute Resolution?

Before we embark on explaining the concept of ADR, it is trite to try to answer the following question: What does "resolution" mean in the context of "alternative dispute resolution?" A simple response is: "resolution" refers to the settlement of a dispute.[26] Universally, there are two types of dispute settlement or resolution: a dispute may be resolved either *consensually* or *by coercion*. Whereas the first category refers to the resolution of the dispute on the basis of agreement made consensually by the parties; the second type refers to the use of sanction as a means of enforcing the resolution of the dispute.[27]

Whereas ADR mechanisms fall under the first category of dispute settlement, the conventional civil justice system falls under the second type of dispute resolution.[28] In the first category, the nature of settlement of a dispute is based on a win-win or compromise situation, whereas in the second category disputes are settled by the judiciary and court judgments are enforced through state's civil justice sanctions normally framed in the civil procedure statute.[29]

1.5.2 The Concept of ADR

ADR simply refers to all modes of dispute settlement/resolution other than the traditional dispute settlement through courts of law.[30] It covers a broad range of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end where an external party imposes a solution.[31]In principle, ADR comprises a

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[26] Faris, J.A., "An Analysis of the Theory and Principles of Alternative Dispute Resolution," LL.D. Thesis, University of South Africa, 1995, p. 45.
[27] Ibid.
[28] Mashamba, C.J., "Legal Aid in Non-litigation Dispute Settlement Mechanisms in Tanzania: An Assessment of the Legal Framework and Practice," *The Tanzania Legal Aid Journal,* Vol. 1 No. 1, 2020.
[29] For the procedure on enforcement of court judgements and decrees in Tanzania, *see* specifically Orders XX and XXI of the Civil Procedure Code, Cap. 33 R.E. 2002 ('the CPC').
[30] Mashamba, op. cit, p. 19.
[31] Shamir, op. cit.

variety of 'mechanisms or techniques, which share the essential characteristics of being different from dispute mechanism of litigation in State courts.'[32] Mainly, these mechanisms or forms are negotiation, mediation, reconciliation, and arbitration. In most jurisdictions, like Tanzania, ADR has two modes: methods of resolving disputes outside of the judicial mechanisms; and informal methods attached to or pendant to official judicial mechanisms.

Of late, ADR is manifested in two categories: offline and online ADR. Whereas the former category is the most common in Tanzania, the latter has just started to take shape in the country, as elsewhere in the world, with the advent of e-commerce that is increasingly dominating the contemporary world stage. Offline ADR is traditionally conducted under a paper-based environment; and online ADR uses the internet as a medium of facilitating dispute resolution.

1.5.3 The Benefits of ADR

ADR is generally regarded as having many benefits over the formal litigation mechanism–ranging from being less expensive, speedier, less formal and more flexible. In principle, the flexibility of ADR is said 'to lend itself to the crafting of "win-win" solutions rather than the "zero sum" game of litigation.' In this regard, ADR suits and functions well in situations where the disputants are to maintain ongoing relationships even after the dispute is resolved. These situations include employer and employee, landlord and tenant, investment and commercial, and family relationships. This is the major reason all dispute settlement mechanisms introduced in Tanzania recently in these areas of the law make it mandatory to resolve by some form akin to ADR.

ADR has been increasingly used alongside, and integrated formally into, the legal systems internationally in order to capitalize on the typical advantages of ADR over litigation. In its scope, ADR is suitable for multi-party disputes; and it is flexible in terms of procedure whereby the process is determined and controlled by the parties to the dispute. Unlike formal litigation, ADR lowers costs to both the disputing parties

[32] Kamau, W., "Law, Culture and Dispute Resolution: Prospects for Alternative Dispute Resolution (ADR) in Africa," *East African Journal of Peace and Human Rights,* Vol. 15 No. 2, 2009. Pp. 336-360, pp. 336-7.

and the arbitrator, conciliator as well as the mediator in that it is less complex and it takes short time to come to an end.

In ADR, parties choose a neutral third party to direct negotiations, which is of particular importance. In ADR there is a likelihood and speed of settlements and practical solutions are tailored to parties' interests and needs (not rights and wants, as they may perceive them). In addition, in ADR there is durability of agreements and parties to a dispute tend to feel they own them. There is also great emphasis of the principle of confidentiality; and the preservation of relationships; as well as the preservation of reputations of the disputing parties.

1.5.4 Origins of ADR

As considered above, disputes have been an integral part of human interaction from time immemorial; and, as such, societies around the world have learnt 'to manage them, to deal with them to prevent escalation and destruction, and come up with innovative and creative ideas to resolve them.' Therefore, dealing with disputes "conflict management," or "dispute resolution" as it is called in professional circles–is as old as humanity itself. Stories of handling disputes and the art of managing them are told at length throughout the history of every nation and ethnic group who share the same history.

A scrutiny of many ancient or traditional societies around the world reveals that there exist accounts of various types of negotiations: for instance, between two persons, between an individual and a group, and between two groups. In other countries, arbitration, as a form of ADR, 'had its origin in private commercial arbitration outside the formal court structure and it was used by merchants when disputing with each other.'[33] In addition, the labour movement, immigrant and religious communities in the US and societies in other parts of the world–Asia and Africa, in particular–'have for a long time relied on consensual methods of dispute settlement.'[34]

[33] Kamau, op. cit, p. 349 (note 68).
[34] Ibid.

Historically, the "contemporary" ADR movement began in the US in the 1970's[35] as a result of two main concerns in the US judicial system: (*i*) there was a call for **better-quality** processes and outcomes in the judicial system; and (*ii*) there was a need for **efficiency** of justice.[36]

ation.

As noted above, modern ADR is a modification of African traditional ways of dispute settlement, which were advanced by the West in the 1970s and later transplanted back to Africa. This reality has been alluded to by the late Francis Nyalali, former Chief Justice of Tanzania, who once remarked: 'The use of customs, special rules and communal practice to resolve disputes is not a strange idea. It is common in most African communities and in commercial communities the world over.' As in other African countries, the introduction of ADR in Tanzania was just reinforcing the already existing traditional ways of settling disputes. As we have observed above, ADR was transplanted into the African legal systems in the 1980s and 1990s as a result of the liberalisation of the economies, which was accompanied by such conditionality as reform of the justice and legal sectors, under the SAP's.

However, most of the methods of ADR that are being promoted today by the Western countries to be included in the African legal systems are similar to the post-colonial African dispute settlement mechanisms that encouraged restoration of harmony and social bonds in the justice system. It should be noted that the retention of the retributive and socially insensitive colonial justice system after independence in Africa has resulted in increased litigation that does not match with the case disposal rate by our courts. In Tanzania,

> This increase in litigation, compounded by delays in disposal of cases by our courts at all levels, often attributed to time-consuming intricate and technical rules of procedure getting in the traditional judicial system hitherto relied on for the settlement of civil disputes, compounded by scarce resources, had

[35] Menkel-Meadow, C., "Alternative Dispute Resolution," in Kritzer, H.M. (ed.), *Legal Systems of the World: A Political, Social and Cultural Encyclopedia,* 2002, p. 40.
[36] Kamau, op. cit, p. 349.

> precipitated an almost choking congestion of cases at all levels of the court system. All these have contributed not only to delays in justice delivery in our courts but also adversely affected the quality of that justice.[37]

These problems "compelled" the Government to take some measures, both statutory and administrative, to improve the situation. Such measures included the enactment of the Ward Tribunals Act in 1985. This law, inter alia, vests limited quasi-judicial powers onto ward tribunals, emphasising the need to use mediation as much as in resolving disputes brought before them. As a recent evaluation report notes, the effect of this law in addressing case congestion in ordinary courts was minimal.

Furthermore, the minister responsible for justice ordered the Law Reform Commission of Tanzania to carry out a study on delays and backlogs of civil cases in 1986. The study was envisaged to find out the major causes of the inordinate delays in determination of civil cases and advise on how to get rid of this problem. The study found, *inter alia*, that delays in disposing civil cases as well as the mounting case backlogs were increasingly becoming unbearable and an immediate lasting solution was needed to address these problems. [38]

Another measure undertaken to address the challenges facing the justice system in the country was the gazetting of Government Notice No. 508 of 1991, which severely 'restricted the granting of adjournments in civil cases.'[39] Administratively, there was devised the Shift System, which was introduced 'to ensure maximum use of the available resources by having morning and afternoon court sessions. That was soon followed by the Individual Calendar system whereby a case assigned to a particular Judge had to be dealt with by that Judge to its finality so as to

[37] Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual" (Dar es Salaam: Project for the Court of Appeal of Tanzania, 2010).
[38] United Republic of Tanzania, "Delays in the Disposal of Civil Suits" (Dar es Salaam: Law Reform Commission of Tanzania, 1986), p. 4.
[39] Global Justice Solutions, op. cit.

reinforce accountability and reduce confusion and misplacement of case files.'[40]

Along these administrative measures, there was initiated another administrative action relating to the setting up of Case Management Committees from the district to the national levels that involve the Judiciary, Police, Prisons and the Office of the Attorney General. These committed are charged with the task of 'finding out causes of delay in each case and suggesting measures to tackle the problem. These committees have achieved some measure of success. Their emphasis, however, has been on criminal rather than civil cases.'[41]

In spite of all these measures and others, public outcry 'grew about court congestion and inordinate delays in the dispensation of justice in the country. This brought to the fore the concept of finding alternative methods of resolving civil disputes to complement the traditional judicial system.' [42] Therefore, ADR was regarded as one of the long-term solutions for addressing the foregoing challenges facing the administration of civil justice in Tanzania.

1.6 Legal Recognition of Court-Annexed Mediation in Tanzania

Before 1994, all ADR mechanisms (including conciliation) were not recognized in our civil justice system, except regarding out-of-court arbitration that was regulated by the Arbitration Act. But with the developments that took place from 1994 to 2019, now all ADR mechanisms are legally recognised and form an integral part of our civil justice system, as considered below.

1.6.1 Amending the CPC to Introduce Mediation in Tanzania

Mediation was the first form of ADR mechanisms to be introduced in Tanzania in 1994 through Government Notice No. 422 (amending the First Schedule to the Civil Procedure Code Act (1966) ['the CPC']).[43]

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[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Cap. 33 R.E. 2002. See particularly Civil Procedure Code (Amendment of Schedules) Rules (1994), which were published in the Tanzania Government Gazette under G.N. No. 422 of 1994; and came into operation on 1st November, 1994.

Further legal recognition of mediation, as one of the fundamental court-annexed ADR processes,[44] was entrenched through further amendments to the CPC in 2019.[45] Under the 2019 amendments, it is now *mandatory*[46] for the court to refer "*every civil action*" to, *inter alia*, mediation,[47] or "similar alternative procedure", before proceeding to trial.

1.6.2 The Implication of the 2019 Amendments to the CPC Introducing Court-Annexed Mediation

One of the major legal consequences of the 2019 amendments to the CPC is the *mandatory* requirement for civil cases to be first referred to, *inter alia*, mediation before full trial is conducted.[48] In principle, these amendments to the CPC have introduced new procedural stages concerning ADR between the completion of pleadings and the beginning of a full trial in given cases. So, now a civil case is ready for ADR in the form of mediation when all the pleadings have been duly filed and there are no pending applications or any other preliminary matter to be disposed of. In effect, a civil case would ordinarily be said to be ready for trial when the pleadings, all preliminary matters and ADR mechanisms have been exhaustively pursued.[49]

It should be noted, however, that not all types of civil cases are amenable to, or suitable for, mediation; there are some types of cases which are unsuitable for this ADR mechanism. These include cases in which constitutional relief is sought, cases in which a definitive interpretation of the law is necessary, cases in injunctive relief or declaratory judgments are sought, and in applications for prerogative orders. These types of cases constitute only a small fraction of all cases

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[44] Universally, the major ADR mechanisms are arbitration, conciliation, mediation and negotiation. These forms of ADR are now recognised as court-annexed processes in terms of Order VIIIC Rule 24 of the CPC.

[45] *See* the Civil Procedure Code (Amendment of the First Schedule) Rules, 2019 ('the 2019 Amendments to the CPC"), GN. No. 381 published on 10/5/2019 ('GN No. 381/2019'). This GN amended certain parts of the First Schedule to the Civil Procedure Code.

[46] Order VIIIC Rule 24 of the CPC.

[47] Ibid.

[48] Ibid.

[49] Chipeta, B.D., *Civil Procedure in Tanzania: A Student's Manual* (Dar es Salaam: Dar es Salaam University Press, 2002).

filed in the courts. So, most are amenable to mediation and so have to go through that process before full trial begins.

In sum, the requirement that every civil action must first be referred, inter alia, to mediation or similar alternative procedure before full trial is conducted, presupposes that all court officials (judges, magistrates and counsel) must be well-versed in ADR mechanisms (including mediation)–procedures and processes–as well as they should possess the requisite skills required in administering ADR processes. Therefore, in the next part, these Guiding Notes highlight both substantive principles and procedural fundamentals necessary and condition precedent in the administration of the mediation process in both judicial and non-judicial settings.

Chapter Two

Chapter Two

SUBSTANTIVE PRINCIPLES OF MEDIATION

2.1 Introduction

As considered above, the recent amendments to the First Schedule to the CPC have further entrenched the use of ADR mechanisms in our civil justice system. Notably, in terms of Order VIIIC rule 24 of the CPC, now the court is *obliged* to refer "*every civil action*" before it to negotiation, conciliation, mediation or arbitration, or "similar alternative procedure", before proceeding to trial. This means that these ADR mechanisms form an integral part of Tanzania's civil justice and *must be pursued first before any civil proceedings move onto full trial*. In addition, the mandatory requirement that "*every civil action*" before the court *must first* be referred to any of these ADR mechanisms before full trial is conducted, presupposes that all court officials (judges, magistrates and counsel) must be well-versed in ADR mechanisms–procedures and processes–as well as they should possess the requisite skills required in administering ADR.

Therefore, this Chapter considers the concepts of, and substantive principles underlying mediation. The Chapter also considers the purpose, nature and advantages of court-annexed mediation. In addition, the Chapter sets out the requisite competence and responsibilities of a mediator. The Chapter outlines the requisite skills of a good mediator. It also canvasses techniques and strategies used in mediation; as well as models and approaches to mediation.

2.2 The Scope and Nature of Court-Annexed Mediation

As one of the ADR mechanisms, mediation is a process in which a neutral third-party help resolve a dispute between two or more other parties. It is a non-adversarial approach to dispute resolution whereby the role of the mediator 'is to facilitate communication between the parties, assist them in focusing on the real issues of the dispute, and generate options that meet the interests or needs of all relevant parties to

resolve the conflict.' [50] Mediation is a process close in its premises to negotiation, as it 'is an assisted and facilitated negotiation carried out by a third party.'[51]

In the mediation process, the mediator (s) may be hired, appointed, or volunteer to help in facilitating the mediation process.[52] The mediator (s) should have no direct interest in the dispute and its outcome, and no power to decide. Mediators have control over the process, but not over its outcome;[53] instead, power to decide is vested in the parties, who have control over the outcome: they are the architects of the solution.[54] The parties agree to the process; the content is presented through the mediation, and the parties control the resolution of the dispute.

2.3 Principles of Court-Annexed Mediation

The mediation mechanism, processes and procedures are guided by several underlying principles,[55] chief among them being:

(i) Parties' voluntary resort to mediation;[56]
(ii) Parties' autonomy in participating and making informed decisions, including the parties' choice of a mediator;[57]
(iii) Efficiency in terms of time and costs;[58]
(iv) Confidentiality of mediation proceedings;[59]

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[50] Honeyman, C. and N. Yawanarajah, "Beyond Intractability: A Free Knowledge Base on More Constructive Approaches to Destructive Conflict." Available at http://www.beyondintractability.org/essay/mediation (accessed 23 September 2020). In particular, Order VIIIC Rule 26(1)(b) of the CPC provides to the effect that: 'the mediator shall facilitate communication between or among the parties to the dispute in order to assist them in reaching a mutually acceptable resolution.'

[51] Goldberg, S. B., et al, *Dispute Resolution: Negotiation, Mediation, and other Processes*. Boston/Mass. Little Brown, 1992.

[52] Mashamba, op. cit, p. 64.

[53] Ibid.

[54] Shamir, Y., *Alternative Dispute Resolution Approaches and the Application* (New York: UNESCO, 2003), p. 23.

[55] *See* generally Faris, J.A., "An Analysis of the Theory and Principles of Alternative Dispute Resolution," LL.D. Thesis, University of South Africa, 1995.

[56] For example, Order VIIIC Rule 36(1) of the CPC requires the consent of the parties to refer a matter that before the court to conciliation or negotiation.

[57] Ibid, Order VIIIC Rules 25(1) and 36(1).

[58] For example, Order VIIIC Rule 26(1)(a) of the CPC obliges the parties, in conducting any mediation session under the CPC, to 'strive to *reduce costs* and *delays* in dispute resolution, and facilitate an *early* and *fair* resolution of disputes.' (Emphasis supplied).

(v) Flexibility in terms of the procedure to be adopted in the mediation proceedings and in reaching the outcome; and

(vi) Neutrality and impartiality of third-parties (*i.e.* mediators), who facilitate the mediation process.[60]

2.4 Competence and Responsibilities of the Mediator

As noted above, mediation is one form of ADR that are presided over by a neutral third-party, i.e. the mediator. The success or failure of the mediation process depends on a mediator. Viewed in this context, the role of the mediator in the mediation process is central and cannot be over-emphasised. In this section we set out the general and specific roles and responsibilities of the mediator in facilitating the mediation process.

2.4.1 General Roles and Responsibilities of the Mediator

Generally, the mediator has a multiple role in the mediation process. However, the following are key to this work:

(i) to help the parties think in new and innovative ways;

(ii) to avoid the pitfalls of adopting rigid positions instead of looking after their interests;

(iii) to smoothen discussions when there is animosity between the parties that may threaten to render the discussions futile; and,

(iv) to steer the process away from negative outcomes and possible breakdown towards joint gains.[61]

The mediator not only facilitates but also designs the process, and assists and helps the parties to get to the root of their conflict, to understand their interests, and reach a resolution agreed by all

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[59] Under Order VIIIC Rule 31 of the CPC, all communications, records, and notes in the mediation proceedings are confidential and cannot be made public.

[60] For example, under Order VIIIC Rule 26(2)(d) of the CPC, the mediator is obliged is guided by principles of *objectivity*, *fairness* and *natural justice*, and is obliged to give consideration to, among other things:

'(i) the rights and obligations of the parties;

(ii) the usages of the trade concerned; and

(iii) the circumstances surrounding the dispute, including any previous business practices between the parties.'

[61] Shamir, op. cit, p. 24.

concerned.[62] In order to achieve this end, the mediator should study the substance of the dispute, and try to identify the issues in conflict, using tools such as re-framing, active listening, open-ended questions, and his/her analytical skills.[63] Therefore,

2.4.2 Specific Roles and Responsibilities of the Mediator

As with the general roles and responsibilities, the mediator also has specific multiple roles and responsibilities in the mediation process. In particular, Order VIIIC Rule 26 (2) (a)- (f) of the CPC, sets out roles a mediator to the effect that the mediator is obliged:

(a) in an independent and impartial manner, to do everything to facilitate parties to resolve their dispute;

(b) where necessary, he or she *may* conduct joint or separate meetings with the parties and may make a proposal for a settlement;

(c) may, where services of an expert may be obtained at no cost or where such services may be obtained at a cost, and if parties agree to pay such costs, obtain expert advice on a technical aspect of the dispute, which advice shall be given in an independent and impartial manner and shall have advisory effect;

(d) shall be guided by principles of objectivity, fairness and natural justice, and shall give consideration to, among other things:
   (i) the rights and obligations of the parties;
   (ii) The usages of the trade concerned; and
   (iii) the circumstances surrounding the dispute, including any previous business practices between the parties;

(e) may, at any stage of the mediation proceedings and in a manner that the mediator considers appropriate, take into account the wishes of the parties, including any request by either of the parties that the mediator shall hear oral statements for a speedy settlement of the dispute; and

[62] Ibid.
[63] Mashamba, op. cit, p. 65.

(f) may, at any stage of the mediation proceedings, make proposals for the settlement of the dispute.

2.5 Requisite Skills of a Good Mediator

Notably, mediation is one of the oldest forms of conflict or dispute resolution in the world, having being practised by many communities from the time when society became complex and experienced conflicts. Traditionally, mediators were, and remain in some societies, untrained in formal dispute settlement. However, because of the increasing complexity of disputes and a blend of parties to them, contemporary mediators need to possess a certain amount of skills to enable them to facilitate the negotiation process. In this section we briefly discuss the basic skills needed in mediation.

2.5.1 Communication Skills

Communication is one prerequisite of a successful dispute resolution mechanism. In ADR processes, good communication ensures individuals know what is expected of them, that the person receives the correct information and that there is coordination within the organization and conduct of any ADR process.

(a) Active Listening

Communication skills, particularly active listening, are a very central part not only in the negotiation but also in the mediation processes. It is one of the most important and difficult skills for a negotiator and a mediator. In fact, active listening as a skill and technique are taught to, and applied by, mediators to enhance their effectiveness during the process. It means 'stopping our inner voices and truly listening to the other person. Listening will enable you to hear important information and learn a great deal about the other party.' By listening attentively, the negotiator or mediator shows:

- ✓ *interests in what the other party has to say;*
- ✓ *understanding to the way they feel, their positions and underlying issues, hidden agendas, demands, and priorities (showing understanding it means you agree with what was said);*

- ✓ *acknowledgment that people like to be listened to, and when you listen, you create a positive atmosphere;*
- ✓ *hope it may clarify many issues;*
- ✓ *Understanding of the other side's point of view, and show respect to the other party's needs, hopes, and fears; and*
- ✓ *hope as it may help to improve the relationship and break the cycle of arguments.*[64]

(b) Talking Clearly and Precisely

Mediation is largely facilitating disputing parties to come to an agreement through dialogue, negotiation, and bargaining. It is essential that the mediator is an effective communicator of options, alternatives to solutions or agreements. Viewed in this sense, effective mediation is also making sure that whatever the mediator says is understood in the manner that he or she intends. To achieve this end, the mediator must speak clearly, phrase his or her sentences carefully, make sure that the other party listens to whatever is said, and confirms with the other party to make sure that they correctly understand what is said.

Therefore, the mediator must send messages that are comprehensive, and explain where they are coming from, their needs, hopes, and fears. While talking they have to assess if the other party is listening, and how they hear/receive the message.

2.5.2 Re-Framing Positions as Interests

In mediation, re-framing is a way of giving feedback, and showing that you listened and understood what the other party said. It is restating and capturing the essence of what the other party said. One removes the negative tones and translates the statements of positions into statements of interests and needs. When we start mediating, we have to identify the issues at the table.[65] In this way, the issues have to be defined in a neutral and acceptable way to all, and not to include any suggestions of the outcome, or judgment of any kind.

[64] Ibid.
[65] Ibid.

Characteristically, parties start the mediation process by explaining their position, and their conclusion. If the one party opens the mediation in this manner, by stating a position, it is very helpful to re-frame it as an interest. It helps the parties to identify their interests and move from position to interests.

2.5.3 Understanding and Perception

In the material world, our perceptions and our interpretation of reality largely influence the negotiation process. Empirically, perceptions are influenced by many aspects of life: personal experience, emotional state of mind, and cultural background. In real life, every individual person has a different way of perceiving and understanding things or issues: for instance, four different people who witnessed the same event may give four different accounts of what happened.

In mediation, the mediator has to keep this fact in mind and make sure the disputing parties' perceptions are clearly understood and given due consideration. In this sense, the negotiator and mediator would be required to possess requisite skills in facilitating this, which include keeping eye contact, listening carefully, and making sure that they understood exactly what the other party said. This may be concretized by the mediator's constant reframing of what was said in order to make sure that what was said was understood and was indeed what was meant. As such, in a mediation process, the mediator must ensure that what was said was understood correctly, and that the other party knows you have understood.

2.5.4 Asking Open Questions

As we have already discussed above, in mediation, communication plays a pivotal role in reaching or failing to reach an agreement. Quite often, a successful mediation necessarily presupposes proper use of communication skills. One of the main components of a successful communication is a proper framing of questions. Notably, questions are an essential skill for the and mediator. When asking a closed question, we get "yes" or "no" for an answer. Often these types of questions are also leading questions "*Would you agree that…*"; or "*Didn't you think it was unfair…"*

In effect, closed and leading questions do not provide essential information needed at the negotiating table, and they close the discussion. "*Do you want to buy this house?*" will provide us only with a "*yes–no*" answer, which does not include all the important information regarding the intention/ability/willingness/readiness of the buyer. But, "*What are the problems that concern you?*" is a question which will provide us with important information how the parties feel about it, what are their concerns, their plans, *etc*. "*How do you view the offer Mr. Juma has just made concerning the price for this house?*" is an open-ended question, while "*Do you like Mr. Juma's offer?*" is a closed question.

In mediation, open-ended questions such as "*What are the advantages and disadvantages regarding his offer?*" or "*What would you need to clarify prior to your counter-offer*?" provide us with important information that can help the process rather than bring it to a dead end. The negotiator or mediator has to be aware of his or her *prejudices, values,* and *biases* when asking the questions, so that if he or she has any, they will not be evident from his or her tone or body language. [66]

2.5.5 Separating the Person from the Problem

Conventionally, parties to a dispute or conflict carry with them positions and grudges. They disagree because of opposing or competing interests and/or positions; and the purpose of negotiation or mediation is to help the disputing parties to move from polarised interests and/or positions to win-lose position. It is important, therefore, to understand the other party's point of view, needs, interests, and concerns. One does not have to agree with the other point of view; but he or she has just to understand that it is legitimate to have a different point of view, needs, and concerns.

In order to facilitate successfully a mediation process, one has to separate the people from the problem. Indeed, removing the person usually does not remove or solve the problem. However, trying to separate the person from the problem is not always practicable. There are societies in which personal relationships have a very high value and

[66] Ibid.

separating the two is difficult. So, this should be carefully done in order to effectively facilitate the negotiation process.

2.6 Techniques and Strategies Applicable in Mediation

As a general rule, mediators use a variety of strategies and techniques in the mediation process. They develop their personal style, depending on their personality, experience, educational background, and beliefs in the role of mediation in resolving disputes they preside over. In principle, mediators have no power as far as what the outcome of the process will be, but they have the responsibility to design the process, set the agenda, and control it. They have to bring the parties to trust them and guide them towards a settlement.

In order to do this, mediators may use experts and expertise in certain disputed issues, and seek guidance for resolution of the dispute based on law, industry practice, and so on.'[67] In addition, mediators may use the *facilitative* and *evaluative* strategies in facilitating the mediation process.

2.6.1 Facilitative Strategy

Through this strategy, the mediator uses approaches and techniques of facilitating and assisting the parties understand their situation and interests, and encourage them to communicate, create options, and agree. During the mediation process, the focus is on the future, but the process does not ignore the past which provides the information about the issues and the causes of the conflict.

Through this strategy, mediators elicit ideas from each side for possible resolution, and assist the parties to develop a negotiated settlement (*i.e.* an amicable agreement), which is usually put into writing, and can be ratified by the court.

2.6.2 The Evaluative Strategy

During the mediation process, the mediator should focus on the legal demands, evaluate the case, offer an opinion, and predict the outcome of

[67] Ibid, p. 27.

the case in court. In such an approach, mediators do not concern themselves with the process or the relationship of the parties. They focus on the settlement of the case and suggest solutions to the problem.

2.7 Models and Approaches in the Mediation

Both in principle and practice, there are several models to mediation (that also apply in conciliation), but the three listed below are the most common and relevant to this discussion: (*i*) the co-conciliator/mediator model; (*ii*) the single mediator model; and (*iii*) the panel of mediators' model. From the analysis of the models applicable in mediation canvassed below, one can note that the models *vary in terms of the methods, techniques, and the process of mediation, and in the particular circumstances of the dispute in question.*

2.7.1 The Co-Mediators' Model

In certain instances, mediation may be facilitated by more than one mediator. This is because mediation is not a simple process and adopting a co-mediation model has many advantages that are very beneficial to the mediation process. However, this model can only succeed where conciliators or mediators are compatible and know how to work together.'[68] In this model, the mediators:

- ✓ Should complement each other (in divorce cases; for instance, a lawyer with a psychologist or social worker can be very effective; one can strategize and the other can reframe positively);
- ✓ can divide the tasks (one can listen and the other can take notes);
- ✓ can strategize and brainstorm together;
- ✓ If one gets "stuck," the other can proceed; and
- ✓ can compare their perception of what was really said by the parties, and so on.

[68] Ibid.

2.7.2 The Single Mediator Model

If the mediators do not know one another, or are not compatible, the process may work better with a single mediator.[69] In fact, this issue has made single mediation to be a very common model, which is used for economic reasons, and because mediators enjoy working alone and being in control of the process. So far, experienced mediators who work alone are doing excellent work.

2.7.3 The Panel of Mediators' Model

The model of a panel of mediators is used in very complex cases that involve multi-party mediation, and in cases of environmental mediation. Mediation is facilitated by a panel of mediators with relevant skills and experience in the field under which the dispute fall.

[69] Mashamba, op. cit, p. 71.

Chapter Three

ESSENTIAL PROCEDURAL STEPS IN COURT-ANNEXED MEDIATION

3.1 Introduction

As we above, the 1994 and 2019 amendments to the CPC have introduced mandatory procedural steps relating to ADR between the completion of the pleadings and determination of preliminary matters, on the one hand, and the commencement of full trial, on the other. This means that ADR procedural steps (*i.e.* arbitration, conciliation, mediation and negotiation) are now sandwiched between the first and second pre-trial conferences.[70]

As considered below, regarding mediation, the relevant procedural steps include the manner through which the court-annexed meditation process is commenced, conducted, completed and closed. There is also consideration of the manner through which mediators are appointed and remunerated, the duration of the court-annexed meditation proceedings and the duty to remit the matter to the trial court for further procedural actions.

3.2 Preliminary Steps in Court-Annexed Mediation Proceedings

Before the court-annexed meditation process starts, the following preliminary steps are undertaken: (i) initial appearance of the parties for necessary court orders and/or directions; (ii) first pre-trial conference in relation to mediation; and (iii) court's order referring a civil action to the mediation process.

3.2.1 Initial Appearance of the Parties for Necessary Orders and Directions

[70] Whereas the first pre-trial conference is held in accordance with Order VIIIB Rule 18 of the CPC, the second one is held in terms of Order VIIID, mainly after ADR has failed.

Within fourteen days after the completion of pleadings the court will direct the parties to appear before it for (necessary) orders or directions in relation to: (i) 'any interim applications', or (ii) 'other preliminary matters which the parties have raised or intend to raise.' The aim of this procedural step is to ensure 'just, expeditious, and economical disposal of the suit.' At this session, the court may hear the parties on any interim application or preliminary matters raised; and within fourteen days after such hearing, the court shall deliver its ruling on the same which may include any such order as to costs 'as it considers just.'

3.2.2 First Pre-Trial Conference in Relation to Mediation

Within a period of twenty-one days after conclusion of the pleadings, a judge or a magistrate to whom a case has been assigned shall hold and preside over a first pre-trial settlement and scheduling conference. This conference is attended by the parties or their recognised agents or advocates. The conference is held for the purposes of resolving the case 'through the use of procedures for alternative dispute resolution such as negotiation, conciliation, mediation, arbitration or such other procedures not involving a trial.' So, it is at this session where the court will, in consultation with the parties, determine the mode of ADR top which the parties will be required to resort to resolve their dispute amicably and expeditiously.

3.2.3 Court's Mandatory Obligation to Refer A Civil Action to Mediation

As noted above, because of the 1994 and 2019 amendments to the CPC, it is now mandatory for the court to refer "every civil action" to negotiation, conciliation, mediation or arbitration, or "similar alternative procedure", before proceeding to trial. Therefore, during the first pre-trial conference the court will, in consultation with the parties, make an order referring a dispute to mediation where it considers this to be the most appropriate alternative procedure to full rial.

3.3 Commencement of the Court-Annexed Mediation Process

Before the 2019 Amendments to the CPC, the CPC did not provide for the procedure at mediation sessions in courts; rather such procedure was

contained in the *Manual for Mediation Training in Tanzania.*[71] But, with these amendments, now there is an elaborate procedure regulating court-annexed mediation proceeding, which should be applied in tandem with universal procedural steps applicable in mediation processes.[72]

3.3.1 Appointment of the Mediator

In particular, the first step towards the commencement of court-annexed mediation proceedings is the appointment of a mediator. Under Order VIIIC Rule 25 (1) of the CPC, the court shall require the parties to appoint and submit the name of a "qualified" mediator of their choice within fourteen days after pleadings are complete. Where the parties cannot appoint a mediator, the court 'shall, manually or electronically, appoint a mediator and notify the parties accordingly.' within Seven days after the appointment of the mediator, the court shall notify the parties of the commencement of the mediation session.

3.3.2 Submission of Pleadings and Statement of Issues to the Mediator

On the progressive salient features introduced in the court-annexed mediation process by the 2019 Amendments to the CPC is the requirement for the parties to submit to the mediator a statement of issues together with pleadings and any documents of importance which identify the issues in dispute and the parties' positions and interests thereon. Such documents, which shall also be served on the other parties to the suit, must be provided at least seven days before the mediation sessions begin.

3.4 Appearance of Parties in Court-Annexed Mediation Sessions

3.4.1 Parties' Appearance

Appearance of parties in proceedings in any form of ADR is necessary in achieving the very goal of ADR–*i.e.* to resolve a dispute out of court

[71] Mashamba, op. cit, p. 114.

[72] Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual" (Dar es Salaam: Project for the Court of Appeal of Tanzania, 2010), p. 54 (quoting the *Manual for Mediation Training in Tanzania,* which states that: 'Procedures in conducting mediation proceedings vary from one jurisdiction to another. But those variations would appear to be in details rather than in substance.').

through amicable and mutual discussions, debate, and dialogue. It is only through being present at an ADR session that a party can communicate its position, present its offer, evaluate the other party's offer, and make an informed consent. However, with the contemporary advancement in technology, it has become necessary for many procedural rules in civil litigation, including in ADR proceedings, to also adopt the online appearance of parties.

Whereas the CPC does not provide any procedure for party appearance in conciliation and negotiation, it provides express procedure governing the appearance of parties in mediation sessions. Under Order VIIIC Rule 27 (1) of the CPC, appearance at mediation session is by the party or his advocate or both. Prior to entering appearance, the party and his advocate, where the parties are represented, must be notified of the date of mediation. Notably, where a third party may be held liable to satisfy all or part of a judgment in the suit or to indemnify or reimburse a party for money paid in satisfaction of all or part of a judgment in the suit, unless the court orders otherwise, that third party or his advocate may also attend the mediation session.[73]

3.4.2 Parties' Non-Appearance and its Consequences

As it is the case with party appearance, the CPC does not have any provisions governing non-appearance of parties in conciliation and negotiation proceedings. Nonetheless, the CPC has expressed provisions regulating a party's failure to appear in mediation sessions.[74] In particular, where it is not practicable to conduct a scheduled mediation session because a party fails, without good cause, to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who may-

(i) dismiss the suit, if the noncomplying party is a plaintiff, or strike out the defence, if the noncomplying party is a defendant;[75]

(ii) order a party to pay costs;[76] or

[73] Ibid, Order VIIIC Rule27(2).
[74] Ibid, VIIIC Rule 29.
[75] Ibid, VIIIC Rule 29(a).

(iii) make any other order he deems just.[77]

The implication of remitting the file to the trial judge or magistrate for the orders set above is that mediation will be marked failed[78] for non-appearance of a party or parties at the mediation session.[79]

3.4.3 Restoration of a Suit Dismissed for Party Non-Appearance in Mediation.

After a suit is dismissed for non-appearance of a party or parties at mediation, the court may make an order for the restoration of such suit.[80] Any party aggrieved by an order made under Order VIIIC Rule 29 of the CPC should file in court an application for restoration of a suit or a written statement of defence within *seven days from the date of the order*.[81] Upon the applicant showing good cause,[82] the court 'shall set aside orders made under rule 29 of this Order and restore the suit or the defence and remit the case to the mediator who shall issue a notice for mediation.' [83]

3.5 Parties' Authority to Settle Dispute Amicably in Mediation

One of the underlying principles in the mediation process is the parties' autonomy to agree to go for any of the ADR mechanisms to settle their dispute amicably and consensually. This presupposes that parties have the authority to settle the dispute consensually. It is based on this underlying principle that Order VIIIC Rule 28 (1) of the CPC requires every party to a mediation session, as a mandatory undertaking, to 'have authority to settle any matter during the mediation session.'

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[76] Ibid, VIIIC Rule 29(b).
[77] Ibid, VIIIC Rule 29(c).
[78] *Tanzania Harbours Authority v. Mathew Mtakula & 8 Others*,Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 46 of 1999 (Unreported).
[79] *A.G. v. M/S JP International Ltd.,* High Court of Tanzania at Dar es Salaam, Civil Case No. 158 of 2002 (Unreported).
[80] Order VIIIC Rule 30 of the CPC.

[81] Ibid, Order VIIIC Rule 30(1).
[82] In terms of Order VIIIC Rule 30(2), the court is obliged to hear and determine such application '*within fourteen (14) days from the date of lodging the application*.'

[83] Ibid, Order VIIIC Rule 30(3).

This provision also obliges a party who requires the approval of another person before agreeing to a settlement, before the mediation session, to have ready means of communication to that other person throughout the session, whether it takes place during or after regular business hours. This requirement strives to ensure that a person who appears in mediation session on behalf of a corporate person or as an agent party to the suit has the mandate (and does not exceed that mandate) to reach a binding decision in mediation. If mediation proceeds with a person without the mandate (or one exceeding the mandate) to make a binding decision in mediation, any aggrieved party may raise it as a ground to subsequently challenge the outcome of the mediation (i.e. the mediation agreement).

3.6 Procedural Steps in Mediation Sessions

Like in conciliation and negotiation proceedings, the CPC does not have detailed provisions setting out the specific procedural steps to be taken during the mediation proceedings. In the absence of such provision in the CPC, the procedural steps contained in the *Manual for Mediation Training in Tanzania* are usually followed in the court-annexed mediation process. The most common procedural steps stipulated in the *Manual for Mediation Training in Tanzania* are:

(i) Issuance of a notice of mediation;
(ii) Mediator's introductory remarks;
(iii) Statement of understanding;
(iv) Mediation sessions (*i.e.* first joint session, separate sessions (or caucuses), and final joint sessions); and
(v) Closure and implementation.

3.6.1 Issuance of Notice of Mediation Session

Upon fixing of a date for mediation, a Notice of Mediation Session (NMS) is sent to the parties or their advocates, informing them the date, time and place of mediation, and before whom the mediation session is to take place. In case of firms or companies, it may also inform them who should attend–i.e. people with authority to make a final decision in the case. The NMS also informs parties: (i) to bring with them relevant documents; (ii) strict adherence to confidentiality of the mediation proceedings; and (iii) failure to attend may cause sanctions.

3.6.2 Mediator's Introductory Remarks

On the mediation day, the mediator should undertake the following preliminaries:

(i) welcoming the parties to the mediation session;
(ii) introduce him/herself and the parties;
(iii) determine if the parties have authority to make final decision in the case; and
(iv) make a brief, but comprehensive introductory statement known as the *Mediator's Initial Remarks.*[84]

In the *Mediator's Initial Remarks,* the mediator will brief the parties on the following matters:
what the mediation process is all about;

(i) what is the role of the mediator and/or parties;
(ii) how the parties should conduct themselves;
(iii) the importance of the confidentiality of the mediation proceedings;
(iv) the advantages of mediation as opposed to other modes of dispute settlement (including litigation); and
(v) consequences of success or failure of mediation.

3.6.3 Statement of Understanding

Upon ascertaining that the parties or their advocates have clearly understood the privileged confidential nature of mediation and the consequences of success or failure thereof, the mediator will ask the parties to sign a *Statement of Understanding*.[85]

3.6.4 Mediation Session

The Manual sets out three Mediation Sessions: (*i*) first joint session; (*ii*) separate sessions (or caucuses); and (*iii*) final joint session. The three sessions are set out below.

[84] Global Justice Solutions, op. cit, pp. 57-61.
[85] Ibid, p. 61.

(a) First Joint Session (FJS)

During the mediation session, the mediator begins by holding a joint session.[86] In the first joint session, the mediator meets with both or all the parties to the dispute for the first time. So, as soon as the mediator has finished his *Introductory Statement*, he will call upon one party, usually the plaintiff or claimant, to briefly state his case. Thereafter, the mediator will call upon the defendant or respondent to do the same. At this stage, the mediator gathers information from both sides; so, he or she will not interfere with the party's narrative.

The mediator also uses the FJS to develop his or her strategies to enhance settlement opportunities; to detect hidden interests and motives of the parties, and identify the wants and needs of the parties and the real issues in the dispute. Wants means those things which are desirable to have but are not crucial or necessary to a party; and needs refers to those things which are necessary and basic to a party and so should be taken care of. After a party has made his brief presentation, the mediator will summarize what has been said and also clarify what appears to have been left obscure.

Three things should be noted during the FJS: first, at this stage parties will still be angry at each other, labouring under their prejudices of winning the case; second, the mediator should be patient at this stage (he or she should not think that the mediation is likely to fail); and, third, if the parties are furious, the mediator should adjourn the joint session and move into separate sessions.

(b) Separate Sessions (or Caucuses) [87]

This is a meeting between the mediator and one party in the absence of the other. A mediator uses separate sessions for many reasons of the case and the parties. S/he may break into separate sessions in order to calm frayed tempers; or to probe more into the facts of the case and hidden motives behind a party's negotiating strategy more closely; or to discover the actual needs of the party; or to enable a shy and withdrawn

[86] Order VIIIC Rule 26(2)(b) of the CPC allows the mediator hold joint sessions.
[87] Order VIIIC Rule 26(2)(b) of the CPC allows the mediator hold separate sessions.

party to talk more freely in private and reveal his or her hopes and fears, and so on.

It is in separate sessions that mediators often make headway: timid parties talk more freely, secrets are more easily revealed, and definite or tentative offers made. Again, it is in separate sessions that the Mediator tries to persuade the parties to judiciously brainstorm and share information which will assist them to, as we say, *"expand the pie"* so that each party may get as much as possible of what he would like.

Furthermore, it is in separate sessions that the mediator translates and transmits offers, clears wrong impressions and suggests options. The mediator also uses this session to again reassure the parties that a settlement will be reached if they tackle the process positively. A mediator can, thus, hold as many separate sessions as he or she wishes, so long as he or she believes he is making progress towards reaching a resolution of the dispute. For the same reason, there is no limit to the number of joint sessions which the mediator may hold.

(c) Final Joint Sessions

Final joint sessions are held at the conclusion of the mediation process, whether the mediation has succeeded or failed. In case of successful mediation, an agreement must be carefully drafted and all its aspects carefully tested with each party in *a separate session*. It should be noted that the final joint session must be held only when there is a whole agreement or there is no amicable settlement and there are no chances of reviving the mediation session, at which the mediator will announce that the mediation has failed and thank the parties for their effort to settle the matter out of the adversarial judicial process.

In case mediation succeeds, the mediator will then congratulate the parties for their efforts, give a copy of the agreement to each of them, shake hands with them and then bid them farewell.

3.6.5 Closure and Implementation

Where mediation succeeds, the parties execute a settlement agreement in terms of Order VIIIC Rule 33(a) of the CPC to flag the completion of the mediation session. If the settlement agreement is executed by the

parties, it should also spell out the manner of its implementation in accordance to the parties' agreement. However, sometimes an impasse may be reached where the mediator, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile.

3.7 Outcomes in Court-Annexed Mediation Proceedings

Like in conciliation and negotiation, there are usually three categories of outcomes in court-annexed mediation proceedings: (*i*) full amicable settlement; (*ii*) partial settlement; and (*iii*) an impasse. These outcomes are briefly highlighted below.

3.7.1 Full Amicable Settlement it is generally taken for granted that parties opt to resolve their disputes through the mediation mechanism with the goal of reaching an amicable settlement. This is reflected in Order VIIIC 26(1)(a) and (b) of the CPC, which obliges both the mediator and parties to strive to reach "an early resolution of the dispute" that is "mutually acceptable". Where parties amicably settle on all issues, a settlement agreement should be drawn and signed by the parties, marking the matter as fully settled. As noted above, the settlement agreement should set out all the fundamental terms and conditions of settlement, and the timelines for performance of covenants to which the parties have mutually agreed to settle.

3.7.2 Partial Settlement In some cases, the parries may reach at a partial settlement where they may only agree on some issues and disagree on others. Where there is partial settlement, the parties and the third-party assisting them (if applicable) will draw a settlement agreement in respect of only those issues that the parties have agreed to settle. Conversely, the unsettled issues should be referred back to the trial court for determination in terms of Order VIIID Rule 40 and Order XIV of the CPC.

3.7.3 An Impasse Although the goal of referring a matter to any of the ADR processes is to reach an amicable settlement that is mutually acceptable by both parties, sometimes an impasse may be reached. This is a situation where the parties cannot agree on a mutually acceptable amicable settlement of all issues referred to ADR. In such a situation,

the entire matter will be referred back to the court for a determination of the issues in terms of Order VIIID Rule 40 of the CPC.[88]

3.8 Duration of Court-Annexed Mediation Proceedings

One of the progressive salient features brought about by the 2019 Amendments to the CPC is the setting of a time-bound duration of the court-annexed ADR proceedings. Under Order VIIIC Rule 32 of the CPC, the duration for mediation is a period not exceeding thirty days running from the first session of mediation.

3.9 Closure of Court-Annexed Mediation Proceedings

All court-annexed mediation proceedings must be closed, and the matter remitted back to the trial court for further procedural actions. For that matter, court-annexed mediation proceedings must be closed after ending by the occurrence of the following events:

(i) the parties execute a settlement agreement;[89]
(ii) the mediator, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile;[90] or
(iii) one of the parties or both make(s) a declaration to the effect that further negotiation or conciliation is not worthwhile;[91] or
(iv) thirty days expire from the date of the first session of mediation.

3.10 Duty to Remit the Matter to the Trial Court after Conclusion of Mediation

It is now trite law that when court-annexed ADR proceedings come to an end, the matter must be remitted back to the trial court for further

[88] In particular, Order VIIID Rule 40(1) of the CPC provides that:
'(1) Where a suit is not resolved by negotiation, conciliation, mediation or arbitration or other similar alternative procedure it shall revert to the trial judge or magistrate for a final pre-trial settlement and scheduling conference, to enable the court to schedule the future events and steps which are bound or likely to arise in the conduct of the case, including framing of issues and the date or dates for trial.'
[89] Order VIIIC Rule 33(a) of the CPC.
[90] Ibid, Rule 33(b) of the CPC.
[91] Ibid, Rule 38(b) of the CPC.

procedural steps.[92] In case mediation proceedings come to conclusion, the mediator has the duty to remit the record to the trial court immediately or within forty-eight hours.[93]

3.11 Costs in Court-Annexed Mediation Proceedings

Being voluntary and consensual, the court-annexed mediation process is embarked upon at the instance of the parties in a civil action. However, this consensual pursuit of this court-annexed ADR process has cost implications, which are borne by the parties. Basically, such costs cover fees for mediators, or any other costs incidental to this ADR process. For that matter, mediators appointed under Order VIIIC Rule 25(6)(d)[94] and (e)[95] of the CPC should be remunerated or compensated in a manner to be determined by the Chief Justice and published in the *Official Gazette*.[96] For a person appointed as the mediator by the parties under Order VIIIC Rule 25 (6) (f) of the CPC, it shall be the responsibility of the parties to pay fees of that mediator.[97]

[92] Ibid, Order VIIIC Rules 34 and 39.
[93] Ibid, Order VIIIC Rules 34.
[94] That is, a person with the relevant qualifications and experience in mediation appointed by the Chief Justice.
[95] That is, a retired judge or magistrate.
[96] Order VIIIC Rule 25(7) of the CPC.
[97] Ibid, Order VIIIC Rule 25(8) of the CPC.

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