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RESEARCH ARTICLE

The Mediation Framework in Botswana's Trade Disputes Act: A Unique Approach to Dispute Resolution

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Abstract
Botswana's Trade Disputes Act was enacted to provide for a settlement of trade disputes by the Commissioner of Labour, mediators and arbitrators and for the establishment of the Industrial Court as a court of law and equity. Mediators therefore play a critical role in the resolution of trade disputes within Botswana's labour law framework, and while their role is facilitative, their contribution to the trajectory of resolving labour disputes is significant. This article analyses the form of mediation envisaged under the act, and the mediator's role and powers. It further considers circumstances under and the extent to which the Industrial Court may intervene in the decisions of mediators.

Keywords: Alternative dispute resolution; mediation; mediators; trade disputes; Industrial Court

Introduction

There is consensus among legal scholars that the rising number of disputes that require resolution has in recent years led to a heightened demand for alternative dispute resolution (ADR) mechanisms.[1] Mediation has been lauded as an ADR mechanism that is becoming increasingly popular, not only in the resolution of disputes in labour and employment, but in other areas of the law.[2] Mediation has been defined as "a voluntary process whereby the parties to a dispute make use of a neutral third party to assist them in resolving their dispute".[3] The essence of mediation was captured by the Industrial Court in *Tsumake and Others v Botswana Power Corporation* as:

> "a structured, interactive and party centered dispute resolution process wherein an impartial third-party aids or assists disputing parties to resolve their conflict or dispute through various communication and negotiation techniques and strategies which are primarily focused on the needs, rights and interests of the parties."[4]

In comparison to traditional litigation, the process of mediation is therefore party-centred in that the interests of the parties are paramount, and while the mediator may use his / her skill and values

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1 J LaVaute "Alternative dispute resolution and enforcement of statutory rights" (1990) 6/1 *The Labor Lawyer* 107 at 107; H Edwards "Alternative dispute resolution: Panacea or anathema" (1986) 99/3 *Harvard Law Review* 668 at 668.

2 P Hughes "Mandatory mediation: Opportunity or subversion?" (2001) 19 *Windsor Yearbook of Access to Justice* 161 at 161; JM Douglas and LJ Maier "Bringing the parties apart: Divorce mediation's debt to labour mediation" (1994) 49/3 *Dispute Resolution Journal* 29 at 30.

3 T Wiese *Alternative Dispute Resolution in South Africa* (2016, Juta) at 47.

4 [2020] All Bots 533 (IC), para 11.

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to influence an outcome, s/he lacks the power to impose a settlement on the parties. A settlement, when reached, must be derived from the propositions and concessions of the parties, who essentially own the dispute and the resultant outcome.[5] The resolution of disputes by mediation in Botswana is common in the area of labour and employment law. This is primarily because the Trade Disputes Act (the TDA) makes the resolution of disputes through ADR compulsory, as will be seen in this article. Apart from that, mediation as a form of ADR may be used to resolve disputes in other areas of the law, even though there is no legislation that compels parties to utilize this mechanism. In fact, it can be argued that most people are unaware of the existence and value of ADR mechanisms such as mediation. This accounts for why the courts in Botswana are overburdened with disputes that require resolution. It is only recently that the High Court rules were amended to introduce court-annexed mediation in an endeavour to promote its use to resolve some of the disputes that end up before it.[6]

As a form of ADR, mediation is significant because it can assist parties to resolve their dispute without them having to resort to the courts. Some parties wish to preserve their harmonious relations despite being in dispute, and the adversarial nature of litigation may strain this relationship. ADR mechanisms like mediation give the parties control over how the dispute will be resolved and the resultant outcome.[7] It facilitates access to justice by providing for a less costly means to resolve disputes without the use of civil-procedure rules that often require strict compliance.[8] Consequently, mediation has traditionally been seen "as a way to achieve 'justice,' rather than merely a 'legal' result".[9] This statement holds true to the extent that the resultant remedies are more diverse, and may involve a settlement which benefits both parties, unlike a court's remedies which are often premised on a win–lose resolution.[10]

Administrative framework

Section 3(1) of the TDA establishes a panel of mediators and arbitrators, with the Commissioner of Labour as the administrator of the panel. Mediators are appointed to the panel by the Minister of Employment, Labour and Productivity Skills after s/he has consulted the Labour Advisory Board. Appointments may be on a full- or part-time basis. A mediator who is appointed should have expertise in labour law, labour relations or other specialist areas of expertise;[11] they are therefore not strictly legal professionals who possess law qualifications. The liberal approach taken by the act should be embraced, because legal training within the context of Botswana does not encompass training law students how to be mediators. In my view, it is acceptable to admit as mediators anyone who has expertise in labour law and industrial relations, but further, to provide those so appointed with specialized training to equip them with mediation skills that may help maintain their efficiency and competency.[12]

A mediator may only be removed by the minister from the panel if s/he is unable to perform his / her duties due to infirmity or in cases where s/he has committed serious misconduct.[13] The role of a mediator under the act is principally to mediate over disputes referred to the commissioner. This role also extends to the need to fulfil other duties that may be assigned to him / her by the commissioner in terms of the act. In this regard, a mediator's role may sometimes involve the provision

5 Hughes "Mandatory mediation", above at note 2 at 165.
6 See Order 42 Rule (2)(4)(a).
7 OBK Dingake *Collective Labour Law in Botswana* (2008, Bay Publishing) at 124.
8 Wiese *Alternative Dispute Resolution*, above at note 3 at 2.
9 Hughes "Mandatory mediation", above at note 2 at 163.
10 Wiese *Alternative Dispute Resolution*, above at note 3 at 2.
11 Sec 3(2)(a).
12 See also DN Frenkel and JH Stark "Improving lawyers' judgment: Is mediation training de-biasing?" (2015) *Harvard Negotiation Law Review* 1 at 8.
13 Sec 4.

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of advice or facilitation of training to organizations in an endeavour to promote the prevention and resolution of trade disputes.[14] A holistic reading of the act demonstrates that a mediator may be assigned to any trade dispute, including those concerning termination of employment and disputes concerning the recognition of trade unions, as well as matters concerning disputes of interest.[15]

Nature of proceedings

When exercising their mediatory role under the act, mediators perform a purely administrative function.[16] Their role and the mediation process itself are not adjudicatory. The act clothes them with the privilege of not being compellable witnesses in any legal proceedings in respect of anything said or the information divulged during the mediation process.[17] The mediator is only required to provide the Industrial Court with a form setting out the claims that the referring party had referred for mediation and the claims that were mediated, to enable the court to establish jurisdiction. Douglas and Maier submit that privilege is important because:

> "it is meant to ensure that the mediator is not used as a pawn by either party for its own purposes or as the target in a subsequent proceeding or litigation. Privilege is important so that they are not fearful of litigation directed against them."[18]

It is worth noting that the Industrial Court has held that due to the confidential nature of mediation proceedings, there is no requirement for a mediator to keep a record of them.[19] However, a record of proceedings may ideally be kept where an application for condonation is being made by the referring party, because this would allow the mediator to provide reasons in writing which either party can interrogate and make an informed decision about whether to take the decision on appeal or review.[20] It would appear that even where a record of mediation proceedings is kept, it remains improper and impermissible for such a record to be placed before a court.[21] This position derives from the fact that sections 7(6) and (7) of the act render mediation proceedings confidential unless otherwise stated by the parties. The act further makes it an offence to contravene this provision.[22]

In order to promote the efficient conduct of mediation proceedings, section 10 of the TDA instructs that sections 22(2) and (3) of the act are to be applied, with the necessary modifications, to the conduct of proceedings by a mediator. These sections provide that:

> "(2) For the purpose of dealing with any matter before it, the Court may order any person to
> (a) furnish, in writing or otherwise, such particulars in relation to the matter as it may require;
> (b) attend before it;
> (c) give evidence on oath or otherwise; or
> (d) produce any relevant document.

14 Sec 5(5)(b).
15 Secs 7(2), 35–36 and 42–43.
16 *Sentle v Botswana Agricultural Marketing Board* [2021] All Bots 278 (IC), para 9.
17 Sec 7(16).
18 Douglas and Maier "Bringing the parties apart", above at note 2 at 35.
19 *Ramooki v Botswana Meat Commission* [2019] All Bots 177 (IC), para 10.
20 Id, paras 11–12.
21 *Attorney General v Tumaeletse* [2020] All Bots 2 (CA), para 12.
22 Sec 7(8) imposes a fine of BWP 2,000, imprisonment for 12 months or both.

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(3) An order given under subsection (2) may include a requirement as to the date on which or the time within which the order is to be complied with."

When read in the context of mediation proceedings, this provision effectively gives a mediator the power to order a person to provide information and / or any documents that may be expedient in the completion of the process. The mediator may order a person to appear at and give evidence on oath or otherwise in mediation proceedings. Since the proceedings are not on an equal footing with those before a court of law, the mediator should not apply strict rules of civil procedure in hearing the testimonies of those called to appear before him / her. In fact, the conceptual underpinnings of mediation require him / her to facilitate the settlement of a dispute with minimal formalities. Hence, the mediator needs to strike a balance between gathering the necessary evidence to assist the parties in reaching a settlement and keeping the proceedings as simple as possible.

The mediator as an impartial facilitator

As the mediator is a third party assisting individuals in dispute to come to a settlement, impartiality is crucial in the fulfilment of his / her duties. In order to act impartially, a mediator may not, inter alia, have a financial or personal interest in the outcome of the dispute or harbour personal bias towards any of the parties.[23] Likewise, the TDA places mediators under the sole direction and control of the commissioner.[24] A person who obstructs or improperly influences a mediator in the performance of his / her duties under the act, or attempts to do so, commits an offence and is liable to a fine or imprisonment, or to both.[25] A mediator may be removed from the panel if found guilty of serious misconduct.

Whereas it remains paramount that the third party be neutral, it has been demonstrated that this need not be absolute. As a trained professional, it is not inappropriate for a mediator to have a disposition for a particular outcome and therefore influence the parties to that outcome.[26] Nevertheless, the parties are still not compelled to agree with the mediator's disposition, and neither is this binding on the parties. The court in *Tsumake* highlighted that:

> "The assistance by the impartial or independent party comes in the form of assisting parties in identifying issues, reducing misunderstandings, clarifying needs, interests and priorities, exploring areas of compromise, and generating or identifying options of solving the dispute."[27]

One may therefore liken the role of a mediator to that of a referee; s/he merely directs the process, provides a compass for the way forward and the issues to be focused on and nudges the parties in the right direction. S/he lacks the power to exercise an adjudicative role over the dispute.

While mediators have traditionally been known to be facilitators of settlements in disputes, the evolving and popular use of this form of ADR, particularly in the United States of America, has culminated in a variety of mediation styles. The most common are facilitative, evaluative, settlement and transformative mediation. In a facilitative mediation, the mediator merely assists the parties in reaching a mutually agreeable settlement without making recommendations or giving advice, save where the parties so request.[28] The focus here is on the needs and interests of the parties, and the

23 DT Weckstein "Alternative dispute resolution symposium issue: In praise of party empowerment – and of mediator activism" (1997) 33 *Willamette Law Review* 501 at 510.

24 Sec 3(4).

25 Sec 3(5).

26 Wiese *Alternative Dispute Resolution*, above at note 3 at 48.

27 *Tsumake*, above at note 4, para 12.

28 Wiese *Alternative Dispute Resolution*, above at note 3 at 48.

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mediator helps each party understand the propositions of the other. In doing this, s/he may paraphrase or reframe statements.[29] Facilitative mediation requires the mediator to provide guidance and steer parties to the relevant law. S/he cannot make recommendations or give advice to the parties unless so requested. Parties to the dispute oversee the outcome, and facilitative mediators are often not invested in whether the outcome is fair or unfair on another party.[30] By contrast, in an evaluative mediation, the shift moves from the needs and interests of the parties to a focus on the legal rights, industry standards and norms concerned in resolving the dispute.[31] In addition, the mediator focuses on highlighting to the parties the weaknesses in their cases and may make formal or informal recommendations. The mediator may weigh in on the likely outcome of other adjudicatory processes the parties may use if there is failure to settle their dispute using mediation.[32] In settlement mediation, the mediator uses persuasion to encourage the parties to settle. Since this is the aim, s/he uses his / her position to encourage the parties to compromise their positions so that a settlement may be reached.[33] Finally, transformative mediation has been classified as therapeutic as it is founded on an "empowerment and recognition" model.[34] That is, the mediation process creates an opportunity for the parties to be empowered and to recognize each other's needs, interests, values and points of view.[35] Due to its therapeutic nature, transformative mediation is normally used in family and community disputes.[36]

Despite mediators' roles being skewed towards facilitation, the mediation envisioned by the TDA is not strictly modelled on the mediation styles described above, but is rather a hybrid of the facilitative and settlement styles. This is premised on the fact that while facilitative mediation generally exempts the mediator from making recommendations, section 7(9)(f) of the act permits them to recommend a settlement. Furthermore, s/he may not only make an advisory award on the request of the parties, but also where it is in the interest of settlement to do so.[37] A use of settlement mediation combined with facilitative mediation is foreseeable where the mediator has been appointed to assist the parties to reach an agreement on the rules to regulate the conduct of a strike or lockout.[38]

Similarly, the provisions of the TDA do not leave room for a mediator to fully employ evaluative mediation, save for the fact that it is implied that in attempting to resolve a dispute, the mediator must engage the parties on the industry standards, norms and legal standards surrounding the dispute. The act only requires the mediator to explain to the parties the implications of referring a trade dispute to arbitration or to the Industrial Court where there has been a failure to mediate.[39] In any event, this provision does not require his / her explanation to entail an

29 P McDermott and R Obar "'What's going on' in mediation: An empirical analysis of a mediator's style on party satisfaction and monetary benefit" (2004) 9 *Harvard Negotiation Law Review* 75 at 76.

30 Weckstein "Alternative dispute resolution", above at note 23 at 510.

31 Wiese *Alternative Dispute Resolution*, above at note 3 at 49.

32 P McDermott and R Obar "'What's going on'", above at note 29 at 76.

33 Wiese *Alternative Dispute Resolution*, above at note 3 at 49; D Spencer *Essential Dispute Resolution* (2nd ed, 2005, Cavendish).

34 Wiese, ibid.

35 See RA Bush and JP Folger *The Promise of Mediation: The Transformative Approach to Conflict* (rev ed, 2005, Wiley) at 41–84.

36 Wiese *Alternative Dispute Resolution*, above at note 3 at 49; A Aiwazian "Transformative mediation: Empowering the oppressed voices of a multicultural city to foster strong democracy" (2008) 11 *Scholar* 31. Transformative mediation is mentioned in this article to bring its existence to the consciousness of the reader. It is not in popular use in labour and employment law as highlighted, hence an analysis of its applicability to mediation under the TDA is intentionally omitted. This notwithstanding, transformative mediation has been successfully used by the United States Postal Services to resolve racial discrimination class-action disputes with its employees. See in this regard NA Welsh "Stepping back through the looking glass: Real conversations with real disputants about institutionalized mediation and its value" (2004) 19 *Ohio State Journal on Dispute Resolution* 573 at 591–93.

37 Sec 7(9)(g).

38 See secs 6(5)(a) and 43.

39 Sec 7(4).

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evaluation of the merits of the dispute in any way. As will be seen below, the common law position concerning the assessment of the prospects of success in a condonation hearing is separate from the mediation hearing itself; hence it cannot be argued that when a mediator does this s/he is engaging in an evaluative mediation. Whereas the act's definition of mediation is open-ended,[40] the argument that evaluative mediation is not sanctioned by the TDA is supported not only by the express powers given to mediators under it, but also by the bulk of disputes that end up before the Industrial Court. The use of evaluative mediation may likely reduce the number of disputes that are referred to the court.

Referral of disputes and condonation for late referral

The process of mediation in terms of the TDA is triggered by the referral of the dispute to the commissioner or to a labour officer appointed by the commissioner.[41] This is an important step as it aids the commissioner or officer to assign someone to mediate over the dispute immediately. Logistical aspects of the anticipated mediation hearing are also fixed at this stage. Referrals are to be made in a prescribed form, and the party making the referral must satisfy the commissioner in writing that a copy of the referral has been served on the other party to the dispute. This provision is imperative in order to allow the other party to attend the mediation proceedings and oppose whatever claims have been brought or negotiate with the referring party in order to reach a settlement. A limited exception to this provision may be applicable where the commissioner is satisfied that it was not possible to serve the referral on the other party. In this case, the onus rests on the referring party to demonstrate that efforts were made to serve the other party but that these were rendered futile due to circumstances beyond their control. This rests on the fact that the failure to attend a mediation hearing may, to a certain extent, have adverse implications on the opposing party if a default award is made.

The TDA sets out a timeline within which a dispute concerning an alleged unfair termination of employment must be referred to the commissioner for mediation, which is within 30 days.[42] Any other trade disputes are not held to a rigid timeline, but the observation is that, this notwithstanding, they have to be referred to the commissioner within a reasonable time.[43] The provision concerning the referral of disputes within 30 days is imperative and must be complied with; however, the act leaves room for a late referral to be made. Section 7(9) provides that:

> "A mediator may, in dealing with a trade dispute assigned to him or her
> a) determine any question concerning
> i. whether a trade dispute has been referred in terms of section 7
> ii. the date on which the trade dispute was referred for mediation or
> iii. the jurisdiction of the mediator to mediate the dispute
> b) allow an application for the condonation of a late referral, where the applicant shows good cause for such late referral."

The first portion of the subsection permits the mediator to decide whether the act was complied with in making the referral. This will shed light on whether it was made within the stipulated time frame and whether the mediator may accordingly mediate on the dispute. The party against whom the referral is being made may also raise the question of whether the referral was made in

40 Sec 2 defines mediation as including facilitation, conducting a fact-finding exercise and the making of an advisory award.
41 Sec 6(1).
42 Sec 6(2).
43 *Ntuane v Standard Chartered Bank* [2015] All Bots 109 (IC), para 3; *Ramotswa v Tamu Construction* [2020] All Bots 318 (IC), paras 2–3.

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time, should the mediator not do so. Whereas the act's language is permissive, the role of the mediator in making this determination has on numerous occasions been subjected to the scrutiny of the courts, and in like manner demands that the mediator exercise this role as meticulously as possible. In *Ramooki v Botswana Meat Commission*, the court opined that:

> "In addition to mediation, the Trade Disputes Act provides mediators with the power *inter alia* to hear and determine condonation applications, these applications are distinct from the process of meditation. They are in my view quasi-judicial functions which are separate from process [sic] of mediation. Therefore, when a mediator exercises his / her power to grant or refuse condonation he / she is bound to provide written reasons for whatever decision they make. This would enable whichever party is aggrieved by the decision the opportunity to consider the reasons advanced and form an opinion as to whether to accept the decision made, or to appeal or review it."[44]

The court in *Molokomme v KTU Express* rightly highlighted that there is no provision in the TDA that requires the applicant who is out of time to make an application for condonation, and that condonation applications can only be allowed if they are made.[45] The court proceeded to highlight that the failure of a party to make such an application does not bar the mediator from proceeding if s/he is satisfied that the referral is within a reasonable time or is on the face of it reasonably explainable. The court based its reasoning on the submission that requiring the mediator to make a ruling on condonation in every referral outside the 30-day period would defeat the purpose for which mediation is intended.

The court's observation should not be taken to imply that a mediator should treat late referrals lightly. I would argue that whenever there is lateness in making a referral, it is incumbent on the mediator to ensure that this is addressed as efficiently as possible by advising the referring party to make an application, hearing their reasons for the delay and subsequently allowing the condonation if good cause is shown. This argument derives from the assumption that while mediation is meant to assist the parties to dispense with the dispute without many legal formalities, there is a degree of expectation that the mediator should be thorough in the fulfilment of his / her duties. S/he cannot simply disregard or allow a condonation without satisfying him/herself of the reasons for it. This submission is supported by the findings of the court in *Kossery v Worldwide Commodities (Pty) Ltd*, wherein the applicant had applied for and was granted condonation of his late referral by simply stating that he was away in India.[46] Upon appeal of the decision to grant condonation, the Industrial Court probed into the merits of the applicant's application and found that he had failed to provide evidence of his absence from Botswana during the relevant periods. After further investigation, the court found from his passport that he had not told the mediator the truth when stating that he was not in the country. This demonstrates that the mediator ought to satisfy him/herself that the reasons given are satisfactory when s/he grants a condonation; s/he should not simply grant it to dispense with the mediation process. Over and above this, professional efficacy should remain important to a mediator.

What amounts to good cause?

As highlighted above, the act permits a mediator to grant condonation of late referral where good cause for it is made by the applicant. In order to show good cause, the applicant must therefore, in his / her application, give reasons why the referral is being made late. In *Gwamulumba v Stanbic*

44 Above at note 19, para 11.
45 [2019] All Bots 26 (IC).
46 [2017] All Bots 234 (IC).

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Bank Botswana and Another, the court held that the standard for determining good cause for condonation by the mediator should not be equated to that required in a court of law.[47] That is, the mediator needs to consider the degree of lateness as well as the reasons provided for it and decide based on those factors, without further evaluating the applicant's prospects of success as the mediator did in this case, where the applicant had delayed for two months. While the court posits that the mediator need not assume the position of a court of law in his / her judgement on whether good cause has been shown or not, in *Mafaila v Botswana Agricultural Marketing Board*, where there was a delay of six months, the court was not opposed to the mediator's evaluation of the applicant's prospects of success in his condonation application.[48] This apparent uncertainty in the law is owed to the fact that the act does not set out the requirements of a condonation application before a mediator. Hence, in making their assessments, mediators rely on the common law as their authority for the decisions they make. Condonation applications before the Industrial Court are guided by the court's rules, which require the applicant to, among other things, demonstrate prospects of success.[49]

Despite the divergent positions above, the jurisprudence of the Industrial Court is at least settled with respect to the fact that the mediator must apply his / her mind to the degree of lateness and the reasons advanced therefor. In some cases, mediators only concern themselves with these two factors and end the enquiry there. For example, in *Lebogang v Permanent Secretary and Another*, the appellant appealed the decision of a mediator who refused to condone a late referral of his dispute to the Commissioner of Labour.[50] His employment was terminated on 22 April 2013; however, he referred his dispute on 5 August 2014, one year and four months after his dismissal. Key among the reasons he put forward to explain his late referral was that he was waiting for his former employer to process his terminal benefits as he needed to establish the number of leave days he had accrued, and that this number of leave days would help him to establish the cogency of the reason for his dismissal, that being allegations of unauthorized absence from work. His terminal benefits payment was only made in August 2014. The mediator accordingly refused to condone the late referral. The court agreed with the mediator's decision because the appellant had failed to demonstrate the nexus between his delay and the employer's delay in paying his terminal benefits. In essence, merely explaining away the delay will not exonerate the appellant; there must be a legitimate connection between the reasons advanced and the delay.[51]

A circumstance that results in a delay must be one that was out of the control of the appellant and that hinders them from proceeding with the referral. Consequently, in *Mopako v Dr Reddy Surgery*, the applicant sought to explain a delay of two months by highlighting that she had taken ill after the termination of her employment, which had been terminated on 14 April 2016; she only made her referral on 30 June 2016.[52] The court found her explanation unsatisfactory because she failed to explain what hindered her from making the referral between 15 April 2016 and 13 May 2016. It suffices to argue that had she taken ill and been admitted to hospital for treatment during this period, the court would have likely condoned the late referral.

Key to the decisions of the court is that once there is a dismissal, the dismissed employee ought to act swiftly if they want to challenge it; they need not wait to attain further information from the employer or payment of any other benefits to enable them to refer the dispute. If the determination of dispute depends at all on that information, the mediator may require the employer to furnish it accordingly. Whereas the Industrial Court is a court of both law and equity, the above decisions

47 [2015] All Bots 94 (IC).
48 [2015] All Bots 51 (IC). See further *Modise v Botswana Power Corporation* [2019] All Bots IC, paras 21–23.
49 Rule 66(2).
50 [2017] All Bots 47 (IC).
51 *Modise*, above at note 48, paras 12–19.
52 [2017] All Bots 263 (IC).

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demonstrate that it will not take kindly to the laxity of appellants who cry foul when mediators refuse to condone late referrals.

Mandatory or voluntary mediation?

Mediation is traditionally a voluntary form of ADR. The voluntariness arises from the fact that participation by the disputing parties remains a choice, and room is left for a party to withdraw from engaging in this process. In this regard, section 6(1) of the TDA provides that a party to a trade dispute may refer it, in the prescribed form, to the commissioner or a labour officer delegated by them. The permissive language suggests that the party is not compelled nor confined to follow the trajectory of resolving a dispute through the mechanisms in the TDA, including mediation. Consequently, a party may exercise their prerogative to directly approach the High Court, which has unlimited original jurisdiction, for the resolution of their dispute.[53]

In essence, mediation only becomes mandatory where a party chooses to follow the dispute resolution mechanisms under the TDA, as this is a prerequisite to obtain the jurisdiction of the Industrial Court, which not only serves the function of settling trade disputes, but is distinguishable from the High Court as it has the jurisdiction to apply both law and equity in exercising this function.[54] This assertion is further supported by the fact that section 20(1) of the TDA gives the Industrial Court exclusive jurisdiction in every matter properly before it. The jurisprudence of the Industrial Court and the Court of Appeal is consistent in the view that a matter "properly" before the Industrial Court means one that has first been referred for mediation under the TDA, resulting in the issuance by a mediator of a certificate of failure to settle or to mediate. As will be seen later, the Industrial Court serves an important role within the dispute resolution framework under this act, as it has the power to hear appeals and reviews of mediators' decisions.

It follows that the Industrial Court has consistently jealously guarded the framework of the TDA that mandates the mediation of disputes before they may be brought before it.[55] The jurisdiction of the court is obtained once a mediator issues a certificate (either of failure to settle or to mediate), which entitles either party to refer the dispute to the court.[56] Whereas these seem to be treated alike in practice, the language of the act suggests that a mediator is not only confined to issuing a certificate of failure to settle, which implies that a mediation hearing was held and the parties could not agree.[57] The act permits the mediator to issue a certificate of failure to mediate, which implies that a mediation hearing was never conducted.[58]

The mere fact that a party has obtained this certificate is not enough; the certificate, whatever form it may take, must be valid. Invalidity of certificates often arises where the mediator has issued a certificate outside the time frame within which s/he is permitted to mediate.[59] The act mandates a mediator to mediate a dispute referred to him / her within 30 days of the date the dispute was received by the commissioner or labour office. This time frame must be adhered to except where the parties extend it by agreement, or where a collective labour agreement provides for an extension.[60] For

53 Sec 95(1) of the Constitution of Botswana provides that "There shall be for Botswana a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law." See further *Botswana Railways' Organisation v Setsogo and Others* [1996] BLR 763 (CA) at 802–803.

54 Secs 14(1) and (2) TDA. See further *Khoemacau Copper Mining (Pty) Ltd v Steward Wallace* [2019] All Bots 83 (CA); *Phuthego and Others v Barclays Bank Botswana Limited* Case No CACGB-013-16.

55 Urgent applications to the Court under sec 23(3) are exceptions.

56 Secs 7(3), (17) and (18).

57 See further K Frimpong "Failure to mediate and failure to settle: A subtle distinction requiring a cautious judicial attention" (2006) *University of Botswana Law Journal* 113 at 117–20.

58 Ibid.

59 *Ponatshego v Kgalagadi Breweries Limited* [2017] All Bots 15. See also secs 7(1) and (2) TDA.

60 Sec 7(2). See further *Morapedi v BBS Limited* [2020] All Bots 469 (IC).

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example, in *Ponatshego v Kgalagadi Breweries Limited*, the applicant referred a dispute to the District Labour Office on 31 March 2015; the mediator scheduled a mediation meeting for 7 September 2015, approximately six months later. The respondent did not attend the mediation, and hence the mediator issued a default award on 8 September 2015. The respondent did not comply with the default award and the mediator accordingly issued a certificate of failure to settle.[61] In the proceedings before the Industrial Court, the respondent raised a point *in limine* that the mediator issued the certificate of failure to settle outside the time frame prescribed by the act, hence vitiating its validity. Undesirable as the outcome was, the court had to agree with the point of law raised by the respondent, thereby depriving the applicant of the remedy sought. The rationale of the court's decision was that the act does not compel a mediator to sit with a referral if s/he is unable, for whatever reason, to assist the parties to reach a settlement. As highlighted above, the act empowers the mediator to issue a certificate of failure to either mediate or settle. On this note, the court was of the view that even though the failure to conduct the mediation within the requisite time frame was not the fault of the applicant, the provisions of the act had to be interpreted strictly. Accordingly, the applicant could ideally, seeing that the mediator failed to conduct a mediation hearing, have invoked his right under section 7(3) that entitled him to refer the dispute to either arbitration or the Industrial Court. A proper construction of the act would require that a party who finds him/herself in this position must engage with the mediator first for the issuance of the requisite certificate before approaching the Industrial Court.

It is worth noting that the Industrial Court in the case of *Morapedi v BBS Limited* attempted to take an equitable approach in favour of the applicant in a situation where a mediator conducts a hearing outside the requisite time frame.[62] The facts presented in this case closely resembled those in *Ponatshego*, save that the mediation was held almost a month and a half after the referral was made. The court reasoned that a construction of the provision as preemptory will result in an injustice, as the applicant, who had no say in the scheduling of the date for mediation, will lose the right to access the court. Whereas the position in this case rightfully protects the interests of an innocent applicant and is a manifestation of the exercise of the court's equitable jurisdiction, the jurisprudence of the court is skewed towards a strict interpretation of the act. In order to balance this situation, it would in the circumstances be expedient for the Office of the Commissioner of Labour to inform parties who make referrals of the provisions of sections 7(1–3) and the fact that they have a right to refer the dispute to either arbitration or the Industrial Court if they notice inaction on the part of the mediator appointed for their dispute.

The extent of parties' obligation to participate in mediation proceedings

Section 7(9) of the TDA provides that:

> "A mediator may, in dealing with a trade dispute assigned to him or her
> (c) dismiss a referral if the referring party fails to attend a mediation meeting
> (d) give a default award if a party upon whom a referral has been served … fails to attend a mediation meeting."

Whereas the language of the provision is not preemptory, I argue that once a dispute has been referred, it is compulsory for the parties who are genuinely interested in a resolution of their dispute to participate in the mediation proceedings. This is because both stand to receive an outcome that may have adverse effects on their interests should they choose not to participate. On one hand, if a party's referral is dismissed, s/he loses the opportunity to assert a claim against the other party. On the other hand, a default award may be granted against a party to whom a referral has been served if

61 Above at note 59.

62 Above at note 60 at 6–7.

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s/he fails to attend a mediation hearing.[63] In this instance, this party would have forfeited their right to be heard and make a case against the referring party. S/he has the option to either comply with the award or apply to the mediator within 30 days, showing cause why the default award should be reversed.[64] This will entail advancing reasons why s/he failed to attend the hearing, whereupon the mediator may reverse the award or decline to do so.[65] Assuming the mediator declines to reverse the award (or the dismissal of the referral), the act gives either party the opportunity to appeal this decision to the Industrial Court.[66] An attempt to appeal a default award before seeking reversal by the mediator has been held by the court to be premature, and such matters have been seen by the court as before it improperly.[67]

The argument that mediation is compulsory once there has been a referral is further strengthened by the fact that the TDA renders a default award that has been confirmed by the commissioner to have the same force and effect as a judgment or order of the Industrial Court.[68] At this stage, if the award is ignored or there is non-compliance, the party to whom the award was made may approach the Industrial Court for assistance with enforcement or further relief.[69] In instances where the mediator makes an award of monetary value which is not complied with, attachment orders may be made.[70] It ought to be highlighted that the argument advanced here that mediation is compulsory should not be read to imply that parties to the dispute are compelled to settle. The act does not give a mediator the power to impose a settlement on the parties, but merely clothes him / her with the power to recommend a settlement, as well as the power to make an advisory award if the parties request it or it is in the interest of settlement to do so.[71] In my view, should a mediator recommend a settlement, the parties must agree to its terms before it can be deemed to have the same force and effect as a judgment or order of the Industrial Court under section 7(13). A party retains the liberty to disagree with a mediator's proposals, and these cannot be imposed on that party. In such a situation, the mediator will be entitled to issue a certificate of failure to settle, as discussed above.

The nature of appeals and reviews in the Industrial Court

For completeness, it suffices to highlight that the Industrial Court derives the authority to review or entertain appeals against the decisions of mediators from section 20(1)(c) of the TDA. Appeals and reviews of mediators' decisions are premised on the fact that when they perform their functions, mediators are essentially exercising administrative powers. Hence, while they cannot impose a settlement on the parties, the act clothes them with the power to make decisions that should be capable of being challenged by an affected party. Such powers as discussed in this article include the award or refusal of condonation of late referral and default awards, as well as reversals of these remedies.[72]

An applicant who desires to challenge the decision of a mediator on appeal or review must do so separately from any court proceedings concerning the dispute. The court in *Isaac Matthews v Banyana Farms* aptly captured the position in the following terms:

63 A default award issued pursuant to sec 7(9) shall be confirmed or varied by the commissioner after the expiry of 30 days. Such a default award shall have the same force and effect as a judgment or order of the Industrial Court. See in this regard sec 7(10) as read with secs 7(11), (12) and (14).

64 Sec 7(12).

65 Similarly, the referring party can apply to the mediator for a reversal of the dismissal. See sec 7(12).

66 Sec 7(15).

67 See *Choices Liquid World v Dirane* [2020] All Bots 384 (IC); *Isaia v Toboka* [2020] All Bots 2014 (IC); *Household Brands (Pty) v Mochudi* [2018] All Bots 45 (IC).

68 Sec 7(14).

69 *Aarone v Your Friend (Pty) Ltd t/a Gabz FM and Another* [2019] 2 BLR 311 (IC).

70 See *Household Brands (Pty)*, above at note 67.

71 Sec 7(9)(f)(g).

72 See also sec 7(15), which gives an option to appeal to the Industrial Court.

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> "What a party cannot do is not to challenge the mediator's decision to entertain and / or mediate upon the referral but at some later point down the line seek to assert that a referral was not timeously [sic] or properly made. To do so would be to treat the mediator's actions as non-existent or ignore that a mediator had entertained and / or attempted to mediate a dispute."[73]

Essentially, a mediator's decision cannot be reviewed or appealed as a point of law following the referral of the dispute to the Industrial Court for resolution.[74] Put differently, a party who seeks to review or appeal a decision of a mediator must institute separate proceedings and not raise such matters as a point of law in proceedings brought by the party who has referred the dispute for resolution to the court. For example, if a mediator allows an application for condonation of late referral and the other party is opposed to this decision, that party must appeal this decision. If s/he fails to do so, s/he cannot later argue that the mediator should not have condoned the referral if the dispute is referred to the court. Hence a distinction exists between matters where the opposing party raises a point of law where the mediator issued a certificate of failure to settle outside the time frame sanctioned by the act, and where the mediator allowed a condonation of late referral.

Appeals and reviews of mediators' decisions before the court are dealt with in a similar manner to reviews and appeals of administrative bodies in administrative law. Consequently, in *Mafaila*, the court held that

> "When an applicant makes an appeal against the decision of a mediator, they are inviting the court to consider the merits of the decision while in a review the court would only concern itself with the legality of the decision. In an appeal, the court would quash the decision of the mediator and substitute its own decision for that brought under appeal."[75]

Similarly, the nature of a review application was distinguished from an appeal by the Court of Appeal in *National Amalgamated Local and Central Government Workers Union v Botswana Power Corporation* in the following terms:

> "Review however differs from an appeal in that it concerns itself with the procedure by which the decision was reached, rather than with the correctness or otherwise of the decision. This is why the reviewing court will look to see whether the person or body making the award was motivated or influenced by fraud or *mala fides* or was acting *ultra vires*."[76]

Because a review does not involve a consideration of merits, the act provides a limited review against the decisions of mediators. A review will lie to the court only with respect to decisions of mediators as prescribed by the act, that is, where the mediator acted contrary to the provisions of the act and the procedures established under it, where their decision-making process was unfair or where they failed to explain in detail the implications of referring a dispute to arbitration in accordance with section 7(4). If a party's dissatisfaction with a mediator's decision is not based on these, it will be prudent to appeal rather than ask the court to review the decision. The act supports this.

Conclusion

This article has demonstrated that mediation is a compulsory form of ADR under the TDA. Whereas mediators' functions are not adjudicative, they serve a vital administrative role and are therefore an indispensable conduit to the trajectory of resolving trade disputes under the act.

73 Case No IC 311/14 (unreported), para 25.
74 See further *Ramooki*, above at note 19, para 9.
75 Above at note 48.
76 [2010] All Bots 50 (CA).

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Instead of being treated like a routine exercise, the compulsory use of mediation under the act should be encouraged and celebrated. If approached by the disputing parties in good faith, it can assist them to deal with disputes in a swift, less costly and less complicated manner. The Industrial Court has contributed immensely to the need for parties to trade disputes to honour the mediation process by strictly enforcing the requirement to exhaust mediation remedies set out in the act before approaching it. The court's response to appeals and reviews brought against decisions of mediators signals its consistency in balancing its role as a court of law and equity by shunning laxity on the part of litigants approaching the mediation process. This has the ripple effect of encouraging mediators to equally dispense with referrals before them with fewer formalities but the requisite acumen.

Competing interests. None

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