Legal review of the mandatory mediation process in South Africa

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Judicial understandings of mediation in the context of South Africa’s Commission for Conciliation Mediation and Arbitration are evaluated from reported decisions where a party sought to set aside a settlement agreement. What is apparent is that courts generally understand that the process of mandatory mediation can be robust and evaluative. The acceptable borderline for advice-giving, scenario-setting, pressure to settle and monitoring the settlement agreement is fact-specific. There is sufficient discrepancy between the cases to show that judicial assessment varies. Generally the courts seem to have no great concern over the breach of mediator confidentiality required in judicial review and none of the commissioners refused to cooperate in the review process.

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Introduction

One of the quintessential features of the traditional mediation process is confidentiality; without this the parties in dispute are reluctant to share interests, to reconsider perceptions, and to make proposals. There is usually an acceptance of and agreement to confidentiality in the mediation
process. But sometimes – inevitably – what did happen in mediation later causes doubt, especially when the signed settlement agreement gives rise to a kind of buyer’s remorse. A party may feel s/he was manipulated, given wrong advice or unfairly pressurised into settlement.

Arising out of these situations, particularly in a system of mandatory mediation, the aggrieved party may seek judicial review of the mediation process, to review not only the settlement agreement but also the entire process. This requires a departure from the confidentiality principle and is one that can undermine mediation: by subjecting a fluid and robust process to judicial review it is inevitable that there will be a chilling effect on both mediators and participants.

This article seeks to look specifically at judicial review of the mediation process at the South African Commission for Conciliation, Mediation and Arbitration (CCMA). Section 135(1) of the Labour Relations Act 66 of 1995 (LRA) requires a commissioner to attempt to resolve employment disputes through ‘conciliation’. Without defining this term, §135(3) says that the commissioner must ‘determine a process to attempt to resolve the dispute’, which may include (a) mediating the dispute; (b) conducting a fact-finding exercise; and (c) making a recommendation to the parties, which may be in the form of an advisory arbitration award. Conciliation in terms of the LRA is thus an umbrella term which can include ‘traditional’ mediation as well other processes which are usually associated with adjudicative functions (fact-finding and advisory arbitration). In this article the words conciliation and mediation are used interchangeably.

Since the establishment of the CCMA in 1995 there have been regular (but not frequent) reported decisions by the Labour Court where a participant in mediation has applied to set aside a settlement agreement. These court decisions are a useful guide to the ethical aspects of mediation, as well as providing practical limits for mediators. This article seeks to evaluate these judicial understandings of mediation.

**Mandatory mediation at the Commission for Conciliation, Mediation and Arbitration**

This article is also, inevitably, about an institutional context – the CCMA as an organisation. Established in terms of §112 of the LRA in 1995, the CCMA is a state-funded, independent organisation, which employs
some 340 full-time and part-time commissioners in all nine provinces of South Africa. During the 2013/2014 financial year 170 673 conciliations were heard, an average of 603 every working day. CCMA figures indicate that the average duration of a conciliation is two hours for individual disputes. About 75 per cent of disputes are settled at conciliation (Commission for Conciliation, Mediation and Arbitration 2014: 45). By any standards these statistics speak of an efficient and effective dispute resolution system.

The CCMA has a list of internal measures of efficiency. Outcomes are compared against targets on a monthly basis to measure the efficiency of each of the regional offices. The results and ranking of regional offices or provinces are published annually in the Annual Review (Bhorat, Pauw and Mncube 2009: 28). From the first assessments of the CCMA it was noted that in order to deal with the pressure of case volume, commissioners were often forced to cut corners in order to get through their case load; time pressures on conciliators forced them to ‘adopt fairly drastic measures’ to achieve those settlements (Brand 2000: 84). The CCMA itself was introspective about this: at an in-house commissioners’ conference in 2010, one presentation dealt with ‘commissioner blind-spots’ (Docrat 2010). Some of those identified were that commissioners are often driven by an over-zealous drive to settle at all costs, and that there may be manipulation, coercion or subtle threats to achieve settlement, as opposed to exploring viable options.

A common complaint about conciliation mentioned by Brand is that some commissioners swiftly judged parties in conciliation on a fairly superficial assessment of the facts (a form of truncated fact finding) and suggested a settlement which they told the parties would be imposed upon them in arbitration if they did not agree (Brand 2000: 85). The ‘self-interest’ of commissioners in settlement was noted in an ILO report because their future prospects as a commissioner could depend on the settlement rate that they achieved (Benjamin 2013: 17). There is little dispute that these pressures and ‘blind-spots’ impact on the quality of the settlements reached in conciliation (Steenkamp and Bosch 2012: 124).

South Africa is not unique in this complaint and these pressures are found in other countries. For example, the criticism of mandatory mediation in the UK by Professor Dame Hazel Genn was that the main thrust of civil justice reform was not about more access, nor about more justice. ‘It is simply about diversion of disputants away from the courts’ (Genn
2010: 69). Mediation, she added, had little to do with access to justice – that is, access to the courts or to just outcomes: ‘Mediation is not about just settlements. It is just about settlement’ (Genn 2010: 69).

It is in this context of competing interests and principles that judicial review of the mediation process needs to be evaluated.

The ethical and constitutional framework

From the commencement of the CCMA in 1995, there was an appreciation of the need to provide an ethical framework for commissioners. The Code of Conduct for Commissioners (developed in terms of Section 117 of the Labour Relations Act No. 66 of 1995) states that in order for conciliation, mediation and arbitration processes to be seen to be fair, just and gain the confidence of the public, commissioners must, among other considerations:

a. act with honesty, impartiality, due diligence and independent of any outside pressure in the discharge of their statutory functions;
b. conduct themselves in a manner that is fair to all parties and shall not be swayed by fear of criticism or by self-interest.

The CCMA Rules (published under GN R1 448 in GG 25 515 of 10 October 2003) deal specifically with the confidentiality issue. Rule 16 provides that:

16(1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.
(2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation.

These CCMA Rules conform to the common understanding of the mediation process, namely that what occurs in mediation is insulated from scrutiny in subsequent legal processes. The policy behind this is plain: the attempts of parties to reach settlement are largely irrelevant to the substantive issue of liability and no weight should be given to proposals from which an admission of liability could be inferred. To do otherwise would freeze initiatives towards possible settlement. The
primary purpose of the confidentiality rule is that it seeks ‘to prevent disputants from using settlement discussions as a tool for gaining a litigation advantage’ (Korobkin 2005: 269). The effect of isolating the offers and counter-offers of the settlement process means that as long as a party in mediation (including the mediator) steers clear of the common law’s traditional concerns (misrepresentation, non-disclosure, mistake, duress, unconscionability and undue influence), the conduct of settlement proposals is generally beyond the law’s reach (Coben and Thompson 2006; Cockburn and Shirley 2003).

But in judicial review of the actions of a state-provided mediator can one say that the confidentiality principle, such as in CCMA Rule 16, insulates the process and outcome of mediation? This appears not to be the case. In *Kasipersad v. Commission for Conciliation, Mediation and Arbitration and others* (2003) 24 ILJ 178 (LC) the court’s starting point was s158(1)(g) of the LRA which empowers the Labour Court to review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law. The court then noted that the prohibition against reference to statements made at the conciliation during any subsequent proceedings, as well as the prohibition against the commissioner or any other person testifying about the conciliation process, conflicts with the right of the applicant to administrative justice and the power of the Labour Court to review the performance of any function by the CCMA. The conclusion reached by the court was that the CCMA Rules, as subordinate legislation, must yield to the LRA and to the Constitution.

In *Kasipersad* the commissioner voluntarily and consensually submitted an affidavit in which she explained her actions during the mediation. This meant that the court did not have to subpoena the commissioner and an ethical stand-off was avoided. The court did not comment further on its coercive powers to force a commissioner to ignore CCMA Rule 16. But there was acknowledgment that in the absence of the commissioner’s affidavit, the court would have had little information on which to base its review.

It is regrettable that the court in *Kasipersad* did not make a fuller analysis of the competing interests in the conflict between, on the one hand, the reasons for confidentiality and, on the other hand, the policy reasons for allowing an intrusive judicial review of the mediation process. The court did also not explore whether ‘administrative justice’
should be applicable at all to a voluntary process with no adjudicative or decision-making outcome. If the court had given consideration to the implications of subpoenaing the mediator and other parties to give evidence (and the desirability of contempt of court for refusal) it would not, it is submitted, have decided so easily that the CCMA Rules must yield to competing administrative law rights.

The court also gave insufficient weight to the centrality of confidentiality in the mediation process. The reasons have been well articulated: (a) effective mediation requires candour; (b) fairness to the disputants requires confidentiality; (c) the mediator must remain neutral in fact and in perception; (d) privacy is an incentive for many to choose mediation; and (e) mediators, and mediation programmes, need protection against distraction and harassment (Freedman and Prigoff 1986–7: 38).

The ordinary rules of contract allow an agreement to be set aside where there is misrepresentation, non-disclosure, mistake, duress, unconscionability and undue influence. This means that courts must be able to lift the veil on the settlement process and interrogate the allegations. This the South African courts have done as will be seen below, with surprisingly little concern for the issue of confidentiality.

**Judicial guidelines**

If one general trend can be extracted from the various court judgments it is that there is a general appreciation of the various techniques – some robust – which a mediator can employ. For example, in *Workers Equally Support Union of South Africa (‘WESUSA’) obo Modise and Others v. Slabbert Burger Transport (Pty) Ltd* [2009] ZALC 214 (3 February 2009) para. 8, the judge said:

> Mediation is often a robust process in which the mediator will seek to persuade and cajole parties, using techniques that rely on gentle and less gentle pressure to reach agreement. Obviously, a mediator cannot overstep the mark and act dishonestly, or misrepresent a position to the parties, or engage in conduct that amounts to intimidation.

It is this tension between robustness and ‘overstepping the mark’ which will be explored thematically by considering judicial comments on different mediation techniques.
Giving advice

One of the ongoing debates among mediation practitioners is whether and when mediation can shift from being purely facilitative to being evaluative (Riskin 1996). Those labels are not the only ones used: therapeutic, directive, advisory, and challenge mediation are frequently used. Wade (2012: 1) comments that each type of mediation has ‘many shifting and subtle hybrids which reflect aspects of the others’. He calls it ‘a convenient historic fiction’ to suggest that mediators do not give advice, but only information, or advice on the process. Wade suggests that this fiction was necessary for the protection of the evolving mediation profession faced with turf protection from older monopolies, such as lawyers, psychologists, financial advisers, valuers, cultural experts, child development experts, life coaches, and so on. But Wade’s conclusion is that advice-giving is unavoidable because it is inherent in question-asking (Wade 2012: 4). The subtext of ‘How will you prove that?’ could be ‘In my opinion I think you will have difficulty in proving that’, and in statements qualifying questions (‘Which of the experts is wrong? At least one of them must be.’)

The South African Labour Court has not always embraced this nuanced approach to mediators giving advice. In Kasipersad a firm stand was taken: commissioners should not give advice or make recommendations that result in their being or being seen to be partial. The court went further and said that a commissioner ‘who gives advice on any matter other than about procedure acts ultra vires’ (para. 25). There was however a concession that if the parties jointly ask the commissioner for advice on any matter, then that would be acceptable as it is similar to an advisory arbitration award which falls within the LRA’s concept of conciliation. The motivation for the court’s ruling is as follows:

[27] Even if a commissioner is invited by a party to give advice, such an invitation should be resisted. A commissioner has to be even-handed in dealing with the parties. If she gives advice to one party, she would have to do likewise for the other party. That would create conflicts of interest for the commissioner. A commissioner who puts herself in such a situation would have great difficulty in acting with honesty, integrity and impartiality. Ethically, it is therefore untenable.

[28] Giving advice is also counterproductive to the objectives of conciliation. A party who is advised that she has a good case is
unlikely to settle. One who is advised that he has a bad case is likely to capitulate, as happened in this case.

A similar ruling was given in *Anglo Platinum Ltd v. CCMA* (2009) 30 ILJ 2396 (LC).

The possibility of evaluative mediation has however been recognised. In *National Union of Metalworkers of SA and others v. Cementation Africa Contracts (Pty) Ltd* (1998) 19 ILJ 1208 (LC), Waglay J said:

> While a commissioner may not advise the parties on the merits or compel parties to adopt any particular view, he or she may indicate to the parties making the claims or demands the possible weaknesses in their claims or demands.

This acceptance of a role in ‘indicating weakness’ is, of course, advisory in nature. A more direct indication of judicial pragmatism is in *WESUSA*, where the court said that the commissioner is entitled to provide an evaluation of a party’s position and ‘sketch likely outcomes should a dispute proceed to arbitration’. In a qualifying and contradictory sentence the court added, ‘But the panellist should avoid any expression of her own views to the parties on the merits of their positions’ (para. 9). It is difficult to imagine how a mediator can easily ‘sketch likely outcomes’ without impliedly referring to the merits of a party’s position.

There is another aspect of the advice-giving taboo that needs to be acknowledged. Most of those who refer disputes to the CCMA are not only unemployed, but disempowered, both educationally and financially. The standard recommended cue of ‘My sense is that you really need to speak to your lawyer to get advice’ is unrealistic because there is often no money to pay for that advice. In a society with sharply unequal resources, particularly in access to legal assistance, it may well be an ethical imperative for a mediator to guide a disputant as to what the law is and how an arbitrator could apply the law to that dispute. This can be done in a guarded and qualified way which does not coerce the disputant into a particular settlement. This appears to be the muted assumption in both *Cementation Africa Contracts* and *WESUSA*. Because CCMA commissioners are knowledgeable about employment law, it is arguable that they would satisfy the requirements in US Model Standards of Conduct for Mediators:
A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards. (American Arbitration Association 2005: VI.A.5)

**Scenario-setting and reality-testing**

A valuable tool in evaluative mediation is for the mediator to sketch different scenarios. By highlighting different possibilities that could arise, a mediator is able to shift firmly held perceptions by creating doubt. These competing scenarios are, of course, a form of reality-testing. Faced with a scenario quite different to the one projected by the disputant as inevitable, the need for flexibility and compromise is surfaced by the mediator. It is possible that when the mediator plays the role of Devil’s Advocate the parties will doubt the mediator’s neutrality simply because being made aware of other scenarios is unsettling and challenging.

In the choice of scenarios it is clearly possible to manipulate the parties. In *Kasipersad* the commissioner admitted having told the applicant that he had a 50/50 chance of success; that it would take between two to three months before the matter would be heard in the Labour Court and that he might have to pay for legal representation and, if he lost, the other party’s costs. The commissioner explained that she wanted the applicant to understand that the matter would not take 30 days, as in the CCMA. She also informed him that it was his decision whether he proceeded with the matter (para. 13). In presenting these scenarios, had the commissioner acted in an impartial manner?

In its assessment the Labour Court was of the opinion that, except for her assessment of the prospects of success being a 50/50 chance, the other three outcomes sketched by the commissioner presented a negative scenario for the applicant. She did not advise the applicant of the possible outcome if he succeeded (para. 15). The court concluded that by sketching only the four possible outcomes, the commissioner manifested bias against the applicant because even if she did not intend to advise the applicant to withdraw the application, then her conduct had precisely that effect. The judge said ‘it was not unreasonable for the applicant, a layperson, to infer from what she said that he was being advised to withdraw the dispute’ (para. 20).

In *Scholtz v. CCMA and Others (C675/2014) [2015] ZALCCT 45* (25 June 2015) the commissioner sketched these different scenarios:
(a) If the applicant could manage to withstand cross-examination, the employer would not be able to show that she was negligent; or (b) On the other hand, the employer could show that she had not fulfilled her duties and had, as a bookkeeper, been ignorant; (c) If the dismissal was unfair, the likely outcome was that she would receive in the region of six months’ compensation; (d) but to these scenarios the commissioner added a caveat that things could be assessed differently. The court in this case found that this was a case where:

the commissioner sailed close to the wind and came near to crossing the line … from a robust conciliation process to one where he pressed too hard for a settlement. But in my view, given the context and the nature of the proceedings, I do not think that he did. (para. 25)

The context was decisive in the court’s assessment. Neither party had objected to the attempt to settle off the record. This attempt was at the initiative of the applicant’s attorney. Once the commissioner had sketched the risks and possible scenarios, everyone went home and the actual settlement was brokered between the parties’ legal representatives with no further input from the commissioner. In these circumstances, the court was of the view that the review could not succeed.

In WESUSA it was common cause that the arbitrator’s language was expressed in tentative terms. The commissioner stated that if the matter proceeded to arbitration he would be asked and would have the power to award the employees a year’s remuneration. There was no evidence that the arbitrator pointed out anything other than a range of possibilities should the matter proceed to arbitration. The court was unable to find on the evidence that the commissioner made any misrepresentations to the Respondent, that he subjected him to any form of duress, or that he acted otherwise in a manner that was unbecoming or unethical (para. 10).

**Pressure to settle**

It has been noted above that the internal standards of the CCMA put expectations on commissioners to achieve settlements and this has led to a perception that commissioners may unduly influence parties to settle. It has been observed that ‘If settlement is encouraged as a goal in
itself, the push to settle acquires a normative force’ (du Toit et al. 2015: 140).

Leaving aside institutional pressures and personal ambition to maintain a high settlement rate, is there a legitimate place for a mediator to exert pressure on parties to agree to a settlement which the mediator, from experience, knows is within the range of fair outcomes for disputes of that sort? Can a mediator use her/his ‘personal power or authority to press an agreement point’ (Wall, Stark and Standifer 2001: 375)? Can a mediator say, for example, ‘If an arbitrator accepts your version entirely, it could be that the compensation ordered will be similar to the employer’s current offer; it is my suggestion that you give serious consideration to accepting the offer’? Where the mediator’s reputation and gravitas are established, this kind of recommendation may be regarded as helpful rather than undue pressure.

Arguably this sort of pressure is no different to the acceptance in WESUSA that a commissioner is entitled to provide an evaluation of a party’s position and ‘sketch likely outcomes should a dispute proceed to arbitration’. In Lutchman v. Pepstores and Another [2004] 4 BLLR 374 (LC) a party to the mediation alleged that at the conciliation proceedings she did not read the paper that was put before her, nor was she informed of the contents thereof. It was only after she reached her home that it became apparent that she had signed a settlement agreement. The court, noting that the ex-employee had been employed as a manager with 11 years’ experience, observed that ‘One has to be extremely gullible to believe this’ (para. 17); the court needed substantial evidence of undue influence before it would set aside the settlement agreement.

There is only anecdotal evidence on the lived consequences of the pressure to conform and comply. Employers routinely complain – with some anger – that they were pressurised to pay compensation to an employee fairly dismissed for serious misconduct simply to avoid the inconvenience of arbitration and subsequent litigation. Employees complain that mediators exploit their ignorance of the law, by urging settlement at a lower figure than hoped for, to avoid the uncertainties of evidence in arbitration.

As with giving advice, the factual situation will determine whether a ‘soft’ pressure to settle crosses over to undue pressure. But this gives rise to the next issue: does a mediator have a watchdog role over the contents of a settlement agreement?
The settlement agreement

The court in Lutchman endorsed the judgment of Grogan AJ in Macyusuf v. Northwest Communication Services (1999) 20 ILJ 1061 (LC) which held that a commissioner can assist in drafting a settlement agreement once parties have reached an agreement, and that the commissioner is not required to pass judgment on the legality of the agreement or the desirability of its terms. This may well be too trite a view of the commissioner’s responsibility, particularly in dealing with parties of very different levels of expertise.

In reviewing practice standards for mediators, there is variation in approach of how to deal with a discrepancy in power. The Code of Practice of the UK’s College of Mediators (2014) recommends that mediators must conduct the process in such a way as to redress, as far as possible, any imbalance in power between the participants. If any behaviour seems likely to render mediation unfair or ineffective, the mediator must take appropriate steps to prevent this, terminating mediation if necessary (§4.3.2). The practice standards of the Australian National Mediator Accreditation System (Mediator Standards Board 2015) require that a mediator should encourage participants to consider the interests of any vulnerable stakeholders (part III, §8.4). Implicit in these guidelines is a role for the mediator in preventing a settlement where the power imbalance results in an unfair settlement.

Does a lack of representation for just one of the parties tilt the balance, raising the possibly unacceptable pressure on the unrepresented party? In Sejane v. CCMA and others (J2789/99) [2001] ZALC (1 October 2001), almost a year after an agreement had been entered into in the course of a mediation, the applicant brought a review application to set aside the agreement as null and void, claiming that the commissioner forced him to sign the agreement. The applicant had not raised any objection to the employer, a large company, being represented by its human resources manager and an attorney. The applicant did not have a representative and it appeared that he was not a literate person. It was argued that the applicant was prejudiced in that he was not legally represented. The court was not satisfied that it had not been explained properly to the applicant what the consequences could be if he consented to the employer being legally represented while he proceeded in person. The court said:
Clearly the playing fields were unequal ... In my view, the second respondent [the commissioner] was derelict in her duties for not properly considering the interests of the applicant in respect of representation. Consequently the agreement is set aside. (paras 11–13)

This is a judgment with serious implications. It challenges the view in Macyusuf that a commissioner is not required to pass judgment on the legality of the agreement or the desirability of its terms; rather it imposes on a commissioner an obligation to check that an unrepresented party has a clear understanding of what is in a settlement agreement. This appears to be an alignment with the US Model Standards of Conduct for Mediators:

If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination. (American Arbitration Association 2005: V.A.10)

The ‘correct’ mediator response may be difficult to describe to fit every case. But in the South African context, with extreme discrepancies in wealth and power, CCMA commissioners do need to be alert to the potential of undue pressure on an unrepresented party to sign a settlement agreement.

Conclusion

This article evaluates judicial understandings of mediation in the context of South Africa’s CCMA. What is apparent is that courts generally understand that the process of mediation can be robust and evaluative. The acceptable borderline for advice-giving, scenario-setting, pressure to settle and monitoring the settlement agreement are fact-specific. There is sufficient discrepancy between the cases to show that judicial assessment varies, as it does in all jurisdictions.

Apart from one case the courts seem to have no great concern over the breach of confidentiality required in judicial review. That said, none of the commissioners refused to cooperate in the review process. There is still a need for a clearer understanding of the CCMA’s ethical rules for
confidentiality, and in what circumstances a reviewing court can demand evidence from the parties and the mediator. Accepting that the mediation process constitutes administrative action (and thus capable of being reviewed by a court), greater clarity is needed as to the circumstances which justify judicial scrutiny.

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References


