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Dispute Resolution Does Not Need to Be a Battle: The Case for Mediation as Transformative Dispute Resolution Mechanism

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Abstract

The gist of the argument presented in this article is that given the constitutional guarantees for access to justice guided by its normative authority, transformative dispute resolution is not only constitutionally mandated but inevitable. In this regard, South Africa has so far been provided with both legislative and judicial support for utilising alternative dispute resolution mechanisms, particularly by way of mediation, of resolving disputes. The transformation process includes the further development and institutionalisation of mediation in which the legal profession and legal education must play meaningful roles. The article illustrates the unsuitability of the adversarial process of formal litigation with special reference to medical negligence claims.

Keywords: Transformative dispute resolution; transformative constitutionalism; transforming legal culture; civil litigation; legal relief; mediation; access to justice

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1 INTRODUCTION

At its core and under its broadest thematic objectives, transformative constitutionalism addresses the legal system in South Africa, enjoining us to find alternative methods of dispute resolution in order to realise access to justice.

According to scholars such as Heyns[1] and Van der Walt,[2] constitutional transformation allows us to consider alternatives outside the mold of that which is settled or ingrained culture. That, we would argue, includes our settled mechanism of resolving civil disputes through conventional litigation. As an injunction and goal of a democratic constitutional state, transformative constitutionalism calls on society as a whole to pursue the stated goals in the Constitution of the Republic of South Africa.[3] And it only makes sense that the executive, legislature, judiciary, legal profession, legal education fraternity, and public service institutions occupy pivotal roles as primary drivers of this pursuit, steering society at large.

This article draws on case law, legislation, and academic scholarship to illustrate the practical realisation of constitutional norms, values, and rights through the practice of mediation as an alternative mechanism for resolving disputes with special reference to medical negligence claims. Although we argue that the practice of mediation in civil claims is consistent with transformative constitutionalism, we do mean to suggest that the conventional civil litigation process is redundant or inappropriate in all civil claims. However, we do believe that the conventional civil process needs to be reformed in line with transformative constitutionalism. This was done, for example by the insertion of rule 41A of the Uniform Court Rules.[4] In the context of medical malpractice suits, the Constitutional Court judgments in *MEC for Health and Social Development, Gauteng v DZ obo WZ*,[5] and the subsequent *MEC for Health, Gauteng Provincial Government v PN*[6] confirm the need for transformation of remedial relief. In these judgments, the highest court in the land openly encouraged alternative relief to routine monetary awards in civil claims, including mediation.

In the section below, we start our argument in favour of transformative dispute resolution through the practice of mediation by examining the normative framework of the Constitution, within which we argue mediation is indeed well accommodated.

2 THE NORMATIVE FRAMEWORK SET BY THE CONSTITUTION UNDERLYING ACCESS TO JUSTICE THROUGH MEDIATION

The supremacy of the Constitution and the rule of law is a foundational value of the South African democracy.[7] Any law or conduct that is inconsisten with the Constitution is invalid. All obligations imposed by the Constitution must be fulfilled,[8] including, if necessary, through transformation. However, the Constitution not only regulates public power and creates enforceable rights for individuals, but it also establishes an impartial system of values and norms for the application and practice of law. Among others, the Bill of Rights guarantees the right to equality,[9] the right to human dignity,[10] and of particular relevance to this article, access to the courts or, in appropriate circumstances, "another independent and impartial tribunal or forum".[11] These rights are not, or ought not to be, mere abstract ideas. The Constitution commands the legislature, judiciary and executive alike to fulfil their respective constitutional obligations, thereby ensuring that the rights enshrined in the Constitution are realised.[12] An indication of the

8 Section 2.

9 Section 9.

10 Section 10.

11 Section 34.

12 O'Regan "From Form to Substance: the Constitutional Jurisprudence of Laurie Ackerman" 2008 *Acta Juridica* 1 6.

resolve of the drafters of the Constitution to make constitutional rights realisable, particularly in terms of access to justice, is the ample provision for standing in South Africa's supreme law.[13] Provisions on standing were considerably broadened from the common law, presenting more people with the right to access justice if their constitutional rights have been violated.[14]

As a central tenet of the Constitution, adherence to the rule of law means that no person is above the law, and that government legitimately exercises authority based on laws enacted through due process. It also means that all persons are entitled to equal protection under the law. In general terms, this implies that the government is obliged to deliver and maintain a civil dispute resolution system that functions optimally and guarantees access to, and the proper administration of, justice. Where the system falls short, the government has a constitutional duty to address the shortcomings. Keeping in mind the dynamic nature of the law, technological advances, and the constant development of societal norms, this ultimately calls for ongoing law reform, including of the civil justice system where it proves inadequate and inaccessible to the public.[15]

The judgment in *AB & ID v MEC for Health and Social Development, Western Cape Provincial Government*[16] has shown that the adversarial system of dispute resolution indeed has glaring shortcomings, requiring urgent reconsideration and reform. Before we delve into the details of *AB & ID*, let us first elaborate on the notion of "access to justice" as one of the primary goals of transformative constitutionalism in the context of civil dispute resolution, including mediation.

3 ACCESS TO JUSTICE

The concept of "access to justice" has a broad meaning and can have a number of theoretical bases. It resonates with the common law principle contained in the well-known Latin maxim *Ubi jus, ibi remedium*, or "Where there is a right, there is a remedy".[17] Where the law has created a right, therefore, there should be a corresponding remedy for the breach of such right. Historically, the availability of a remedy for the violation of a recognised right, was one of the fundamental rights recognised in all legal systems. This, transposed to "the law" established in terms of a constitutional democratic state, the *Ubi jus, ibi remedium* principle clearly requires an extended interpretation. After all, the Constitution has not only created a number of additional rights to our previous legal order; it also demands that those rights and their concomitant obligations be exercised, fulfilled and pronounced on in terms of constitutional norms, values and contexts.[18]

3 1 General

There can be no dignity, equal enjoyment of rights and freedoms or equality before the law where the dispute resolution rights that section 34 of the Constitution guarantees, are beyond the financial reach of most South Africans. Because of the intricacies and cost of a civil suit, the fair adjudication of a dispute invariably requires legal representation, which comes at an

13 Constitution s 38.

14 Swanepoel "The Judicial Application of the 'Interest' Requirement for Standing in Constitutional Cases: A Radical and Deliberate Departure from Common Law" 2014 *De Jure* 63.

15 Hurter "Seeking Truth or Seeking Justice: Reflections on the Changing Face of the Adversarial Process of Civil Litigation" 2007 *JSAL* 240 240 *et seq*; Theophilopoulos "Constitutional Transformation and Fundamental Reform of Civil Procedure" 2016 *JSAL* 68 68 *et seq*.

16 (Western Cape Division) unreported case no 27428/10 (7 September 2016).

17 For a discussion of the extension of the principle in the context of constitutional rights, see Thomas "Ubi Jus, Ibi Remedium: the Fundamental Right to a Remedy under Due Process" 2004 *San Diego L Rev* 1633.

18 Hoexter's "transformative adjudication". Hoexter "Judicial Policy Revisited: Transformative Adjudication in Administrative Law" 2008 *SAJHR* 281.

exorbitant fee. South Africa's adversarial trial system is also notoriously complicated, technical and cumbersome. The inability to assert one's rights and obligations has many negative consequences, including being denied the opportunity to protect one's individual dignity, which, in turn, leads to a loss of confidence in the rule of law, democracy, and the values espoused in the Constitution. South Africa's fledgling democracy can ill afford a lack of confidence and trust in its legal system.[19]

However, access to justice goes beyond access to the courts or resolving a dispute in another suitable forum. It is also about the fairness of the process, the satisfaction of having a say in one's dispute, and taking ownership of a satisfactory outcome, even if this is only a sincere apology or an understanding of the actual context that gave rise to the complaint. These are outcomes the formal adjudication process seldom caters to, but are hallmarks of the mediation process.[20] Litigants who embark on litigation may, at the end of their case or the defendant's case, receive a court order of "absolution from the instance".[21] When this order is made at the end of a civil trial, it essentially means that the court is unable to deliver a judgment either in favour of the plaintiff or of the defendant. Should this happen, the time and money spent on civil litigation would have been wasted, with the plaintiff receiving no redress for the complaint against the defendant. Opposed to the latter scenario, the process of mediation gives ownership of how and on what terms a dispute is resolved between disputants.[22]

Against this backdrop, the Supreme Court of Appeal judge Edwin Cameron's remarks in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*,[23] namely that "the law is a scarce resource in South Africa", but "that justice is even harder to come by",[24] is particularly poignant. His remark emanated from the court's affirmation that a right to bring a class action was a constitutional right. In *Permanent Secretary* the court argued that the right of the applicants to bring a class action was further bolstered by their individual lack of access to legal representation, and the fact that their respective, relatively small claims were unsuitable for individual and separate enforcement through litigation.[25] Yet, irrespective of the context of Cameron J's remark, it undoubtedly reflects the sentiments of the majority of the South African public. It highlights the need for an adjudicatory perspective that takes account of the entire context of a claim, the personal circumstances of the claimant, and the relief that may be granted.

3 2 Some Theoretical Underpinnings of Access to Justice

According to Cappelletti,[26] "access to justice" as a theory has emanated in response to a formalistic and dogmatic interpretation of legal norms that ignores the context in which civil causes arise, the roles of people and institutions, and the processes that are followed in an attempt to enforce rights and obtain relief.[27] Therefore, in addition to the rights, responsibilities, and protections

19 Heywood and Hassim "Remedying the Maladies of 'Lesser Men or Women': The Personal, Political and Constitutional Imperatives for Improved Access to Justice" 2008 *SAJHR* 263 279.

20 Hurter "Access to Justice: to Dream the Impossible Dream" 2011 *CILSA* 408 414.

21 See rule 39(6) of the High Court's Uniform Court Rules and rule 29(7)(b) for the magistrate's court in respect of the application at the close of the case for the plaintiff. Also, see s 48(c) of the Magistrates' Courts Act 32 of 1944.

22 Patelia and Chicktay *Appropriate Dispute Resolution: A Practical Guide to Negotiation, Mediation and Arbitration* 2015 24.

23 2001 4 SA 1184 (SCA).

24 Paragraph 1.

25 *Permanent Secretary* para 14.

26 Cappelletti "Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform" 1992 *SALJ* 22.

27 Cappelletti 1992 *SALJ* 22 *et seq*.

contained in legal norms, access to justice also involves the judicious consideration of the community in which rights violations occur, and of the governance processes of the bodies who administer legal principles and norms to effect justice.[28] In essence, access to justice is aimed at bringing the law closer to the consumer, as an indispensable part of a functioning, participatory democracy that meets the needs of the community it professes to serve.[29]

Real, realisable, and effective access requires reform of the entire legal landscape, including substantive and procedural law.[30] In our view, it calls for a fundamental change in the culture in terms of which civil wrongs are perceived and resolved. In the context of medical negligence claims, for instance, one needs to consider whether surgeons working at severely understaffed and under-resourced medical facilities can be held to the same standard of care as their better-resourced peers when having to perform an urgent medical procedure. Sadly, this is often the reality facing the public health sector in South Africa, and the law and its processes ought to take account of these extraordinary circumstances. In these circumstances, when a patient with a claim of medical negligence is fully informed of the constrained conditions, in frank and open disclosure, the matter may very well be settled outside the customary relief sought in formal litigation. The process of mediation encourages not only ownership of the process of dispute resolution but sharing and considering the full context within which the alleged wrong occurred.[31]

The text of legal formulations in general, and the norms and values prescribed in the Constitution in particular, especially those in the Bill of Rights, represent the "ideal". Legal norms only become "realistic" when the public generally adheres to them, and voluntarily allows a democratic government to enforce them. Put differently, the theory and function of "the law" must be practically realisable, enforceable, and perceived and seen by the public as such. If not, the law and its systems are of no value.[32] The rule of law is premised on the belief in both the law itself and the system that establishes and enforces it.[33] It follows, then, that a democracy grounded in a norm-driven constitution cannot function without effective mechanisms to enforce legal rights and obligations. Moreover, it is the duty of the democratically elected government to provide access to such mechanisms.[34]

Access to justice is an indispensable cog in the wheel of any democracy. The better a nation's access to justice to remedy societal wrongs, the truer its democracy. Therefore, exploring alternative dispute resolution mechanisms is in everyone's interest.

3 3 Seeking Justice through Alternative Mechanisms

For lack of a single, universally accepted and all-encompassing definition of access to justice, it is safe to say that, at the very least, all dispute resolution mechanisms should be fair, open and dignified.[35] Because litigation is often not the best vehicle to achieve justice for parties locked

28 Cappelletti 1992 *SALJ* 26.

29 Cappelletti 1992 *SALJ* 39; Hurter 2011 *CILSA* 408.

30 Cappelletti 1992 *SALJ* 28.

31 Boulle and Rycroft *Mediation Principles Process Practice* (1997) 34 35.

32 Malan "Deliberating the Rule of Law and Constitutional Supremacy from the Perspective of the Factual Dimension of Law" 2015 *PELJ* 1206 1226; Brickhill and Van Leeve "Transformative Constitutionalism - Guiding Light or Empty Slogan?" 2015 *Acta Juridica* 141 152.

33 Heywood and Hassim 2008 *SAJHR* 266; Malan 2015 *PELJ* 1220; Madondo "The Role of the Legal Sector in Developing a Legally-conscious Society" 2019 *THRHR* 353 353 *et seq*.

34 O'Regan 2008 *Acta Juridica* 10; Hurter 2011 *CILSA* 408; Malan 2015 *PELJ* 1026; Madondo 2019 *THRHR* 356.

35 Hurter 2011 *CILSA* 413–414.

in a dispute, alternatives need to be considered.[36]

While "justice" means different things to different people, at its very core, it entails achieving an outcome that is as close as possible to being mutually acceptable to both parties. While mediation sets mutually acceptable settlement of a dispute as the primary objective, the relief offered by civil judgements often do not correspond with what parties envisioned. Sometimes, courts also decide civil cases on legal technicalities. Therefore, although one party may "win" the case, both parties may end up feeling dissatisfied with the outcome because they never had the opportunity to state their respective cases. Apart from procedural and substantive justice (in terms of relief), parties mostly long for an effective and impartial process, such as in mediation, in which their views are heard and considered.[37]

In medical negligence disputes for example, the defendant party may desperately want to defend their professional reputation, while the plaintiff party may experience an intense desire to gain insight into the true circumstances in which they suffered the alleged wrong. The patient plaintiff may want the defendant party to understand the full extent of the consequences suffered at the hands of the defendant. Unlike court-based justice, mediation offers access to these outcomes, allowing the parties to construct their own remedies and realise their desires.[38]

Mediation is not aimed at "winner–loser" outcomes. The process is not viewed as an "us versus them" battle, which is so often characterised by "Stalingrad", or delaying tactics.[39] Instead, mediation is transformative,[40] affording parties the opportunity to face and frankly discuss preconceived biases on neutral ground, and potentially restore their relationship. As a result, conflict is reversed or transformed into a mutually satisfactory and positive outcome that does not exacerbate existing tensions between the parties. Where the formal legal system cannot provide such appropriate outcomes for all involved, justice is not attained.[41]

3 4 The Financial Challenges Associated with Accessing Justice through Formal Litigation

There can be little doubt that financial constraints currently hamper proper access to justice in South Africa. Due to its nature and complexity, most civil litigation requires that the parties employ legal representatives,[42] whose fees are unaffordable for most South Africans. For the well-heeled, more money means better legal representation, sadly implying that access to equal justice is either granted or denied based on socioeconomic power imbalances.[43] Legal Aid South Africa (LASA) has a constitutional mandate to provide legal representation to members of the public who cannot otherwise afford it.[44] To qualify for representation, individuals must however

36 Menkel-Meadow "The Trouble with the Adversary System in a Postmodern, Multicultural World" 1996 *William & Mary LRev* 5 33; Howarth and Carstens "Can Obstetric Care be Saved in South Africa?" 2014 *South African J of Biomedical Ethics and Law* 69 71.

37 Dugard "Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice" 2008 *SAJHR* 214 216; Hurter 2011 *CILSA* 414

38 Boulle and Rycroft *Mediation Principles Process Practice* (1997) 53.

39 *Daily News* "We're too Lax on Stalingrad Tactics" https://www.southafricanlawyer.co.za/article/2021/07/were-too-lax-on-stalingrad-tactics/ (accessed 22-07-2021).

40 Rycroft "Mediation a Key to Alternative Dispute Resolution" https//www.news.uct.ac.za/article/-2011-04-04-mediation-a-key-to-alternative-dispute-resolution-rycroft (accessed 23-05-2019).

41 Hurter 2011 *CILSA* 414.

42 Dugard 2008 *SAJHR* 220.

43 Langa "Transformative Constitutionalism" 2006 *Stell LR* 351 355; Dugard 2008 *SAJHR* 216.

44 Legal Aid Act 39 of 2014 preamble; Constitution s 34. Also, see McQuiod-Mason "The Delivery of Civil Legal Aid in South Africa" 2000 *Fordham Intl LJ* 115 for a general discussion of the delivery of legal aid in South Africa.

comply with LASA's means test, which is aimed at only those earning very low incomes.[45] In fact, the maximum qualifying income level for legal aid is so low that it is inconceivable how anyone earning even twice the amount would be able to finance civil litigation, while maintaining even the most modest of households. Therefore, the ideal of access to justice is but a pipedream to many.

Moreover, most of the legal representation granted by LASA pertains to criminal matters. In their 2018/19 annual report, LASA indicated that a mere 13% (around 53 000) of total finalised cases and new matters taken on in the year in review had been civil matters.[46] Like all other initiatives aimed at providing legal aid in civil cases, LASA is capacity-constrained, and can only aid to the extent that their limited budgets and human resources allow.

For the 2020/21 financial year, the Department of Justice and Constitutional Development was allocated a R22,4 billion (2%) share of the total national budget. Of this, LASA received approximately R2 billion (9,3%).[47] Judging by the fact that legal aid for civil matters represented only 13% of all cases taken on by LASA in 2018/19, it is safe to assume that a proportionally small amount would be allocated to civil cases. The fact that many South Africans are left without recourse in terms of assistance for civil litigation substantiates the conclusion that the government needs to consider increasing the amount allocated for alternative dispute resolution from the central budget. Additionally, the government needs to play a proactive role in driving a mindset/cultural change in civil society that the resolution of a dispute need not be a battle.

3 5 Access to Justice as a Vehicle to Create Social Justice and Close Inequality Gaps

Litigation alone cannot rectify the social injustices experienced by the poor in the form of poor access to adequate primary healthcare. It requires systemic change to address the multiple root causes of the problem,[48] one of which is the small South African tax base. In the 2019 tax year, the personal income tax of approximately three million taxpayers contributed 97% of the total income tax collected. This unsustainably small tax base largely funds the infrastructure, including the healthcare infrastructure, of the entire country.[49] It is now general knowledge that the rot of state capture had also reached the office of the Receiver of Revenue. As a result, public funds were squandered and stolen at a startling rate, which, to his credit President Cyril Ramaphosa has since admitted.[50] Any progress with basic medical care and access to justice, therefore, will be contingent on a rejuvenated fiscus that is employed for the benefit of all South Africans.

The cyclic effect of the problems in the public health sector is that already limited resources allocated to provide primary healthcare are used to fund litigation.[51] In Gauteng, for example, the Department of Health recently warned staff that it intended to recover some of the funds

45 At the time of writing: (a) a monthly income of no more than R7 400 after tax for individuals, or a total income of no more than R8 000 for a household; (b) movable assets to the value of no more than R128 000; or; (c) fixed property and movable assets with a combined value of no more than R640 000. See LASA "Integrated Annual Report 2018-2019" https://legal-aid.co.za/annual-reports/ (accessed 27-07-2020).

46 *Ibid*.

47 Vulekamali (Government website providing budgetary information) https://vulekamali.gov.za/datasets/adjusted-budget-vote-documents/aene-2020-21-vote-25-justice-and-constitutional-development (accessed 03-09-2020).

48 Hurter 2011 *CILSA* 414.

49 Kruger "SA's Problem of a Narrow Tax Base and High Taxes" https://www.moneyweb.co.za/news/south-africa/sas-problem-of-a-narrow-tax-base-and-high-taxes (accessed 18-05-2021).

50 Ramaphosa "President Cyril Ramaphosa's Letter to ANC Members about Corruption" https://www.businesslive.co.za/fm/opinion/2020-08-24-read-in-full-president-cyril-ramaphosas-letter-to-anc-members-about-corruption/ (accessed 10-02-2021).

51 Howarth and Carstens 2014 *South African J of Biomedical Ethics and Law* 69 69.

paid in medical negligence claims from those found guilty of negligence.[52] Money spent on litigation could much rather have been used to appoint competent healthcare personnel and provide them with the necessary means to perform their duties, which would have prevented cause for negligence claims in the first place — making for a classic vicious circle.

3 4 Access to Justice Gaining Traction through Mediation

The recently introduced rule 41 of the Uniform Court Rules now enables the legal representatives of government healthcare institutions to utilise mediation as a dispute resolution mechanism. It provides that, when instructing their legal representatives, public healthcare providers should as a matter of course state that mediation must be considered, and where legal representatives advise against mediation, they must furnish reasons for doing so.

From the potential claimant's perspective, attaining justice may seem like an insurmountable obstacle. Private legal practitioners only take on a case on a contingency basis if they consider it meritorious on the facts, and if the quantum of the potential payment makes the claim worth the risk of funding it. Ultimately, the claimant is not only deprived of the opportunity to obtain financial relief but also of the psychological peace of mind associated with being compensated for economic loss and having one's "day in court". Mediation, in contrast, does not require the presence of legal counsel. Where the parties to medical negligence claims opt for mediation, the defendant, usually the doctor or hospital, may likely still employ representation, as these matters are often perceived to be complex, and the defendant can afford to do so. The claimant (plaintiff), however, may not be able to afford representation. It would therefore make sense to provide legal aid should parties choose to mediate medical negligence claims. This would firstly enhance access to justice by levelling the playing field and removing power imbalances in terms of legal representation. Secondly, it would increase our overburdened courts' capacity by unclogging congested court rolls. In addition, efficient dispute resolution through mediation would free up legal aid lawyers' time to attend to matters that necessitate going to court. Clearly, mediation is an appealing dispute resolution alternative to civil litigation.[53]

As already stated, the constitutional imperative to enhance access to justice implores the state to provide dispute resolution mechanisms other than court-based adjudication, which is costly, complicated and, thus, exclusionary. The discussion of the *AB & ID* matter below vividly illustrates the excesses and unsuitability of the formal litigation process in particular circumstances.

4 *AB & ID V MEC FOR HEALTH AND SOCIAL DEVELOPMENT, WESTERN CAPE PROVINCIAL GOVERNMENT*[54]

It is beyond the scope of this article to discuss the substantive and procedural issues in *AB & ID* in detail. Instead, the aim is to illustrate some of the inefficiencies of the adversarial dispute resolution system and, importantly, how a transformative dispute resolution methodology may lead to a preferred and constitutionally informed outcome.

In short, the parents of a minor child issued a summons against the Western Cape MEC for Health and Social Development for damages based on negligence. The negligence stemmed from a failure to diagnose and treat jaundice timeously, which caused the child to suffer

52 Broughton "Gauteng to Make Doctors, Nurses Pay Out of Own Pocket for Liability Claims" https://select.timeslive.co.za/news/2019-09-03-gauteng-to-make-doctors-nurses-pay-out-of-own-pockets-for-liability-claims/ (accessed 03-09-2019).

53 Heywood and Hassim 2008 *SAJHR* 266.

54 (Western Cape Division) unreported case no 27428/10 (7 September 2016).

irreversible brain damage, which, in turn, manifested in irreversible athetoid cerebral palsy.

The summons was issued in December 2010, and the defendant conceded the merits in July 2012, leaving the court only to decide the quantum of the claim. Yet, although the merits had been conceded, the trial on the quantum ran for 45 days. Arguments extended over four days, and the 185-page judgment was handed down on 7 September 2016, some seven years after the incident.

Between them, the parties employed 37 experts, of whom 19 testified at the hearing. The transcript of oral evidence comprised 4 880 pages, and the papers filed, excluding heads of argument, totalled more than 3 282 pages. By the time the trial started, the total claim amounted to R38 235 717.[55] It is not difficult to see that this case did not represent a model of efficiency, and that there must be more effective ways to resolve disputes. In the paragraphs below, we include selected passages from the case that highlight the wasteful nature of adversarial litigation in this instance.

In his discussion of the expert evidence, Rodgers J observed that incomplete expert reports had necessitated the leading of unnecessary evidence. Apart from not complying with court rules, this wasted the court's time and impaired the judge's ability to prepare for and understand the testimony.[56] The judge also expressed his discomfort at the number of opposing expert opinions, which purported to support vastly different damage amounts. Moreover, some of the expert opinions were regarded as "subconscious pro-client biased".[57] The legal representatives of the parties were responsible for preparing the expert summaries. Their failure to do so properly amounted to professional misconduct, including negligence. The same applies to the testimony of the experts themselves, who exhibited extreme bias in favour of the party that had called for their evidence. This confirms that, for transformative dispute resolution to be achieved, public industries such as the healthcare industry have a shared responsibility to effect a change in their culture of settlement, in line with constitutional principles.

By way of illustration, the then applicable tariff of fees for attorneys on the party-and-party scale was R53 per page for the perusal of documents, and R263 for 15 minutes' court attendance.[58] The judgment mentions 8 777 pages of court documents that the presiding judge was required to read. It is safe to assume that one attorney for each of the parties also read the same number of pages, if not more.[59] This puts the party-and-party costs for perusal alone by one set of attorneys at R930 362. The judgment further mentions that the case was heard over 45 days. Assuming the court sat for an estimated six hours per day, this would bring the cost for court attendance by one set of attorneys to R568 080.[60] A conservative estimate of the cost of counsel for the 45 days would be R80 000 per day, making up a total of R3 600 000 in court attendance fees alone. This excludes the experts' professional fees and disbursements, which would have run into millions of rands, let alone the total attorney-and-client fees as well as counsels' fees for other work. Had this case been aired in the realm of public opinion, it would have certainly offended every sense of justice.

The *AB & ID* case highlights the need for a drastic change in the legal and related industries' culture regarding dispute resolution and achieving social justice. The matter also provides an

55 *AB & ID* 2–7, paras 1–10.

56 *AB & ID* para 44.

57 *AB & ID* para 45.

58 *Government Gazette* No 38399 of 23 January 2015.

59 *AB & ID* 6, paras 5 and 6.

60 *AB & ID* para 4.

opportunity to further the discussion on the need for transformative dispute resolution practices.

In his judgment in *Port Elizabeth Municipality v Various Occupiers*,[61] Sachs J remarked as follows on the issue of transformed approaches to dispute resolution:

> [T]he procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.[62]

This sentiment aligns with what Hoexter calls "transformative adjudication".[63] It represents a commitment to infuse adjudication with the norms of substantive equality, achieve social justice, instil human rights standards, and inculcate rationalisation in public-law dispute resolution interventions.[64]

In the *AB & ID* matter, the unfortunate reality is that no amount of money can ever compensate the parents for the trauma they have suffered, and for having to raise a child with a mental disability, knowing that the condition was preventable. There is no dignity in having to endure 45 trial days rehashing one's traumatic experience. Waiting almost seven years for a case to be tried is neither justice, nor does it instil any degree of confidence in the rule of law and its avenues of relief. It amounts to a flagrant violation of the right to a speedy trial and justice.

Lawyers are trained to analyse legal problems with a view to finding solutions in existing and established legal rules and reasoning, without having regard to alternatives that may facilitate transformation and social justice.[65] A departure from the prevailing legal culture of formalism towards substantive reasoning may have yielded a completely different outcome in the *AB & ID* case.[66] The merits in the case were conceded, so a decision to refer the matter for mediation on the quantum of the claim could have saved the parties time and money, as well as the emotional stress associated with the drawn-out trial.[67] In addition, had mediation been used in *AB & ID*, an apology given as part of the process could have eased the tension between the parties and opened the possibility of an offer to treat the child at the facility in question.

Mediation costs a fraction of the price of litigation and takes considerably less time to conclude.[68] Legal costs in civil litigation may also include costs borne by the fiscus in the case of state institutions such as hospitals. The South African public healthcare sector is under tremendous financial strain because of negligence claims. The time and cost savings achieved through mediation may also have various other positive effects on both the healthcare and

61 2005 1 SA 217 (CC).

62 *Port Elizabeth Municipality* 239 para 39.

63 Hoexter 2008 *SAJHR* 286.

64 Hoexter 2008 *SAJHR* 286; Khampepe "Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy" 2016 *Stell LR* 441 444.

65 Van der Walt 2006 *Fundamina* 19.

66 Hoexter 2008 *SAJHR* 299.

67 Wiese *Alternative Dispute Resolution in South Africa Negotiation mediation, Arbitration and Ombudsmen* (2016) 52.

68 Meruelo "Mediation and Medical Malpractice. The Need to Understand Why Patients Sue and a Proposal for a Specific Model of Mediation" 2008 *JLM* 285 302–303; Nelson "Healthcare Crisis is not Fault of Lawyers but Wasteful Litigation – Expert" http://www.medicalbrief.co.za/archives/healthcare-crisis-not-fault-of-lawyers-but-wasteful-litigation-expert/ (accessed 23-05-2019).

justice systems.[69] Money saved on litigation frees up much-needed resources for primary healthcare, makes available valuable court time, and lightens the burden on the fiscus that funds the country's judicial infrastructure.[70]

The decision to apply alternative dispute resolution methods and use alternative legal reasoning when dealing with disputes represents the ideal of transformative constitutionalism. Yet the responsibility for achieving that ideal and shifting dispute resolution culture lies not only with government, but also with the judiciary, the legal profession, legal training institutions and various associated industries, including the medical sector, the medical insurance industry, consumers, and the public at large.

However, there is a positive side to the ideals expressed in this article and some progress has been made in shifting towards transformative dispute resolution in South Africa. The following section provides an overview of existing legislative enactments and judicial interventions in this regard, with a particular focus on mediation as one of the ways to achieve such transformation. Education as a means to change the existing attitude towards dispute resolution in the legal profession and among law students and consumers is also addressed.

5 TRANSFORMING LEGAL CULTURE

5 1 Introduction

The consensus among commentators is that legal culture informs lawyers' approach to transformative constitutionalism.[71] Through statutory interventions and jurisprudence, both the legislature and the judiciary have contributed to a move toward the constitutional transformation of dispute resolution. Because such transformation requires a monumental change, it will naturally elicit some resistance among practitioners. However, effecting the change is pivotal, as the legal practitioner is the first port of call for a disgruntled client who needs a dispute resolved. LASA in particular, which is often the first port of call for legal assistance by many poor members of the public, ought to be sensitised to the need for a transformed dispute resolution culture.

5 2 The Role of the Judiciary and the Legislature

A few actors serve as drivers of constitutional transformation. As far as the role of the judiciary is concerned, Khampepe J[72] refers to its "meaningful participation", stating that the judiciary engages purposively with disputes to encourage solutions that enhance transformation, realising that a court need not always be involved in resolving a dispute. With reference to judgments relating to housing, the legislative process, and education, she illustrates how the process of meaningful participation has developed in constitutional jurisprudence.[73] The common theme in these judgments is that the court encouraged the parties to engage in processes such as negotiation and mediation to facilitate mutually agreeable solutions. Yet Khampepe J also warns

69 South African Law Reform Commission *Issue Paper 33, Project 121, Medico-Legal Claims* (2017); Mashego "Gauteng Health Faces R1.1 bn in Claims for Alleged Negligence" https://www.news24.com/citypress/news/gauteng-health-faces-r11bn-in-claims-for-alleged-negligence-20190706 (accessed 07-07-2019).

70 Nelson "Healthcare Crisis".

71 Davis and Klare "Transformative Constitutionalism and Common and Customary Law" 2010 *SAJHR* 403 406; Heyns "The Inoperative Community of Law Students: Rethinking the Foundations of Legal Culture" 2014 *Acta Academia* 77 86; Van der Walt 2006 *Fundamina* 17.

72 Khampepe 2016 *Stell LR* 445. Litigation in large public-interest cases is often required due to the need for an authoritative court decision as part of the judicial function, i.e. to set a legal precedent. This need, however, is often absent in private disputes that concern only the parties to the dispute.

73 See Kampepe 2016 *Stell LR* 441–453 for a comprehensive discussion.

that mutually acceptable and lasting solutions can only be achieved if all involved robustly endeavour to move from a culture of passivity to a culture of active participation.[74]

In terms of the legislature's contribution, mediation, in particular, is provided for as a dispute resolution mechanism by approximately 50 South African statutes.[75] Examples include the Children's Act,[76] which provides that conciliatory methods of dispute resolution should be followed in matters concerning children generally;[77] and the Consumer Protection Act,[78] which allows consumers to refer disputes with suppliers for mediation.[79] Chapter 2 of the rules governing the conduct of matters in magistrates' courts initially contained detailed provisions regarding court-annexed mediation in the lower courts.[80] Rule 41A of the Uniform Court Rules requires parties to high court litigation to indicate at the start of exchanging pleadings whether they consent to mediate their dispute.[81] The rules governing the conduct of matters in magistrates' courts was recently amended to bring the rules in Chapter 2, with the necessary contextual changes, in conformity with Uniform Rule 41A.[82]

These steps mirror initiatives in other parts of the world to change the traditional approach to dispute resolution. According to Douglas and Batagol,[83] the Australian government at all levels has aimed

> … to shift legal culture from one of adversarial dispute resolution to one of cooperation and conciliation, one of improved access to justice, and one of utilising the full benefits of ADR [alternative dispute resolution] processes.

As of 2009, the Australian federal court requires parties to civil proceedings to comply with a reformed "overarching" purpose of civil practice and procedure, which involves the "just resolution of disputes … as quickly, inexpensively and efficiently as possible".[84] A failure to comply with this duty is considered by the court when awarding costs.

In the United Kingdom, in turn, the government has established the National Health Service (NHS) Resolution as a body of the Department of Health and Social Care "to provide expertise to the National Health Service to resolve concerns fairly, share learning for improvement and preserve resources for patient care".[85] Created within the context of the COVID-19 pandemic, the body has seen "a spirit of collaboration" between claimant and defendant lawyers, and a consequent rise in out-of-court settlements. According to its chief executive,

> [a] welcome development was greater cooperation between the parties. Our efforts to keep cases out of court gained more traction as there was an increased willingness to resolve matters without formal

74 Khampepe 2016 *Stell LR* 453.

75 Brand, Steadman and Todd *Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa* (2012) 92–99.

76 38 of 2008.

77 Section 4(a).

78 68 of 2008.

79 Section 70(1)(c).

80 *Government Gazette* No 37448 of 18 March 2014.

81 *Government Gazette* No 43000 of 7 February 2020.

82 *Government Gazette* No 48518 of 9 June 2023.

83 Douglas and Batagol "The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal" 2014 *Monash Univ LR* 758.

84 Douglas and Batagol 2014 *Monash Univ LR* 760.

85 For more, see NHS Resolution "About NHS Resolution" https://resolution.nhs.uk/about/ (accessed 22-07-2021).

court proceedings and to try new approaches such as remote mediations.[86]

As a result, resources otherwise spent on costs associated with medical negligence claims and investigations could be utilised for the frontline response.

It is encouraging, therefore, that the legislative arm of the South African government, as a form of expression of the will of the people and a demonstration of the political will of the executive, has also started shifting from a formal to a more accommodating regime of addressing disputes in various contexts. The judiciary too has embraced this change.[87] However, government and the judiciary alone will not succeed in entrenching mediation in the civil dispute resolution culture. Other actors will also need to join in.

5 3 The Role of Legal Education

Some believe that transformed legal education has a role to play in changing the dispute resolution regime and culture.[88] Former Chief Justice Pius Langa,[89] for instance, understood teaching of the law to involve more than just transferring knowledge about legal principles, but also illustrating the judicious application of those principles.

Although an indispensable component of the teaching and practice of law, the study of legal tenets alone is not always sufficient to equip law students with a mindset geared towards transformative constitutionalism.[90] According to Langa J, incorporating human rights and constitutional law courses in the tertiary law curriculum is not enough. Law graduates must also be taught how to critically engage with the Constitution and be willing to apply its norms in their practices.[91] Practically, this could entail presenting students with a set of facts to which settled law applies. Having established the "conventional" answer to the legal problem, the answer is then assessed for fairness against the backdrop of the parties' personal circumstances to establish whether a more just outcome could possibly be achieved. Finally, the "more just outcome" is interpreted against constitutional norms, values, and dictates.

Quinot[92] too argues persuasively that the prevailing formalistic legal culture establishes how the law is taught. To inculcate transformative objectives, therefore, would require a shift in teaching methodology to infuse constitutional principles into teaching.[93] He suggests that teaching practices should allow students to perceive the law not only in relation to what the legal position is, but what it could be. This would involve a departure from a culture that propagates only singular solutions to legal problems, to finding various ways of resolving issues.[94]

Fourie,[95] in turn, advocates for the teaching of "preventative lawyering", which emphasises

86 Hyde "Pandemic Cooperation Keeps Clinical Negligence Claims Out of Court" https://www.lawgazette.co.uk/news/pandemic-cooperation-keeps-clin-neg-claims-out-of-court/5109281.article (accessed 22-07-2021).

87 See, for example, *MB v NB* 2010 3 SA 220 (GSJ), *FS v JJ* 2011 3 SA 126 (SCA); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC).

88 Fourie "Constitutional Values, Therapeutic Jurisprudence, and Legal Education in South Africa: Shaping our Legal Order" 2016 *PELJ* 1 6–8; Langa 2006 *Stell LR* 355–356; Quinot "Transformative Legal Education" 2012 *SALJ* 411 411.

89 Langa 2006 *Stell LR* 356.

90 Langa 2006 *Stell LR* 356; Fourie 2016 *PELJ* 7.

91 Langa 2006 *Stell LR* 356; Fourie 2016 *PELJ* 8.

92 Quinot 2012 *SALJ* 416.

93 *Ibid.*

94 *Ibid.* 418.

95 Fourie 2016 *PELJ* 6–8.

a culture of future-oriented practices aimed at providing for and averting future disputes. Incorporating such practices through, for example, client role-play and moot court preparation instils in students an approach to legal practice that may produce social change and transformed adjudication, as enjoined by the Constitution.[96] To Fourie, the introduction of mediation in the law curriculum as an alternative to adversarial practices would help cultivate an ethos among students to search for dispute resolution methods that could reduce the negative effects of litigation.[97]

Therefore, law faculties ought to include core modules on alternative dispute resolution in their curricula, and law teachers should constantly remind students of the potential and merits of mediation and other alternative dispute resolution methods. The end goal is to ensure that law students are well versed in alternative dispute resolution and, therefore, would be able to confidently suggest it to their future clients as an avenue to consider.

In 2019, Legal Education and Development, the education arm of the Law Society of South Africa, introduced a module on alternative dispute resolution into the curriculum of their practical vocational training courses for candidate attorneys. While the module is a good start, it could have a much greater impact if underpinned by a substantive course on alternative dispute resolution during undergraduate studies.[98] In the context of medical malpractice claims, parties' selection of a dispute resolution method is more often based on legal advice. Therefore, lawyers advising their clients need to be properly educated in mediation in order to promote less adversarial ways to resolve disputes.

5 4 The Role of Lawyers and the Public

In terms of the role of lawyers and the public in creating a transformed dispute resolution culture, the following is worth considering.

The first observation, and the primary basis for our arguments, is that lawyers are ethically bound to act in their clients' best interests in discharging their duties. An essential duty of any legal practitioner is to advise clients on the most appropriate manner to solve their dispute. This involves considering the facts of the particular case, and then weighing up the pros and cons of the alternatives.[99] Where the facts seem to favour alternative dispute resolution, lawyers have an ethical duty to advise clients accordingly, even where this would mean forgoing work and, thus, financial gain. While the choice is ultimately the client's to make, it is likely to be significantly influenced by the lawyer's advice.[100] Judging by the facts in *AB & ID*,[101] for instance, the obvious and ethical choice based on an objective analysis of the matter would have been referral for mediation.

Secondly, in the context of the United States, Volpe and Bahn[102] note that mediators increasingly encounter resistance to mediation among disputants. According to the authors, any measure devised to change behaviour naturally elicits resistance to such change, whether consciously or unconsciously. There are a few reasons for this natural human trait. Resistance to mediation firstly often emanates from ignorance about the mediation process, and, secondly, from the belief that mediation "operates in the shadow of the law and that legal practitioners serve as

96 *Ibid.* 5.

97 *Ibid.* 17.

98 *Ibid.* 17–18.

99 Marnevick *Litigation Skills for South African Lawyers* 2 ed (2007) 39.

100 Marnevick *Litigation Skills* 39.

101 (Western Cape Division) unreported case no 27428/10 (7 September 2016).

102 Volpe and Bahn "Resistance to Mediation: Understanding and Handling it" 1992 *Sociological Practice* 26 26.

gatekeepers".[103] Therefore, the attitudes and involvement of members of the legal profession are key in validating mediation and securing its future in the dispute resolution regime.

Australian scholars Douglas and Batagol echo this view.[104] In calling for the institutionalisation of alternative or "appropriate" dispute resolution, they argue:

> (L)awyers in mediation can embrace the underlying philosophy of much of mediation practice and engage in collaborative problem-solving that is non-adversarial in orientation. Alternatively, lawyers may stymie the potential for settlement by taking an adversarial, rights based approach in mediation. At times lawyers may need to advocate vigorously for their clients' rights, but automatically approaching mediation with an adversarial mindset may defeat some of the potential of mediation to meet their clients' needs.

An encouraging sign in this regard is that, based on a cursory internet search, many South African law firms have taken the initiative to establish dedicated mediation departments.

6 RECOMMENDATIONS AND CONCLUSION

Because "the law" is central to any constitutional democracy, transformative dispute resolution has a key role to play in realising constitutional rights, and particularly also in offering people access to justice. Moreover, transformative dispute resolution sits well within the broader theme of transformative constitutionalism.

South Africa has shown its willingness to embrace mediation as one such form of transformative dispute resolution. The recent promulgation of rule 41A of the Uniform Court Rules now obligates parties to civil litigation to consider the possibility of resolving their dispute through mediation. This they must do prior to setting the case down for trial.[105] In our view, this development could potentially spark a change in the prevailing legal culture from an adversarial to a more accommodating approach to dispute resolution.

In addition, court-annexed mediation was introduced in South African lower courts in December 2014 by way of chapter 2 of the Magistrate's Court Rules.[106] This provides parties with an alternative to litigation in the form of voluntary mediation. Unfortunately, the Department of Justice and Constitutional Development has no official statistics available that demonstrate the success (or failure) of court-annexed mediation. As statistics offer tangible evidence of the results of legal transformation, it is hoped that such data would be gathered, analysed, and presented to the public. This will go a long way toward countering public resistance to mediation.

Other required steps for the full institutionalisation of mediation include the proper regulation of the mediation industry, setting national qualification standards for mediators, and, importantly, demonstrating to the South African public that dispute resolution does not need to be a battle.

103 Volpe and Bahn 1992 *Sociological Practice* 28.

104 Douglas and Batagol 2014 *Monash Univ LR* 758.

105 *Government Gazette* No 43000 of 7 February 2020.

106 *Government Gazette* No 37448 of 18 March 2014.