Reflections on the role of mediation at the 'junior Bar'

Shaun Fergus, Cape Bar

DURING the September recess last year I attended a five-day commercial mediation training course at the University of Cape Town, run through its Law@Work project. The course was conducted by Alan Nelson SC and Jacques Joubert, both former members of the Cape Bar and the founding members of Mediation in Motion. The Cape Bar was in fact well represented at the course across all categories of seniority, with Hansie Botha SC, Sven Olivier SC, Hanri Loots and Claire Cawood making up the contingent. While we probably each had our own expectations, I think we would all describe it as an eye-opening experience.

Reflecting on the nature of my practice as I pass the relative milestone of five years at the Cape Bar, it occurs to me that apart from the benefits that it offers to litigants (and would-be litigants) in the form of a cost-effective means to resolve disputes, mediation could play a useful role in assisting junior advocates (and in particular members of the Bar in the 0 to 5 years level of seniority) in starting their practices and gaining useful insight into, and experience in, disputes arising in a commercial setting. In this manner it could also assist in some way towards the transformation of the Bar. Looking back on my own experience as well as the perceived experience of my colleagues with whom I started practice, I share some thoughts on both the role mediation can play in the types of matters in which juniors are typically briefed as well as the role it could play in developing a practice at the Bar.

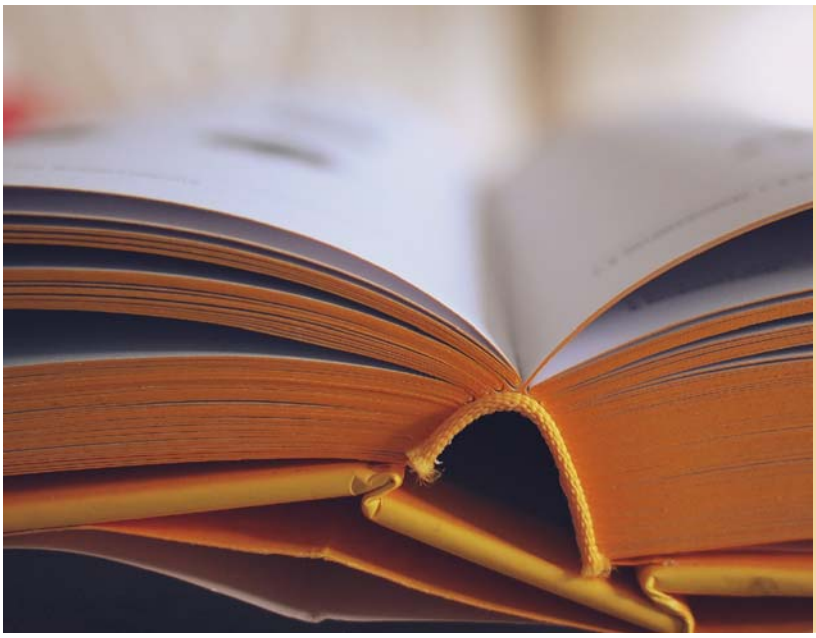
Practising as an advocate at the Bar is a notoriously difficult market to break into, with a number of barriers to entry. The year-long period of pupillage although rigorous, is financially taxing and even if one is briefed on the first day in chambers, one can only reasonably expect to receive the fees for that first instruction some two months in the future. It can also be emotionally stressful to sit in chambers day in and day out waiting for the telephone to ring while one's floor dues and rental accumulates. Quite easily, one year of unpaid pupillage can turn into 18 months without income. In order to join the Bar and persevere long enough to give oneself a reasonable chance of establishing oneself, one needs some form of significant financial support. This of course tends disproportionately to prevent a greater number of previously disadvantaged candidates from joining the Bar. Even if one is able to make it through those early years, the Bar is highly competitive and it can be difficult to gain good experience in commercial matters.

First, how could mediation be useful in the types of matters that juniors are typically briefed in? It must be fair to say that two primary considerations for an attorney briefing a junior advocate just starting practice, whose hourly rates quite often may be lower than the attorney's, are the complexity and/or quantum of the matter, and the cost-sensitivity of the client. In general, if the matter is particularly complex, the amount at stake is large or the client has bottomless pockets, an attorney would probably instruct a junior counsel of longer standing. The typical Magistrates' Court trial that a junior advocate would be briefed in, where the quantum is just below or just above Magistrates' Court threshold (be it an MVA, a lease dispute or a claim for the cost of goods sold or services rendered) is an ideal matter for mediation.

Most junior advocates starting out would typically charge between R600 and R700 per hour and would reserve a day for running the trial. Conservatively therefore, it would cost in the region of R8 000 to R10 000 as a minimum for a junior counsel to consult, prepare for and run a basic Magistrates' Court trial. This assumes that the trial actually runs on the day it is set down for and is not postponed or left only part-heard. This is in addition to the attorney's fees in the matter. As the quantum decreases and approaches the limit of the Small Claims Court's monetary jurisdiction, it becomes less and less feasible to brief counsel (or an attorney for that matter) to run a trial in the Magistrates' Court.

A litigant could rather spend R6 000 or R7 000 (or half of that if they could get the other party to agree to split the cost) on a mediator's fees.[1] The potential savings in legal costs are self-evident. While some clients may be reluctant to spend any costs that would be additional or wasted if the mediation is unsuccessful and litigation in the matter is ultimately pursued, these clients need only be referred to the international statistics on settlement in mediation. If these are to be believed, a settlement rate of 90%, with 70% settling on the first day, means that the decision to try mediation in these types of matters should be an obvious one.

JUNIOR ADVOCATES are also often briefed in High Court trials where the quantum is not much above the monetary jurisdiction of the Magistrates' Court or Regional Court. Many of these matters are crowded out and a Judge is not allocated to hear the matter. As a result, counsel is often left to explain to his or her instructing attorney that the Judge President has directed the parties to try and settle. Indeed, many of these matters are readily capable of settlement given the correct encouragement. This happens the day before the trial is set down to run. By then, most of counsel's preparation has been done and counsel is entitled to charge a collapse fee for the



It is unclear at this stage whether the potential benefits that mediation offers as a dispute resolution mechanism will be realised and in what manner. There seems still to be a pervading prejudice against mediation and perhaps a fear that it will reduce the amount of work available for counsel.

day reserved for trial. How many costs could potentially be saved if, even a few weeks before the trial, the parties attempt mediation? The case for spending a little bit of money upfront to attempt mediation only becomes more compelling from a cost-benefit point of view as the quantum increases. This also applies equally to matters to which a Judge is allocated, with the vast majority of matters settling 'on the steps of court'.

This raises the question of the role junior members of the Bar could play in providing mediation services. One of the best ways for a junior advocate starting practice to get exposure and begin to establish him or herself, is to be available and in chambers when an attorney calls. It can be particularly trying to sit and wait for a new brief, but this is something advocates starting out at the Bar have always had to do. In the past, the acceptance of *pro deo* criminal trials helped pay the bills and provide valuable trial experience. This service is now run by Legal Aid SA and, while this remains a good source of trial experience for junior advocates starting at the Bar, they have to compete for these instructions with an ever-increasing number of independent advocates, as well as attorneys. Further, very little commercial litigation experience is gained from doing primarily criminal trials.

THEREFORE junior counsel in their first few years at the Bar offer a source of readily available potential mediators for the kinds of matters referred to above. As the mediator does not need much advance warning in order to prepare for the mediation, counsel who is advised by the Judge President's registrar that the parties should settle could suggest to his or her attorney that the parties agree to refer the matter to mediation and suggest three or four junior counsel who could act as the mediator. Once the parties have agreed and a mediator is chosen and instructed, he or she could simply peruse the pleadings[2] and the mediation could be held the very next day (i.e. on the day that the matter was set down for trial). Alternatively, the matter could be referred to mediation before the trial (with the approaching trial date serving as a useful motivation to the parties to settle).

Not only would this be a potential source of fees for juniors starting out but it would also expose them to new attorneys and potential further instructions from these attorneys. Perhaps more importantly, it would give them valuable insight into commercial matters which they might otherwise not have had an opportunity to gain. This will assist them in confidently advising their own clients and running their own commercial matters.

The potential downside is that juniors would not be getting litigation experience in the strict sense which is ultimately counsel's specialisation. This must however be seen both in the context of the move towards mediation and other alternative dispute resolution mechanisms and the fact that the juniors might otherwise still be sitting waiting for the telephone to ring. A reality check if you will.

This will require junior members to complete a mediation course which is likely to be an additional expense that a struggling new member of the Bar can ill-afford. One possible solution would be for the Bar Council to consider offering an optional mediation course at a subsidised rate as a component of the pupillage advocacy training programme. Corporate sponsors such as the publishing houses, who already support transformation initiatives within the pupillage programme by offering financial assistance, could also be approached.

It is unclear at this stage whether the potential benefits that mediation offers as a dispute resolution mechanism will be realised and in what manner. There seems still to be a pervading prejudice against mediation and perhaps a fear that it will reduce the amount of work available for counsel. This will have to be overcome. However it is possible that mediation could play a useful role in the development of a junior advocate's practice while at the same time offering an efficient and cost-effective alternative to litigation. A

Endnotes

1 Assuming that a junior advocate acting as a mediator would charge his or her day fee for doing so.

2 Which would perform the function of a pre-mediation statement.