Family mediation in South Africa: Developments and recommendations

Amanda Elizabeth Boniface*

BLC LLM LLD
Senior Lecturer, University of Johannesburg

OPSOMMING

Gesinsbemiddeling in Suid-Afrika: Ontwikkelinge en aanbevelings

Die artikel handel oor die toekoms van gesinsbemiddeling in Suid-Afrika. ’n Omskrywing van en oorsig oor die beginsel van gesinsbemiddelaars in Suid-Afrika word verskaf. Die bepalings van die Kinderwet 38 van 2005 met betrekking tot bemiddeling word uiteengezet. Onlangs hofbeslissinge wat handel oor gesinsbemiddeling word kortliks verduidelik. Voorstelle word gemaak met betrekking tot gesinsbemiddeling in Suid-Afrika, soos dat daar sentrums vir bemiddeling gestig moet word wat verskeie rolle moet speel, byvoorbeeld as onderrig- en leersentrum vir bemiddelaars en ’n verskaffer van bekostigbare bemiddeling. Die sentrums kan byvoorbeeld verbonde wees aan regshulpklinieke en universiteite. Dit is noodsaaklik dat gesinsbemiddeling aanhou groei in Suid-Afrika en dat die behoeftes van alle Suid-Afrikaners in ag geneem word.

1 INTRODUCTION

This article provides an overview of the development in South African law of the concept “mediation” as well as recommendations regarding the future practising of family mediation in South Africa. A definition and an overview of the concept of mediation, and an explanation of what family mediators are, in South Africa will be provided. The provisions of the Children’s Act with regard to mediation as well as similar alternative dispute resolution mechanisms will be explained. Recent court decisions dealing with family mediation and the rules of court dealing with mediation will be discussed. A comparison between African-style mediation and Western-style mediation will be made. Thereafter, Family Relationship centres in Australia will be discussed. In conclusion, recommendations will be made with regard to family mediation in South Africa.

2 FAMILY MEDIATION

Family mediation is defined as

*a process in which the mediator, an impartial third party who has no decision-making power, facilitates the negotiations between disputing parties with the object of getting them

* Certificate in Advanced Divorce and Family Mediation, advocate of the High Court of South Africa, divorce and family mediator. This article was originally conceived whilst a senior lecturer on contract at the University of Pretoria in 2011, but researched and completed whilst a senior lecturer at the University of Johannesburg during 2013 and 2014.
1 Within the realms of family law.
2 As well as their qualifications.
3 Such as family group conferences.
back on speaking terms and helping them to reach a mutually satisfying settlement agreement that recognises the needs and rights of all family members. In an attempt to achieve this, the mediator uses specific techniques and strategies, such as empathic listening, power balancing or equalising, rephrasing or reframing, rephrasing, summarising, clarifying, prioritising, mutualising, neutralising, hypothesising, role reversal, option generation, and reality testing”.  

Mediation is not family therapy. The parties in mediation are regarded as being competent to make their own decisions and to define the issues that need to be dealt with. Mediation may result in there being less bitterness and conflict between the parties, but the primary purpose of mediation is to solve concrete problems.

The mediator does not have a personal interest in the dispute and the parties make their own decisions. The mediator does not have any power to impose a settlement on the parties. The role of the mediator is to facilitate communication between parties. The mediator clarifies and focuses on the parties’ own negotiations and assists them to find areas where they can agree or reach a compromise. Family mediation has many advantages; however, there are also limitations or disadvantages. The article will not deal with these aspects of family mediation.

Divorce and family mediation in South Africa is based mainly on the British and American models. Alternative dispute resolution has become more commonly practised in South Africa since the 1980s and 1990s. Private family mediators are mainly attorneys, psychologists or social workers who have at least forty hours of training in family mediation. These mediators charge professional fees for the services they offer and may work either individually or

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5 Mediators give the parties an opportunity to vent their emotions, but then manage any conflict that results in order to proceed with reaching a settlement. In comparison, therapists explore the conflict between the parties in order for the parties to understand themselves better: Singer Settling disputes (1990) 40.
7 Unlike an arbitrator.
8 Roberts 4.
9 There must be a willingness to co-operate by the parties. The parties must at least be willing to try to mediate. Additionally, the parties must be competent to reach their own decisions and there must be an equality of bargaining power: Roberts 7.
10 The main objectives of a mediator are to re-establish contact between parties; to provide a safe and neutral forum where parties may meet face to face; to provide within that forum an impartial presence supportive of negotiation; to facilitate the exchange of information between the parties within a structured framework; to help the parties to examine their common interests and objectives, and the possibilities for reaching agreements that are practicable, acceptable and beneficial to themselves and their children: Roberts 6.
11 Van Zyl Divorce mediation and the best interests of the child (1997) 142 143.
12 The South African Association of Mediators (SAAM), founded in 1988, was the first organisation in South Africa that dealt exclusively with divorce and family mediation. Other associations include the Family Mediator’s Association of the Cape (FAMAC) and the Arbitration Foundation of Southern Africa.
13 In future, all mediators will need to be accredited by the national regulatory body (NABFAM): De Jong “A pragmatic look at mediation as an alternative to divorce litigation” 2010 TSAR 515 528.
in a team. Most South Africans cannot afford private mediators and often this is an under-utilised service. The Family Advocate’s office in Cape Town offers mediation services in conjunction with the Family Mediator’s Association of the Cape (FAMAC). There are also community mediation services, such as Family Life and FAMSA, that offer mediation services either for free or at minimal cost for the poorer sections of the population.

3 COURT DECISIONS

Prior to the coming into effect of the Children’s Act, mediation was ordered by the court in a number of South African decisions, for example, in Van Den Berg v Le Roux; G v G and Townsend-Turner v Morrow. Subsequent to the commencement of the Children’s Act, the courts have indicated that matters must first be mediated before coming to court. In Brownlee v Brownlee it was stipulated that the parties have a duty to attempt to mediate their dispute and that there is an obligation on opposing attorneys to encourage mediation with their clients before litigation begins. In Van den Berg v Le Roux there was a dispute regarding the care of a girl aged 10. The parties were ordered by Kgomo J to privately mediate all future disputes with regards to their daughter, and the parties could only approach the court again after the conclusion of the mediation process. In Townsend-Turner v Morrow a full bench of the High Court ordered the parties who were disagreeing regarding contact with the child, to attend mediation. According to a decision reached in MB v NB parties have a duty to at least attempt to mediate their dispute and there is an obligation on opposing attorneys to encourage their clients to mediate before litigation begins. In S v J an appeal was instituted against an order made by the Cape High Court regarding the care and guardianship of a child whose parents were not married at the time of the child’s birth, but were living together. The maternal grandmother and maternal step-grandfather were engaged in a five

14 Ibid.
15 De Jong “Judicial stamp of approval for divorce and family mediation in South Africa” 2005 THRHR 95.
16 Ibid.
17 The Family and Marriage Association of South Africa.
18 [2003] 3 All SA 599 (NC): A dispute regarding custody of daughter of the parties; parties were ordered to undergo mediation in any further disputes and could only approach the court again after the conclusion of the mediation process.
19 2003 5 SA 396 (ZH): The court held that there was greater satisfaction between parties when mediation was used instead of the traditional adversarial approach.
20 [2004] 1 All SA 235(C): The parties, the father of a 7 year old boy and the boy’s maternal grandmother, disagreed regarding contact between the grandmother and the boy and were ordered to attend mediation.
21 2010 3 SA 220 (GSJ).
22 In this case, the fees of the attorneys on both sides were capped as they had not advised their clients to go for mediation at an early stage. Each party, therefore, had to bear their own costs (usually the unsuccessful litigant pays the cost of the successful one).
23 [2003] 3 All SA 599 (NC).
24 Then referred to as custody.
25 [2004] 1 All SA 235 (C).
26 See fn 20.
27 2010 3 SA 220 (GSJ).
28 2010 ZASCA 139.
year-long battle with the father of the child regarding the care and residence of the child. Lewis JA endorsed the views expressed in *MB v NB*, “that mediation in family matters is a useful way of avoiding protracted and expensive legal battles and that litigation should not necessarily be a first resort”, and that legal practitioners should heed section 6(4) of the Children’s Act which provides that, in matters concerning children, an approach “conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided”. The court ordered that the child should reside with her father and that her maternal grandmother and step-grandfather may have contact with her on a regular basis. The court also stipulated that, in the event that the parties experience difficulty in arranging contact, they must first attempt to resolve this through a mediator rather than through court proceedings.

4 PROVISIONS OF THE CHILDREN’S ACT

4.1 Mediation

The Children’s Act includes mediation as a method of dispute resolution. According to section 21(1), if there is a dispute as to whether an unmarried father has fulfilled the conditions specified in section 21(1), then the matter must be referred to mediation. Section 21(3) stipulates that such mediation must be done by a family advocate, social service professional, or other suitably qualified person. Section 33(2) of the Act states that where such co-holders of parental rights and responsibilities “are experiencing difficulties in exercising their responsibilities and rights, those parents must, before seeking the intervention of a court, first seek to agree on a parenting plan determining the exercise of their respective rights and responsibilities”. This section does not compel parties to agree on a parenting plan, but does instruct parties to at least try to agree by first going to mediation before seeking the intervention of the court. Section 33(5) provides that parties must first seek the assistance of a family advocate, social worker or psychologist in preparing the parenting plan. The regulations of the Children’s Act contain a certificate of non-attendance of mediation, or of an attempt to reach an agreement in a parenting plan. The Children’s Act also provides for non-compulsory mediation. Section 33(5) states that parties may seek mediation when preparing a parenting plan.

4.2 Other alternative dispute resolution mechanisms

Section 49 provides that before a Children’s Court decides a matter, the court may order that a lay forum hearing be held in order to try and settle the matter. This may include mediation by a family advocate, social worker, social service

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29 To be arranged via a third party, the step-mother’s mother.
professional or other suitably qualified person; or a family group conference; or mediation to a lay-forum, including a traditional authority. Section 71 specifies that the court may appoint a suitably qualified person or organisation to facilitate the family group conference. The aim of the family group conference is to find solutions for any problem involving the child. A family group conference includes the parties involved in the matter and any other family members of the child.

5 MEDIATION RULES OF COURT

The Draft Mediation Rules of Court 2011 would have applied to the high courts and the magistrates' courts. The amendment of Rules Regulating the Conduct of Proceedings of the Magistrates’ Courts of South Africa was finalised and published in the Government Gazette on 18 March 2014. The purpose of these rules is to regulate the referral of opposed matters to mediation and the conduct of such mediation. The essential characteristics of mediation are stressed in the rules. Rule 71 states the main purposes of mediation, which are, inter alia, to promote access to justice, promote restorative justice and to preserve relationships between litigants. The rules stress the neutral and facilitative role of the mediator and the confidential nature of the mediation process.

The draft rules provided for the mandatory referral of disputes to mediation whenever an appearance to defend is entered into in action proceedings, or a notice of intention to oppose is delivered in application proceedings. The finalised rules provide in rule 72 for the “voluntary submission of civil disputes to mediation in selected courts”. Rule 74 provides for the voluntary submission of parties to mediation of disputes prior to the commencement of litigation and disputes where litigation has already commenced. Rule 78 provides that the parties may request referral to mediation and rule 79 states that the court may “enquire into the possibility of mediation and accord the parties and opportunity to refer the dispute to the clerk or registrar of the court to facilitate mediation”. Rule 86 stipulates that the qualifications of mediators who may mediate under these rules will be determined by the Minister and that a schedule of mediators will be provided. The rules also provide mediation forms, for example, an application for referral to mediation form in Annexure 3.

In essence, the rules provide only for voluntary mediation at the magistrates’ courts. The parties, themselves, are liable in equal measure to pay the fees of the mediator. Rule 84 states that this is the case, except where a mediator is providing their services free of charge or if one of the parties offers to pay the mediator’s fee in full.

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34 These are proceedings that start with a summons being issued.
6 COMPARISON BETWEEN AFRICAN-STYLE MEDIATION AND WESTERN-STYLE FAMILY MEDIATION

According to Faris, Western mediation has discarded its original social context and has been re-engineered to suit the needs of industrialised urban societies.\(^{35}\) In South Africa, Western mediation is a service profession and such mediation usually takes place in a formal setting, where the mediator usually has no former relationship with the parties. The objective of Western mediation is to reach consensus which gives rise to a settlement agreement.

In African group mediation, there is a tradition of family mediation that is facilitated by elders. Ubuntu-style values are found in African-style mediation as the restoration of harmony\(^{36}\) is more important than stating the rule of law and the essence of resolving a dispute is reconciliation. The nature of the proceedings is informal and flexible and this allows participants to feel that justice has been done and leads to social harmony.\(^{37}\) Peace is seen as a communal matter, so reconciliation involves all the parties concerned.

The objective of African group mediation is to restore social equilibrium. Disputes are seen as having an effect on the order of the group. The basis on which disputes are settled is reconciliation instead of retribution. In African culture, mediation is compulsory when a family problem occurs. Conflicts are not seen as isolated events but instead are seen as occurring within their social context. All relevant background information is used during mediation. According to Murithi,\(^{38}\) “the Lekgotla/Inkundla is a group or public mediation forum” in which disputants, their family members, witnesses and members of the public take part. The elders and the headman or chief conduct the mediation, provide the forum and listen. All present at the forum may ask questions and make suggestions about how to resolve the dispute. The elders guide the process. The elders also have investigative functions and advise the headman or chief. The elders do not have formal mediation qualifications. The elders have a reputation as persons in the community with wisdom and integrity, who understand the traditions and culture of their people. The elders are appointed on the basis of their “notable status” in the community.\(^{39}\)

In African society, mediators function in different roles: for example, they make recommendations, give assessments, convey suggestions on behalf of a party, clarify information, interpret a standpoint and may even play a passive role where they are present to represent shared values.

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\(^{35}\) Faris “From alternative dispute resolution to African dispute resolution: Towards a new vision” unpublished paper delivered at the 5th Caribbean conference on disputes 28–30 April 2011, Jamaica.


\(^{37}\) Dlamini “The role of customary law in meeting societal needs” 1991 Acta Juridica 71 84.


\(^{39}\) Obarrio “Traditional justice as the rule of law in Africa: An anthropological perspective” in Siriam, Martin-Ortega and Herman (eds) Peace building and the rule of law in Africa: Just peace (2011) 23–43.
African-style mediation emphasises co-operation and problem-solving as well as the essential unity of humanity. It also gives a sense of shared destiny and provides a value system to give and receive forgiveness and this helps to renew social trust. African-style mediation helps maintain social harmony and emphasises the mending of relationships and reconciliation of groups. The process is less intimidating than Western-style courts and disagreements can be heard quickly. Only serious cases go to the traditional courts. This conflict-resolution procedure is seen as an event in the continuum of social life.

7 CAN AFRICAN-STYLE MEDIATION IMPROVE THE WAY IN WHICH WESTERN-STYLE FAMILY MEDIATION IS PRACTISED?

According to Skelton, in South Africa we can benefit from a unique model which would unlock the conflict-resolution skills which exist in communities and merge them with the realities of life in South Africa.

Neither Western knowledge nor African knowledge should be rejected. Faris recommends that Western knowledge systems should be deconstructed and indigenous knowledge introduced. Western knowledge can be brought into a complementary relationship with indigenous knowledge. In essence, a combination of transformative and family-inclusive mediation, together with the inclusion of Ubuntu-style values could be practised. The emphasis of mediation should be on a restorative outcome that benefits the whole community. Faris suggests that Lekgotla/Inkundla may be remodelled in a modern setting as a circle for use in family mediation. The mediator could conduct the circle according to either a Western standard of mediation or an intra-cultural style of mediation. Narrative mediation and transformative mediation allow an opportunity for healing and are found in both African-style and Western-style mediation. Mediators should share the journey to healing with the parties. The extended family can be included in mediation, for example, two “elders” from either side of the family can play the role of go-betweens or intermediaries if this complies with the beliefs of the parties. It has been suggested that the social context should be part of the broader mediation process and could include visits to the parties’ homes and that mediators may become more personally involved with the parties than is usual in Western-style mediation. Agreements should go further than just solving the problem and should offer genuine conciliation and, where necessary, restitution. Parties should be supported and encouraged as they go through the process of peace-making.

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42 Boniface 2012 PELJ 378/638.
44 Boniface 2012 PER 378/638.
45 Brigg “Mediation, power and cultural difference” 2003 CRQ 287–306.
46 See further, Malan Conflict resolution: Wisdom from Africa (1997).
8 FAMILY RELATIONSHIP CENTRES IN AUSTRALIA

In Australia, the importance of early intervention strategies in family matters has been recognised. In 2004, the Australian government published a “Framework statement on reforms to the family law system”. The suggested reforms included the establishment of a network of Family Relationship Centres in Australia, as well as changes to the law and the expansion of other services. The final package of reforms was part of Australia’s Federal Budget in May 2005. The three key roles of Family Relationship Centres were identified as being the provision of information, advice and dispute resolution, as well as a doorway to other services.

Family Relationship Centres in Australia are sources of assistance for families. They provide information, referral services, group programs and sessions for separating parents, counselling, support for children after separation and help parents with post-separation co-operative parenting services. Often, counselling and relationship programs are not provided directly by the Family Relationship Centres, but families are referred to other service providers. Programmes for community development and the development of skills as well as educational programmes may also be presented. Additionally, a family relationship advice line is available, as well as a family relationship online website, established in 2006.

These centres focus on mediation and assist families who are separating to “achieve workable parenting arrangements outside the court system”. The services are offered on a sliding pay scale. Communications are confidential during family dispute resolution, unless children need to be protected from risk of harm or child abuse needs to be reported. Quality-control of the centres started with the selection of service providers who applied for funding for a Family Relationship Centre. The next step was to provide training. Each year, staff training was provided for the Family Relationship Centres as they opened. In order to ensure that the centres were accessible, locations were chosen that were close to transport hubs or shopping centres.

All persons wanting to apply for a parenting order in Australia must first attend family dispute resolution. Mediation offered at Family Relationship Centres fulfils the requirement of such attendance. In Australia, the coming into being of Family Relationship Centres, as well as other expanded services, required the combined efforts of the government as well as the non-governmental service sector. Family Relationship Centres are still evolving.

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48 Parkinson “Keeping in contact, the role of Family Relationship Centres in Australia” 2006 Child and Family LQ 157.
49 Pidgeon “From policy to implementation how Family Relationship Centres become a reality” 2013 Family Court R 224–233.
50 Ibid.
51 Pidgeon (2013) 224–233. Pidgeon clearly states that the Family Relationship Centres are “not a one-stop-shop”.
53 Ibid.
54 Excluding urgent matters or where there is a risk of family violence or child abuse.
55 Parkinson (2006) 157. See further, Moloney “From helping court to community-based services: The 20-year evolution of Australia’s Family Relationship Centres” April 2013 Family Court R 214–233 for the history behind the establishment of these centres.
Robinson\textsuperscript{56} states that the emergence of Family Relationship Centres shows that disputes about parenting after parental separation must not be seen merely as a legal problem requiring the intervention of lawyers and the court.

9 \textbf{RECOMMENDATIONS}

There is a need for a gradual phasing in of mediation centres in South Africa and pilot projects should be launched. Robinson\textsuperscript{57} has emphatically stated that mediation that is court-ordered or court annexed “still places lawyers and courts in the centre of the process of determining issues about post-separation parenting”, whereas Family Relationship Centres shift the focus away from the law as being the first line of remedy. In order to aid this process of establishing mediation centres and in order to make it accessible to all, family mediation centres could be established at centres such as universities and legal aid clinics. We could use the provisions of the Children’s Act 38 of 2005, in particular, sections 60(3) and 69 to 72, for the introduction of Family Relationship Centres.\textsuperscript{58} These centres could also have offices or helpdesks situated at or near the courts.\textsuperscript{59} Professionals from various fields, including lawyers, psychologists, social workers and mediators need to be involved at these centres. This could take place in the form of voluntary work for a few hours a month, or on a full- or part-time basis. Such staff would need to have a family law and mediation background and be able to make contact with other role players to assist with mediation as necessary, such as mediators with a psychology or social work background. Family Relationship Centres offer possibilities conducive to empowering families to heal themselves or to deal with their disputes in a peaceable manner.\textsuperscript{60} These centres could provide an ideal training environment for future mediators\textsuperscript{61} and practical training at these centres could form part of the accreditation criteria for future mediators in South Africa.

These centres could fulfil the following roles:

- a training centre for new mediators, with real clients referred by the courts or law clinics;
- a free or very affordable mediation centre for lower income groups;\textsuperscript{62}
- a mediation centre for higher income groups who decide to go to the centre instead of a private mediator: in such an instance a fee can be charged on a sliding scale;\textsuperscript{63}
- a learning and volunteer centre for existing mediators;

\textsuperscript{56} Robinson “Family Relationship Centres — Australian lessons for South Africa” Paper presented at International Conference in Riga Latvia, September 2013.

\textsuperscript{57} Idem. Robinson also states that often difficulties related to parenting are relationship problems.

\textsuperscript{58} Ibid.

\textsuperscript{59} Family Relationship Centres are community-centric, offer holistic services to families and are a gateway for other services for parents and families: \textit{ibid.}

\textsuperscript{60} Ibid.

\textsuperscript{61} As well as social workers and family advocates.

\textsuperscript{62} De Jong (2005) 95 recommends an expansion of qualified mediators “who offer free or inexpensive services, are required if mediation is to fulfil the role it should play in family law in the future”.

\textsuperscript{63} Based on income. Such fee could then contribute towards running the centre.
– an information and education centre;\textsuperscript{64} and
– a service provider for private mediators.\textsuperscript{65}

Funding would need to be obtained for these centres. It is suggested that this could be in the form of a government grant, particularly in the initial phases of the project; as well as in the form of funds received from clients and funds received from training programs offered by the centre. Such centres can be linked to already-existing institutions, such as legal aid clinics and universities. These centres would need time to grow and this growth should be timed with the implementation of compulsory mediation.

Additionally, elements of African group mediation could be included in both private family mediation and court-mandated mediation, depending on the needs of the parties; and this can positively change the way in which mediation is practised in South Africa. Thus, these centres could fulfil functions in addition to court-based mediation and will serve to direct parties away from the court environment whilst fulfilling their needs for mediation and auxiliary services such as counselling. The mediation conducted at these centres will be a more collaborative process than that offered by court-based mediation.

\textbf{10 CONCLUSION}

It is clear that the concept of family mediation has developed in South African law from a point where mediation seldom occurred in family matters to where it is mandatory to mediate in certain instances, for example, where stipulated in the Children’s Act, and where it is encouraged in other instances. It is essential that family mediation services continue to grow in South Africa. The co-operation of all role players is essential in this process. In order to assist in this growth, such services should be made available to the entire South African population and more community mediation centres need to be developed in order to meet the future family mediation needs of South Africans.

\textsuperscript{64} Providing information on mediation to the public, educating the public about mediation, as well as providing contact details of mediators and mediation organisations to members of the public.

\textsuperscript{65} Such as mediation rooms and mediation resources, possibly available at a small fee for members who pay a membership fee or who do volunteer work at the centre.