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IS ALTERNATIVE DISPUTE RESOLUTION ALL IT'S MADE OUT TO BE?

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In today's fast-paced business environment, where time is of the essence, any manner in which processes can be streamlined, made more efficient, and concluded within a shorter time frame than previously possible, is generally met with positivity and appreciation. This is no less the case in the realm of dispute resolution, since parties to a failed agreement often find that there is hardly time to have a dispute, let alone resolve it. Increasingly the benefits of Alternative Dispute Resolution ('ADR') are being lauded over more traditional, litigious methods which most often start with contending and expensive lawyers, followed by complex, expensively drawn out legal processes. Juxtaposing the traditional approach of settling disputes first and formally through the courts, there are international calls for greater efficiencies in all aspects of the dispute resolution process. However, notwithstanding the benefits expected by 'side-stepping' the formal courtroom process, the success of ADR depends largely on *negotiation*, including the *goodwill* and *collaboration* of all the affected parties. If any of these elements are missing, then it is inevitable that the ADR process may be negatively impacted and even fail.

The good in ADR

Over the past five decades, the concept of ADR has been gaining momentum on a global scale, with a strong emphasis on the benefits of this method of dispute resolution. The popularity of ADR was, once again, brought into sharp focus at the recently-held 2016/2017 Global Pound Conference ('GPC') Series. The GPC Series of meetings included judges, arbitrators, lawyers, mediators, business representatives and academics at twenty-eight (28) conferences held across twenty-four (24) countries, over several months, as a platform to discuss the current and future global ADR landscape.

"Most dispute resolution still has as its frame of reference an adversarial process (litigation or arbitration) based on asserted legal rights with the lawyer fighting their client's corner tenaciously … The call for more efficiency and collaboration puts into question whether traditional dispute resolution processes meet the needs of corporate and civil users."

Global Pound Conference Series - Redefining Dispute Resolution

(May 2018)

The GPC Series confirmed the international interest in the use of pre-dispute protocols such as ADR, which is designed to 'de-escalate' a potentially adversarial situation and thereby prevent a full-blown dispute altogether which courts want to avoid where possible.
Done correctly, and where the parties are genuinely interested in resolving their differences as quickly as possible, and without burdening the already overloaded court systems, a mixed-mode dispute resolution as an alternative to the more traditional processes of litigation and arbitration, is seemingly the preferred option.

Of the main themes which arose from the GPC Series was the efficiency of the ADR process. ADR pundits were quick to point out the typical long and drawn out legal processes involved with litigation and that with willing parties seeking quick resolution, the time taken to settle disputes on a win-win basis was drastically

reduced, thereby saving the disputing parties -- as well as the courts -- inordinate monetary costs and time. Indeed, the efficiency of the ADR process generally offers many benefits, especially so in a country such as South Africa where the courts are already severely over-subscribed. As ADR is promoted further, as an alternative to using courtroom litigation as the *first* and *only* solution for matters that can potentially be resolved through ADR, it stands to good reason to use the courts for more pressing and urgent matters. Moreover, the South African Labour Court already requires that certain cases go through a conciliation phase before the court will adjudicate the matter. Discrimination disputes, automatically unfair dismissals, and certain retrenchment disputes, for example, must first have gone through conciliation in order to clothe the Labour Court with the jurisdiction necessary to hear the matter.

Other benefits of the ADR process include the fact that it can be conducted and concluded in private, with the associated confidentiality and avoidance of bad publicity. The fact that a mediator or arbitrator (rather than a judge) presides over the more informal proceedings of ADR, generally means that there is an opportunity for novel solutions to be explored between the parties; unlike the rigidity of a courtroom. Through the dialogue and process of ADR -- where the parties are given time to find 'common-ground' -- an element of flexibility is introduced which is quite unlike the customary route adopted by a court which limits parties to the strictest provisions found in the legal statutes and case law precedent. Whilst maintaining the rights and obligations of each of the disputing parties, because ADR aims to simplify the legal process with a faster turn-around time for solutions, the all-round costs can be significantly reduced. This is especially true if the person presiding over the matter is an expert in the field under consideration, meaning that less time and money may be spent on expert witnesses.

A further benefit of ADR, assuming of course that the disputing parties have entered the ADR process with a genuine commitment of goodwill, is that the process seeks to reach a healthy, and non-aggressive compromise when solutions are sought. Unlike a court ruling, where in most cases there is either a 'winner' or a 'loser' mentality, realistically, it is seldom that a court ruling gives the benefit of doubt to both parties. In fact, such a ruling is often viewed as having been ineffective and can lead to uncertainty. The underlying ADR philosophy seeks to facilitate collaboration between the parties to the dispute, which could lead to their relationship being preserved, without either party feeling cheated, or that one of them was the winner and the other the loser.

"Perhaps the answer lies in not having a one-size-fits-all solution. There are certain disputes that cry out for mediation rather than adjudication and vice versa, and the challenge is to find a balance between compulsion and voluntariness."

Source: SA ripe for alternative dispute resolution to take root (02 August 2017)

Expectedly, if the ADR process has been successful, each party will be more inclined to fulfill their agreed obligations which will have been determined by the process of collaboration, thereby also preserving their business relationship with each other.

ADR assumes a mutual willingness to compromise

It is this latter benefit -- which is based on the assumption that the parties wish to collaborate, and that they enter into an ADR process in good faith -- which should give some pause for consideration. It may occur that

parties enter into an ADR process for the 'wrong' reasons, perhaps being placed under pressure from their legal representatives. A party may be under the mistaken belief that the other party has equally good intentions of finding a mutually-suitable solution, and this may not necessarily be the case.

Even worse; it may be that the other party has simply agreed to enter the ADR process in an attempt to save time and costs, but in reality, the matter in dispute is better suited to a more formal, adjudicative court process. In these instances, the ADR process may break down, with the parties ultimately having to pursue a litigious route and spending significantly more time and money on resolving the matter, with an outcome that may not be ideal for any of them.

For ADR to be effective, all parties to the dispute must have a real interest in the process working. There is a very real danger that one party could frustrate the process by not co-operating with the other party or abiding by the so-called "rules of engagement", or they could in fact use the entire process as a delay tactic. Mediation, in particular, is appropriate only when there is goodwill and an equal determination from all of the parties to reach consensus.

Approach ADR with caution

While it is clear that ADR is becoming increasingly mainstream in its acceptance and use internationally, in itself, it is not necessarily always the answer to expedite a cost-effective resolution of conflict. As identified at the GPC Series, the ideal position is for potential disputes to be identified, pre-empted and mitigated, even before they arise.

Parties to an agreement should be proactive in allocating risk-identification and risk-management measures between them, and they should consider agreeing on incentives which would encourage collaboration from the outset of their relationship. In this way, the inevitability of the adoption of the ADR process by parties to a dispute will in fact save them time, money and reputational damage, rather than wasting those already scarce resources.

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