

Alternative Dispute Resolution in the Settlement of Environmental Disputes in South Africa

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Abstract—Alternative Dispute Resolution denotes all forms of dispute resolution other than litigation or adjudication through the courts. This definition of Alternative Dispute Resolution, however, makes no mention of a vital consideration. ADR is the generally accepted acronym for alternative dispute resolution. Despite the choice not to proceed before a court or statutory tribunal, ADR will still be regulated by law and by the Constitution. Fairness is one of the core values of the South African constitutional order. Environmental disputes occur frequently, but due to delays and costs, ADR is a mechanism to resolve this kind of disputes which is a resolution of non-judicial mechanism. ADR can be used as a mechanism in environmental disputes that are less expensive and also more expeditious than formal litigation. ADR covers a broad range of mechanisms and processes designed to assist parties in resolving disputes creatively and effectively. In so far as this may involve the selection or design of mechanisms and processes other than formal litigation, these mechanisms and processes are not intended to supplant court adjudication, but rather to supplement it. A variety of ADR methods have been developed to deal with numerous problems encountered during environmental disputes. The research questions are: How can ADR facilitate environmental disputes in South Africa? Are they appropriate? And what improvements should be made?

Keywords—Alternative dispute, environmental disputes, non-judicial, resolution and settlement.

I. INTRODUCTION AND PROBLEM STATEMENT

ENVIRONMENTAL issues and disputes have emerged as hot subjects in all economic discussions since the early 1980. This article presents a detailed and critical review of ADR as a non-judicial mechanism for the settlement of environmental disputes because they are cross-sectoral, covering such issues as tourism, agricultural, fishing, and urbanisation. Ordinarily, disputes whether environmental or otherwise are resolved through court processes, but due to delays, costs, publicity and technicality associated with ADR mechanisms evolved. ADR for environmental disputes should be affordable, effective and accessible to the various disputes in a given situation. The justice system must introduce ADR techniques to supplement the formal justice system at different levels, especially in so far as environmental law is concerned, to provide South Africans with an opportunity to establish an acceptable justice system that will be swift and effective. Undoubtedly, there are methods of resolving disputes which

are less expensive and more expeditious than formal litigation. ADR is a more effective dispute resolution. Adversarial litigation is the only means, apart from agreement, of resolving disputes.

The biblical account of the judgment passed by King Solomon between two women laying claim to a child was accompanied with such a profound wisdom that, till date, it is traditionally considered the philosophical foundation of ADR in 1 King 3: 16-28 [2]. Important questions are: How can ADR assist in resolving environmental disputes and what improvements should be made to ADR? And, how can litigation assist in facilitating environmental disputes resolutions especially with the relaxation of law of *locus standi*?

II. MEANING OF ADR

ADR is an acronym for Alternative Dispute Resolution. In brief, ADR denotes all forms of dispute resolution other than litigation or adjudication through the courts. ADR provides an opportunity to resolve disputes through the use of a process best suited to particular disputes and conflicts. For this reason, many ADR practitioners prefer to use the term of appropriate dispute resolution. Therefore it is a broad range of mechanisms and processes designed to supplement the traditional courts litigation by providing more effective and faster resolution process. It is a procedure for the settlement of disputes by means other than confrontational and relationship destroying litigation. Amicable settlement of disputes is preferred to litigation. The ADR processes are not only less formal but also less expensive and more expeditious than court processes. ADR involves not only the application of new or different methods to resolve disputes, but also the selection or design of a process which is best suited to the particular dispute and to the parties in dispute.

The goals of ADR may be described as follows:

- To relieve court congestion;
- To facilitate access to justice;
- To prevent undue cost and delay; and,
- To provide more effective dispute resolution.

The essence of the study and practice of ADR is to provide mechanisms and processes to resolve disputes more effectively than automatic recourse to litigation. Greater awareness of interdependence of the environment and economic activity raises political, social and scientific issues in addition to those that are directly economic. The court added that parties should bear in mind the overriding objective and purpose of ADR and should therefore be careful.

Most environmental disputes are characterised by issues

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involving data interpretation and scientific uncertainty to which many stakeholders have different but overlapping interest [3]. Crowfoot and Wondolleck point out three characteristics of any given environmental dispute resolution; (i) voluntary participation by the parties to the dispute; [7] (ii) direct face-to-face group interaction among the representatives of the parties to the dispute; and [7] (iii) consensus or mutual agreement on the issues must be reached by the parties [7].

One of the most significant effects that dispute resolution practice has had in South Africa over the last decade is to challenge the view that adversarial litigation is the only means, apart from agreement, of resolving disputes.

III. DIFFERENT FORMS OF ADR

- Mediation is a consensual process in which disputing parties engaged the assistance of an impartial third-party mediator, who helps them to try to arrive at an agreed-on resolution of the dispute. Mediation is a type of ADR methods, of which, the purpose is to facilitate negotiations between the disputants so as to enable them to resolve their disputes. It is a voluntary, non-binding private dispute resolution process in which a neutral person helps the parties to reach amicable settlement of their disputes. It requires the direct participation of the third party mainly to encourage the disputants resolve their differences themselves. Legal rules may be relevant to mediation but not mandatory. It is just one of the factors to be considered in the process but more importance is accorded to the subsisting relationship and interest of the parties. That is why mediation is suitably adopted in the resolution of conflicts of a sensitive and confidential nature where the disputants would wish to settle them in private rather than in public, as required in litigation.
- Arbitration is an adjudicative process. Arbitration is also a form of litigation and as a form of ADR. Some literature refers to Arbitration more as akin to litigation as a form of ADR [20]. Parties who have failed to negotiate or mediate may refer their dispute to arbitration. The impartial arbitrator's role is to make a decision for the parties, which decision is intended to be final, binding and enforceable. Some ADR processes are similar to adjudication, but are not binding; the non-binding nature of such processes means they are not arbitration.
- Negotiation is the most common and familiar form of ADR mechanism. It is a dialogue or a consensual discussion with a view to reaching a compromise without the aid of third parties. Negotiation has become an indispensable part of our daily lives as it happens in almost every transaction between two or more persons. It is a means to an end and not an end in itself, the end being a mutually beneficial dispute settlement. Therefore, unlike in arbitration and mediation, the parties in negotiation are in full control of both the process and the outcome either in person or by proxy [4]. Where decisions are reached through this process, the parties are bound since they are architects of both the process and the solution.
- Facilitation is a collaborative process in which a neutral

third party assists a group of stakeholders in constructively discussing the issues of controversy [17]. In practice, the difference between facilitation and mediation is not always clear and these terms are sometimes used interchangeably [17]. Facilitation must improve communication but not to achieve an agreement.

- Negotiated Rule-making, also known as regulatory negotiation or reg-neg, is a process in which regulatory agencies design environmental regulations by first negotiating with interested stakeholders. This form of administrative rulemaking has its origin in the United States [12]. Negotiated rulemaking is a formal public consultation process. Before the party has formulated a full proposal a formal notice and comment process must first take place [21].

IV. INTERNATIONAL BEST PRACTICES TO ENVIRONMENTAL DISPUTES

A dispute resolution is a method by which a dispute may be resolved. However, the phrase "dispute resolution" is frequently being used to refer to disputes resolution methods, which is an alternative to litigation. The environmental effects, widely defined, include cultural and social elements, and are probably the biggest problems of environmental disputes. ADR is in most of the cases a mechanism to resolve the disputes. Therefore, environmental dispute resolution excludes litigation as a mechanism of environmental dispute resolution [13].

Moore describes environmental dispute resolution as "approaches where people meet face-to-face and use some form of consensus building or negotiation to seek a mutually acceptable resolution of disputed issues" [15]. O' Leary and Bingham describes that "environmental dispute resolution or environmental conflict resolution refer to various alternatives to dispute resolution techniques as applied to environmental conflicts" [17]. Bingham and Haygood correctly pointed out that alternative environmental dispute resolution processes are supplementary tools to litigation because they may (or may not) be more effective or efficient in particular circumstances [3]. Disputes over environmental issues are so varied that in some cases no new dispute resolution process is likely to be successful in all situations. Depending on the circumstances, the parties may prefer to litigate, lobby for legislative change, or appeal to an administrative agency for favourable action, rather than negotiate a voluntary resolution of the issues. The applicable laws and regulations may also differ from one country to another, and therefore, complicated strategic decisions should be made to take into consideration the best interest by the different approaches.

Amy observes that the characterisation of environmental conflicts as misunderstandings arising from miscommunication, misinformation or scientific disagreements is wrong [1]. There are always conflicts between environment and economy and the misunderstandings are only a contributory factor.

Environmental disputes arise from different groups within the society such as industry, tourism environment,

government, environmentalists and community groups and in some cases the public at large. Political democracy provides a venue for expression and protection of these differences and promotes decision-making when differences need to be solved [7]. At the stage of policy-making and rule-making, environmental dispute resolution must be part of it to be effective and efficient [7]. An appropriate environmental dispute resolution is seen as the one that split the difference between equally valid interests by achieving a compromise in which each side gets some of what it wants [1]. By treating disputes in terms of conflicting interest, rather than conflicting values, the mediation process, for example, suppresses the most fundamental issues at stake [18].

The Best Practice is that environmental dispute resolution through courts and administrative bodies may still be appropriate depending on the nature of an environmental dispute in question.

Environmental Dispute resolution mechanisms must take a multi-facet approach. The nature of an environmental dispute will necessarily determine the best practice of environmental dispute resolution. It is difficult to demand that consensus must be achieved in all environmental disputes. Resort to environmental litigation is necessary in some instances.

V. ENVIRONMENT DISPUTE RESOLUTION IN SOUTH AFRICA

The inclusion of an environmental clause in the South African Bill of Rights represents an important step in the constitutional recognition and protection of socio-economic rights [5]. Section 24 (a) recognises the rights of every person to an environment that is not harmful to their health or well-being. Section 24 (b) recognizes the right of every one to have the environment protected, for the benefit of present and future generations, through reasonable legislative measures. Section 24 (b) belongs to the category of collective rights, which usually impose constitutional imperatives on the state to secure and provide services and other social or economic amenities [5].

The phrase "reasonable legislative and other measures" in Section 24 (b) is used characteristically in some other socio-economic provisions of the Bill of Rights. Life on earth is remarkably complex and diverse, but also fragile and facing enormous pressures. The many linkages between protection of human rights and protection of the environment have long been recognized. The right to have the environment protected in terms of Section 24 (b) is curtailed in that the measures must be reasonable. The mechanisms of environmental dispute resolution in South Africa will be examined and evaluated in this paragraph.

The Republic of South Africa consists of national, provincial and local spheres of government and the resolution of intergovernmental disputes are governed by the Constitution. Suffice to mention that the Supreme Court emphasized in *Western Cape Minister of Education vs. Governing Body of Mikro Primary School* that there is a constitutional duty on organs of states to foster cooperative government and to avoid instituting legal proceedings against one another. Those organs have a duty to resolve amongst

them at a political level where possible rather than through adversarial litigation [23]. Section 2 (4) (m) provides that actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures. Section 7 (2) (f) of the National Environment Management Act requires that conflicts regarding the functions of national departments and spheres of governments be dealt with by the Committee for Environmental Co-operation. Conflict among national departments within the same sphere and between different spheres of government, private persons may be resolved by conciliation, mediation, arbitration and litigation [15].

Environmental law is rapidly changing on a global and national scale, perhaps on account of the abuse of the environment with impunity, and especially, the injustices of natural resources exploitation. ADR today is considered a more potent tool in environmental cases than the confrontational and adversarial-based system of adjudication. In South Africa, for instance, the South African Environmental Agency published a policy in 1978 to use ADR methods in the resolution of disputes arising from the enforcement of environmental laws [22]. The agency funded the training of some of its officials in the acquisition of ADR skills to enhance the settlement of disputes between the oil companies and the victims of pollution.

The Minister for Environmental Affairs and Tourism is required to create a panel or panels of persons from which appointment of facilitators and arbitrators may be made or contracts entered into [16]. The Minister for Environmental Affairs and Tourism may adopt a panel in terms of Section 31 (1) of the Land Reform (Labour Tenants) Act, 1996. The Director-General for Environmental Affairs and Tourism may occasionally appoint persons or organisations with the relevant knowledge or expertise to provide conciliation and mediation process.

The Director-General of Environmental Affairs and Tourism is required to keep a record and to prepare an annual report on environmental conflict management for submission to the Committee for Environmental Coordination and the National Environmental Advisory Forum for the purpose of evaluating compliance and conflict management measures in respect of environmental laws [Section 22 (2) (a) 16].

NEMA tries to provide an Alternative Environmental Dispute Resolution mechanism which meets the basic requirements of a successful environmental dispute resolution mechanism. A decision relating to a reference of a difference or disagreement to conciliation, appointment of a conciliator, facilitator or an investigator must take into considerations the following factors:

Speed – expeditious determination of cases remains one of the attributes of ADR which is unlikely to be available in the courtroom. Litigation is extremely time consuming.

The desirability of resolving differences cheaply; no doubt, the ADR mechanism is less expensive than litigation. Mediation also spares the parties the experience of contentious courtroom battles. Not only is mediation less costly, it places less of a burden on the courts since many cases are dealt with

outside the court process. This is an invaluable advantage, especially today, as the cost of litigation in South Africa has soared to the extent that many litigants can no longer pursue their cases. Mediation also has a positive effect on the behaviour of lawyers, as it may stubbly change the dynamic of the negotiation, making adversarial and combative tactics less acceptable [8].

Access must be given to people to conflict management but it must be in the interest of the protection in the environment. The quality of decision-making must be improved by giving interested and affected persons the opportunity to bring relevant information to the decision-making process [14]. Public interest is the key to use by any representations made by persons interested in the matter to institute action.

In order to use Alternative Environmental Dispute Resolution mechanisms free from suspicion and corruption, it is necessary to ensure that the agencies using Environmental ADR mechanisms allow public involvement through open meetings to discuss the issues, public records of the proceedings in the meetings, and public opportunity to comment on ADR decisions [19]. There is also a fear in cases of environmental disputes between private parties and national departments and it may be a factor discouraging alternative environmental dispute resolution. Environmental disputes either between private persons themselves or within national departments, NEMA creates a more effective legal mechanism for enforcement by private persons. Section 32 (1) of NEMA also states that a person or group of persons may seek appropriate relief in the interest of protection of the environment, apart from other interest that may be sought before the court. In *Hichange Investments (Pty) Ltd v Cape Produce* an applicant successfully obtained an order directing the Director-General of Environmental Affairs and Tourism to order the respondent, to conduct an environmental impact assessment of the gases emitted from a semi-tanning owned by the respondent [10].

Environmental Dispute Resolution in South Africa takes a middle ground. There is a need to provide for a more independent body of environmental dispute resolution rather than using the Minister to create such a panel [16].

VI. MANDATORY VERSUS VOLUNTARY MEDIATION

Mandatory mediation consists of court-mandated mediation and statutory mediation. This mediation compels parties to come together in an attempt to reach an agreement in a non-hostile, non-adversarial manner. Parties are not forced to reach an agreement through the mediation process, but are merely compelled to attend a mediation session and to attempt to reach a mutual agreement.

Empirical data from Europe provide supportive evidence that mandatory mediation is much more effective than a purely voluntary process [5]. A contrary view could also be expressed that in some instances, mediation is not only inappropriate but actually has no chance of resulting in a settlement.

The question of whether it would be constitutional to make attendance at an initial mediation session mandatory is being

debated. Parties cannot be forced to mediate, because mediation should be voluntary due to its very nature. The Constitution provides the opposite view that the interests of the parties are paramount, and hence, forced attendance would not be unconstitutional. If a party does not attend mediation or disrupts the mediation process, it will be noted.

It is of interest that courts in the United Kingdom impose sanctions on parties who unreasonably refuse or fail to mediate. In the United States of America, mediation is more firmly embedded in the litigation process, with courts applying various degrees of coercion to encourage parties to mediate [11]. In Canada, lawyers are required to certify that they have complied with their duties to discuss dispute resolution options with their clients prior to starting a proceeding in court. This policy promotes the informed use of out-of-court processes to resolve disputes.

VII. ARBITRATION AS OPPOSED TO LITIGATION

Avoidance of adversarial proceedings is said to favour the idea of both mediation and arbitration. Arbitration is not necessarily consensual or non-adversarial by the time parties are involved in it. Arbitration can be every bit as bitter and contentious as litigation. In the case of disputes, it is not always necessary to go through litigation as an alternative to this according to Chapter 4 of NEMA is mediation or arbitration. Mediation allows parties to focus on their needs and interest. Very often these overlap or are compatible. The parties then can agree on a solution to the problem [16].

A frequently cited advantage of arbitration is that it can significantly speeds up the process, as there are no long waiting periods for a court date [8]. Closely linked to the advantages of flexibility and an expedited process is the claim that arbitration is less costly than litigation. Parties can streamline the process and avoid the delays that may occur in the formal court process. The fact that arbitration is a private and confidential process is also regarded as a plus. Arbitration is a private and flexible procedure which is intended to avoid the formalities, delays, expense, and irritation of routine litigation.

It is an advantage that the parties themselves, guided by their legal representatives (if they are represented), can select the person who they wish to arbitrate their disputes - someone with experience and expertise in environmental matters, and especially experience and expertise in the particular controversy or conflict being presented. The parties can appoint one and the same arbitrator to deal with the dispute from start to finish. This will result in continuity and an informed and holistic approach by the arbitrator to all the different issues that might arise from a dispute [8].

The public interest also overloaded the court system and that results pressure on courts to deal with cases expeditiously and makes it difficult for judges to examine their cases thoroughly. It may therefore be in the public interest to use arbitration to help to relieve pressure on our overloaded court system [20].

Party autonomy is premised on the notion that the parties to a contract are entitled not only to create rights and obligations

between themselves, but also that they are free to choose the law applicable to their contract. In other words, the parties to a contract are free to determine the law governing their contract. This choice of law by the parties to govern their contract is referred to as the 'proper law' or the 'applicable law' i.e. the *lex causae* or the *lex voluntatis* of the contract. The former is generally used by academic writers on conflict rules in English and Commonwealth contract law [8] and the latter by the drafters of international instruments. However, one might imagine that the empowerment aspect of mediation differ from the respect for autonomy in the adjudicatory features of arbitration [9]. The policy concerns around contractual freedom and decision-making autonomy are particularly alive in environmental disputes.

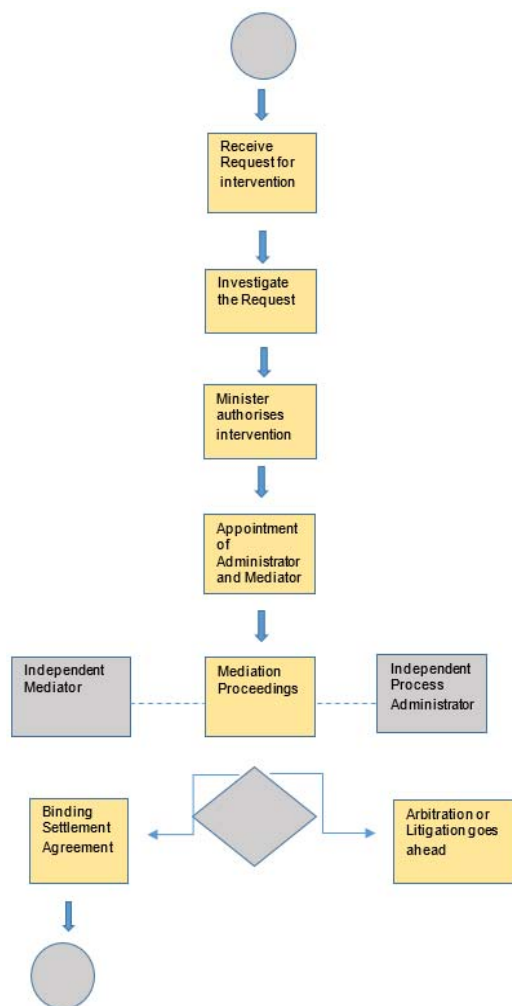


Fig. 1 Environmental conflict management process

VIII. THE ENVIRONMENTAL CONFLICT MANAGEMENT PROCESS

Chapter 4 of the National Environmental Management Act 107 of 1998 authorises the use of ADR mechanisms so as to ensure fair decision making and effective conflict management. Section 12 (2) provides some guidance in this

regard by stipulating decisions regarding dispute resolution.

Everyone has a responsibility to take steps to resolve or clarify disputes and should be supported by the Department of Environment.

Chapter 4 of NEMA gives some guidance in the process:

- To speedily resolve all the conflict in a decision making process;
- The desirability of giving indigent persons access to conflict resolution measures in the interest of the protection of the environment;
- The desirability of improving the quality of decision making by giving interested and affected persons the opportunity to bring relevant information to the decision making process;
- Any representations made by persons interested in the matter; and,
- Such other consideration relating to public interest as may be relevant.

IX. CONCLUSION

We have discovered in this work that disputes which are inherent in business relationship are today resolved more by ADR process than by litigation. Indeed, ADR processes have been fully developed in other jurisdictions as a means of resolving environmental disputes. ADR has been effectively used to enhance public confidence in environmental decisions, facilitate technical inquiries and information exchanges, and to identify creative solutions to daunting problems. As earlier stated, ADR comprises, inter alia, arbitration, conciliation, mediation, negotiation, including the court-connected ADR mechanism. This work has established the criteria for determining which particular process fits a dispute.

We have weighed the pros and cons of these mechanisms vis-à-vis the judiciary. No doubt, the merits of the ADR outweigh the judicial process especially in view of the latter's adversarial and confrontational nature. We have no wish to create the impression that ADR does not have its shortcomings. It does. For instance, engaging an outside mediator who is acceptable to both parties may not only be expensive but also may take a little time to put in place. Again, it is not all kinds of cases that can be settled through the ADR mechanism.

Considering its increasing popularity world over, it is imperative that we strive to have a background knowledge of arbitration theory and practice despite our professions, such as engineers, accountants, doctors, surveyors, among others, so that the practices of arbitration should not be an exclusive preserve of the practitioners in the field. Even the judges who handle environmental cases should have basic knowledge of arbitration. Fortunately, many universities, especially in Europe, have included in their programmes comprehensive arbitration curriculum with in-depth study of arbitration theory and exposure to practical aspects such as how to draft arbitral awards.

Section 24 comprises two important components. Firstly, it confers on everyone the right to an environment that is not harmful, and secondly, it places a duty on the state to prevent

pollution and other damage. Therefore, environment is a wide concept that can mean different things to different people, and therefore, a lot of disputes will arise from environmental disputes. Perhaps the greatest challenge now is to determine an appropriate environmental dispute resolution for a particular environmental dispute.

In South Africa, the environmental dispute resolution process provides participation for citizens, but the process is still State-centred. The current mechanism for alternative environmental dispute resolution restricts the parties to environmental disputes to choose a third party because the panel is statutorily determined by the Minister, a MEC or Municipal Council. The environmental resolution process in South Africa is much closer to international best practices.

Proactive and early intervention is also recommended as the best way of dealing with differences, disagreements and disputes. In contrast, ADR promotes the settlement of disputes in a manner that avoids many of the transactional costs associated with litigation. In fact, the monetary savings achieved through ADR processes and the results have been acknowledged in a lot of jurisdictions. In some cases, the cost may be borne either by the government or the multinational companies desirous of sustaining its relationship with the host communities, and not the poor victims of pollution as in litigation.

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