

OPPORTUNITIES FOR MEDIATION IN THE NEW CHILDREN'S ACT;

Introduction

Besides the fact that the new Children's Act 38 of 2005 in general underpins the importance of a conciliatory and non-confrontational approach to the settlement of child-centred disputes, it very specifically refers to mediation as an appropriate means of dispute resolution. In some instances the Act expressly mandates mediation and in certain other instances the Act grants the court the discretion to order mediation. There are also several provisions in the Children's Act which do not specifically mention mediation, but where mediation, in my opinion, is definitely implied if the general provisions of the Act regarding procedural matters are to be taken seriously.

Provisions that mandate mediation directly:

In two instances the Children's Act provides for the mandatory referral of child-centred disputes to mediation. The first one is to be found in section 21 of the Act, which deals with the parental responsibilities and rights of unmarried fathers and the second in section 33, which deals with parenting plans.

Section 21(3)(a), which came into operation on 1 July 2007, provides that if there is a dispute between a child's unmarried biological parents as to whether the father meets certain requirements for acquiring full parental responsibilities and rights, the dispute must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person. In the same way, section 33(2) read with section 33(5) determines that the co-holders of parental responsibilities and rights in respect of a child, who are experiencing difficulties in exercising their responsibilities and rights, must first seek to agree on a parenting plan by attending mediation through a social worker or other suitably qualified person, or by obtaining the assistance of a family advocate, social worker or psychologist.

It is apparent from both sections 21 and 33 that parties may not approach the court as a first resort for the resolution of their disputes. They must first attend mediation through a family advocate, social worker, social service professional or other suitably qualified person or, in the case of section 33, obtain the assistance of a family

advocate or other social welfare officer. As it is one of the functions of the family advocate in practice to mediate, I believe that when the assistance of a family advocate is sought, he or she would in any case try to mediate the dispute between the parties as a matter of course. When the assistance of a social worker or psychologist is sought, they would in all probability also try to mediate the dispute between the parties or possibly just try to give the parties some advice. The objective of sections 21 and 33 is nevertheless clear – the parties need the intervention of a mediator or neutral third party to assist them in solving their disputes privately and informally.

If the mediation or intervention by a neutral third party is successful and the parties reach an agreement either on whether the unmarried father qualifies for full parental responsibilities and rights or on an appropriate parenting plan, the agreement may be subjected to judicial approval or review. In this regard section 21(3)(b) provides that any party to the mediation may have the outcome of the mediation reviewed by a court and section 34(1)(b) determines that a parenting plan may be registered with a family advocate or made an order of court. Section 34(3) further provides that when an application for the registration of a parenting plan or the incorporation of such a plan into a court order is made, the application must be accompanied, *inter alia*, by a statement by a family advocate, social worker or psychologist to the effect that the parenting plan was prepared after consultation with him or her, or by a social worker or other appropriate person to the effect that the plan was prepared after mediation by him or her.

If the mediation or intervention by a neutral third party is unsuccessful, the parties will probably also need some kind of proof that they have indeed attended mediation or consulted a family advocate or other social welfare officer, before they can approach the court with their dispute. It is submitted that the mediator or other designated intermediary should, by regulation, be required to issue a certificate to the parties after an attempt to mediate a dispute has failed to the effect that the attendees made a genuine effort to resolve the issues in question or that attendance of mediation was inappropriate in the circumstances. Although mediators should generally not comment upon the extent to which parties participated in the mediation process, the fact that a party flatly refused to participate in the mediation process or abused the mediation process should be recorded. For the purposes of this

certificate, it would be very useful if a prescribed form could be provided in the regulations to the Children's Act, for completion by the mediator in each case.

Provisions that grant the court the discretion to order mediation

There are also a few instances where mediation is mandatory in the discretion of the children's court. The first two concern lay-forum hearings as contemplated by sections 49, 70 and 71 and pre-hearing conferences in terms of section 69. In terms of these sections the children's court may order the parties to attend lay-forum hearings or pre-hearing conferences to enable them to settle matters by way of mediation out of court. The mediation can be provided by family advocates, social workers, social service professionals, other suitably qualified persons or even traditional authorities.

With regard to these lay-forum hearing and pre-hearing conferences, the children's court may prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such hearing or conference which ought to be brought to the notice of the court. The fact that the mediator might have to record any fact which ought to be brought to the notice of the court in addition to any agreement or settlement reached, may however inhibit parties from being completely honest during these proceedings. They might try to conceal certain relevant facts in order to make a good impression on the mediator so that nothing negative about them might be reported to the children's court.

Any agreement or settlement reached will, once again, be subjected to judicial review as the records kept at lay-forum hearings and pre-hearing conferences will be considered by the court when the matter is heard.

If no agreement or settlement is reached at these proceedings, the parties will probably, once again, need some kind of proof that they have indeed attended the lay-forum hearing or pre-hearing conference, before proceedings in the children's court can be resumed. Here, I would like to repeat my previous proposal that the mediator should be required to issue a certificate to the parties to the effect that they made a genuine effort to resolve the issues in question, but with no success.

The third instance where it might also be argued that mediation is mandatory in the discretion of the children's court relates to children who are brought to the children's

court after a designated social worker has found them to be in need of care and protection, but the court finds that they are not in such need. Under these circumstances the children's court may, in terms of section 155(8)(b), make an order for early intervention services in terms of the Act. According to Adv Ronel Van Zyl, one of the drafters of the Children's Act, such intervention services include mediation.

Provisions in the Children's Act where mediation is implied

Several provisions in the Children's Act encourage parties to try to reach an agreement on certain issues. For instance, in terms of section 22(1) the mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement with either the unmarried father of the child who does not already have parental responsibilities and rights or another person who has an interest in the child's care, well-being and development in order to confer upon such father or other person the parental responsibilities and rights specified in the agreement. Likewise, section 30(3) determines that a co-holder of parental responsibilities and rights may enter into an agreement with the other co-holder of parental responsibilities and rights to allow such other co-holder or another person to exercise specified parental responsibilities and rights on the co-holder's behalf. Furthermore, section 234(1) provides that the parent or guardian of a child may, before an application for the adoption of a child is made, enter into a post-adoption agreement with a prospective adoptive parent of that child to provide for communication between the child and the parent or guardian and the provision of information about the child after the application for the adoption is granted. Lastly, section 292 read with sections 293 and 295 requires that a surrogate mother and her husband or partner and the commissioning parents or the commissioning parent and his or her spouse or partner may enter into a surrogate motherhood agreement to provide for matters not regulated by the Act.

Although no mention is made of mediation in these sections, mediation can surely play a vital role in facilitating negotiations between the parties in these matters.

Sanctions against resisting parties and parties who are not willing to mediate in good faith

Parties who are not desirous of mediation, but are ordered to participate, should still act ethically. This means that parties must participate in mediation in good faith and must disclose all relevant documentation and information honestly and candidly. If a party refuses to participate in the mediation process, or does not participate in good faith, or abuses the mediation process, the *bona fide* party should be able to request that the *mala fide* party be penalised by the court at the hearing of the case. The court can do this by applying any one of the following three possible sanctions:

- (i) The most usual sanction against a resisting party or a party not acting in good faith in the mediation process is an order as to costs. In terms of this order, a court can recommend at the hearing of the case that the *mala fide* party pays all legal costs as well as mediation costs. Although the children's court does not have the power to make costs orders in terms of the Child Care Act 74 of 1983, section 48(1)(d) of the Children's Act specifically empowers the children's court to make appropriate orders as to costs in matters before the court. When this section comes into operation, parties will hopefully be discouraged from refusing to participate in mediation or from acting *mala fide* in the mediation process.
- (ii) Strictly speaking, where parties are required in terms of legislation to go for mediation, as in terms of sections 21 and 33, they cannot be found guilty of contempt of court if they refuse to observe the legislative provisions. However, nothing prevents legislation that expressly makes mediation mandatory from determining that a party who refuses or neglects to participate in mediation, or who acts unreasonably or dishonestly during the mediation process, is guilty of an offence and punishable with a fine of a specific amount. Where the mediation takes place pursuant to court orders^{aZ} in terms of sections 49, 69, 70 and 71, there is no reason why a *mala fide* party cannot be found guilty of contempt of court and be penalised with a fine or even imprisonment.
- (iii) In both Australia and New Zealand, the family courts have the authority to postpone or adjourn court proceedings to allow the parties to seek mediation. There, a resisting party who is hampering the mediation process runs the risk of having the court suspend the hearing of a case until the mediation process has run its course. This should also be the case in South Africa. It is therefore

significant that section 64(1) of the Children's Act authorises the children's court to adjourn proceedings for a period of up to 30 days. Currently, section 14(3) of the Child Care Act only allows inquiries to be postponed for 14 days at a time.

Who should be providing the mandatory mediation services

Except for section 69, which leaves it up to the court to decide who should provide mediation at pre-hearing conferences, all the other sections of the Children's Act that either mandate mediation or grant the court the discretion to order mediation give a definite indication as to who should provide mediation. In terms of these sections mediation can be provided by a family advocate, a social worker, a social service professional, another suitably qualified person or organisation or a lay forum, which includes a traditional authority. A suitably qualified person would probably be someone who is not a family advocate, a social worker or a social service professional, but who has a degree, diploma or other qualification from a university or other tertiary institution and has undergone specific training in mediation. A suitably qualified person could, for example, be a lawyer who also completed an approved training programme in family mediation of at least forty classroom hours. A traditional authority would include community-based and non-governmental organisations or institutions such as street committees, community courts, community-based advice centres and traditional leaders. It is therefore clear that in terms of the Children's Act mediation may be offered in the public and the private sector and at community level.

As South Africa is often classified as a third world country, the government does not have the financial capacity to offer large-scale and country-wide mediation services through the office of the family advocate or the social development department. Any extra burden on the family advocate, whose present operations are already being seriously hampered by a lack of funds and human resources, would therefore prove to be unbearable. Consequently, it is my submission that where the Children's Act does not explicitly stipulate that a government official should perform the mediation, mandatory mediations in terms of the Act should preferably be referred to existing community-based and private mediation organisations or institutions. This would be a relatively cheap option for the state since these services are, to a large extent,

already available countrywide. However, as most of the mediation services at community level are currently also hampered by a lack of funds and human resources, the state will have to provide funding to these organisations or institutions in one form or another. To overcome this problem and/or to alleviate this burden on the state it might be a good idea to first refer parties to private mediation for which they would be expected to pay themselves. However, if financial, cultural or other logistical considerations (such as distance or language barriers) justify this, parties could be referred to state-subsidised community mediation services.

Conclusion

When the whole of the Children's Act comes into operation, mediation, whether mandatory, in the discretion of the court, or voluntary upon the request of the parties, will play an ever-increasing role in the resolution of child-centred disputes. Proper and comprehensive mediation services should therefore be available country-wide to everyone. These services must be representative of all ethnic and cultural groups, all religions, all age groups and all socioeconomic levels. It is also vital that all public and private mediators, and preferably also community-based mediators, should undergo the necessary training, including ongoing training.

In order to ensure mediation services of the highest standard and to protect the relevant parties as well as the mediator, it is further essential that uniform and comprehensive standards for the mediation process and the practice of mediation are developed. These standards should further be re-evaluated from time to time so as to avoid rigidity.

In my opinion, the highly important task of ensuring high-quality mediation services through-out South Africa should be undertaken as a joint endeavour by the national mediation organisation, SANCOM (South African National Council of Mediators), the Office of the Family Advocate and the Department of Social Welfare and Development. It is perhaps also a matter that could fruitfully be addressed in the regulations to the Children's Act which are currently in the process of being finalised.