Judicial stamp of approval for divorce and family mediation in South Africa

1 Introduction

In the recent case *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC), which dealt with the variation of a custody order after divorce, Kgomo JP ordered the parties to privately mediate all future disputes with regard to their 10-year-old daughter. He ordered that "[o]nly subsequent to the conclusion of the mediation process could either party approach a competent court which has jurisdiction to decide the dispute" (614*g*). In delivering this decision the court effectively subjected the parties to mandatory family mediation. In another recent case *Townsend-Turner and another v Morrow* [2004] 1 All SA 235 (C), the full bench of the Cape Provincial Division of the High Court made a similar decision when confronted with an access dispute between the father of a 7-year-old boy and the boy's maternal grandmother. The parties were ordered to attend mediation offered by private mediators of their own choice or those proposed by the office of the family advocate in an effort to resolve the issues of conflict between them including, of course, the issue of access (256*f-h*). The court ordered that the mediation had to commence within two weeks of the granting of the order (256*j*) and that it should continue for a period of at least three months or for the duration of at least four mediation sessions (257*a*). The parties were also ordered to share equally the costs of the mediation (256*i*).

From a slightly different angle mediation also came under the spotlight in the Zimbabwe High Court in *G v G* 2003 (5) SA 396 (Z). In this case it was pointed out that the adversarial system of litigation (which also applies in Zimbabwe) is often inimical to the interests of children when questions of divorce, custody and access are involved (412A). The court referred to a comparative study of parties who went for mediation and others who left it up to the court to adjudicate their differences

which showed "... very clearly and definitely, that there was greater satisfaction among both children and parents in those cases where mediation was used as opposed to an adversarial approach" (412D-E).

2 Divorce and family mediation in South Africa

Despite the fact that much has been written about mediation the past two decades, little mediation takes place in divorce and other family-related matters in South Africa today. Although there is talk of divorce and family mediation being offered by some private mediators, who are generally affiliated to mediation organisations such as SAAM (The South African Association of Mediators in Divorce and Family Matters), ADRASA (The Alternative Dispute Resolution Association of South Africa) and FAMAC (The Family Mediators Association of the Cape), it appears that these private mediation services are totally under-utilised. It is only a very small percentage of the more prosperous section of our population who can afford to make use of these services. Besides these private services, divorce and family mediation is also being offered by various non-governmental and community-based organisations and institutions such as street committees, community courts (known as '*makgotla*'), community-based advice centres, Family Life and FAMSA (The Family and Marriage Society of South Africa). These community mediation services are, however, seriously hampered by a lack of funds and human resources and it is an unfortunate fact that they, too, offer divorce and family mediation to the public on a very small scale.

In light of the decisions in *Van den Berg v Le Roux supra* and *Townsend-Turner and another v Morrow supra* regarding mandatory private mediation and the comments in *G v G supra* about the inappropriateness of the adversarial system of litigation in divorce matters, it is very clear that divorce and family mediation, whether private or on community level, will soon start to play a much more prominent role in South

Africa. This will surely prove to be a step in the right direction as it appears that the minimal mediation services offered by private mediators deliver excellent results in practice and that the small-scale mediation services offered at community level are generally perceived as accessible and responsive to community concerns (see Van der Merwe “Overview of the South African Experience” 1995 (Apr) *Community Mediation Update* 3).

Mediation in this context should, however, not be confused with the services offered by the office of the family advocate in terms of the Mediation in Certain Divorce Matters Act 24 of 1987. Because the purpose of an enquiry in terms of section 4 of this Act is to evaluate the parties and the circumstances of a case in order to furnish the court with a report and recommendation on matters concerning the welfare of any minor children, the activities of family advocates and family counsellors should rather not be regarded as mediation (even though they sometimes indeed try to mediate disputes between divorcing parties).

3 The most important features of divorce and family mediation

As mediation is still in a developmental phase and is still practised in many different ways, it is impossible to give a generic or general definition of divorce and family mediation. This is probably the reason for the many different definitions of divorce and family mediation in legal literature at present. The following elements can, however, be regarded as the most important features of divorce and family mediation:

- Usually an impartial and neutral third party facilitates the negotiation process in which the parties themselves make their own decisions.
- Divorce and family mediation has a multi-disciplinary character and is regarded as a socio-legal process.

- The aim of divorce and family mediation is to assist parties to reach a mutually satisfying agreement which recognises the needs and rights of all family members.
- Divorce and family mediation operates under the aegis of the law.
- The mediation process is confidential.
- The mediation process is flexible and creative and can be adapted according to the context of the dispute and the needs of the parties.

4 The advantages of divorce and family mediation

Divorce and family mediation has numerous advantages for divorcing couples, children affected by divorce and the judicial system in general:

4.1 Advantages for parties who are getting divorced

An important advantage of mediation is that it allows divorcing parties greater control over the consequences of their divorce. Parties are actively involved in the mediation process and can themselves make the important decisions related to divorce. As a result of this, and also because parties are able to make decisions regarded as fair and right within their particular cultural and moral frame of reference, they are more likely to honour these mediated agreements. Research in this regard has shown that parties, for example, adhere closely to mediated agreements long after their divorce (see Hauser *Good divorces, bad divorces: a case for divorce mediation* (1995) 18; Goldberg "Family mediation is alive and well in the United States of America: a survey of recent trends and developments" 1996 *TSAR* 370).

Mediation also improves communication between divorcing parties. Mediators are schooled in, amongst other things, the social and behavioural sciences, and know what techniques and strategies to use to lessen conflict between parties and to bridge communication gaps. Meaningful communication between parties usually

uncovers all sorts of problems, including underlying issues that often remain hidden in divorce litigation (see Scott-MacNab & Mowatt “Mediation and arbitration as alternative procedures in maintenance and custody disputes in the event of divorce” 1986 *De Jure* 316; Rogers & Palmer “A speaking analysis of ADR legislation for the divorce neutral” 2000 *St Mary’s Law Journal* 875-876). Constructive communication between parties also betters the level of cooperation between parties during the divorce process and the period thereafter.

Although, on the one hand, mediation teaches parties how to deal with conflict in a non-aggressive way, on the other hand, it gives them the opportunity to express their feelings of bitterness, disappointment and anger. Furthermore, mediation allows parties to deal with those matters they feel are important, but which the law may consider frivolous or unenforceable. Therefore, unlike in litigation, the mediation process is not restricted solely to legal issues, and allows parties to deal with all facets of divorce.

The mediation process is also more accessible than litigation. It is an informal and simple process which people can understand and in which they can fully participate (see Dorf, Hendler & Alion 1995 “Mediating Family Law Disputes” *Maryland Bar Journal* 20). Furthermore, it is a flexible and creative process which takes place in an unthreatening atmosphere and takes religious and cultural differences into account. Therefore parties can easily relate to the mediation process, especially where the mediation services are offered by community centres.

Although mediation may be more expensive than an unopposed divorce, it is definitely much cheaper than opposed divorce litigation. In South Africa, the going rate for a mediation session is anything between R400 and R1 000, depending on who the mediator is. The mediation process usually runs for a period of four to six sessions. Six sessions of mediation may therefore cost parties anything between

R2 400 and R8 000. In comparison, a very straightforward, unopposed divorce costs about R5 000 today and the costs of an opposed divorce may run into the hundreds of thousands of rands. Clearly, mediation may save divorcing parties a considerable amount of money.

Unlike the adversarial system of litigation, which often draws out the divorce process, mediation enables parties to work out and resolve all matters related to divorce, including emotional and underlying issues, as quickly as possible. However, it is true that unopposed divorce litigation may often be faster than divorce mediation. This should nevertheless not be regarded as a disadvantage since it is very important that the mediation process should not be rushed and that parties should be given enough time to think carefully about the important decisions that have to be made upon divorce.

With regard to the advantages of mediation for divorcing couples it is, once again, appropriate to refer to *G v G supra* where it was indicated at 412D-E that divorce mediation is seen by its participants as significantly more satisfactory than the normal adversarial divorce process.

4.2 Advantages for children affected by divorce

Legal literature often refers to the fact that mediation focuses on the interests of children. In the first place, mediation enables those who know the children best, namely their parents, and not some or other third party or institution, to make decisions about their welfare. Furthermore, section 28(2) of the Constitution of the Republic of South Africa 108 of 1996 places an obligation on, amongst others, the mediator to see to it that divorcing parties put the interests of their children first in all negotiations between them. The chances of the interests of children being protected in the mediation process are therefore excellent. Research undertaken by Kelly

("Mediated and adversarial divorce resolution processes" 1991 *Family Law Practice* 386-387) has shown that upon divorce, mediated settlement agreements provide far more advantageous provisions regarding the interests of children than agreements or orders made in terms of the adversarial system. Kelly's comparative study between mediation and traditional litigation indicates that spouses in divorce mediation agree on more favourable financial arrangements in respect of their children's maintenance and the costs of their tertiary education. In addition, mediated agreements usually contain more detailed definitions of the non-custodial parent's rights of access, thus keeping to a minimum future disagreements between parents on these matters (see Hauser *Good divorces, bad divorces: a case for divorce mediation* (1995) 18, 25; Pearson "Ten myths about family law" 1993 *Family Law Quarterly* 291-292).

Furthermore, mediation emphasises that unlike marriage, parenthood is not terminated on divorce, but that both parents retain their roles and responsibilities in a restructured family (see Hoffmann "Divorce mediation and custody evaluation: fundamental differences" 1989 *Social Work* 107). In mediated divorce matters there are thus a greater chance of the non-custodial parent remaining involved in his or her children's upbringing. The involvement of both parents creates a positive atmosphere for children and helps them to adapt to their new circumstances upon the divorce of their parents.

The fact that mediation teaches divorced spouses to get along better, also improves the likelihood of children maintaining a meaningful relationship with both parents after divorce. Divorce mediation, thus, lessens the chances of children becoming the innocent victims of their parents' divorce.

4.3 Advantages for the judicial system

Since, in mediation, both parties themselves make the important decisions that have to be made on divorce and do not leave them up to the courts, the courts' burden becomes considerably lighter. Because parties are more likely to honour mediated agreements, there is less chance of them later requesting the courts to step in where the provisions of a divorce order have not been met. The fact that courts are kept less busy by divorcing couples or those who are already divorced, saves them a lot of time and administrative work and allows judges to use their expertise and time to work on more complex cases (see Faris "Exploiting the alternatives in alternative dispute resolution" 1994 *De Jure* 339; Rogers & Palmer 2000 *St Mary's Law Journal* 875).

Mediation also has a positive effect on the adversarial and combative behaviour of lawyers in the sense that, when lawyers assist their clients in the mediation process, any such behaviour is discouraged by the mediator. It is said that "[m]ediation thus can subtly change the dynamics of the negotiation enterprise, making adversarial tactics less acceptable and more difficult to mobilize because a third party can credibly call their use into question" (McEwen, Mather & Maiman "Lawyers, mediation and the management of divorce practice" 1994 *Law and Society Review* 161). Mediation, therefore, helps lawyers to focus on coming to a fair settlement agreement rather than striving to negotiate the best possible deal for a client.

5 The disadvantages of divorce and family mediation

Divorce and family mediation is obviously not without problems. The problems are, however, not insurmountable and there is a counter-argument for every criticism levelled against divorce mediation. The most important criticisms of divorce and family mediation as well the counter-arguments are looked at more closely

hereunder:

5.1 Divorce mediation is inappropriate where parties do not have equal bargaining power

Critics often argue that mediation only reinforces the unequal bargaining power that may exist between divorcing parties (see for example Van Zyl *Divorce mediation and the best interests of the child* (1997) 201-202; Freeman "Divorce mediation: sweeping conflicts under the rug, time to clean the house" 2000 *University of Detroit Mercy Law Review* 86). They hold that, in the mediation process, the stronger party may dominate and intimidate the weaker party thereby forcing the weaker party to agree to provisions which will benefit the stronger party at the weaker party's expense. Feminists feel strongly that women, in particular, are prejudiced by the mediation process, since socially and financially women are generally in a subordinate position to their husbands, a fact which they feel mediators do not take into account (see for example Winks "Divorce mediation: a nonadversary procedure for the no-fault divorce" 1980-1981*Journal of Family Law* 275; Clark "No holy cow - some caveats on family mediation" 1993 *THRHR* 460). It is argued, therefore, that divorce mediation is inappropriate in cases where the parties are in unequal bargaining positions.

In actual fact there is always a power imbalance between parties and it would be unreasonable to conclude that mediation cannot succeed unless both parties have precisely the same bargaining power. Similarly, in the adversarial system of litigation, parties who do not have equally good attorneys or advocates do not have equal bargaining power. Proponents of mediation hold that divorce mediation can indeed be used successfully in these cases. They believe that where there is a power imbalance between parties, mediators must exercise a greater measure of control over the process to prevent the weaker party, usually the woman, from being

prejudiced. Although there is little empirical research available on whether mediation generally prejudices the woman, the little evidence there is, indicates that mediation affords women a better chance than the adversarial system of litigation (see Rogers & Palmer 2000 *St Mary's Law Journal* 880). It is also true that men, despite their stronger financial position, are not necessarily the strongest party at the negotiating table, especially when it comes to custody matters (see Wan "Mediating family property disputes in New Zealand" 1999 *Dispute Resolution Journal* 75). Mediators should therefore always be on the lookout for any power imbalance between parties in order to take appropriate action to strengthen and support the weaker party, whether it be the man or the woman.

5.2 Divorce mediation is inappropriate in cases of family violence

Many legal writers and feminists believe that divorce mediation is totally inappropriate in cases of family violence (see for example Kabanas & Piper "Domestic violence and divorce mediation" 1994 *Journal of Social Welfare and Family Law* 271-273; Van Zyl *Divorce mediation and the best interests of the child* (1997) 203-206). They fear that women, who are usually the victims of this violence, will be powerless against their husbands in the mediation environment and will be unable to negotiate fair settlement agreements for themselves. Family violence in this regard not only refers to physical abuse, but also to financial abuse as well as emotional, familial and sexual abuse. (The Family Violence Act 116 of 1998 which provides for the granting of protection orders, also contains such a broad definition of family violence that includes, in addition to the above-mentioned forms of violence, harassment, intimidation and stalking.)

Another argument against divorce mediation in cases where there is family violence, is that abusers may avoid criminal-law sanctions for their actions if their divorce is not dealt with by the courts, but settled privately in the mediation process where all

disclosures of the parties are confidential (See Scott-MacNab “Mediation and family violence” 1992 *SALJ* 283). Concern is also expressed about the safety of victims of abuse in the mediation process. For this reason, legislation that makes mediation compulsory, often contains clauses which exclude any kind of mediation in the case of family violence.

Nevertheless, there are some writers and mediators who feel that divorce mediation can be applied and be effective in cases of family violence (see for example Scott-MacNab 1992 *SALJ* 283; Pearson 1993 *Family Law Quarterly* 288; Goldberg 1996 *TSAR* 366; Greatbatch & Dingwall “The marginalization of domestic violence in divorce mediation” 1999 *International Journal of Law, Policy and the Family* 175, 185-187). They believe that since mediation places the emphasis on future relationships rather than on previous criminal behaviour, it indeed gives parties the opportunity to make their own decisions regarding their divorce as quickly as possible. Mediation might even be more appropriate than litigation in cases of family violence, since it is indeed the courts that humiliate and discredit abused spouses by allowing opposing advocates to tear apart their evidence. In contrast, mediation, which is a confidential and private process, provides a comfortable atmosphere in which the violence can be assessed.

The viewpoint that mediation is completely unsuitable in cases of family violence is obviously too narrow. Although divorce mediation cannot be used in all cases where family violence is at issue, it can certainly be applied successfully in the majority of these cases.

5.3 Mediators cannot always be impartial and neutral

It is true that mediators cannot always be impartial and neutral, and that every mediator has his or her own perceptions of what is fair and right, linked to his or her

cultural background, education and training.

A mediator's cultural background can give rise to problems if it is not the same as that of the parties in the mediation process (see Moodley "Mediation: the increasing necessity of incorporating cultural values and systems of empowerment" 1994 *CILSA* 46; Goldberg "Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular" 1998 *TSAR* 755). In particular, where mediators are part of the dominant cultural group they may try to impose their values and principles on the parties. This problem is, however, not unique to the mediation process and the courts, which tend to be staffed by persons with a common cultural background, face similar problems as well. It is therefore vital that all mediators should have a thorough knowledge of cultural sociology in order to make a neutral transition from the value system of one culture to another.

As indicated above, a mediator's professional training may further influence his or her neutrality or impartiality. Since mediators from different professional backgrounds are presently involved in mediation, this necessarily gives rise to the following problems:
Where lawyers act as mediators, they may find it difficult simply to provide the parties with information on the legal position without giving one or both parties legal advice. Should they give legal advice, however, their neutrality becomes seriously impaired and the parties have considerably less control over the outcome of the mediation process. On the other hand, mediators who are trained in the behavioural or social sciences tend to play a more active role in facilitating the parties' agreements on the best interests of the children. These problems can be resolved effectively, however, by developing proper standardised training courses for all mediators in South Africa. (This aspect is explored in greater detail in De Jong *Egskeidingsbemiddeling in Suid-Afrika: 'n vergelykende perspektief* (2003 Unisa LLD thesis) 321-325.)

From the above discussion it is clear that there will always be some factors which may affect mediators' neutrality and impartiality. As long as the mediation process is conducted properly, the parties have confidence in the mediator and the outcome of the process is acceptable, the principle of complete neutrality and impartiality should thus not be regarded as an absolute prerequisite for mediation (see Faris *An Analysis of the Theory and Practice of Alternative Dispute Resolution* (1995 Unisa LLD thesis) 190; Goldberg 1998 *TSAR* 759).

5.4 Mediation does not offer the same safeguards as litigation

The fear is often raised that mediation, as an informal process, does not offer the parties and their children the same safeguards as the adversarial system of litigation (see Clark 1993 *THRHR* 460; Wan 1999 *Dispute Resolution Journal* 74; Bridge "Family mediation and legal process: an unresolved dilemma" 1997 *New Zealand Universities Law Review* 232-233; Freeman 2000 *University of Detroit Mercy Law Review* 75). In mediation, no formal legal process is in place to ensure the parties' procedural rights, such as the disclosure of all relevant documentation and the testing of evidence for accuracy. Another concern is that the parties have less access to attorneys and advocates in the mediation process and are therefore denied the protection of legal representation. Critics worry that mediation does not offer the parties and their children the same just and fair results as traditional litigation in the courts does. However, proponents of mediation argue that for all concerned, the results of mediation are as fair and equitable as those achieved through traditional litigation, if not better (see McEwen, Rogers & Maiman "Bring in the lawyers: challenging the dominant approaches to ensuring fairness in divorce mediation" 1995 *Minnesota Law Review* 1320).

Regarding the argument that mediation denies parties the protection of legal

representation, it is a fact that most parties in divorce litigation do not enjoy representation in any event. The vast majority of divorce cases heard in the courts are unopposed. In these cases, it is often only the plaintiff who sees an attorney. In addition, many divorce cases are dealt with *in persona*. Then, neither of the parties has legal representation. There is in any case no rule to prevent parties from consulting their own attorneys during the mediation process or bringing them along to mediation. Parties are in fact encouraged to do so if they can afford it (see McEwen, Mather & Maiman 1994 *Law and Society Review* 149 *et seq*; McEwen, Rogers & Maiman 1995 *Minnesota Law Review* 1376 *et seq*). In a country like South Africa, where legal representation is a costly luxury for most people, very few will be able to do so, however.

Furthermore, as has already been shown above, mediation takes place under the aegis of the law. Part of the mediator's duty is to provide parties with objective information on the legal position in respect of disputes and further to ensure that the equality clause (s 9) and the children's clause (s 28) of the Constitution of the Republic of South Africa 108 of 1996 are met during the negotiations between parties.

The issue of the disclosure of relevant documentation and the testing of evidence for accuracy is more problematic in the case of mediation than opposed divorce litigation. Mediation is an informal process that does not provide for these procedural safeguards. In unopposed divorce litigation there is no question of the formal disclosure of documents or the testing of evidence for accuracy either and since most divorces are unopposed, these too are finalised without any procedural safeguards being enforced. The mere knowledge that the courts will conclude an agreement for the parties if they cannot reach one in the mediation process, should in itself be enough motivation for them to disclose all the relevant documentation and information openly and honestly.

Finally, it is very important to remember that mediated agreements must be presented to the courts on divorce for final approval and/or revision. Clearly, the courts will not incorporate mediated agreements into divorce orders if they are in conflict with stipulated rules of law or are completely unjust or unfair towards one of the parties. For example, the courts will not accept a mediated agreement if there is a significant discrepancy between what parties would have obtained in terms of the applicable legal system and what they will receive in terms of a mediated agreement. Similarly, the courts will not approve a mediated agreement which is not in the best interests of any children involved. The courts therefore have the last word on agreements made in the mediation process and in this way one of the most significant safeguards is built into divorce mediation.

Conclusion

From the above discussion it is abundantly clear that mediation is an important tool for dealing with all divorce and family disputes. In these disputes, where there are usually strong emotional issues involved and where, very often, there will of necessity be an ongoing relationship between the parties because there are children involved, it is imperative that parties should first attempt to resolve their issues in mediation before they are exposed to the confrontational nature of the adversarial court procedure. As family law lawyers are slow to recognise mediation's overwhelming benefits, this new impetus of compulsion by cases like *Van der Berg v Le Roux supra*, *Townsend-Turner and another v Morrow supra* and *G v G supra* will surely go a long way to convincing them of the importance of mediation in the family law process.

M DE JONG

University of South Africa