CARE AND CONTACT WITH CHILDREN - ALTERNATIVE DISPUTE RESOLUTION IN FAMILY

FURTHER COMMENTARY TO THE DRAFT FAMILY DISPUTE RESOLUTION BILL 2024

1. Ad the preamble

   It is suggested that we should also recognise compliance with international instruments such as the United Nations Convention on the Rights of the Child, the African Union Convention on the Rights of the Child and so on.

2. Ad the definition of "child expert" – The definition may be problematic. The referral to parental alienation may also be problematic in the sense that parental alienation in certain jurisdictions is not acknowledged by this name but rather has different names or is looked at broadly against the best interests of the child.

   There is no specific period of experience that such a person must have had in regard to their experience and training. It may be that the person has no qualification whatsoever, as there is no reference to their qualifications. Access to the justice system for parties to a family law dispute is in issue. It seems that the definitions relate to non-justice system persons. Should it not rather be defined as the first point of access for parties to determine a family law dispute or to resolve a family law dispute or lodge a family law dispute?

3. The definition of family would have to refer also to ART procedures and children born of such procedures. It should perhaps also refer to persons who have parental responsibilities in respect of the child and to any other person with whom the child has developed a significant relationship based on psychological or emotional attachment which resembles a family relationship as set out in the definition of family member in the Children's Act. The Acts should line up with each other.

4. "Family law dispute" – this definition is quite narrow. It should also deal with divorces, cohabitation disputes, proprietary claims and then of course one has

customary law, religious marriages, etc. This again seems not to be a broad enough definition.

5. "Family dispute resolution professional" – There are no stipulated time periods for the level of experience of such a person and this should maybe be reconsidered.

6. "Mediated settlement agreement" – Does this relate to a written document signed by the parties or an outcome of mediation summary by a mediator?

7. "Parenting co-ordinator" definition – The definition should perhaps be subject to section 58 and this should be inserted here.

8. <u>Ad paragraph 10</u>

   Who is going to monitor these programmes? What would the content specifically be? There would have to be quality control measures on an ongoing basis. particularly as case law develops. What is envisaged would be the extent of this programme? It appears that extensive legal advice is given in these programmes and one would have to ensure that such advice is succinct and correct.

9. <u>Ad paragraph 13(1)(b)</u>

   It seems that the broad reference to "child" may be difficult to implement in view of a very young child and in view of the definition of child as under the age of 18 years. Such a programme for a 2 or 3 or a 5 year old may be difficult to implement.

10. <u>Ad paragraph 17</u>

    Concerns are raised regarding dispute resolution before any litigation. It is not always advisable, it is not reasonable to expect parties, where they have no knowledge of each other's financial position, to meet and mediate before there has been disclosure or before they have been advised of their rights regarding such information obtained. In mediation, difficulties with disclosure and delays in disclosure may occur as well as frustration of disclosure on occasion. This makes it a very difficult process without the ability to have had access to

information, to have had advice regarding the information and to force disclosure. The mediation process runs the risk of losing credibility where persons may be obliged to mediate in a vacuum. It is unfair and unreasonable and may perpetuate unequal playing grounds and abuse of the process.

11. Ad paragraph 22(4)

The mediator should be able to exercise a discretion to include the legal representation in the mediation on a caucus mediation basis in certain cases. Mediations can be completed effectively with the assistance of practitioners, who participate in the mediation process with a client.

12. Ad paragraph 26

Factual disclosure should be capable of being disclosed in a court, as would any financial information and documentation made available.

13. Family Arbitration

Ad section 47

Sometimes arbitration proceeds after litigation has commenced. It would not be correct to exclude this.

14. Enclosed is the previous commentary to the Bill, which was submitted.

COMMENTARY TO THE DRAFT MEDIATION BILL

1. Ad preamble

"To assist litigants to determine at an early stage of litigation whether proceeding with a trial or an opposed application is in their best interests or not."

In family law matters litigants often require to be advised of the extent of their claims. There should be a process whereby there is full disclosure and an opportunity for litigants to have been advised of their rights before entering into mediation. Mediation has been used by unscrupulous parties to avoid the disclosure process in order to settle broadly and detrimentally to the other party for example, in the case of marriages in terms of the accrual regime or where there are personal maintenance claims and the parties' access to means, inter alia, in regard to trusts via loan accounts or distributions or otherwise are relevant.

The Rule 41 notice to mediate, suspends the litigation and then effectively bars compulsory discovery and the access to disclosure of information in a controlled manner. There should be no adverse inference drawn, regarding the refusal to mediate in the initial stages of a matter, where there is not full disclosure upfront.

This relates back to the disclosure procedures followed, for example, in England, Australia and Canada upfront when litigation ensues and disclosure is required on affidavit. Copies of the disclosure required, for example in England and as proposed to the Law Commission previously by the LSSA Family Law Committee and the Western Cape Family Law Forum are referred to.

Unless there is a mechanism for compulsory disclosure upfront with consequences in the event of non-disclosure or avoidance of disclosure, mediation may not bring justice to the parties. It is of course always best for parties in family law to find their own solutions via ADR and this should be encouraged. However, this should not be at the expense of equal playing fields, an ability to be advised on claims and to make informed decisions after disclosure.

The LSSA Family Law Committee as well as the Western Cape Family Law Forum support for ADR and mediation to resolve disputes in Family Law matters and this is to be encouraged. However, mechanisms need to be found to assist the parties to mediation to find justice in mediation and to obtain disclosure in such a manner as to ensure that there is not evasion or avoidance or manipulation of the mediation process to avoid such disclosure and the formulation of equitable claims/proposals.

2. Chapter 1 clause 1 – Definitions

"Community mediation" - the community mediation persons or groups should have qualifications and training. They should also be subject to an accreditation process and/or training process.

"Costs of mediation" - experts such as psychologists or accountants are appointed by the parties in consultation with the mediator to provide a report and not necessarily just to advise. Such costs should be catered for.

A mediator may decide in consultation with the parties to co-op a co-mediator or an expert to co-mediate such as an accountant or a psychologist or a psychiatrist, and there may also be testing (such as hair follicle testing, blood or urine testing required), the services of a supervisor who supervises contact and provides reports of the factual observation of such contact may be required and so on. This clause needs to be broadened to take this into account.

"Deliver" – this should be in terms of the various court rules in regard to service.

"New definition" – the Family Advocate needs to be defined. The Family Advocate may also be incorporated in mediation, apart from the mediation its officers conduct itself. This will have to be catered for in family law matters.

"Family" – This definition should be broadened to incorporate extended families, ART families and so on.

"Family law dispute": - this definition should be broadened to incorporate all claims whether in terms of the Children's Act, the Divorce Act or the Matrimonial

Properties Act or in terms of alternative reproduction rights or in terms of any of the Hague Conventions and so on. It seems limited.

"Mediation" – As long as the mediation process incorporates the ability of the mediator to make recommendations regarding the appointment of experts, co-mediators, and the manner in which contact should be exercised (without advisory and not as an expert), if the definition of mediators and their functions are clear enough, this should be in order.

"Minister" – this may also mean the Minister of the Department of Justice and Constitutional Development and/or the Minister of Social Development.

"Mediation party" – this requires to be defined? **[note: see definition of "party"]**

3. Chapter 3 – clause 93(c)

It may not be so that the mediator consults with the child, but that it is done through a suitable expert or the Family Advocate or a psychologist reporting or through the legal representative of the child. This should be catered for. Care should be taken that guidelines are issued in regard to consultations with children and how the voices of children are to be heard.

4. Chapter 4 – clause (2)

The mediator may elect to co-op a co-mediator, particularly in regard to a discreet issue. The parties would have to agree to the costs and identity of this person.

5. Clause 12(5)

This should be by agreement.

6. Clause 12(6)(e)

Care should be taken of diversity, cultural issues, religion, orientation, equality, gender and so on.

7. Ad clause 12

Generally, the procedure and costs of the mediation should be resolved in the mediation agreement.

8. Ad clause 13

Often one party loses faith in the mediator and the mediation is effectively then brought to a halt. Although this may be manipulated, but there should be provision for termination of the mediation in such an event on good cause shown. Often in such circumstances agreement may not be reached to terminate the mediator's mediation. It may also be so that a party effectively frustrates the mediation by not arriving for appointments or not participating or postponing the mediation unreasonably.

9. Ad clause 14

Care must be taken that the notice of mediation is not used as a method of manipulation to postpone disclosure and the discovery process to enable a party to be informed about the parameters of such a party's claims.

10. Ad chapter 5 – clause 17

The best interests of the children should be a factor. The rights protected in the constitution including cultural, religious, gender, sex, equality, dignity etc should also be a consideration.

The issue of domestic violence and mediation should be addressed.

11. Ad clause 17(3)

This may give rise to abuse. Does it mean that the non-party would be present with the party throughout the mediation and advise. What would the capacity and position of such a non-party be. This would require to be clarified.

12. Ad clause 17(4)

The previous comments to experts and the appointment of third parties apply here as well.

Generally, the mediator may not act as an expert, a psychologist, a lawyer, an expert advisor and may not counsel the parties.

13. Ad clause 17(8)

This is a fine line as the mediator cannot give legal advice. How would these options be suggested and would this be suggested after disclosure with a view to the parties' claims, rights and obligations?

14. Ad clause 19

Any facts or factual documentation or financial information that are exchanged will not be privileged and may be used in ongoing litigation. Any settlement discussions, however, will remain privileged. This requires to be clarified properly in the bill.

15. Ad clause 20

It needs to be clarified to which documents and information will be privileged and which not.

16. Ad Clause 21

If facts are exchanged or financial information is exchanged or financial documents are exchanged, these should not be privileged and should be used in the discovery process or in litigation.

It should also be important to stress that agreements in regard to certain aspects may not stand, if the whole matter is not resolved in mediation. The parties need to decide up front whether they are agreeable to piecemeal agreements or whether they will only reach an agreement once an overall settlement is reached. This is often problematic particularly where there are proprietary/maintenance claims.

17. Ad clause 21(6)

There should not have to be a hearing to determine this, where such information should have been provided during the discovery process, but is provided during mediation. This would also apply to clause 21(10).

18. Ad clause 22

Often the parties negotiate from an unequal basis and one party would refuse the other party's assistance by a legal practitioner. Therefore, there would not be agreement. There should be an alternative that the mediator could request that a person should be assisted by a legal practitioner. This will enable more equality in the process. It may also be that a party who is subject to domestic violence, where in certain instances mediation may be possible, would want to be assisted by a mental health practitioner or legal practitioner in the process.

19. Ad clause 23

Who will draft this agreement? Usually it is not drafted by the mediator.

Is there scope that the legal practitioners can advise on the agreement, not in regard to the terms of the settlement as such, but in regard to the wording of the agreement in order to facilitate implementation of the settlement.

There are often arrangements that the document should be drafted by a third party and should be checked by the legal practitioners, purely in regard to its wording and possible implementation, prior to signing the document.

20. Ad clause 26

The court rules will provide for these tenders. Does this mean that the offers during mediation will then stand as without prejudice offers and will be treated the same way as offers in terms of the rules are treated. This may inhibit the mediation process. It may be that a party makes an offer, taking into account future costs up front, which the party would not otherwise have made. It may restrict certain proposals to be exchanged.

21. Ad clause 27

22. Ad clause 28

These costs must be agreed up front as to how it will be charged and what the hourly rates are.

Does this mean that the fees of the actual mediation time spent in seeing a party would be paid by the parties jointly but that any correspondence or separate consultations by the parties with the mediator or telephone calls with the mediator will be paid by such a party. This would need to be clarified up front in the agreement.

23. Ad clause 29

Prejudice may result if a compulsory discovery process has not been followed or if there is not full disclosure to enable the parties to be advised about their claims. There has to be some process through which disclosure is obtained in a mandatory manner before the mediation commences. The mediation is set up to fail if it is done in an uninformed basis. It could be done on a needs basis but there would be no negotiation leverage, due to the lack of information and/or disclosure and/or advice.

24. Ad clause 30

Is there any reason why family law matters are excluded?

25. Ad clause 35

It is not always so clear in family law matters what the costs would be. This is dependant upon the long delays in court proceedings, when a case management judge is appointed, when the matter settles, whether experts are to be appointed etc.

The procedure in family law matters is onerous and does not suit families – it should be shortened so that there is discovery and disclosure up front with the

issuing of a summons and with the filing of the plea and counterclaim. The periods during which family law matters are to be heard should also be shortened to a maximum of one year. The notice periods, the investigations and so on should all be telescoped. The time is overdue to look at a different process in family law matters. This would assist mediation exponentially.

26. Children's voices

There should be provision for the requirements in the Children's Act to inform children of process affecting them and also to hear the voice of the child. The outcome of mediation processes should also be communicated to the child.

Guidelines should be developed in this regard.

27. Domestic Violence

See below.

INTERNATIONAL MEDIATIONS

Forum non conveniens-

An agreement may be entered into that the choice of forum for the mediation will not in any manner affect the dispute about jurisdiction between the parties and will not be an acknowledgment that any one forum is more appropriate than the other. The proceedings in both jurisdictions are usually halted pending the outcome of the mediation.

If agreement is reached the agreement may be made an order in both jurisdictions or in one jurisdiction only and the proceedings in the other jurisdiction are withdrawn.

Expedited procedures should be agreed to upfront.

Quality and training of the mediator is vital -must be aware of differences in law and procedures as well as implementation mechanisms cross border - may by agreement

co-opt experts in the various jurisdictions to advise on the law and which law applies, tax, accounting practices or the best interests of children during the mediation process. May also co mediate with mediator's expert in certain fields.

The mediator should have a special skill set.

Discrete disputes may be referred to arbitration to facilitate the process.

Caucus mediation may occur in the mediator's discretion, particularly if parties separated or a history of eg domestic violence-difficulties prompting, assessing participants, momentum of mediation, slower process. Positives-more openness by participants, safety and security.

ON LINE MEDIATION

Smooth on line mediation-principles of technological neutrality, equality, safety and reliability. Centralised cloud storage- documents updated, shared with participants, cyber security, compliance with data protection. Should be part of initial agreement.

Underhanded tactics to delay the process or undermine the process in cross border disputes to be discouraged.

Guidelines to hear children and report back to them should be established and sensitively dealt with.

Cross border mediation requires a special skill set and insight into international laws and conflicts of law, procedure and implementation. Mediators should be flexible to involve co mediators and experts as well as alternative dr mechanisms to move the matter forward as it is often time sensitive.

Important are processes, the involvement of co mediators and experts, the costs thereof and whether and how implementation of the agreement is possible.

In a Hague Convention case eg, the mediator should be au fait with international conventions. In a surrogacy case eg the various issues and possible relief in the respective countries should be known to the mediator. Even if agreement is reached it still has to conform to the law of the respective countries, otherwise it is futile.

Upfront it should be agreed that litigation is halted, pending the outcome of the mediation. Processes also of disclosure should be agreed as well as the confidentiality of disclosures. Can factual documents be used outside the process (as is usual) or not. What is privileged / confidential or not.

The documents to be exchanged should be agreed upfront.

There should be agreement that the forum of mediation does not affect the choice of jurisdiction.

Statements, admissions and/or settlement proposals are usually confidential.

Agreement upfront should be reached in the mediation agreement with the mediator.

All discussions and documents specifically prepared for mediation are confidential, unless differently agreed or disclosure is required by law or required under any law for the implementation or enforcement of a settlement agreement. This may be views expressed, suggestions, settlement proposals, acceptance or the willingness to accept certain proposals.

Privilege may be waived and has to be dealt with preferably upfront.

Privilege will not apply in regard to: Information available in the public forum, threats of violence, plans to commit a crime or to conceal criminal activity, a mediated agreement signed by the parties, aspects which are agreed will not be privileged.

In SA certain cases of DV are mediated - only if it is assessed to be possible of mediation. It is often caucus mediation, or a party is assisted by a lawyer, a therapist or a family member. Security and safety arrangements are made. Matters are screened and evaluated as to whether capable of mediation, and if so, what protective measures can be put in place during the mediation and also in the respective jurisdictions.

The mediation agreement must be in writing and must deal with the issues referred to above in the replies- *inter alia* circumstances of the matter, personal questionnaires, participation of non-parties, the presence of dv, the disputed issues, confidentiality, procedures, disclosure, experts, co mediators, caucus mediation, advice from lawyers, time periods, termination of the mediator, costs, jurisdiction, suspension/ upliftment of court proceedings, what documents/ pleadings to be provided to the mediator, etc.

There should be agreement upfront to suspend the litigation-in SA a court order is obtained regulating that the process is suspended and that mediation shall take place and also deals with breaches. It usually confirms the agreement that the forum of mediation does not affect the dispute regarding jurisdiction

Rule 41 of our High Court Rules in any event suspends litigation when the parties file a minute to proceed with litigation.

If the court order and/or mediation agreement deals upfront with these issues the problems may be minimised.

<u>Issues to be dealt with:-</u>

Screening

Jurisdiction race

Suspension of proceedings

DV present

Children

Applicable laws

Implementation

Procedures co mediation

Experts

Caucus mediation

Legal advice

Disclosure

What information for the mediator

Costs

Cyber security

AI

Privilege

Third parties

Communication, cloud, protection of personal info, etc

A written contract

Special clause - see above

Parties may elect to have lawyers' review the written contract

The contract has to be explained, preferably to both parties simultaneously

Process:

The process should be uncontaminated independent and have integrity

Side discussions initially should not be encouraged.

Protection of process to be discussed with lawyers -see above re court order, agreement, stay of legal process, etc.

There should be one explanatory session regarding the process and the agreement, before or after information may be requested to assess intake, depending on the matter. Before intake confidential info should not be requested.

The law of the countries will impact the role of a mediator:

Legislation regarding mediation

Conflicting statutes

Implementation

Risks in law

Strict ethical rules should apply -

> integrity, experience, confidentiality, independence, experience and accreditation, codes of conduct, standards, impartial, equal playing fields.

The mediator in their discretion should decide how lawyers participate. It is however good if the participants receive legal advice independent of the mediation.

The written agreement should provide for requests for info.

Termination

May occur where mediation is not possible, one party acts in bad faith or uses the mediation strategically for delays or a party bona fide loses faith in the process. Also, if a mediator is not qualified, not experienced enough, has an interest in the dispute, acts fraudulently or improperly, is unable to continue or where settlement is reached and a written agreement signed

The mediator certifies the outcome of mediation.

Mediation should be declined if the matter is not suitable for mediation or the mediator is not qualified for or has an interest.

Mediation may be paused for the participants to obtain legal or expert advice, to arbitrate a discreet point, to further disclose, etc.

The financial agreement is usually drafted by a third party. If assistance is needed to implement the parties may use the court system or return to mediation.