Mediated Settlement Agreements in South Africa: A Judicial Review

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Declaration

“No part of this thesis has been submitted elsewhere for any other degree of qualification in this or other university. It is all my own work unless referenced to the contrary in the text.”

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Abstract

The research question of this thesis is a simple one: when should a court review a settlement agreement? In South Africa, mediation as an alternative dispute resolution tool is a popular mechanism for aggrieved parties in commercial disputes, where litigation may be limited or inappropriate in the circumstances. Where a mediation concludes with a settlement agreement, and one of the parties then regrets his or her acceptance of the agreement, he or she may approach a court of law for legal review. However, when dealing with a mediated settlement that is primed for legal review, there is uncertainty in the law. There are no fixed rules to guide a court in determining when the legal review of the mediated settlement agreement is appropriate. Judicial review raises complex questions that sit at the intersection of public policy and the constitutional freedom to contract in South Africa, yet the law provides no coherent framework for assessing when judicial review of a settlement agreement is appropriate. Examining the law of legal privilege; confidentiality and without prejudice settlements, and how these principles might affect the legitimacy of the legal review of a mediated settlement agreement, this research reveals that there are no legal tests to be used by the courts, and, that this is an area of the law of mediation that is in need of urgent reform.

Searching for a new fount of knowledge in terms of alternative dispute resolution, this research plumbs South African labour law to ask whether we can use labour law principles to supplement our understanding of the legal review of mediated settlement agreements. This thesis contends that by using principles from South African labour law cases and related legislation, the law of mediation in South Africa can be supplemented and developed. This thesis will show that individual labour law principles, public policy and overarching constitutional norms can provide useful contributions to private, voluntary mediation. It will be argued, by way of doctrinal analysis, that South African labour law has the capacity to augment the jurisprudence of mediation in South Africa, specifically where the suitability of judicial review of a mediated settlement agreement needs to be assessed. Building on this analysis of labour law, the thesis develops the concept of variables as a novel theoretical framework for indicating whether judicial review of the settlement agreement is likely.

Further developing this framework, suggestions are offered as to how such variables might be used to inform reform in this area of law. These reforms, should they be adopted by the South

African legislature, would provide the courts and legal practitioners with a cogent and well-articulated framework to use when assessing whether the legal review of a mediated settlement agreement is apt.

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Chapter 1 Do we need mediation?

1.1 Conflict is a constant theme

From Dieselgate[1] to Weinstein[2] to Boeing[3] and most recently in the UK, Prince Andrew,[4] we can see that secret mala fide settlements seem to be losing credibility. Currently there seems to be little space in our social and legal framework for mediation in its pure form, namely, where mediation takes a strictly confidential approach and dissuades judicial review.[5] This position needs further clarification.

Life can be complex, nuanced and, at times, peppered with conflict. Disputes and conflict occur in all human relationships, societies and cultures.[6] Conflict, unfortunately, is a constant theme in civilization, and people can address such conflict in a variety of ways. Once a dispute has arisen, a settlement is often very welcome as an alternative to a protracted legal battle. A good settlement agreement between two parties will end the dispute. We know that disputes and conflicts can take many forms. For example, a couple experiencing relationship issues might approach a family elder or religious leader for help to understand each other better. A landowner might be having a dispute with alleged unlawful occupiers of his property and may wish to resolve the dispute out of court. Perhaps an employee who feels he has been discriminated against might ask an employment tribunal to intervene on his behalf, if he feels that discussions with his employer have stalled. If a business partnership wishes to dissolve as a business entity, the partners might enlist an independent facilitator to conduct

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[1] Sarah Dadush, 'Why You Should Be Unsettled by the Biggest Automotive Settlement in History' (1 February 2018) <https://papers.ssrn.com/abstract=3123281> accessed 23 November 2022.

[2] Jodi Kantor and Megan Twohey, 'Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades' *The New York Times* (5 October 2017) <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> accessed 23 November 2022.

[3] David Shepardson, 'Boeing to Pay $200 Million to Settle U.S. Charges It Misled Investors about 737 MAX' *Reuters* (23 September 2022) <https://www.reuters.com/business/aerospace-defense/boeing-pay-200-million-settle-civil-charges-it-misled-investors-about-737-max-2022-09-22/> accessed 23 November 2022.

[4] Caleb Wheeler, 'Prince Andrew: A Legal Expert Explains the Settlement with Virginia Giuffre' (*The Conversation*) <http://theconversation.com/prince-andrew-a-legal-expert-explains-the-settlement-with-virginia-giuffre-177255> accessed 23 November 2022; Caroline Davies, 'Prince Andrew's Settlement Raises Many Questions but Answers None' *The Guardian* (15 February 2022) <https://www.theguardian.com/uk-news/2022/feb/15/prince-andrew-settlement-virginia-giuffre-raises-many-questions-but-answers-none> accessed 6 June 2022.

[5] Richard Fossey, 'Secret Settlement Agreements Between School Districts and Problem Employees: Some Legal Pitfalls' (1998) 12 Journal of Personnel Evaluation in Education 61, 63–65.

[6] Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (John Wiley & Sons 2014) 3.

negotiations between the partners to find common ground. In all these scenarios a mediation process could be a useful platform for parties who are looking for solutions to their conflict; a fruitful outcome would be a fair and just settlement agreement that would end their dispute.

Versatility is an aspect of mediation, and it indeed, has many uses; attempting to provide a complete list is almost impossible. Mediation, besides being used primarily for conflict resolution, may be used for educational purposes, namely, to train parties directly or indirectly in conflict management. It can also be used where difficult decisions need to be made by consent rather than in an autocratic manner.[7] Mediators may help to develop dispute resolution systems for organisations, which, once implemented, aid in reducing or preventing a conflict from escalating either within the organisation or when dealing with the public. An example of this is a dispute resolution system that human resources might use to resolve employee-related disputes internally. Mediation can aid in compliance by monitoring due diligence processes in commercial contractual arrangements, where parties often meet to discuss whether the stages of a transaction are on schedule and what can be done if action needs to be taken.[8] While mediation is often touted as an alternative to litigation, it can also be an integral part of the litigation or arbitral process. Parties may use mediation as a 'filtering mechanism' to agree on a set of facts or a timeline of events.[9] These elements can be agreed to, or narrowed down, in a mediation process before arriving at the courtroom, so that the adjudicator can focus on one or two important issues like liability or the quantum of damages.[10]

Although mediation is greatly praised, it is not perfect and there are some disadvantages to the process. One particular imperfection, suggested by Vettori, is that if mediation does not end in a settlement, then it is merely an extra hurdle for the parties to clear before justice can be attained by way of traditional litigation in the courtroom.[11] When mediation fails, the parties are in the same position as they were before the mediation commenced, but they are now in the unenviable situation of either progressing to court as litigants or abandoning their

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[7] Laurence Boulle and Miryana Nesic, *Mediation: Principles, Process, Practice* (Butterworths 2001) 13.

[8] Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths 2011) 34.

[9] Boulle and Nesic (n 7) 13.

[10] ibid.

[11] Stella Vettori, 'Mandatory Mediation: An Obstacle to Access to Justice?' (2015) 15 African Human Rights Journal 355, 363.

claim all together. This thesis understands that mediation, like all processes, has inherent flaws. If the mediation process has some flaws, how do we review settlement agreements that may be faulty in some way? This thesis uses comparative legal examples and case studies to determine the status quo of mediation and how it works within a legal system, with particular reference to South Africa. What becomes apparent quite early on is a tension between mediation as a private law mechanism being used with public law principles; this tension is explored in this thesis. This project uses the existing literature from several sources, jurisdictions and authors as a foundation to expand the area by creating a new and novel framework from which to consider the judicial review of settlement agreements in South Africa. The aim of this work is to identify the problems that may occur during mediation and develop legal reforms which may assist a South African court in determining whether a settlement agreement derived from a difficult mediation process can be legally reviewed. To do this, this thesis showcases a new way of categorising and identify issues that negatively affect or 'taint' a settlement agreement, by curating a set of variables that allow an analysis to be conducted. With this set of variables, we should be able to predict whether a judicial review of a settlement agreement would be successful.

1.2 The contribution of this thesis to the existing South African literature

The research question of this thesis is very simple: When can a court judicially review a mediated settlement agreement? To answer this question, this research deals with settlement agreements that have been derived from a mediation, and the factors that may prompt a judicial review. When embarking on this type of research, it may seem esoteric to the reader, that such research is even necessary, in the first instance. To place this research in contextual terms, let us look at a possible scenario envisioned by this thesis. Party A and Party B are in dispute over a commercial contract; both parties accuse each other of breach. Both parties agree to partake in a mediation process,[12] hopeful that they can come to an acceptable and appropriate joint decision. The parties jointly hire a mediator and start the mediation process, which in totality, lasts 6 hours. At the end of the mediation process, both parties are, in what seems to be, consensus, and sign a settlement agreement which regulates their future contractual dealings by way of financial compensation. A few days later Party A feels, what can only be described as: 'buyer's remorse'. The settlement agreement is now undesirable to

[12] They could also be directed towards mediation by an ADR clause in their primary commercial contract that is now in dispute.

him.[13] Party A does not feel the terms of the mediated settlement agreement are fair. Party A thinks that he was bullied to acquiesce, and he now questions the validity of his assent to the settlement agreement.

1.2.1 A South African research objective

From the initial broad stroke conceptualisations of this research, I intended it to be a comprehensive study of settlement agreements, with a distinct focus on South Africa. I am a South African legal scholar and very interested in South African labour law jurisprudence as a research endeavour. The research objectives of this work are to this point. My research objective was to create a framework to guide practitioners and South African courts in terms of mediated settlements, drawing lessons from labour law. It is my view that South Africa is not likely to ratify any international convent concerning mediation in the future. This research identifies, first, *when* a court should entertain a request for the review of a settlement agreement. Second, the research highlights and analyses *how* the courts make these decisions. This analysis is the crux of the research, as it is conducted at a sophisticated level.

1.2.2 Theoretical basis

The theoretical underpinnings of this work come from my own experience and knowledge of the South African labour market. I have taught employment law, I have sat as a mediator and I have audited mediations at the CCMA, I have published several articles in the *Industrial Law Journal.* I have insight into South African labour law. At times this research refences theorist that might seem outdated or archaic today. It is my view that it is not. After conducting a thorough literature review, I determined that the best approach, that gives a nuanced South African perspective is by using tracts of theorists such as Boulle and Rycroft (writing in the ‘90s). South Africa is a discreet area of jurisprudence, and it was important that as a research project I used materials, sources and works from the existing literature that stems from South Africa. This project takes a distinctly South African perspective.

1.2.3 Research methodology

To this research work I offer my expertise as a labour law scholar and South African mediator. In the main, mediation settlements are difficult to expose and the analysis of such

[13] Alan John Rycroft, ‘Legal Review of the Mandatory Mediation Process in South Africa’ (2016) 1 Mediation Theory and Practice 79, 80.

can be stymied. Many mediations are conducted under the secrecy and belief in a non-disclosure agreement or confidentiality clauses. It is true that this work draws on cases from the labour courts and the principles of CCMA and rules outlying the dispute resolution mechanisms within the labour law mechanisms. The effect of such a focus on South Africa labour law means that some of the veil of secrecy can be lifted.

I, at times, references sources that stem from the 1980s and 1990s. These are pieces of work written by pioneers in the field of labour law, mediation and CCMA in South Africa. Many of these authors were present at the democratic advent in SA and were, and are, instrumental in the foundational drafting of pieces of labour regulation. Where possible, and appropriate, I look at newer authorities but at the expense of jurisdictional difference, especially when the goal was to understand curate factors in a South African mediation setting. More recent books on mediation in South Africa can be helpful for comparison, however, many of these books rely on definitional features of mediation as set out in Boulle & Rycroft.[14]

The major limitation of this research relates to one of the core features of mediation: confidentiality. This research has, at times, been thwarted by the fact that many mediations, and subsequent settlement agreements, are not available for public academic or legal consumption and analysis. Ignoring the value of precedent, these mediated settlements are often secret and confidential, making it hard to draw themes or patterns. Despite this limitation, the study certainly adds to our understanding of the area of mediation in South Africa. This research develops an approach to assist with determining when a court is most likely to review a mediated settlement agreement. This research conducts a review and analysis of appropriate and important cases from the labour courts and CCMA that deal with mediation. This is a novel endeavour for South Africa labour law.

[14] Ebrahim Patelia and Mohamed Alli Chicktay, *Appropriate Dispute Resolution: A Practical Guide to Negotiation, Mediation and Arbitration* (LexisNexis 2015); Zwelethu Jolobe, *International Mediation in the South African Transition: Brokering Power in Intractable Conflicts* (Routledge 2019); John Brand, *Labour Dispute Resolution* (Juta 2008).

1.2.4 The judicial role of the court in resolving disputes and interpreting settlement agreements

The role of the court is hard to avoid even when a mediated outcome is envisioned. A court may find itself at the disposal of parties when there is an allegation of a tainted settlement. When a settlement agreement is tainted, the court must determine whether the contract should be upheld. The role of the judiciary and the courts is an important one and integral to the functioning of a democratic, fair and free society. In South Africa, the Constitution[15] provides that the judicial power of the Republic of South Africa is vested in the courts, and they must be independent and subject to only the Constitution, and the law, which they must apply with impartiality and without fear, favour or prejudice.[16]

The Constitutional Court has endorsed the view that there is a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.[17] The role of the judiciary under the Constitution is to interpret, enforce and protect constitutional and individual fundamental legal rights and duties.[18] Formulating a new model of mediation review is not a simple task. South Africa has a unique history, and a relatively new constitutional dispensation, which must grapple with social, political and economic forces.[19] There is a need for the development of a distinctly South African model of mediation and for the judicial review of mediated settlements.[20] In pursuing its constitutional mandate, a court has the power to uphold, amend or rescind a settlement agreement which demands judicial review. Currently there is no concrete test for determining when and how a court should conduct a judicial review. This thesis argues that a properly articulated test for the judicial review of settlement agreements is imperative in allowing a court to perform its role properly and efficiently under the Constitution.

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[15] Constitution of the Republic of South Africa, 1996.

[16] Section 165(2).

[17] *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) paras 108–109.

[18] Kate O'Regan, 'Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' [2005] 5 PER 145 <http://www.saflii.org/za/journals/PER/2005/5.html> accessed 22 April 2022.

[19] Pius N Langa, 'The Role of the Constitutional Court in the Enforcement and Protection of Human Rights in South Africa: Symposium' (1996) 41 Saint Louis University Law Journal 1259, 1260.

[20] *De Lange v Smuts* 1998 (7) BCLR 779 (CC) para 60.

1.3 Mediation in South Africa as a case study

This thesis offers South Africa as a case study for mediation. The aim of such an offering is to locate the discussion of mediation in the context of its performative value in South Africa. Mediation in South Africa is interesting. It has been used for centuries in various way but more recently to great effect and efficacy in the labour law sector. It is from this specific area that this work draws heavily. This section will promote the use of mediation in South Africa as a case study by showing the reader that mediation is well established, despite still new as a legal jurisprudence and allow the reader to determine how mediation fits into the zeitgeist of employment disputes in South Africa. What we will find is that employees and employers in South Africa have become accustomed to refined alternative dispute resolution procedure at their disposal, which allows us to use South Africa as an effective case study for mediation protocols. This section will also plot the history of mediation in South Africa.

Mediation in South Africa is not new. The use of alternative methods of dispute resolution by traditional societies on South Africa is well established.[21] In traditional communities, people who were parties to a dispute or breached a community law were not punished according to western notions of justice and retribution, but rather by corrective measures found by way of conflict resolution and approved by their community.[22] Mediation, as a dispute resolution mechanism, had been used by indigenous communities in South Africa long before the arrival of the Dutch or English settlers. The colonists and the indigenous peoples appear to have had the use of alternative dispute resolution (ADR) in common, and mediation conducted by British officials was first referred to in 1837.[23] Traditional dispute resolution has always taken a holistic view and envisions a combination of community building, communication, compromise and consultation, which can be still found today in the modern, western approach to dispute resolution.[24]

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[21] RGB Choudree, 'Traditions of Conflict Resolution in South Africa' (1999) 1 African Journal on Conflict Resolution 10.

[22] See N Masina, *Traditional Cures for Modern Conflicts African Conflict Medicine* (I William Zaartman ed, Lynne Rienner 1999).

[23] Klaus Peter Berger, 'Earliest Reference to Mediation in South Africa of April 1, 1837' <https://www.trans-lex.org/803707/_/earliest-reference-to-mediation-in-south-africa-of-april-1-1837/> accessed 18 August 2020.

[24] John Brand, Felicity Steadman and Chris Todd, *Commercial Mediation: A User's Guide* (Juta & Co 2016) 1.

In South Africa, before the advent of democracy and during apartheid, when the institutional courts were viewed with scepticism and as mouthpieces for a repressive government,[25] black African citizens approached traditional and unofficial forums called community courts or 'Makgotla'.[26] These courts, sophisticated and modern in a sense, enabled persons to access justice in a non-western forum and then find resolutions that they were part of creating or making.[27] By contrast, formal courtrooms were generally eschewed, and in the early 1980s, less than 2 per cent of urban black South Africans took their disputes to official courts.[28] Despite some of the problems highlighted by theorists relating to the efficacy of, or the legal process followed, in these traditional forums, mediation techniques were often employed with success.[29] These traditional forums were so useful and wise that the drafters of the current Constitution decided to maintain this method of dispute resolution. Chapter 12 of the South African Constitution provides for the legacy of these traditional courts to remain after the end of apartheid and therefore efforts have been made to give more 'legitimacy' to the traditional courts.[30]

South Africa's stormy and violent past means that drafters of the Constitution were eager to manage, limit and resolve future disputes. The legislature did this by giving power, structure and independence to the court system. Thus, the Constitution[31] provides that the judicial power of the Republic of South Africa is vested in the courts. Courts must be independent and subject to only the Constitution, and the law, which they must apply with impartiality and without fear, favour or prejudice.[32]

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[25] Mohamed Paleker, 'Mediation in South Africa: Here But Not All There' in Nadja Marie Alexander (ed), *Global Trends in Mediation* (Kluwer Law International 2006) 334. See also South African Law Commission, 'Community Dispute Resolution Structures Project 94' (1999) Discussion Paper 87 3; GJ van Niekerk, 'People's Courts and People's Justice in South Africa' (1988) 21 De Jure 292, 293.

[26] John*; Kotu-Rammopo Malebo** Hund, 'Justice in a South African Township: The Sociology of Makgotla' (1983) 16 Comparative and International Law Journal of Southern Africa 179.

[27] It has been noted that some of these courts aligned themselves with male-centric views as elders (males) normally acted as mediators and facilitators.

[28] Van Niekerk (n 13) 294.

[29] ibid.

[30] Should the Traditional Courts Bill [B1-2017] become law, it will recognise traditional leadership and its role in dispensing criminal and civil justice. See also Jennifer Williams and Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 South African Journal on Human Rights 276.

[31] Constitution of the Republic of South Africa, 1996.

[32] Section 165(2).

The Constitutional Court has endorsed the view that there is a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.[33] The role of the judiciary under the Constitution is to interpret, enforce and protect constitutional and individual fundamental legal rights and duties.[34] Formulating a new model of mediation review is not a simple task. South Africa has a unique history, and a relatively new constitutional dispensation, which must grapple with social, political and economic forces.[35] There is a need for the development of a distinctly South African model of mediation and for the judicial review of mediated settlements.[36] In pursuing its constitutional mandate, a court has the power to uphold, amend or rescind a settlement agreement which demands judicial review. Currently there is no concrete test for determining when and how a court should conduct a judicial review. This thesis argues that a properly articulated test for the judicial review of settlement agreements is imperative in allowing a court to perform its role properly and efficiently under the Constitution.

While mediation has been an accepted form of dispute resolution in traditional settings and communities, the use of mediation in modern South Africa has been slow to take off in civil or commercial matters. South African mediation has generally been a success or has been used more widely where it has been mandated by legislation.[37] Unlike in the USA,[38] where mediation has been used more 'generally' and is widespread, and where costs[39] and time are motivating factors for the use of ADR mechanisms,[40] one of the catalysts for the use of mediation in South Africa was the political landscape. Before the advent of democracy in

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[33] *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) paras 108–109.

[34] Kate O'Regan, 'Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' [2005] 5 PER 145 <http://www.saflii.org/za/journals/PER/2005/5.html> accessed 22 April 2022.

[35] Pius N Langa, 'The Role of the Constitutional Court in the Enforcement and Protection of Human Rights in South Africa: Symposium' (1996) 41 Saint Louis University Law Journal 1259, 1260.

[36] *De Lange v Smuts* 1998 (7) BCLR 779 (CC) para 60.

[37] A full discussion is undertaken of when such a mandate occurs later in this thesis.

[38] Jay Folberg, 'A Mediation Overview: History and Dimensions of Practice' (1983) 1983 Mediation Quarterly 3.

[39] For the impact of costs of litigation in Hong Kong see Peter CH Chan, David Chan and Chen Lei, 'China: Hong Kong. Selective Adoption of the English Woolf Reforms' in CH (Remco) van Rhee and Fu Yulin (eds), *Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties* (Springer Netherlands 2014) 70 <https://doi.org/10.1007/978-94-007-7666-1_5> accessed 11 November 2022.

[40] Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 Journal of Empirical Legal Studies 459, 460.

South Africa, the courts were not trusted by many black citizens, and civil society attempted to reduce its reliance on the court system. Trade unions wielded, and still wield, considerable power in South Africa and encouraged the use of mediation to reduce dependency on the court system, since mediation was independent and impartial. One of the drivers of this change was the establishment of the Independent Mediation Service of South Africa (IMSSA) in 1984 by a group of trade unionists, employers, academics and legal practitioners.[41] Politically, South Africa found itself a pariah in the eyes of the international community, and statutory institutions such as the executive, judiciary and legislature lacked credibility and the effectiveness to dispense just and equitable dispute resolution with the rules or procedures in place at the time. Tensions between black workers and white employers were reaching fever pitch and a solution was needed to prevent a civil war.[42] This came in the form of IMSSA. The aim of IMSSA was to provide a credible, independent body that could offer services to resolve employment disputes.[43] Government-appointed mediators were generally found to be ineffective in resolving large industrial disputes due to mistrust or misgivings because of their affiliation to an apartheid state.[44] IMSSA held various workshops in the early 1980s to discuss the formation of a mediation service, and these workshops brought together, remarkably, white unions and black unions.[45] By the end of the 1980s, IMSSA had been so successful in handling employment disputes that it began facilitating community disputes too and offered mediation training that encouraged focusing on the parties' relationships and interests.[46] Hirschman says the following about IMSSA's impact:

> The performance of IMSSA's mediators and arbitrators in the field earned it a great deal of credibility and provided the basis for its move into community mediation in early 1990 in response to unprecedented country-wide violence at the grassroots level.[47]

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[41] Brand, Steadman and Todd (n 24) 2.

[42] Philip Hirschsohn, 'Negotiating a Democratic Order in South Africa: Learning from Mediation and Industrial Relations in Practice: A Special Section: The Changing Workplace and Alternative Dispute Resolution' (1996) 12 Negotiation Journal 139, 142.

[43] ibid 141.

[44] ibid 142.

[45] ibid.

[46] ibid 144.

[47] ibid.

The performance and credibility of the IMSSA is just the tip of the iceberg in explaining why South Africa is being used as a case study for mediation. South Africa is well versed in provided mediation and such a case study is an interesting and novel way to use mediation in South Africa as a template for augmenting the current jurisprudence of mediation. This work analysis previous theory on mediation in South Africa and contemplates a more refined and coherent template for future disputes resolution.[48] This is not to say that mediation in South Africa is looking for a saviour. Mediation in South Africa has been honed by tough and difficult circumstances and is a robust mechanism. In time, and after the advent of democracy, the courts were quick to appreciate the emergence and impact of mediation, and to respond more appropriately when it came to recognising the need for mediation in resolving disputes. In *Port Elizabeth Municipality v Various Occupiers*[49] the Constitutional Court approved mediation as an approach and held as follows:

> [T]he procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents.[50]

However, the development and status of mediation in South African law cannot rely solely on the encouragement of the court, as it is not strictly the court's role to make law in a country where state powers are separated. Possibly noting the versatility of mediation, Boulle and Rycroft write, too, that mediation does not provide a simple single model which can be described in a succinct manner, or which can be easily distinguished from other decision-

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[48] Ronán Feehily, 'Commercial Mediation Agreements and Enforcement in South Africa' (2016) 49 The Comparative and International Law Journal of Southern Africa 305; Ronán Feehily, 'The Certainty of Settlement: Research' (2016) 27 Stellenbosch Law Review 25; Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13).

[49] 2005 (1) SA 217 (CC).

[50] At para 39. See also *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) where the court encouraged meaningful engagement.

making processes.[51] Despite this non-conforming nature of mediation, attempts have been made to define mediation in the South African context. The clearest definition of mediation by the South African legislature can be found in Rule 73 of the Magistrates' Court Rules, which defines 'mediation' as:

> the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute. [52]

Various theorists have sought to define the essence of mediation. Mediation in several respects is still new and emerging as a South Africa. Marnewick thoughtfully attempts a South African definition of mediation and states that 'mediation therefore has to be seen as a process whereby parties to a civil dispute negotiate a settlement of their dispute under the guidance of an independent third party, the mediator.'[53] Since mediation is seen as an adaptable and flexible process, it might be argued that there is no need for a uniquely South African definition of mediation. However, what this work shows us is that mediation in South Africa is sui generis in some respects, and South Africa has a distinct genre of mediation that has evolved over time and contrasts with international conceptions.

Mediation could be seen as a means to guarantee a constitutional right. In South Africa, there is a clear constitutional right of access to justice in South Africa, as enshrined in s 34 of the Constitution.[54] The phrase 'access to justice' comes with its own difficulties, since access to a system of dispute resolution does not mean that justice is served for all participants. In other words, just because there is a legal system, and perhaps civil or governmental organisations that offer some sort of legal assistance to parties with fewer resources, obtaining a fair and equitable outcome may still be problematic. There are many barriers when trying to access justice and the legal system, such as financial costs, delays, complexity and the uncertainty of outcomes. The use of mediation is one way to overcome some of these hurdles and to offer

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[51] Laurence Boulle and AJ Rycroft, *Mediation: Principles, Process, Practice* (Butterworths 1997) 3.

[52] Rules of Court: Amendment: Mediation Chapter 2, G 37448 RG 10151 GoN 183, 18 March 2014.

[53] Chris Marnewick, *Mediation Practice in the Magistrates' Courts* (LexisNexis 2015) 11.

[54] See the views expressed by the Constitutional Court in *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

more than lip service to s 34 of the Constitution.[55] Brand states that the world of commerce has been slow to utilise the full potential of mediation and offers a number of reasons for this: the conservative nature of the business community, the inexperience of legal practitioners, and perhaps the perception that mediation is 'soft' and not decisive.[56] This is in sharp contrast to other jurisdictions[57] such as the USA, where mediation is supported and actively encouraged.[58]

1.3.1 UNCITRAL Model on International Commercial Conciliation and the reluctance of the South African government to adopt it

A possible reason for this lack of support for mediation in South Africa is the fact that mediation is situated in a non-regulated area.[59] No national South African statute provides for mediation and South Africa has not adopted[60] the 2002 United Nations Commission on International Trade Law (UNCITRAL)[61] Model Law on International Commercial Conciliation.[62] The model was updated and amend in 2018, and in the initiated the Singapore Convention. Unlike the Model Law which covers the enforcement of all settlement agreements, regardless of whether they stem from a mediation, the Singapore Convention focuses specifically on mediated settlement agreements.

The Singapore Convention applies only to mediated settlements of international commercial disputes, namely where at least two parties to the settlement agreement have their places of business in different jurisdictions; or the jurisdiction in which the parties have their places of business is different from either jurisdiction in which a substantial part of the contractual

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[55] Vettori (n 11) 356.

[56] Brand, Steadman and Todd (n 24) 4.

[57] For a general overview see Ronán Feehily, *International Commercial Mediation: Law and Regulation in Comparative Context* (Cambridge University Press 2022).

[58] Galanter (n 40) 460.

[59] It is true that arbitration is regulated by the Arbitration Act 42 of 1965, which does provide a framework for arbitration in South Africa, despite being outdated in many ways.

[60] Approximately 55 countries have signed the convention and 10 countries have ratified the convention as law. The first being Fiji in 2020 latest being Kazakhstan on 23 May 2022.

[61] Feehily, *International Commercial Mediation* (n 57) 225–230.

[62] Brand, Steadman and Todd (n 24) 10.

obligations under the settlement agreement is performed or the jurisdiction with which the contractual obligations of the settlement agreement is most closely connected. Timely and sophisticated the Singapore Convention, as impressive as it is, adds little to the context of mediations in south africa. This is especially acute where the intention is to provide mediation insight to help individuals in South Africa, where many disputes call for an Afrocentric lens.[63]

South Africa has not ratified or joined any of these conventions past or present. Several reasons for this non-committal may exist. Holistically, if I analyse the mood in South Africa, there does not seem to be a capacity to ratify, adopt UN conventions or legislate its own mediation principles. My view is supportive of South Africa as an autonomous actor to make its own jurisprudence. South Africa, by its virtue of its embattled history and its progressive Constitution, makes South Africa an exceptional case study. It is my view that the sophisticated approach set out by the Singapore Convention is not appropriate for the South African legal landscape where the intention of this work is to offer guidance for private. It is my view that the ideology of sovereignty and its own constitutional verve, hinder the South African government's ratification of any international ratification of conventions, not through inaction, but by intention. One way that the South African government protects foreign investment and stakeholders is through its own domestic legislation.

The Protection of Investment Act 22 of 2015 provides in its preamble that there is an obligation to take measures to protect or advance persons, or categories of persons, historically disadvantaged in the Republic due to discrimination. The idea of protecting the investments of foreign entities seems to hold less importance, compared to economic and social redress. Nevertheless, investors are offered some protection and dispute resolution measures for large investors are contained in s13 of the Act. Quite blaring, the legislature in South Africa wants to regulate the disputes of investor rather than give this power to a UN entity.[64] It is an approach that I do not think needs to waiver, while heralding state sovereignty and contractual freedom, and diminishing the legacy of colonisation and apartheid.

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[63] In recent times, the South African government has given preferential treatment to Russian and Chinese forces, reading between the lines, one might wonder the extent that South Africa remains aligned to UN or western norms of justice and fairness.

[64] See s12 of the Protection of Investment Act where possible measures could be taken to redress social and environmental issues.

Issues of autonomy aside, one potential benefit of South Africa adopting the Singapore Convention would be that there would be enforcement if a party did comply with a settlement agreement. Ratification would also send a signal to business partners from abroad that we take contractual agreement seriously and the subsequent enforcement of settlement agreements. This could be a boon for international trade. To ratify the Singapore Convention, the South African legislature, must draft and enact a suite of supplementary litigation to give effect to the Singapore Convention. South Africa has not done so and considering the current socio-economic situation and the failure of state energy provider Eskom, which leave SA with rolling blackouts, I can't see mediation legislation being high on the priority list.

Consequently, there is no codified, standardised procedural framework for aspects of mediation such as the appointment of mediators, the mediation process, confidentiality, admissibility of evidence in other proceedings, the mediator acting as arbitrator, and the enforceability of agreements to mediate.[65] To lessen the impact of this lack of legislation, certain stakeholders in the dispute resolution sector founded the Dispute Settlement Accreditation Council[66] in 2010. The aim of this council is to construct and publish a national accreditation standard for mediator training which draws on the standards of the International Mediation Institute.[67] Despite the progress made, mediation in South Africa is largely still an emerging area of law and is ripe for nuanced development. This research fills the current gap where the South African government won't or can't ratify the Singapore Convention.

1.4 The overall approach of this research

At this point, it has been established that the South African law on mediation needs clarification and that the jurisprudence regarding settlement agreements needs to be developed. Consequently, the primary aim of this study is to conceptualise the issues relating to settlement agreements and then to recommend law reform that will allow for the development of clarity in terms of when and how a settlement agreement be reviewed. This

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[65] Brand, Steadman and Todd (n 24) 10.

[66] Founding members include the Association of Arbitrators of Southern Africa of South Africa and the Africa Centre for Dispute Settlement.

[67] Brand, Steadman and Todd (n 24) 10. Also see 'International Mediation Institute' (*International Mediation Institute*) <https://www.imimediation.org/> accessed 23 April 2020.

thesis will consider various jurisdictions' legal norms and will use South Africa as a case study on which to base its findings. The research conducted for this thesis is qualitative in the form of doctrinal desktop research. There will be an extensive analysis and critical review of the current South African legal position relating to mediation and settlement agreements in both civil and labour matters. In order to draw definitive conclusions, and to offer recommendations on appropriate law reform, it will also be necessary to review South African legislation, as well as relevant international academic articles, legislation and case law relating to mediation and settlement agreements. This research will guide the reader through the various aspects of mediation in South Africa and the issues facing mediation jurisprudence today.

The research question of this work can be divided into two main parts: (i)When should a court conduct a judicial review of a mediated settlement agreement and (ii) in what ways can we use current labour law norms to clarify this process of judicial review. In answering this research question (which is developed in further sub-questions), I hope to develop a uniquely South African framework to decipher when a settlement agreement may be reviewed by way of labour law principles.

1.5 The chapters of this thesis

Chapter 2 of this thesis examines the role of mediation and how it has developed to meet evolving legal requirements and the needs of modern society. The chapter outlines some of the important core features of mediation and how these essential characteristics contribute to the getting to settlement. The chapter then considers what factors may negatively influence a settlement agreement and puts forward the idea that these factors may 'taint' a settlement agreement. This chapter looks at aspects such as self-determination, neutrality, consensus and the role of judicial review. Finally, this chapter considers mediation and the shadow of the law. It examines whether mediation is always, and firmly, subject to legal norms and procedures?

Chapter 3 is a conceptual chapter and appraises the current status quo of the South African mediation landscape and conceptualises some of the problems that crop up in mediating a settlement agreement. Further, in this conceptualisation the idea is developed the idea that mediation has variables which can affect the legitimacy of a settlement agreement. This

chapter then scrutinises when these variables come into play and whether these variables, when present, might lead to the need for the judicial review of a settlement agreement. This categorisation aids in determining whether the review process is appropriate. In a novel contribution to the field of mediation, this chapter creates a decision tree as a tool, which will aid the prediction of the likelihood that a settlement agreement may be subject to judicial review. These variables are used in conjunction with the decision tree. Lastly, this chapter illustrates how labour law can provide us with legal and procedural principles that may be useful in developing the law of mediation.

A case study of mediation in South Africa is provided in chapter 4. This chapter is a more detailed examination of the core general features of mediation. This chapters explores labour law in South Africa and, how, via various mechanisms, mediation is provided for. A thorough survey is conducted with regards to decision making at the Commission for Conciliation, Mediation and Arbitration (CCMA), the rules and procedures of the CCMA, and the impact of legislated mediation. This chapter considers the role of the labour courts and how they deal with variables in mediation that may taint a settlement agreement. One of the functions of this chapter is to contrast different types of mediation and their inherent variables. This chapter will compare voluntary mediation and mandatory mediation and seeks to illuminate how the variables constructed in the previous chapter fit into the existing legal framework of South African mediation.

Chapter 5 analyses settlement agreements under labour legislation. The chapter examines how the labour courts have dealt with their power of judicial review of settlement agreements. Chapter 5 considers the effect that judicial review processes can have on a settlement agreement. To do this, this chapter categorises, indexes and curates different settlement agreements in terms of labour law legislation and examines the effect and of mediation variables, judicial review and court orders. Additionally, the chapter explores the factors of bargaining (power, duress, undue influence and misrepresentation), and to what extent a settlement agreement is affected by these. This chapter illustrates the lessons that can be learnt from labour law and provides a lens through which to view the tension and intersectionality between public law and private law on mediation.

Chapter 6 goes to the nub of the research question of this thesis: when is it appropriate for a court to review a mediated settlement agreement? This chapter demonstrates that there are

limitations on the freedom to contract and looks at how these limitations are shaped by public policy and constitutional norms. This chapter illustrates the far-reaching impact of constitutional norms and the effect that they may have on parties wishing to enter into settlement agreements. The chapter argues that the South African courts need a clear and coherent framework that they can use when considering the review of settlement agreements or when converting a settlement agreement into a court order. It is a balancing act. This chapter recognises that the courts must employ a legal test to determine when to defer to a settlement agreement despite a request from a party to the settlement agreement for judicial review. This chapter provides a fresh assessment of case law that has not been undertaken in a manner such as this previously. In conclusion, this chapter provides the basis upon which I will formulate and provide a new judicial review framework for the review of settlement agreements in South Africa.

Chapter 7 outlines the development of reform approaches. This chapter presents us with three approaches, packaged as legal tests, that can be used to settle some of the issues raised by this research. These approaches will allow us to determine when it might be appropriate for a court to give a mediator a legal privilege, and amend or intervene in a settlement agreement, and will provide a template for a court to use where a court order has been requested. This chapter formulates three new legal tests, namely, the *Good Faith Test*, the *Mediator Privilege Test* and the *Public Policy Test*. This chapter is also the conclusionary and final chapter. This chapter acknowledges that any reform will have shortcomings. This chapter identifies three main consequences that may attach to proposed reform: the ‘publicisation’ of mediation, the erosion of confidentiality and the limitation to contract freely. This chapter considers the extent to which these consequences might hinder any development in this area of law.

Chapter 2 The need for development in mediation

2.1 Getting to settlement[68]

'Mediation is not about just settlements. It is just about settlements.'[69] Such a simple phrase hides a sizable meaning. There has for some time been a worry that mediation and ADR processes operated by the state are machine-like; the output judged by the number of mediations conducts. Mediators are encouraged to find agreement between parties and the more they do this the more successful and skilled they become and seem. The institutionalisation of mediation by the state, finds that in many circumstance parties are thoroughly encouraged (and often must) partake in mediation as an initial step in a dispute resolution process. Feehily notes a recurring theme:

> [I]n some of the jurisprudence that has emanated from England, and an issue that South African practitioners and the judiciary should remain mindful of, is the concern expressed that the more vigilant the judiciary becomes in encouraging mediation, the more it appears that mediation is becoming compulsory. The more mandatory mediation appears to be, the more likely it will be to run into allegations that it violates the rights guaranteed by section 34 of the Constitution. Experience of mediation when recommended in other jurisdictions such as the UK, would seem to indicate that voluntary mediation is preferable to compulsory mediation as it is more likely to lead to a successful outcome.[70]

Genn hints that perhaps (or perhaps not a hint at all) that institutions would rather take any kind of settlement, than incur court room expenses or clog the court roll, for disputants to get the outcome that is most fair or equitable in the circumstances. It is this impatience and austerity that lends itself to promote the vehicle of mediation.[71] This public law versus private

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[68] This heading borrows from 'Getting to Yes'. Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin Harcourt 1991).

[69] Hazel G Genn, *Judging Civil Justice* (Cambridge University Press 2010) 69.

[70] Feehily, 'Commercial Mediation Agreements and Enforcement in South Africa' (n 48) 336.

[71] Remo Caponi, '"Just Settlement" or "Just About Settlement"? Mediated Agreements: A Comparative Overview of the Basics' (2015) 79 Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law 117, 122.

law tension is not novel but the difficulties of this intersectionality still exist and play out in settlements today. This status quo of mediation is a primary focus of this thesis and indeed this chapter. This chapter locates the thesis within the existing literature in the field.

Mediation as a dispute resolution mechanism has long been an important part of labour relations and international negotiation. The earliest recorded mediations occurred more than four thousand years ago in Mesopotamia, when a Sumarian ruler helped to avert a war by reaching an agreement in a dispute over land.[72] With this long history, different jurisdictions have approached mediation in different ways and at different speeds. Mediation as a form of dispute resolution has become more sophisticated and more widely accepted, and people turn to mediation when their own attempts at finding a solution have stalled. By many accounts, mediation seems to be a neat solution to the age-old problem of disputes.

As mediation has been used more widely (with specific reference here to the US), several writers have examined the fact that mediation has overtaken litigation as a form of dispute resolution.[73] Galanter, analysing data from the US, states that the number of trials in the US has not increased in proportion to other factors such as the number of lawyers, authoritative legal material, money spent on law or the prominence of legal culture in the public.[74] Galanter states that 'a decline in trials must mean an increase in settlements'.[75] And Calkins (also in the US) notes that there has been a dramatic transfer of disputes from the courtroom to the conference table, and from trial to mediation.[76] This increase in mediation in the US is not surprising since mediation has several advantages and is important for a modern legal system, which must adapt to meet changing needs.

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[72] PJ Carnevale and DG Pruitt, 'Negotiation and Mediation' (1992) 43 Annual Review of Psychology 531, 561.

[73] Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 Journal of Empirical Legal Studies 459; Thomas J Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"' (2004) 1 Journal of Empirical Legal Studies 843; Martin H Redish, 'Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix 2005 Stanford Law Review Symposium: The Civil Trial: Adaptation and Alternatives' (2004) 57 Stanford Law Review 1329; Hope Viner Samborn, 'Vanishing Trial, The Justice System' (2002) 88 ABA Journal 24.

[74] Galanter (n 40) 460.

[75] ibid 483.

[76] Richard M Calkins, 'Mediation: A Revolutionary Process that is Replacing the American Judicial System' (2011) 13 Cardozo Journal of Conflict Resolution 1, 2.

2.1.1 Defining the mediation process

Before we can properly understand a new concept or any concept that requires expansion, it is imperative that the defining features of the concept are examined and organised. This is essential for in-depth analysis. Defining mediation is not merely an academic exercise but a foundational, practical endeavour. How we describe and define mediation will influence how we use it, when we apply it and, more importantly, how we determine what solutions would be most appropriate for any kind of reform. Mediation is essentially a process of storytelling.[77] We can describe and define mediation in several ways. The academic literature on mediation, while voluminous, has not been able to settle on a precise definition of mediation. The *Oxford English Dictionary* defines mediation as simply:

> [T]he process of attempting to settle a dispute without recourse to litigation, through negotiation conducted by a neutral intermediary who may now frequently be a professional individual or organization employed for this purpose.[78]

It has been said, quite correctly, that mediation is not easy to define.[79] There are two approaches to defining mediation.[80] The 'conceptualist' approach defines the mediation process in ideal terms, which emphasises certain values, principles and objectives.[81] Conceptualist definitions often have a high normative or idealistic content and might not reflect what actually happens during a mediation process in the real world.[82] Folberg and Taylor provide such a conceptualist definition:

> Mediation is the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.[83]

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[77] Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 Social & Legal Studies 221, 226.

[78] 'Mediation, n.' <http://www.oed.com/view/Entry/115665> accessed 29 April 2020.

[79] Boulle and Nesic (n 7) 3. See also George Kurien, 'Critique of Myths of Mediation' (1995) 6 Australian Dispute Resolution Journal 43.

[80] K Douglas, 'National Mediator Accreditation System: In Search of an Inclusive Definition of Mediation' (2006) 25 The Arbitrator and Mediator 1.

[81] Boulle and Rycroft (n 51) 4.

[82] ibid.

[83] Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (John Wiley & Sons 1984).

A conceptualist definition of mediation can read like an aspirational set of goals or ideals for a mediator to follow, and for parties to achieve. Boulle and Rycroft state, in relation to the above conceptualist definition:

> Despite its wide endorsement this definition has many questionable elements and a number of internal tensions. There may be instances in which mediation does not systematically isolate the issues in dispute and consider options for its most effective resolution – it merely involves incremental bargaining towards a compromise solution. Mediation can sometimes have very little to do with accommodating 'needs', and more to do with the quick and efficient disposal of files in a large organisation, there are also difficulties with the terms 'neutral' and 'consensual' ...[84]

Boulle and Rycroft highlight that there are other conceptualist definitions, but these are not without their issues too:

> Other conceptualist definitions assert that mediation 'is empowering for the parties', that it 'reflects an alternative philosophy of conflict management', or that it strives to 'improve relationships between the parties.' Again, these goals are aspired to and achieved in some mediations, but in others they are neither in evidence nor are they contemplated by those involved. It is misleading to include without qualification such factors in the definition of mediation.[85]

The strength of the conceptualist approach is that it brings to the fore the higher goals and values of mediation which differentiate it from other forms of decision-making processes.[86] The main shortcoming of the conceptualist approach is that it tends to colour the prescriptive, idealist elements as descriptive and essential, resulting in a definition that is ideological rather than empirical.[87]

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[84] Boulle and Rycroft (n 51) 4.

[85] ibid 5.

[86] ibid.

[87] ibid.

The second, perhaps more pragmatic approach to defining mediation is the 'descriptive approach'. The descriptive approach refers to what actually happens in practice, and is said to have a low normative or prescriptive content because there is an acceptance of the varying nature and practice of one mediation compared to another.[88] A simple descriptive definition may take the following form: 'a process of dispute resolution in which disputants meet with the mediator to talk over and then attempt to settle their differences'.[89] Descriptive definitions keep norms and rules to a minimum because they generally accept that within the wide diversity of mediation practices, the values, principles and objectives of the conceptualist definition are often overlooked or overridden.[90]

A contemporary definition of mediation can be found in Article 2(3) of the Singapore Convention which defines 'mediation' to mean a process, irrespective of the expression used or how the process is carried out, where parties attempt to reach a cordial settlement of their dispute with the assistance of a third person lacking the authority to impose a solution upon the parties to the dispute.

Various academics and jurisdictions, then, have offered an array of definitions of mediation.[91] However, whichever definitional approach one chooses, it is clear that mediation is a dynamic dispute resolution method, which can pivot to different kinds of disputes and parties. Such a characteristic is appealing but it also means that it can be difficult, as seen from above, to distil into one static definition.[92] Always compelling, Boulle and Rycroft provide their own definition of mediation that is particularly persuasive 'Mediation is a decision-making process where parties are assisted by a third party, the mediator, who attempts to improve the process of decision-making and to assist the parties reach an outcome to which each which of them can assent.'[93] I subscribe to this definition. A hallmark of the mediation process, as I define it in this thesis, is 'decision-making'. Mediators aim to assist parties in

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[88] Boulle and Nesic (n 7) 5.

[89] Marian Roberts, 'Systems or Selves? Some Ethical Issues in Family Mediation 1' (1990) 12 Journal of Social Welfare and Family Law 6, 11.

[90] Boulle (n 8) 5.

[91] Brand, Steadman and Todd (n 24); Feehily, *International Commercial Mediation* (n 57); Boulle and Rycroft (n 51); Marnewick (n 53); David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press 2007); Boulle and Nesic (n 7); Boulle (n 8).

[92] Boulle and Rycroft (n 51) 3.

[93] ibid.

decision-making and not necessarily in finding a resolution to a dispute, because not all mediations occur in the context of a dispute and sometimes parties may just need a mediator to help them make decisions in a fair and equitable manner.[94] Some mediations may be used to negotiate the termination of a relationship or the winding up of a business enterprise. It is necessary to emphasise decision-making as an important feature because it might reassure nervous participants, who see it as a less threatening process, compared to one where a decision is made for them by a judge or adjudicator. Also, the idea of resolving a dispute may carry connotations of struggle, compromise, victory and defeat, whereas decision-making has none of these connotations and may be reassuring for parties who are new to mediation.[95]

2.1.2 Why this research project on mediation is important

Traditionally litigation and courtrooms have been used to manage and resolve disputes. Litigation can be effective in situations where a court must determine a rights issue, but this is not always the case in disputes. There are limits to litigation[96] and mediation can fill these gaps. As more people turn to mediation it is important for us to fully understand how legal rights and settlements may be affected and when or how the judicial review of a settlement agreement may occur. In many ways mediation is very attractive. The costs of bringing a matter to court and ever-increasing legal practitioner fees make trials expensive,[97] and there are other litigation costs involved, such as the serving of papers and transcripts. A party must also face the backlog of the court roll and the time that it takes to get a date for either a trial or an application on the papers.[98] The effectiveness of litigation may also be limited, as litigation often focuses on a narrow set of issues circumscribed by the law.[99] Furthermore, the court is limited by prior remedies and precedent and may not be able to make novel

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[94] Such instances could be where a mediator helps a couple separating come to decision regarding the custody of minor children. See Boulle and Nesic (n 7) 7.

[95] Boulle and Rycroft (n 51) 8.

[96] Mary F Radford, 'Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters' (2000) 1 Pepperdine Dispute Resolution Law Journal 241, 249.

[97] Kenneth R Feinberg, 'Mediation – A Preferred Method of Dispute Resolution Symposium: Alternative Dispute Resolution' (1988) 16 Pepperdine Law Review 5, 6.

[98] In June 2020, legal practitioner colleagues in Durban, South Africa, anecdotally reported that once a matter is certified for trial by the court, it could take from six weeks to twelve months to obtain a High Court trial date, depending on the number of days requested. An opposed application could wait for six to eight months for a court date, depending on the days needed for argument. Unopposed matters could be placed on the court roll within six to eight weeks. This all depends on the capacity of the court roll at a given time.

[99] Lon L Fuller, 'Mediation – Its Forms and Functions' (1970) 44 Southern California Law Review 305, 344.

settlements, due to legal precedent or a lack of ingenuity, while a skilled mediator can conclude a settlement unconstrained by of civil procedure.[100] Feinberg states:

> These limitations rarely permit a full exploration of the factors underlying the dispute and a resolution of the problems in the relationship that led to the dispute between the parties. Indeed, the objective of litigation is not to resolve the dispute so much as it is to arrive at a decision about who is right and who is wrong.[101]

A productive mediation may lead to shrewd settlement agreements that participants are able to future-proof, as they are often more aware than a court of future issues or challenges concerning their situation.[102] Conversely, the outcome of a judicial procedure may constitute binding legal precedent on related disputes in the future, and parties may seek to avoid the establishing of judicial precedent, especially in new and uncertain areas of the law, or to avoid a slew of future liability claims resulting from negligence.[103]

2.1.3 Does a flexible approach really work?

This section seeks to illustrate that the inherent characteristics of mediation which make it so useful can also lead to uncertainty. This uncertainty leads to a grey area in terms of judicial review. Feehily outlines the following contexts that can relate to judicial review:

> There have also been situations where courts were asked to determine whether a valid mediation agreement existed between the parties, and if so what were its terms, whether a mediated settlement was represented in a particular document, whether settlement terms comprised sufficient certainty, and whether performance was in terms of a mediated settlement agreement. Courts can be required to interpret clauses in complex mediated settlements, for example, on the effect of statutory obligations on a mediated settlement.[104]

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[100] Feinberg (n 97) 6.

[101] ibid.

[102] ibid 12.

[103] ibid 6.

[104] Ronán Feehily, 'The Legal Status and Enforceability of Mediated Settlement Agreements' (2013) 12 Hibernian LJ 1

Flexibility and adaptability mean that mediation can be used for a wide range of disputes, including construction, commercial, family or environmental disputes.[105] This flexibility means that mediation can also be commenced at any stage of the dispute irrespective of whether litigation has begun.[106] Furthermore, parties can schedule a mediation soon after the dispute has arisen, or wait for the dispute to become ripe for mediation.[107]

Connected to flexibility is informality. Having a process that is flexible lends itself to a type of informality which is seen as an advantage of mediation, and the process can often be far less structured than, say, arbitration.[108] Informality allows mediation to be used in various ways or with different parties, such as relationship disputes, where informality may be preferable to formalised courts and may elect a better response from participants. Since parties are generally in control of the mediation process, they can determine how formal or rigid the process should be and can set the tone for conducting the process. Such informality may also lead to a less hostile environment for the parties. A court process may destroy the relationship between warring parties indefinitely because of the adversarial and combative nature of litigation.[109] Noting a link back to the idealist conceptualisation of mediation described above, in a softer sense, mediation can foster improved relationships. Mediation can be seen as a healing process for relationships where the value of the relationship is important, and the parties want the relationship to continue, or where relationships must remain civil and amicable, for example, where minor children are involved.[110] These transformative mediations are used by family advocates or mediators at the family courts where informality is key. Mediation offers the opportunity for a diversity of disputants. Those experienced with the litigation process will know that the additional cost of emotional energy must be invested in a dispute. Mediation expends less emotional capital than long drawn-out litigation and may allow the parties to salvage the relationship:

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[105] Feinberg (n 97) 9.

[106] ibid.

[107] ibid.

[108] ibid 8.

[109] Howard R Sacks, 'The Alternate Dispute Resolution Movement: Wave of the Future or Flash in the Pan' (1987) 26 Alberta Law Review 233, 234.

[110] ibid.

> The non-adversarial, cooperative nature of mediation and its focus on the needs of the parties also help parties to avoid the costs associated with damage or destruction of their business relationship. Adversarial processes often increase antagonism among the parties and damage or destroy the potential for a positive relationship. Mediation, on the other hand, seeks to encourage cooperation among the parties, not only with regard to the immediate dispute, but also with regard to structuring their relationship in the future.[111]

Designed to bypass the courts, mediation is often seen as the cheaper dispute resolution process and is cost-effective in several respects.[112] Generally, mediation takes less time than other forms of dispute resolution such as litigation and arbitration.[113] The efficiency created by a less rigid procedure saves human energy, legal costs, and other opportunity costs such as lost income, revenue or business opportunities.[114] If it is accepted that mediation is cheaper than litigation or arbitration, then mediation may offer advantages to parties where there is a wealth disparity between them.[115] Feinberg notes that even though the fees of the mediator need to be paid (and the mediator might be a lawyer and thus lawyers' rates apply), these fees are normally shared between the parties; since the parties are in control, they can decide not to hire outside counsel, once again reducing costs.[116]

An examination of the literature makes it clear that mediation can be used for a variety of purposes. At its core, it is submitted, mediation is a forum for decision-making, where parties can be assisted by a third person, namely the mediator, who attempts to improve the process of decision-making and assists the parties in reaching an acceptable settlement agreement.

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[111] Feinberg (n 97) 11.

[112] ibid 9.

[113] ibid 10; John W Cooley, 'Arbitration vs. Mediation – Explaining the Differences' (1985) 69 Judicature 263, 265.

[114] Feinberg (n 97) 10.

[115] Spencer and Brogan (n 91) 112.

[116] Feinberg (n 97) 10.

2.2 The tainted settlement agreement and where this research diverges in a novel manner

In terse terms, this research finds that there is a need for the development of a bespoke South African model of mediation, and for the judicial review of mediated settlements. As a South African, I am aware of the somewhat problematic rhetoric from theorists that Africa must 'learn' from the northern hemisphere, in terms of all law. This is not correct. Some areas of African law can be very sophisticated. Labour Law in South Africa is one such area. This research thesis begins to highlight some of the shortcomings of mediation and looks at the impact of these shortcomings on the creation of settlement agreements. I use the word 'taint' to describe the situation where a settlement agreement that has a factor or uses a process which has affected the mediation in a negative way. A simple definition of 'taint' as verb is to spoil something or give it an unpleasant quality. Contractually, the scenario could play out as such: after mediation, parties have only just acquiesced to a settlement agreement following a process facilitated by a mediator. However, now, one party feels disgruntled (due to one or several factors at play during the mediation) and now wishes to recant their agreement which is 'tainted' in their eyes. Such a person may approach a court to legally review the settlement agreement. This research uses some of the factors that taint (or negate) settlement agreements to clarify and augment the current state of the law.

It is here this research starts to diverge from current and past work on jurisprudence in the area of mediation. This thesis examines how mediation can, and must be developed, to meet the criteria of what mediation is, what we understand it to be, and what theorists want it to be. This thesis also examines the principles of contract law (shaped by the constitutional norms and public policy) and how those relate to, and interplay with, agreements that follow on from mediations. Finally, this work considers the impact of civil procedure on mediation as a process. This balancing act takes place largely by way of a case study of South African law, and more specifically labour law.

It is my opinion that there is a distinct unease in the sphere of mediation. Important aspects and factors, which will be discussed in a comprehensive manner, have a pivotal bearing on the outcome of a mediation. The following themes can be adduced: Firstly, there is such a varying degree as to how a mediation takes place; secondly, the skills of the mediator have a correlation to the efficacy of the process and the insight of the parties involved, and the integral make up of mediation that demands that the process must be adaptable, flexible and

dynamic. Together this makes forecasting an outcome of a mediation difficult. Mediation is stymied by its own weight of freedom. For mediation to be widely accepted with gravitas and precedent, more stringent rules must be codified to enable mediation to work more uniformly. This work attempts to do this. Some of these factors that make predicting the outcome of a mediation difficult also attribute to some of the reasons why a person may feel 'buyer's remorse' after the ink has dried on a settlement agreement. Fundamentally, the focus on tainting is instrumental to deciding whether review is appropriate or not - not about the broader outcome of mediation.

There is a further argument to make. There is a tension within mediation as a process. Should mediation 'bend' in its form to follow mandatory mediation court processes? In other words, should mediation use formalistic legal principles and procedures that have legal precedent? Could mediation become more 'controlled' and rigid? To draw these aspects out further, it might be helpful to comment on the relationship between the form of the mediation and the outcome. A mediated settlement agreement which is tainted because of procedural elements is more likely to give rise to a request for judicial review. If the answer to the questions above is 'yes' then the end result will be robust mediations that provide certainty (often under the banner of mandatory mediation) but with the true essence of mediation being lost in terms of self-determination and flexibility. This work takes cues from international law to fortify its arguments and novel reform proposals. Finally, once all these factors have been considered, and judgments from mediation-related matters analysed, a decision tree will be formed. Such a tool will enable the easy identification of issues that arise when a mediation agreement is destined for judicial review. The thesis recommends reforms that could make mediation in any jurisdiction more robust and certain. The thesis is unique is the way it uses and presents South Africa as a case study to compare and develop mediation as a holistic and better-established practice.

2.3 What factors taints a settlement agreement?

It is clear from the discussion above that mediation has been praised. Mediation, however, it is not perfect and there are some disadvantages to the process. Clearly, if a mediation does not end in a settlement, then it is merely an extra hurdle for the parties to clear before justice

can be attained.[117] In other words, when a mediation fails, the parties are in the same position as they were before the mediation but are now in the unenviable situation of either abandoning their claim or progressing to the court as litigants. There are tensions in the use of mediation that can bring it into conflict with other principles of legality. At times, parties may wish to construct a settlement agreement in a certain way that meets their needs or circumstances, but the form of these settlement agreements may not mirror guiding principles of constitutional norms or public policy.

At its core, a mediated settlement agreement is a contract; this section also examines some of the most common contractual factors that may taint the legality of a settlement agreement such as misrepresentation, the neutrality of the mediator, self-determination, bargaining power, duress and undue influence. This section also examines the idea that constitutional or public law principles may apply differently in different types of cases; this can have an impact on how we value or limit a comparative analysis of the factors that taint mediation across thematic settlement agreements.

2.3.1 How important is self-determination in mediation?

Mediation is promoted as a process that allows for maximum self-determination, where parties regulate and consent to their own processes. Self-determination also links to the principle of consent and the idea that parties are at the mediation by their own volition.[118] Mediation is a process of self-determination, and consent is generally integral to a successful mediation outcome.[119] It has been argued that mediators are supposed to honour, protect and nurture parties' self-determination.[120] The Model Standards of Conduct for Mediators[121] provide as follows:

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[117] Vettori (n 11) 363.

[118] Consent as an ancillary of mediation with be discussed in detail below.

[119] Jacqueline M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1998) 74 Notre Dame Law Review 775, 787.

[120] Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization' (2001) 6 Harvard Negotiation Law Review 1, 85.

[121] The Model Standards of Conduct for Mediators were adopted in 2005 by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution. These standards were designed to serve as the fundamental ethical guidelines for persons mediating in all practice contexts and may be viewed as establishing a standard of care for mediators.

> Standard 1 Self-determination
>
> … Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.[122]

However, in some cases, the parties to a mediation may not be able to exercise self-determination as defined.[123] In some situations,[124] courts, tribunals or government agencies suggest that parties go through mediation before the matter is heard and resolved by an official body. Such an approach is considered mandatory mediation and can dilute the ideal of self-determination.[125]

2.3.1.1 Self-determination in mandatory mediation

A key consideration when considering whether a settlement agreement should be reviewed, is whether the parties partook in the mediation of their own accord. An area of concern, according to theorists, is mandatory mediation. Fiss states that he does not believe that settlement, as a generic practice, is preferable to judgment or should be institutionalised on a complete and indiscriminate basis.[126] Mandatory mediation, by its simple definition, loses sight of the underlying fundamentals of mediation: a process that is being entered into voluntarily.[127] Mediation may be a prerequisite for parties wishing to obtain support or other assistance such as legal aid. Disputants may feel pressure to partake in an alternative dispute resolution process. Failure to attend mediation may have ramifications, such as not receiving legal aid. It is not uncommon for large organisations, employers or companies using standard-form contracts to insert a mediation clause to 'persuade' members or employees to

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[122] 'Model Standards of Conduct' <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf> accessed 15 September 2022.

[123] Boulle and Rycroft (n 51) 15.

[124] ibid.

[125] Dorcas Quek, 'Mandatory Mediation: An Oxymoron – Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2009) 11 Cardozo Journal of Conflict Resolution 479, 481.

[126] Owen M Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 1073, 1075.

[127] Quek (n 125) 481.

use mediation in the first instance in resolving a dispute. In effect, at times, entering a contract might bring the bind of a mandatory mediation. There may be an argument that mediation does not allow for pure self-determination if a party enters it under the threat of litigation from the other side, or because a party is unable to afford a long and costly court case.

What impact, if any, is there when mediation participation is not optional? Boulle and Rycroft argue that if mediation is not an optional process, it no longer constitutes a form of alternative dispute resolution.[128] This allegation is problematic for mediation as a pure process defined by the various definitions above. If there is a lack of self-determination, what effect would this have on a judicial review? Furthermore, what about the prerogative to pull out of a mediation process? The right to terminate the process must rest with the parties and, once parties have engaged in mediation, they should be able to withdraw from the process if they so wish.[129] Hedeen states:

> Many mediation proponents have claimed, and some researchers have concluded, that voluntary action in mediation is part of the 'magic of mediation' that leads to better results than those from courts or other forums: higher satisfaction with process and outcomes, higher rates of settlement, and greater adherence to settlement terms.[130]

How then do we reconcile 'mandatory mediation' with the principles of mediation theory? Mandatory mediation occurs when the parties are *compelled* to participate in mediation. This means that parties must now either participate in, or attend, mediation and the element of self-determination may be lacking to some extent.[131] Despite the many advantages of mediation in general, it is often under-used in certain jurisdictions and parties and their attorneys still select litigation as the default mode of dispute resolution.[132] To counter this,

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[128] Boulle and Rycroft (n 51) 14.

[129] David E Matz, 'Mediator Pressure and Party Autonomy: Are They Consistent with Each Other in Practice: Two Different Views' (1994) 10 Negotiation Journal 359, 360.

[130] Timothy Hedeen, 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, But Some' 20, 275.

[131] Richard Ingleby, 'Court Sponsored Mediation: The Case against Mandatory Participation' (1993) 56 The Modern Law Review 441.

[132] Quek (n 125) 483.

mandatory mediation may be the encouragement that parties need. Numerous studies have documented the positive effects of court-mandated mediation initiatives.[133] The benefits of mandatory mediation include high litigant and attorney satisfaction, high settlement rates, decreased costs for parties, increased use, increased court efficiency and cost-effective programme administration.[134]

While there are benefits to mandatory mediation there has been considerable criticism too.[135] Quek notes that being coerced into the mediation process can seem inconsistent with, and even antithetical to, the fundamental tenets of the consensual mediation process.[136] Academics state that any attempt to impose a formal and involuntary process on a party may potentially undermine the reason for mediation and, in light of this danger, mandatory mediation should only be used for compelling reasons.[137]

Self-determination may be lacking were there has been a form of coercion. Coercion in mandatory mediation is a complex issue. Coercion has a general meaning of forcing or compelling a person to do something against their will and often coercion might look similar to duress.[138] As Quek states:

> The apparent paradox of mandatory mediation has sparked diverse opinions on whether coercion into mediation may realistically be distinguished from coercion within mediation. Some writers adamantly contend that coercion into the mediation process invariably leads to coercion to settle within the mediation process, which leads to unfair outcomes.[139]

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[133] Jessica Pearson and Nancy Thoennes, 'Divorce Mediation: An Overview of Research Results Symposium: Children, Divorce and the Legal System: The Direction for Reform' (1985) 19 Columbia Journal of Law and Social Problems 451; James A Jr Wall and Lawrence F Schiller, 'Judicial Involvement in Pre-Trial Settlement: A Judge is not a Bump on a Log' (1982) 6 American Journal of Trial Advocacy 27; Craig A McEwen and Thomas W Milburn, 'Explaining a Paradox of Mediation in Theory' (1993) 9 Negotiation Journal 23.

[134] Hedeen (n 130) 276.

[135] Quek (n 125) 484.

[136] ibid.

[137] ibid 481.

[138] Hedeen (n 130) 275–276.

[139] Quek (n 125) 485.

It might be easy to define mediation as a 'voluntary' or 'consensual' process, yet, in many cases, parties do not choose to start the mediation process.[140] There is a link between self-determination and the underlying consent to partake in the mediation process.

The literature about mediation identifies several ways in which a party's self-determination may be compromised and thus, consent vitiated to some extent; these may be grouped by the stage of mediation – such as whether the parties must attend and participate in mediation – or whether parties are persuaded to settle on terms that they might regard as unfair. Quek outlines three factors that lead to mediation losing its voluntary nature: where judges refer cases for mediation as a blanket rule regardless of the case's specific circumstances;[141] over-penalising parties for not complying with mediation instructions;[142] and, finally, the excessive scrutiny of parties' participation in the mediation process.[143] Quek makes the following submission:

> It is thus submitted that court-mandated mediation should only be a short-term measure utilized in jurisdictions where mediation is relatively less well developed, and that this expedient should be lifted as soon as the society's awareness of mediation has reached a satisfactory level.[144]

There is an intersectionality here. The CCMA uses labour principles to dispense with workplace disputes by conducting mediations. By nature, labour law legislation in South Africa is public law orientated, with many pieces of legislation having been derived to promote and protect the socio-economic aims of redress by the South African government. Lessons gleaned from workplace mediations at the CCMA will illustrate the nuanced and subtle relationship between mediation at the CCMA and public policy goals. Put another way, the South African legal system prioritises the pursuit of economic redress rather than the theoretical definition mediation, which is gives self-determination as lesser footing. Such an indexing of factors is a new and bespoke type of research.

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[140] Boulle and Rycroft (n 51) 15.

[141] Quek (n 125) 490.

[142] ibid 491.

[143] ibid.

[144] ibid 484.

2.3.2 How neutral should the mediator be?

The role of neutrality in a mediation process is important. One quality that brings legitimacy to the mediation process is neutrality. The neutrality of a mediator is central to the idea of a fair mediation process.[145] Neutrality, as it relates to mediation, can have several meanings:[146] the mediator does not influence the content or outcome of the mediation; the mediator is not partisan and will treat the parties equally and without favour; the mediator will not be influenced by financial or personal connections with the parties or be aware of prejudicial information about either party or both of the parties; or the mediator will act without influence from governments[147] or organisations.

Some academic works use the terms 'neutrality' and 'impartiality' interchangeably.[148] This is not helpful for when a close evaluation of the concept must take place. Helpfully, some mediators make a distinction between neutrality and impartiality.[149] Boulle and Rycroft offer a clear distinction between neutrality and impartiality.[150] Neutrality generally relates to the mediator's background and her relationship with the parties, her prior knowledge of the dispute, and her interest in the outcome or the way in which the mediation is conducted. Impartiality refers to an even-handedness, objectivity and fairness towards the parties participating in mediation. Impartiality relates to matters such as the allocation of time, the facilitation of the communication process, and the avoidance of displays of bias or favouritism. It has also been submitted that the distinction between neutrality and impartiality is merely a matter of semantics and the two terms can be used interchangeably.[151]

It may not be surprising then that, despite the importance of neutrality to the mediation process, there is a lack of consistency in the definition, and neutrality is a highly contested

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[145] Astor (n 77) 221.

[146] ibid 223.

[147] If mediation providers are funded by the state, they may be vulnerable to government influence.

[148] Astor (n 77) 223; Sara Cobb and Janet Rifkin, 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) 16 Law & Social Inquiry 35, 41–46.

[149] Astor (n 77) 227.

[150] Boulle and Rycroft (n 51) 18.

[151] Cobb and Rifkin (n 148) 42.

term.[152] One view is that in the case of judicial and administrative bodies both neutrality and impartiality are requirements for the decision-making process.[153] Neutrality is more complex, and a less absolute requirement, which could be waived in relation to the mediator's prior conduct with one of the parties.[154] Astor[155] offers a summation of the problem relating to neutrality:

> Many mediators are conscious of the problems of neutrality and its intersection with power ... but they are in a double bind. They must assert neutrality, because they believe it to be important and because the legitimacy of mediation depends on it. Yet unless they overstep the boundaries of neutrality and intervene, they may perpetuate injustice.[156]

The extent to which neutrality is adhered to affects the way in which mediators deal with power imbalances, dominant narratives and attempts by parties to monopolise the process. It is argued that when mediators treat disputing parties equally in order to be fair, or differently in order to deal with relationships of power, they do so on the basis of assessments informed by their own values and understandings.[157] It becomes clear to me that attempts at neutrality show partiality and the perspective and situatedness of the mediator. As Astor states:

> Such judgments are inevitably made from a standpoint – from the particular life experiences and values of the mediator concerned. Asserting impartiality as a solution merely cloaks the situatedness of the mediator and again conceals the operation of power. Second, it acknowledges that mediators have perspectives that they bring to

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[152] Brian L Heisterkamp, 'Conversational Displays of Mediator Neutrality in a Court-Based Program' (2006) 38 Journal of Pragmatics 2051, 2052; Astor (n 6) 223; Cobb and Rifkin (n 114); Carol Izumi, 'Implicit Bias and the Illusion of Mediator Neutrality: New Directions in ADR and Clinical Legal Education' (2010) 34 Washington University Journal of Law & Policy 71; Linda Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?' (2001) 10 Social & Legal Studies 505.

[153] Boulle and Rycroft (n 51) 18.

[154] ibid.

[155] Astor uses the words 'neutrality' and 'impartiality' interchangeably.

[156] Astor (n 77) 226.

[157] ibid 227.

> mediation but it gives no guidance as to how mediators should handle that perspectivity.[158]

Astor suggests regulating the input of the mediator to ensure neutrality in the mediation process. First, mediators should engage in a reflexive practice, where they are mindful of the impact of their perspective, culture and values on the mediation.[159] Second, mediators should seek to cultivate an openness towards other perspectives and views.[160] Third, they should be able to weigh and value competing vantage points and cultural norms.[161] Fifth, mediators should aim to maximise the control that the parties have over the mediation. Lastly, mediators must intervene when a power imbalance exists, but must do so in a neutral manner.[162] Astor challenges the idea of neutrality and holds that the mediator has an obligation to deal with power imbalances:[163]

> In other words mediators are not forbidden from analysing and intervening in power relationships in mediation; they are required to think about power, how it impinges on their practice of mediation and how they may intervene to deal with its manifestations. A mediator seeking to maximize party control has an obligation to think about their own power, in all its forms, to think about the power relationships between the parties and to take all of these dynamics of power into account in their practice. Maximizing party control means maximizing the control of all the parties in mediation, not maximizing the control of any at the expense of others.[164]

Astor argues that removing the absolute requirement of neutrality allows for the safeguarding of a core mediation value – consensuality.[165] This is an interesting argument and places a much weight on the concept of consent and the intersectionality in terms of mediation and other core features.

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[158] ibid.

[159] ibid 230.

[160] ibid 231.

[161] ibid 232.

[162] ibid 236.

[163] Cobb and Rifkin (n 148) 40–41.

[164] Astor (n 77) 236.

[165] ibid.

2.3.3 Consent as a core feature

One feature that differentiates mediation from other forms of dispute settlement is the presence of a third party who encourages the contending parties to settle their dispute consensually.[166] There can sometimes be a lack of clarity between the concepts of 'consent' and 'consensual'. In the most basic form, 'consent' is a process consideration and 'consensual' is a substantive consideration. Consent relates to the earlier material above on the voluntary and self-determinate nature of mediation. Consensus is what distinguishes the outcome of a mediation from that of litigation, i.e., an agreement the parties agree to by consensus. Consensus would be engaged here in relation to outcome – where it was coerced or entered into, e.g., under duress. This would be different from the parties agreeing to take part in the process in the first place. Building consensus is a process closely linked to the mediation process and it can be used to solve problems, in law making, in settlements, in making legal decisions in new institutions, in policy development, and in healing or transformative encounters.[167] Menkel-Meadow defines the process of building consensus as:

> [A] managed, deliberative, and decision-making process in which a third-party neutral is usually hired to perform conflict or issue assessment, to map potential interests and stakeholders, and to design and implement a process of 'convening' representatives, groups, and constituencies to deliberate in a structured way about how to make decisions ….[168]

Consensus happens at various levels.[169] The deliberation process and what decisions to make usually require a set of rules laid out and enforced by the mediator and accepted by the participants.[170] Put differently, for a successful and consensual mediation outcome,

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[166] Craig A McEwen and Richard J Maiman, 'Mediation in Small Claims Court: Achieving Compliance through Consent' (1984) 18 Law & Society Review 11, 12.

[167] Carrie Menkel-Meadow, 'When Litigation is not the Only Way: Consensus Building and Mediation as Public Interest Lawyering Access to Justice: The Social Responsibility of Lawyers' (2002) 10 Washington University Journal of Law & Policy 37, 51.

[168] Carrie Menkel-Meadow, 'The Lawyer as Consensus Builder: Ethics for a New Practice' (2002) 70 Tennessee Law Review 63, 76.

[169] David Binder, Paul Bergman and Susan Price, 'Lawyers as Counselors: A Client-Centered Approach' (1990) 35 New York Law School Law Review 29.

[170] Menkel-Meadow (n 168) 76.

participants must first agree on several things before the final decision is made.[171] The idea of consensuality relates squarely to the voluntary nature of mediation and the fact that decisions should reflect the preferences of the parties and not those of the mediator.[172] Outcomes reached by mediation and consent, rather than externally imposed decisions, are widely thought to lead to greater satisfaction, legitimacy, implementability and voluntary compliance.[173] Parties must be able to give consent and reach a decision without pressure or duress, together.[174] Boulle and Rycroft make the following observations about the consensual outcomes of mediation:

> The mediator manages a process which assists and allows the parties to jointly come to their own decision on the merits, as they see them, without undue pressure to settle. Here consensuality is contrasted with coerciveness, in the sense of having a decision or order imposed on disputants, as occurs in the litigation system. While litigation is based on coercive adjudication by a court, so the argument goes, mediation is based on consensual decision-making by the parties.[175]

It is human nature for a mediator to want her mediation to end in a settlement; such a desire can lead to behaviour which either consciously or subconsciously promotes a certain way of decision-making. It is fair to say that in some cases decisions at a mediation are not consensual but rather imposed. Boulle and Rycroft present the following examples of the absence of consensuality:

a) Where sanctions are imposed on parties that have not participated in the mediation with good faith or have behaved badly;
b) Where the actual mediation creates momentum for settlement pressure through the use of brinkmanship tactics, long sessions and imposed deadline pressure;

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[171] Jacqueline M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1998) 74 Notre Dame Law Review 775, 777.

[172] Boulle and Rycroft (n 51) 24.

[173] Menkel-Meadow (n 167) 53.

[174] Welsh (n 120) 5.

[175] Boulle and Rycroft (n 51) 24.

c) Where mediators use a range of techniques such as nonverbal signalling or impatience to induce settlement;
d) Where mediators use procedural techniques to influence the terms of the settlement by postponing certain issues, overlooking comments by parties, or becoming inappropriately involved in the discussion;
e) Where a mediator relentlessly presses the parties for settlement.[176]

The presence of any of these examples in a mediation would suggest a lack of consensus between the parties, which is problematic for mediation as a process. As we know, a lack of consensus can have a detrimental effect on mediation as a process or on the settlement agreement – which could lead to a call for judicial review. To address such issues, it has been suggested that there is a duty of informed consent in the case of decision-making. Nolan-Haley notes that informed consent in the current landscape of mediation is often absent and the mediator has a duty to uphold the principle of informed consent.[177] Nolan-Haley states:

> Fairness requires that parties know what they are doing when they decide to participate in mediation, that they understand all aspects of the decision-making process, including their right to withdraw consent and discontinue negotiations, and that they understand the outcome reached in mediation. Toward this end, the principle of informed consent in mediation protects the psychological and legal interests associated with the values of autonomy, human dignity, and efficiency.[178]

The above quote takes us to the heart of the research question. If it is accepted that mediation is *prima facie* common good: in what circumstances is that undermined in such a way that would or should give rise to a right of judicial review? A further question that emerges from this discussion is whether there should be a duty of informed consent in mediations. The question becomes complex in South Africa, many indigent persons are unaware of their legal rights or the mediation process. There might be a concern that overzealous mediators may push for non-consensual mediation outcomes, but it is submitted that a court can (and should) perform the role of review and legal oversight to prevent any gross coercion. In a way, the

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[176] ibid 24–25.

[177] Nolan-Haley, 'Informed Consent in Mediation' (n 119) 793.

[178] ibid 787–788.

courts' power to review is not only about the black letter law review of issues that taint a settlement agreement. If the mediator knows that a court may intervene, and her conduct may be inspected, she should act accordingly. This could be seen as a welcome counterbalance to the 'freewheeling' forms of mediation.

A consensual outcome is an important requirement. However, some matters are not appropriate for mediation, even if the parties participate consensually, for example, where there is an overt power imbalance between the parties.[179] In these matters, a consensual outcome may be difficult to achieve. Consensuality can relate to power and submission. If a party is submissive to the will of another party, is that consensus? Mediation and settlement, as a form of alternative dispute resolution, implicitly assumes that there is a level playing field between the disputing parties,[180] but sometimes this is not the case, and agency or consensus is then affected. Mediation can bring with it power imbalances that are the result of disparities in financial resources, status or influence, which are explicit in the litigation process. Fiss notes:

> [T]he distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.[181]

Disparities in power and resources can influence a mediated settlement in three ways.[182] First, the less advantaged party may be unable to gather and analyse the information pertaining to the dispute and will not be able to make informed decisions at the bargaining table.[183] Second, the poorer party may need the damages he claims immediately and may be induced to accept the lower offer now, rather than wait for the longer litigation process where he might be awarded more. Lastly, a party in an inferior financial position might be unable to afford sustained and costly litigation and will therefore be forced to settle. It has been

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[179] Conversely, see Diane Neumann, 'How Mediation can Effectively Address the Male-Female Power Imbalance in Divorce' (1992) 9 Mediation Quarterly 227.

[180] Fiss (n 126) 1076.

[181] ibid.

[182] ibid.

[183] For the experience of women in divorce settlements, see generally: Penelope Eileen Bryan, 'The Coercion of Women in Divorce Settlement Negotiations' (1996) 74 Denver University Law Review 931.

suggested that settlement benefits the party claiming financial compensation, because he can save on the costs of litigation, but this is often not true.[184] The other party may anticipate the claimant party's potential litigation costs and may decrease any settlement amount accordingly.[185] While a good mediator should be alert to the issue of a power imbalance between the parties, Vettori notes that a court may be better equipped to handle the situation where one party tries to place pressure on the weaker party:

> In court proceedings, on the other hand, the judge, whose aim it is to achieve justice, determines the outcome. Imbalances of power between the parties may, therefore, influence the outcome in favour of the weaker party, or not at all. Chances of a fair solution are better in court proceedings than in a mediation settlement where the balance of power is skewed in favour of one of the parties.[186]

Money can distort consensus. Where one party can afford the best legal representation, it might be argued that very high quality and expensive representation could distort the court's judgment. A court aspires to autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration.[187] The court's role is to supplement weaker representation by asking questions, and by inviting witnesses or other persons and institutions to participate as *amici curiae*.[188]

There cannot be true consensus when a party lacks authority to enter into a settlement agreement. Participation and the conclusion of a settlement agreement assume that the parties are able to fully participate and have the authority and consent to enter into valid settlements.[189] In some situations parties who are present at the mediation may not have the agency or the authoritative consent to agree to a settlement, or the party at the mediation is in a contractual relationship that impairs their autonomy.[190] For example, an attorney, acting on

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[184] Fiss (n 126) 1076.

[185] ibid.

[186] Stella Vettori, 'Mandatory Mediation: An Obstacle to Access to Justice?' (2015) 15 African Human Rights Law Journal 355, 363.

[187] Fiss (n 126) 1078.

[188] ibid 1077.

[189] ibid 1078.

[190] ibid.

behalf of a client, accepts a settlement that in not in the best interest of their client, but suits their own agenda. The problem of authority to accept a settlement agreement can also occur when the parties to a mediation are large groups or classes of people, or organisations.[191] The mediator may not know who is entitled to represent these entities and to give appropriate consent.[192] Fiss states that many organisations and trade unions[193] have formal procedures for authorising and identifying persons to speak for a group of persons.[194] However, these procedures are often flawed because they are designed to facilitate agreements between the organisation and third parties, rather than to ensure that the members of the organisation agree with the decision or settlement made.[195] Furthermore, agency and the need for valid representation become more pronounced in class action litigation where one litigant must speak for many. Attempts have been made in the US to provide for such challenges by way of civil procedure rules, but they have not always been successful.[196] Similarly, labour legislation in South Africa can sometimes bind minority trade unions to settlement agreements made by larger majority unions, depending on certain factors.[197] In matters where the authoritative consent of hundreds or thousands of members of a group is needed, Fiss states, a judge's approval of a settlement agreement turns on whether there is group consensus. This can be impossible to establish, and often the judge's approval of the settlement agreement is based on what she thinks is fair or reasonable in the circumstances.[198] Interestingly, in such matters, the approval of the settlement agreement may not rely on the consent of all the parties, but rather on the settlement agreement's approximation to an actual judgment. This is problematic in the sense that the mediator has not had the benefit of being presented with evidence, as in a full trial.[199] Out-of-court settlement agreements may produce some sort of resolution for the parties involved, but they have no value for the community at

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[191] ibid.

[192] ibid.

[193] In several cases in South African labour law, trade union members have questioned the authority of the union leader to enter into certain settlement agreements.

[194] Fiss (n 126) 1078.

[195] ibid.

[196] ibid 1080.

[197] Section 23 of the Labour Relations Act 66 of 1995 provides for majoritarianism.

[198] Fiss (n 126) 1081.

[199] ibid.

large in terms of legal precedent.[200] The litigation process and subsequent judgments can have a remedial effect. Fiss states:

> Often, however, judgment is not the end of a lawsuit but only the beginning. The involvement of the court may continue almost indefinitely. In these cases, settlement cannot provide an adequate basis for that necessary continuing involvement, and thus is no substitute for judgment. The parties may sometimes be locked in combat with one another and view the lawsuit as only one phase in a long continuing struggle. The entry of judgment will then not end the struggle, but rather change its terms and the balance of power.[201]

A judgment delivered by a court may aid those seeking certainty and the context of the dispute should one of the parties return to the court for further assistance.[202] This further assistance may not be available for those who conclude an out-of-court settlement agreement. Such an agreement may make remedial steps more difficult and expensive for disgruntled parties as the court has no basis for assessing or modifying the settlement agreement.[203]

The dynamic nature of mediation means that not all the issues identified in the mediation process can be neatly resolved. These issues are generally left for a court to resolve; the court will determine the correct approach and make a ruling in a just and equitable fashion. To ensure certainty and to expedite court review, a set of recommendations for dealing with these unresolved issues would be valuable. This thesis will analyse these issues and then offer recommendations in the chapters that follow.

2.4 Mediation in the shadow of the law

The previous material has demonstrated how mediation is seen as a viable alternative to a formal legal process outlined by the 'law'. At this juncture it is important to clarify that a court is only likely to intervene where there is a legal defect, reason of public policy or an unjust factor such as duress or unconscionability present.

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[200] Vettori (n 186) 364.

[201] Fiss (n 126) 1082.

[202] ibid 1083.

All mediation is situated, more or less, in the shadow of the law.[204] Statutes, legal norms and principles govern or potentially govern the way in which mediation is conducted, the behaviour of the participating parties, and the mediation outcomes.[205] Astor takes a stricter approach to how mediation interacts with law and contends as follows:

> Mediation takes place in private. Its legitimacy as a method of dispute resolution cannot depend securely on decision-making according to law, since mediated agreements may disregard law.[206]

The above statement is lacking nuance. Jacob draws on past research and states:

> Thus two conflicting positions dominate the literature. One asserts the centrality of law and is epitomized by Mnookin and Kornhauser's metaphor of 'bargaining in the shadow of the law'. The other denies the law's centrality and argues that social or folk norms may govern the formulation of claims and their processing. The former is an absolutist position; the latter concedes a role for law, and several formulations argue that social norms are most likely to be preferred when problems or disputes arise among closely knit groups…[207]

Where mediation is situated within a legal framework this may have complex consequences.[208] The law may require certain things of mediation and how the process is conducted or formed. These include, for instance, whether the mediation has been mandated by a court or legislation; whether the dispute being mediated should or could be litigated in court; whether clear and settled legal precedents exist relating to the dispute; whether the mediation takes place during the course of pending or active litigation; how attorneys participate in the mediation process; and whether the mediation outcome or procedure must be reported back to a court or tribunal.[209] All these consequences will almost certainly also

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[204] Boulle and Rycroft (n 51) 225.

[205] ibid.

[206] Astor (n 77) 222.

[207] Herbert Jacob, 'The Elusive Shadow of the Law Context of Litigation' (1992) 26 Law & Society Review 565, 566.

[208] Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13) 83.

[209] Boulle and Rycroft (n 51) 225.

have an impact on when or how a settlement agreement should or can be reviewed by a court of law. It is important to clarify that a court is only likely to intervene where there is a legal defect, reason of public policy or an "unjust factor" such as duress or unconscionability present.

When participating in mediation, the parties do not forfeit any of their legal rights or remedies, and if no settlement agreement results from the mediation, the parties are entitled to enforce any legal right they may have by using appropriate judicial procedures.[210] The situation differs if the parties have concluded a settlement agreement. In a settlement agreement, legal rights and obligations may be affected in varying degrees. A valid and binding settlement agreement can supersede the parties' prior rights, unless there are grounds for reviewing or overturning the settlement agreement. Legal rights and obligation being affected by a mediation agreement is not a novel theory and should not in itself cause concern. The issue of concern is when and how it is acceptable for legal rights to be affected and when that would prompt a court to intervene. While it seldom occurs, judicial involvement in proceedings to enforce a mediated settlement agreement often reveals legitimate and complicated concerns about the practice and integrity of the mediation process.[211] Despite this limited occurrence, these questions create uncertainty and need to be settled in South African law. Further issues under the curtailment of legal rights include the limits of confidentiality in regard to what is said during mediation, the non-compellability of a mediator as a witness, and whether a mediator enjoys any type of judicial privilege. This section examines each of these issues in turn and analyses the effect that they may have on a robust settlement agreement.

2.4.1 Mediation and confidentiality

Mediation is founded on confidentiality[212] and the expectation that statements made during the mediation will not be repeated elsewhere.[213] This characteristic means that mediation

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[210] ibid.

[211] Peter Robinson, 'Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should Be Embraced and Broadened' 2003 Journal of Dispute Resolution 135, 142.

[212] AA Landman, 'Mediating in the Shadow of the Law' (2015) 36(2) Industrial Law Journal 1766, 1773.

[213] T Noble Foster and Selden Prentice, 'The Promise of Confidentiality in Mediation: Practitioners' Perceptions' 2009 Journal of Dispute Resolution 163, 164.

does not accord with certain legal principles. For mediation to work properly, certain information must remain secret. Without confidentiality, parties will be unwilling to share interests or positions or to make proposals. The assurance of confidentiality can make agreement possible in difficult cases where ordinary negotiations have failed.[214] The courts have accepted that mediation is an important dispute resolution tool, but does this mean it the courts also accept the proviso of confidentiality? South Africa has a sophisticated dispute resolution process provided for by labour legislation and facilitated by the Commission for Conciliation, Mediation and Arbitration (CCMA). Similar in many ways to in the UK's Advisory, Conciliation and Arbitration Service (ACAS), the CCMA has been an instrumental pioneer in the ADR space. The law has held that in the specific context of the CCMA, confidentiality is not guaranteed.[215] Generally, by the time most parties reach the mediation table, the relationship has deteriorated into one of animosity and distrust, and most adversaries are unwilling to disclose their disadvantages to each another.[216]

There is abundant scholarly support for confidentiality in the mediation process.[217] Confidentiality is said to exist at two levels.[218] The primary level is the mediation process, which means that what is said in the mediation process is supposed to remain confidential between the parties and the mediator. This means that statements that are made in the mediation to the mediator, or to the other parties, should not be used as evidence in other processes, legal or otherwise. In some instances, it is acceptable to allow for a media release about the outcome of the mediation, if it pertains to a public-interest matter such as large-

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[214] Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13) 79.

[215] See LRA s 158(1)(g), which provides that the Labour Court may review CCMA proceedings and makes no mention of confidentiality.

[216] Ellen E Deason, 'The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability Reply' (2001) 85 Marquette Law Review 79, 81.

[217] See Lawrence R Freedman and Michael L Prigoff, 'Confidentiality in Mediation: The Need for Protection' (1986) 2 Ohio State Journal on Dispute Resolution 37; Eileen P Friedman, 'Protection of Confidentiality in the Mediation of Minor Disputes' (1981) 11 Capital University Law Review 181; Jonathan M Hyman, 'The Model Mediator Confidentiality Rule: A Commentary I – Mediation Confidentiality' (1988) 12 Seton Hall Legislative Journal 17; Alan Kirtley, 'The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest' 1995 Journal of Dispute Resolution 1; Michael L Prigoff, 'Toward Candor or Chaos: The Case of Confidentiality in Mediation I – Mediation Confidentiality' (1988) 12 Seton Hall Legislative Journal 1.

[218] Brand, Steadman and Todd (n 24) 25.

scale industrial bargaining.[219] In some cases, however, even the fact that the mediation took place can be kept confidential.

A secondary level of confidentiality exists between the mediator and one party at a side caucus meeting. A side caucus is a tool that can be used to break a deadlock; it is a private, confidential meeting where parties are separated so that each can have a discussion with the mediator.[220] During these meetings the mediator is charged with the task of defining and refining the party's interests and needs. These side caucus meetings allow the mediator to gain a better understanding of what a party may want or need but may not want to say in front of the other party. For any hope of a successful mediation, it has long been thought that disclosures, such as bottom lines, made during a side caucus should remain confidential between the mediator and each party.[221]

The promise of confidentiality allows the parties to confide in the mediator without reservation and reveal fewer aspects and information that may conflict with their own interests, which in practice has proven critical for reaching settlements.[222] In a way, the fundamental difficulty of mediation is that one may disclose information that could prove harmful to one's position.[223] Difficulties of confidentiality are exacerbated during mediation, as the role of the mediator is to ensure that information which would normally be considered 'confidential' flows from one party to the other. At the start of the mediation, the mediator's role is to transform a normally fractured relationship between the parties into one of trust and exchange, in part by promising that the statements made in the room or between the parties or to the mediator will be kept confidential. The link between confidentiality and trust during the process of mediation is critical. There is also a further link between the requirement of confidentiality in mediation and the place of confidentiality within legal structures.

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[219] Laurence Boulle and Miryana Nesic, *Mediation: Principles, Process, Practice* (Butterworths 2001) 490. The authors state that the original purpose of a confidentiality provision was to prevent parties from going to the press with the details of the mediation.

[220] Christopher W Moore, 'The Caucus: Private Meetings that Promote Settlement' 1987 Mediation Quarterly 87, 87.

[221] Brand, Steadman and Todd (n 24) 25.

[222] Foster and Prentice (n 213) 171.

[223] Deason (n 216) 81.

Boulle[224] lists five arguments for the use of confidentiality in mediation. First, confidentiality encourages participants to participate in the process and to engage in frank and open discussions about positions or possible solutions. Second, where mediation occurs as part of a large litigation process, it allows parties to make proposals in a safe space and dissuades participants from using the process as a 'fishing expedition'. Third, confidentiality has a transformative function that allows parties to express their concerns and explore narratives that might heal a relationship.[225] Fourth, it aims to protect the integrity and legitimacy of the mediation process. Lastly, confidentiality contributes to a narrower basis on which to seek a review or challenge the mediation process in post-mediation litigation. However, it is submitted that the extent to which Boulle's last argument is valid is questionable. This research, drawing from a review of case law in South Africa, will show that the limits of confidentiality does not seem to deter parties from seeking the judicial review of their settlement agreements.

Many academic journals and articles addressing mediation and confidentiality come from the US, which has been the forerunner in mediation practice. The case law and precedents on mediation and confidentiality can be varied and complex, especially in the federal and state legal systems of the US.[226] Fortunately, other jurisdictions have grappled with these issues in a more accessible manner and can be analysed in combination with the US sources. The US literature[227] on the confidentiality of meditation draws on various legal cases that find that a mediator who testifies about what occurred in the mediation proceedings will be seen as acting contrary to the principles of mediation and straying from their neutral role.[228] However, the US is not a clear-cut example from which South Africa (or other countries for that matter) can borrow to inform its approach to mediation.[229] The US lacks uniformity in its approach to confidentiality in mediation, with some states (geographical and jurisdictional)

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[224] Boulle (n 8) 671.

[225] See generally Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (John Wiley & Sons 2004).

[226] See generally Deason (n 216).

[227] It must be noted that the USA has over 2,500 state statues and court rules on confidentiality: see Ellen E Deason, 'The Uniform Mediation Act' (2003) 18(2) Ohio State Journal on Dispute Resolution 603, 604.

[228] Ellen E Deason, 'The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability Reply' (2001) 85 Marquette Law Review 79, 85 where the author relies on *NLRB v Joseph Macaluso, Inc*. 618 F.2d 51 (9th Cir.1980). Deason states that as soon as a mediator testifies, she cannot be seen as neutral anymore, as she has invariably undermined the party's position.

[229] Feehily, *International Commercial Mediation* (n 57) 23.

providing a mediation privilege to the parties and other states attaching the privilege to the mediator. In both cases, this would mean some rights to confidentiality, in varying degrees.

The UK too has been helpful in clarifying the role of confidentiality in mediations. Some judgments have emphasised the overlap between the concepts of confidentiality and legal privilege and how the courts might conflate the two issues. The court in *Farm Assist* clarified the concepts when it summarised the issues as follows:

> (1) Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result, even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.
>
> (2) Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege that exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.
>
> (3) Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege, and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege.[230]

Farm Assist provided important clarification, but would a uniform test of confidentiality be practical? Deason, writing about uniformity, highlights that '[v]aluing confidentiality is one thing but promoting uniformity in confidentiality laws is altogether another. Consistency would certainly be foolish if the sole purpose … was to promote uniformity for its own sake.' In other words, is a uniform test needed to determine when it is appropriate for a mediator to break confidentiality, or should there be a case-by-case analysis? It is submitted, and this will be explored in depth in subsequent sections, that given the current socio-legal situation in

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[230] *Farm Assist Ltd v Secretary of State for the Environment, Food & Rural Affairs (No2)* 1102 (EWHC (TCC)) para 44.

South Africa, it would be more beneficial to have a uniform rule relating to when confidentiality ends, which would allow for less complicated review processes.[231]
There is a tension between the courts and the legislature. Courts are unwilling to provide mediation with the prominence that policy makers tend to provide, especially relating to the need for confidentiality, and how this confidentiality encourages disclosure, aids in finding common solutions and protects the integrity of the mediation process.[232]

Despite the wide approval of confidentiality, there is little consistency in the current laws, rules and judicial practices that govern the principle of confidentiality in settlement agreements.[233] Confidentiality is an essential aspect of mediation for several reasons.[234] At the very outset confidentiality constitutes the legitimacy and feasibility of mediation as an autonomous dispute resolution mechanism by preventing the disputants from using settlement discussions as tools for gaining an advantage in the courtroom, without having any intention of coming to settlement.[235]

2.4.2 What effect does 'settlement privilege' have on a mediated settlement?

The legal procedural rules relating to settlement privilege and 'without prejudice' influence mediation practice, whether the participants may be explicitly aware of this. This is another way in which mediation is situated within the periphery of the law. Privilege and confidentiality are similar but different and can be said to be two sides of the same coin.[236] This situatedness creates a tension between public policy and the existence of legal settlement privilege. Noting this, Zeffertt states:

> The rules of privilege emerge from the endless jarring of irreconcilable policies. On the one hand, justice demands that all relevant evidence should be ventilated; on the

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[231] John Henry Wigmore et al, *Evidence in Trials at Common Law* (Little, Brown 1961), who states that the court is entitled to 'every [person's] evidence'.

[232] Ronán Feehily, 'Confidentiality in Commercial Mediation: A Fine Balance (Part 2)' 2015 Journal of South African Law 719, 733.

[233] Deason (n 216) 81.

[234] Those being the fostering of options and frank discussions without the risk of disclosures going public.

[235] Russell B Korobkin, 'The Role of Law in Settlement' (Social Science Research Network 2004) ID 601505.

[236] Marnewick (n 53) 72.

> other hand, there are many necessary activities whose proper fulfilment would be stultified by the disclosure of secrets.[237]

In routine legal relationships, between attorney and client, the idea of confidentiality is uncontroversial: confidentiality protects clients and makes the legal system work and is often known as 'privilege'.[238] In terms of the law of evidence, settlement privilege or statements without prejudice are statements made expressly or impliedly without prejudice, in the course of *bona fide* negotiations for the settlement of a dispute, and may not be disclosed in evidence without the consent of both parties.[239] The exclusion of statements without prejudice is based upon the tacit consent of the parties and the public policy approach of allowing parties to attempt to settle their disputes without the fear that what they have said will be held against them, if the negotiations should break down.[240] Where without prejudice applies, for instance, where statements made during negotiations are to be later disclosed in a court, such disclosures must have the consent of the parties concerned.[241] Generally it has been held that if a negotiation is successful and a settlement agreement is concluded, then the communications should be made available to the court because there is no need for non-disclosure protection.[242] Put another way, if the negotiation is successful and a settlement agreed upon, the without privilege protection falls away. Landman submits that this rule, allowing for disclosure after settlement, overstates the allowable exception. He states:

> Ordinarily only evidence of the settlement and not the negotiations would be relevant

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[237] D Zeffertt, 'Confidentiality and the Courts' (1974) 91 South African Law Journal 432, 435.

[238] Fred C Zacharias, 'Rethinking Confidentiality' (1989) 74 Iowa L Rev 351, 356.

[239] David T Zeffertt, A Paizes and Andrew St Q Skeen, *The South African Law of Evidence (formerly Hoffmann and Zeffert)* (LexisNexis/Butterworths 2003) 700.

[240] DT Zeffertt and AP Paizes, *Essential Evidence* (LexisNexis 2010) 214. See also *Kapeller v Rondalia Verserkeringskorporasie van Suid Afrika Bpk* 1964 (4) SA 722 (T) at 728F; *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677.

[241] Landman (n 212) 1768. See also *Coetzee v Union Government* 1941 TPD 1; *Waste-Tech (Pty) Ltd and Another v Van Zyl and Glanville NNO and Another* 2000 (2) SA 400 (SE) at 406; *Naidoo v Marine and Trade Insurance Company Ltd* 1978 (3) SA 666 (A) at 677B–C; *Milward v Glaser* 1950 (3) SA 547 (W) at 554 and *Dennegeur Estate Huiseienaarsvereniging v Zonnekus Mansion (Edms) Bpk* (2024/2011) [2014] ZAWCHC 70 (8 May 2014).

[242] *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914.

> and admissible. If the settlement had been reduced to writing, the parol evidence rule would also prevent the admission of evidence of the negotiations unless a recognised exception applied.[243]

South African law provides for an exception to the principle of settlement privilege.[244] An offer made during settlement negotiations is inadmissible unless it is being used as evidence to prove that an offer of settlement was in fact made.[245] In South Africa, Rule 34 of the High Court Rules provides for offers of settlements without prejudice:

> (1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.
> …
> (10) No offer or tender in terms of this rule made without prejudice shall be disclosed to the court at any time before judgment has been given. No reference to such offer or tender shall appear on any file in the office of the registrar containing the papers in the said case.
> (11) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.

Interestingly, case law in South Africa has shown that 'without prejudice' need not be uttered or stated for *de facto* negotiation communications to be protected by privilege.[246] Conversely, if the phrase 'without prejudice' is expressly used but the statement in question is not a relevant part of the bargaining process, then no protection will ensue.[247] In *September and*

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[243] Landman (n 212) 1768–1769.

[244] ibid 1768.

[245] ibid. See *Santam Ltd v Sayed* [1998] 4 All SA 564 (A).

[246] Zeffertt and Paizes (n 240) 214.

[247] ibid. See also *Patlansky v Patlansky* (2) 1917 WLD 10.

Others v CMI Business Enterprise CC[248] the Constitutional Court highlighted the importance of such a protection and the impact it has on public policy by quoting Dendy:

> The rationale behind providing privilege for statements made 'without prejudice' is very similar, if not the same, which is that– 'public policy demands the parties to the disputes should be encouraged to avoid litigation and all the expenses, delays, hostility and inconvenience that it usually entails, by resolving their differences amicably in full and frank discussion without fear that, if the negotiations fail, any admissions made by them during these discussions will be used against them in ensuing litigation'.[249]

Zeffertt states that for an offer to be protected by 'without prejudice' it must be made in good faith.[250] However, the court will not investigate the matter unless the *bona fides* of the offer is directly relevant to an issue in the case. Zeffertt further states:

> The fact that an offer contains statements which are fraudulent or even criminal does not in itself make it admissible, but it may tend to show that the offer was not made in good faith. If this fact is relevant only to credibility, the court will not concern itself with the collateral issues.[251]

Furthermore, a court is entitled to peruse a document which one party claims is privileged in order to determine whether that document deserves protection or not.[252] South African law has not expressed itself clearly on the issue of settlement privilege.[253] It is submitted that the case law surrounding 'without prejudice' which gives validity to settlement privilege is not very current and possibly outdated. The case law did not consider that mediation might be the process affected by such evidentiary rules. In fact, it could be further submitted that the law of evidence is biased towards communications stemming from pending litigation rather than from a stand-alone mediation process, where litigation has not yet become a possibility. Civil procedure, because it is not current, gets in the way of mediation.

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[248] *September and Others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC).

[249] Mervyn Dendy, 'Privilege' in *The Law of South Africa*, vol 18 (3rd edn, LexisNexis SA 2015) para 181.

[250] Later I connect the concepts of confidentiality and good faith.

[251] Zeffertt and Paizes (n 240) 214.

[252] ibid.

[253] Landman (n 212) 1768.

It is unsurprising that the myopic scope of 'without prejudice' might derail mediation attempts, as those wishing to reach a settlement might not make any offers for fear that it may be used against them later. Here one might glance towards other jurisdictions for inspiration to remodel mediation parameters. South African law and Canadian law have many similarities in terms of settlement privilege.[254] Recently, considering the nub of the issue, the Canadian Supreme Court had to determine whether a mediation settlement agreement prevented parties from referring to events that took place during the mediation. The court held that there was a difference between a confidentiality clause found in a settlement agreement, which is a contract, and settlement privilege, which is a common-law rule of evidence. They do not provide the same protection or consequences for breach, and, in some circumstances, they may clash. For example, a confidentiality clause may promote settlement by fostering frank and honest discussions between the parties, which may result in a settlement agreement. Settlement privilege applies to all communications between parties that lead up to a settlement, even after a mediation has ended. This means that all communications made during the settlement discussions are protected by common-law settlement privilege, even once the mediation has ended, and even if parties settle in a corridor or hallway away from the mediation table.

Parties generally enter settlement discussions knowing (or perhaps hoping) that any statements made by them will be confidential.[255] There is an exception to the common-law rule of privilege: a communication that has led to a settlement will cease to be privileged if disclosing it is necessary to prove the existence or the scope of the settlement.[256] This is a settled and established principle in the law of evidence. But what is the situation when one party demands or requires absolute confidentiality? Is it possible to insert a confidentiality clause and try to contract out of this exception, thus making it impossible for a party seeking to prove the terms of a settlement agreement they have negotiated? In the Canadian case *Union Carbide Canada Inc v Bombardier Inc*,[257] the parties disagreed about the interpretation of the financial settlement clause after a successful mediation. The court had to consider

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[254] ibid 1767.

[255] ibid.

[256] Wayne D Brazil, 'Protecting the Confidentiality of Settlement Negotiations' (1987) 39 Hastings Law Journal 955, 956.

[257] *Union Carbide Canada Inc. v Bombardier Inc.,* 2014 SCC (2014) 35.

whether the statements from the mediation that the applicant was relying on to prove his case fell within the confidentiality clause of the mediated settlement agreement. The court held that settlement privilege is a common-law evidentiary rule that applies to settlement negotiations regardless of whether the parties have expressly invoked it. The crisp question before the court was whether a contractual confidentiality clause can displace the common-law evidentiary settlement privilege. The court held that the parties to a mediation were free to sign settlement agreements that vary from the protection of confidentiality under the common law. However, the court rejected the presumption that a confidentiality clause in a mediation agreement automatically displaces the settlement privilege and, more specifically, the exceptions to settlement privilege that exist at common law. If a party is barred from revealing communications that prove the existence of a settlement agreement – because of a confidentiality clause – then the settlement agreement would have no force and effect in a court. Such a situation would give no weight to settlement agreements in terms of judicial enforcement.

The Canadian court stated that exceptions to settlement privilege had been developed for public policy reasons and they exist to further the ultimate purpose of the privilege, which is to aid and promote settlement. The court held that a confidentiality clause in a settlement agreement should not deprive parties of the ability to prove its terms by disallowing evidence of communications made in the mediation context, unless the court can find that there was an intention to do so by both parties. In *Union Carbide Canada Inc* the court held that the parties did not intend to set aside the common-law rules which provided for settlement privilege, thus leaving the door open to use the exception of the rule to prove the terms of the settlement agreement at a later date, if need be. The court held that it was illogical to assume that the parties would renounce their right to prove a settlement in existence, especially if the reason for participating in a mediation was to reach a settlement. From this case, it is clear that for parties to have absolute confidentiality, the settlement agreement must state that both parties wish for confidentiality and must further set aside any common-law exception. Exercising the freedom to contract would be valid unless a party can prove that some factor tainted the agreement at the time of settlement.

2.4.3 Does mediator privilege exist?

Formal legal interactions and communications are often the benefits of privilege. Do such benefits accrue to mediators since they facilitate the process? As noted above, mediation is situated in a grey space, and this needs further elucidation. Confidentiality and privilege are similar and in a non-legal setting may sometimes be used interchangeably. Confidentiality refers to the situation between individuals, where documents and information are exchanged with the intent that such exchanges will not be shared outside of this relationship.[258] Privilege is a legally recognised exemption from testifying.[259] South African courts distinguish between two types of privilege. Legal professional privilege is the right of a client to the confidentiality of communications between a client and his or her legal advisor.[260] Litigation privilege relates to communications between an attorney and his or her client for the purpose of pending or contemplated litigation.

As we have seen, parties may attempt to rely on mechanisms like settlement privilege or a confidentiality clause to ensure confidentiality in mediation. To further protect the confidentiality of mediation, mediators will sometimes argue that they are precluded from being called as witnesses to testify in a court or tribunal. These arguments may be classified as witness immunity or a type of quasi-judicial privilege that attaches to the role of a mediator. The principle of mediator privilege has an impact on when a court may intervene and how they may do so. Mediators are generally not required to appear as witnesses in a courtroom to testify, because, according to settlement privilege, if no agreement has been reached to settle a dispute the confidentiality of the negotiation process protects any information disclosed during discussions, irrespective of whether the parties have agreed to this.[261] Mediators can avoid being subpoenaed to testify or to disclose documents from a mediation in two ways: first, by including a clause in the agreement to mediate which provides that the mediator will not be called by any party as a witness; and secondly, by asserting the right to witness immunity.[262] But where do we draw the line? How do we know when to stop? Traditional privilege, not in a courtroom setting, is attached to communications

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[258] Gary Joseph Kirkpatrick, 'Chapter 8. Should Mediators Have a Confidentiality Privilege?' (1985) 9 Mediation Quarterly 85, 85.

[259] ibid.

[260] Pamela-Jane Schwikkard, *Principles of Evidence* (4th edn, Juta 2016) 168.

[261] Landman (n 212) 1769.

[262] ibid.

between parties that have inter-dependent, ongoing and supportive relationships, such as those between spouses or life partners, doctor and patient, or priest and penitent.[263] The ideology behind such a privilege is to strengthen these kinds of relationships so that society can trust them.

However, it would appear that some relief is available to these professionals if they can establish that they have a 'just excuse' for not testifying.[264] Schwikkard argues that certain professional communications may be protected from disclosure by the constitutional right to privacy as provided for by s 14*(d)* of the Constitution which provides that everyone has the right not to have the privacy of their communications infringed.[265] So, in circumstances when the disclosure of such a communication is demanded by a court, privilege may be claimed on the basis of s 14.[266] However, that privilege may be denied if the court is able to establish that the requirements of the limitations clause have been met. Such an approach would not constitute such a radical departure from the common law as such constitutional scrutiny would inevitably incorporate the Wigmore preconditions[267] discussed below.

Zeffertt quotes Professor George W. Keeton, who glibly states 'that the law of evidence ... was until modern times very largely the creation of the judges. The judges made the privilege; why did they not perfect it?'[268] Zeffertt declines to answer such a question, but one possibility is that since judges are the recipients of privilege and can create such a privilege, they do not wish to bestow such a privilege on a class of practitioners such as those who conduct mediation. Some academics have attempted to structure the principles of legal privilege. Wigmore, writing in the US, laid out the foundational principles for privilege as a four-stage test:

> (1) Does the privilege originate in a confidence? (2) Is the inviolability of that confidence vital to the achievement of the purposes of the relationship? (3) Is the

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[263] Brazil (n 256) 990.

[264] Schwikkard (n 260) 168.

[265] ibid.

[266] ibid.

[267] ibid.

[268] Zeffertt (n 237) 434.

> relation one that should be fostered? (4) Is the expected injury to the relation, through the fear of later disclosure, greater than the expected benefit to justice in obtaining the testimony?[269]

If all the enquiries can be answered in the affirmative, there is a strong case that privilege exists. Brown and Marriott[270] discuss the possible existence of, and desirability for, a distinct privilege attaching to the mediation process in the UK. They state the following in relation to mediation privilege:

> It remains to be resolved definitively by the English Courts (if not by the legislature) whether there is a privilege attaching to the whole mediation process, including all communications passing within that process, whether the mediation relates to family matters, civil or commercial disputes or any other kind of issue.[271]

Regarding mediator privilege, they state:

> As the law presently stands, any privilege that might exist attaches to the parties and not the mediator. Consequently, the parties may agree to waive that privilege and allow the mediator to provide the Court with any information that arose in the mediation process. There is an issue, however, as to whether privilege should be attached to the mediator as well as the parties involved in the process.[272]

In *Re D (Minors)*[273] Sir Thomas Bingham MR reviewed the English law and stated:

> A substantial and, to our knowledge, unquestioned line of authority establishes that where a third party (whether official or unofficial, professional or lay) receives information in confidence with a view to conciliation, the courts will not compel him to disclose what was said without the parties' agreement.[274]

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[269] Charles W Quick, 'Privileges under the Uniform Rules of Evidence' (1957) 26 University of Cincinnati Law Review 537, 539.

[270] Henry J Brown and Arthur L Marriott, *ADR Principles and Practice* (Sweet & Maxwell 1999).

[271] ibid 22–079.

[272] ibid 22–097.

[273] *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231.

[274] ibid 238.

The court went on to say, rather passionately:

> To override the privilege in such an event would be to emasculate the privilege and so undermine the whole process of conciliation. To permit evidence to be given of a party's statements of fact inconsistent with his or her open position would, in our judgment, have the same result: unless parties can speak freely and uninhibitedly, without worries about weakening their position in contested litigation if that becomes necessary, the conciliation will be doomed to fail.[275]

In the UK case of *Brown v Rice*[276] the court had to consider whether a mediator was obliged to give evidence and, if, a privilege existed:

> [I]t was common ground between the parties that the court could not properly require Mr Walker to give evidence and, consistently with clause 7.4 of the agreement to mediate, neither party was intending to issue a witness summons against him. I agree that this case can be decided under the existing without prejudice rule. It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts but that is not something which arises for decision now.[277]

The court did not consider the matter of a privilege any further and reserved judgment on that issue. Writing in the US, Kirkpatrick has some reservations about mediators claiming a specific mediation privilege. He writes: 'The paradox of simultaneously asserting a right or duty to know and a right or duty to conceal requires a way to decide which right or duty to acknowledge.'[278] Kirkpatrick concludes that despite the dangers of secrecy and the need for information, the privilege assuring that confidential exchanges between mediators and clients will not be violated by giving testimony should be allowed but limited. Further, Kirkpatrick claims that while mediators and their clients could operate safely under a general umbrella of

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[275] ibid.

[276] *Brown v Rice* [2007] EWHC 625 (Ch).

[277] ibid para 20.

[278] Kirkpatrick (n 258) 87.

privilege the umbrella must be limited. He states further that when a mediator's behaviour is in question then the confidentiality privilege should not be applied. The approach of Kirkpatrick, it is submitted, would not be inconsistent with the scope and import of the South African Constitution.

What can be ascertained from the section above is that there is uncertainty about when a mediator may claim privilege to prevent giving testimony in court. It has also been stated that it is up to the parties to waive any privilege should it exist. Like the UK, the courts and legislature in South Africa have yet to pronounce on the issue of mediator privilege. A legal test is demanded to assist the court in determining whether a mediator can apply for the privilege of not testifying – especially if the parties to the mediation refuse to renounce or waive such privilege. The link to the research question is this: can a mediator be summoned by a court during a legal review of a settlement agreement.

2.4.4 Should mediators be immune from liability?

In the courtroom, judges who decide on legal issues have immunity. The issue of mediator witness immunity was considered by a UK court in *Farm Assist Limited v Secretary of State for the Environment, Food and Rural Affairs*.[279] The court conducted a review of previous decisions that dealt with confidentiality in mediation. In this matter that court had to determine whether a distinct immunity existed in respect of the duty of confidentiality and 'without privilege'. A mediator applied to the court to set aside a summons that sought her attendance to give evidence in a matter before the court. One of the parties to the initial mediation where the mediator was present claimed alleged economic duress in reaching a settlement agreement.[280] Informal efforts were made to persuade the mediator to participate as a witness, and both parties in the matter had agreed that the mediator could be contacted to give evidence, and to assist in the discovery of documents or notes from the mediation. The mediator wrote to one party and stated that she genuinely believed that she was unable to recall any important facts – having conducted many mediations since – of the mediation since it had happened several years ago, and further took the view that it was inappropriate for her to get involved again.[281] The mediator also referred to a clause in the agreement to mediate,

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[279] *Farm Assist Ltd v Secretary of State for the Environment, Food & Rural Affairs (No. 2)* (n 262).

[280] ibid para 2.

[281] ibid para 8.

where both parties agreed that the mediator would not be called as a witness. The mediator stated that she would only devote further time to the matter if required to do so by a court.

Considering the principle of privilege, the court held that the issue of privilege or 'without prejudice' did not preclude the mediator from giving testimony or evidence as this privilege or confidentiality is held by the parties and can be waived, as they had done. It is not the privilege of the mediator, and therefore the mediator is not exempted from giving testimony on this aspect. The court then considered whether the meditator could raise an immunity. The court held that the dispute before the court in *Farm Assist* concerned an allegation of duress to enter into an agreement, a variable that can taint an agreement, and not the initial dispute with which the settlement agreement was concerned. The court went on to say that despite there being a provision in the settlement agreement that precluded the mediator from disclosing information as a witness, this was not definitive, and a court would take such a clause into consideration before setting aside a summons. The court held that the provisions 'provide strong support for the proposition that the general privilege in mediation derives from the without prejudice nature of the mediation proceedings and applies that concept by analogy'.[282] In other words, confidentiality stems from 'without prejudice' and no further distinct privilege need be given to mediators. Considering the circumstances of the matter, the court did not set aside the summons and held that the 'interests of justice lie strongly in favour of evidence being given of what has been said and done'.[283] On the subject and referred to by the court, Toulson and Phipps state that:

> It is accordingly suggested that, although the phrase 'mediation privilege' may be a convenient short-hand expression to denote the status of negotiations in the context of a mediation, they will in fact be protected by reference to the traditional categories of confidential, legally privileged or without prejudice communications: there is no need for an additional distinct head of mediation privilege, founded on different principles or following different rules.[284]

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[282] ibid paras 42–43.

[283] ibid para 53.

[284] RG Toulson, *Confidentiality* (3rd edn, Sweet & Maxwell/Thomson Reuters 2012) para 14–021.

Landman states, and I agree with him, that the mediation privilege and compellability of mediators as witnesses in the US is too varied and involved to be captured accurately and succinctly, especially if one is not an expert on US jurisprudence.[285] However, a high-water mark was reached in *Howard v Drapkin*,[286] where the court considered the non-compellability of mediators. It is clear from this Californian judgment that the court was promoting the core functions of mediation as an alternative to the traditional legal process. The court had sight of the larger picture, which was to give mediators the power to facilitate the resolution of disputes that would lessen the burden on the strained judicial system. It was argued that the court should go beyond California's limited application of the 'persons connected with the judicial processes' analysis and apply common-law quasi-judicial immunity like the federal courts had applied it: to people connected with the judicial process who are not public officials, arbitrators or referees, such as mediators, guardians ad litem, therapists, bankruptcy trustees and other persons appointed by the courts for their expertise and persons whose work is used by the court even though they are not court-appointed, such as social workers and probation officers. It was further argued that immunity should be extended even further to a third category of people: those persons involved in alternative methods of dispute resolution, such as mediators and neutral factfinders, who function separately from the court.[287] The court agreed with the arguments put forward and held as follows:

> Thus, we believe it appropriate that these 'nonjudicial persons who fulfil quasi-judicial functions intimately related to the judicial process' … should be given absolute quasi-judicial immunity for damage claims arising from their performance of duties in connection with the judicial process. Without such immunity, such persons will be reluctant to accept court appointments or provide work product for the courts' use. Additionally, the threat of civil liability may affect the manner in which they perform their jobs.[288]

The court, in an all-encompassing decision, held as follows:

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[285] Landman (n 212) 1771.

[286] *Howard v Drapkin* 222 Cal.App.3d 843 (Cal. Ct. App. 1990).

[287] ibid s 1*(d)*.

[288] ibid.

> We therefore hold that absolute quasi-judicial immunity is properly extended to these neutral third-parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes. As the defendant was clearly engaged in this latter activity, she is entitled to the protection of such quasi-judicial immunity.[289]

The judgement of the court is progressive and shows the intention of the courts to foster alternative dispute resolution as a valid and credible process within a legal system. Here the court brings mediation out of the shadows and places it squarely in the light of the law. Could other jurisdictions follow this theme? Landman opines that it is doubtful that South African courts will be constrained to fashion anything approaching mediator non-compellability as has been done in the US.[290] Furthermore, he states that the constitutional right to a fair trial or a fair public hearing before a court of law embodied in s 34 of the South African Constitution would weigh against such an approach.[291]

I agree with Landman that it is unlikely that such a progressive approach would be followed in South Africa, for three reasons.[292] First, South African law resembles UK law more closely than it does US law; second, the US has had a much longer and more robust history of and connection with mediation as a form of judicial process; third, the separation between federal power and state power gives US courts more freedom to dispense such progressive judgments.

An interesting point on why the extension of mediator privilege has not gained universal acceptance is raised by Galanter, writing in the US, who states that during a trial, judges often play an important role in facilitating a settlement between opposing parties. Parties, guided by their attorneys, are more likely to find convergence with the imprimatur of a judge's

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[289] ibid s 1*(e)*.

[290] Landman (n 212) 1772.

[291] ibid.

[292] On 'mediation secrets' see Feehily, *International Commercial Mediation* (n 57) 259.

authority. Galanter further states that settlement, gently steered by a judge, often has more impact and weight than private attempts at settlement. The possible reason for such gravitas of the judge in a settlement negotiation might not only be linked to the traditional power and legacy associated with sitting as a judge but could also be that the parties are attracted to the promise of confidentiality and proper judicial immunity.[293] Such a power and authority are unlikely to be invested in mediators, who may not even have legal training or account to a legal body or society, which is required of so many other professions.

The extent to which such an immunity will be protected by the South African courts is unclear. The principle of a mediator participating as a witness in a court has only been considered by the courts in an employment matter in terms of the LRA. The importance of the immunity of mediators in relation to commercial or civil matters has not been settled.

[293] Marc Galanter, '"... A Settlement Judge, not a Trial Judge": Judicial Mediation in the United States' (1985) 12 Journal of Law and Society 1, 5.

Chapter 3 The conceptualisation of the judicial review of mediated settlement agreements

3.1 When the settlement agreement fails

Like non-compliance of an agreement to mediate, damages for breach, specific performance or an injunction, are possible remedies for non-compliance with the terms of a mediated settlement agreement and the rules of law applicable to those remedies; such as rules regarding causation, remoteness and the duty to mitigate loss, are applicable.[294] This tenet of contractual law is useful and leads us to the following primary conclusion: Party A has two options at this juncture. He can communicate with Party B or the mediator (or both) and request that the settlement agreement be varied appropriately, within a new spirit of consensus. This would be the fastest, and generally[295] cheapest option. If Party B is not interested in reopening the negotiation, then the alternatives left to Party A are: (i) abide by the original settlement agreement as per settled contract law; or, (ii) approach a court to have the court perform judicial review of the settlement agreement. Party A may hope that if a court does perform a judicial review of the settlement agreement, the court will find that the settlement agreement is lacking contractual consensus and the court may sever those flawed contractual terms or set aside the settlement agreement in its entirety. Such an outcome would leave the initial dispute unresolved once again and both parties would have to start and follow the dispute settlement process again. This seems an undesirable situation.

Upon reflection, questions arise relating to the efficacy and practicality of the scenario above, specifically the process of asking a court to review a mediated settlement agreement. One might wonder about how such a situation can come about, and, what – if any – are the ramifications of a judicial review in terms of coherency, feasibility and lawfulness.

3.1.1 This research and judicial review

This research concerns itself with the judicial review of mediated settlement agreements, and puts forward a simple yet multifaceted question: when can a court legally review a settlement

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[294] Ronán Feehily, 'The Legal Status and Enforceability of Mediated Settlement Agreements' (2013) 12 Hibernian Law Journal 1, 2.

[295] Of course, this depends on the cost of the mediator and the fees involved in redrafting the settlement agreement or even conducting the mediation from scratch again.

agreement? As can sometimes be expected, a simple question does not always lead to a simple answer. To answer such a question, I have engaged with the literature so as to build a case for why a decision-making tool can, and should be, developed to advance the existing work in this area. To this extent what follows is a discussion of some of the most salient themes of the existing work in this area.

What this research will show is that the law, as it stands, does not offer an articulate or well-illustrated example of how a court might conduct a review in terms of settlement agreement. In fact, the law is not particularly well-defined or codified in this area at all. The aim of this conceptualisation is to place in context this research question and extract ancillary and adjacent sub-research questions that become apparent through this comprehensive examination of mediation law. This research conducts a survey of the current shape of mediation, and then considers the factors or variables that specifically relate to the sanctity of; and freedom to, contract to a settlement agreement. These factors will directly influence how a court deals with a request that it intervene by means of judicial review.

This thesis works largely on the assumption that most alternative dispute resolution processes envision, and use, mediation to some extent. Irrespective of the type of mediation used, this research extracts commonalities between various types of mediation processes and connects these commonalities to legal precedent gleaned from case law. We find that whether the process started as 'arbitration-mediation' or 'mediation-arbitration'; or 'negotiation'; or 'pure mediation'; or court-approved mediation; or a chat in the judge's chambers – mediation is prevalent, and in some instances, begs for clarity where the mediation fails to produce a settlement agreement that is, *prima facie* good faith.[296] Mediation is often the process that may lead to a settlement agreement, and there are several factors and characteristics at play here. In some cases, mediation, its principles and its techniques, can be used quietly and insidiously, which can sometimes not be glaring in law reports and thus difficult to extract important *ratios*. Mapping the problems associated with mediation can be difficult (as mediation can take many nuanced and oblique forms) when one is tackling research of this nature. A good researcher must engage in a perpetual exchange of views; and must juggle the status quo of the current jurisprudence, their own ideas, perceptions, as well as the views of

[296] Good faith has many connotations in contract law and is used broadly here. This research will look at the ideal of good faith contractual agreements in detail later.

fellow theorists.[297] This multipronged approach can be confusing and sometimes disparate. One way to be conversant of the issues tackled by this research, is to develop a theoretical framework to analyse settlement agreements in a thoughtful and productive manner. This conceptual framework is key to understanding the need for this research and will help us to understand how decisions are made in terms the judicial review a settlement agreement. Importantly, this chapter will highlight why this work on mediation in South Africa is not merely a solution in search of a problem, but rather a progressive and timely advancement, needed to fortify mediation as a viable dispute resolution process for the future.

This conceptualisation engages with the problems facing mediation derived settlement agreements and create categories for various factors pertaining to the mediation process. One way that this research does this, is by engineering the concept of 'variables' in relation to a mediation process, and the subsequent effect that such has on the certainty of a settlement agreement. This research conducts a thorough review of the case law and the reasons for judicial review identified and contemplated. This research then curates these reasons that taint a settlement agreement in a set of classified variables. This is where the original and novel contribution to the field of mediation is added by this research. A comprehensive classification of the variables is conducted by, highlighting and then sorting the variables that are most likely to trigger a judicial review by a court. Using this data, we can now create a tool for predicting the likelihood of a judicial review process happening. Such a tool is innovative and has not been used in this manner before. This research has developed a decision tree as systematic tool that will allow the reader several things. Firstly, the reader would be able to predict the likelihood of a successful application for judicial review for those who claim buyer's remorse in terms of settlement agreement. Secondly, once one, is able to predict (with some certainty) whether a legal review might be carried out, affected persons can then evaluate the risks associated with a legal battle or accepting the best alternative to a negotiated settlement (BATNA)[298] i.e., the somewhat original tainted settlement agreement, becomes the best solution to the original dispute. [299] Third, there might be a saving of legal costs and resources should the frustrated party accept the original

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[297] Luis H Toledo-Pereyra, 'Ten Qualities of a Good Researcher' (2012) 25 Journal of Investigative Surgery 201.

[298] James K Sebenius, 'BATNAs in Negotiation: Common Errors and Three Kinds of "No"' (2017) 33 Negotiation Journal 89.

[299] BATNA is a concept in negotiation has proven to be immensely useful and made famous by Roger Fischer and William Ury. In this case since the settlement is tainted – the best alternative to pursuing a judicial review, is abiding by the original settlement agreement.

settlement agreement and not pursue a judicial review. Finally, establishing this decision tree, and how it works and where success lies, could encourage those hesitant to try mediation, to engage with the process and settle well.

The significance of this research cannot be highlighted enough. The ability to predict how likely it is that a mediated settlement agreement may trigger a review is invaluable to mediation as a dispute resource. Mediation is a bourgeoning area of dispute resolution.[300] I am of the view that one of the reasons why persons would not elect to mediate their dispute is, because they fear that the outcome will be one that they are unhappy with and must now abide by. This fear of having to abide by an incorrect decision makes participants of mediation circumspect. What may also be lacking is the institutional trust (and gravitas) that society may place in the court system. This trust may oblige persons to abide by a formal ruling given by a legal officer, in formal court room. Buyer's remorse can be prevalent with mediation. This area of the law needs clarification. The view of this thesis is that the overarching principle of mediation should be certainty or a circumstance close to that. But how do we cultivate confidence in the process? Any development of mediation must foster a robust sense of certainty. It is not by accident that this work seeks to look for certainty from South African jurisprudence and specifically labour law.[301] However, to make this research future-proof, it is necessary for any reforms devised here to be used in varied and different international jurisdictions. These conceptualisations showcase issues specifically faced in South Africa; in the context of South African labour law. This chapter aims to tackle problems in a generalised manner, then offer South Africa labour law as a case study, and as useful comparator of principles. Once this comparison has been conducted it will be possible to distil principles for legislative development and reform. This reform can set the tone for the future of mediated settlement agreements.[302] While South Africa is unique and context specific – it is put forward those powerful lessons can be drawn from South Africa.[303] Principles derived from this research can be used in a myriad of approaches. The aim of this

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[300] From reports published by the CCMA, mediation participation grows year on year for employment disputes. See Paul Benjamin, 'Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)' (International Labour Organization 2013) 994802973402676.

[301] The incentives to examine South African mediation are further elaborated later in this chapter.

[302] Mathebe, L. (2021). The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial Activism. *Journal of Asian and African Studies*, *56*(1), 18–33

[303] Klaaren, J. (2021). Regulatory Politics in South Africa 25 Years After Apartheid. *Journal of Asian and African Studies*, *56*(1), 79–91.

research is to use labour law in South Africa to guide and inform disputants in South Africa, bearing in mind the lack of codified legislation in this area.

Reviewing the literature on mediation, certain themes emerge. These themes (highlighted at various times, by several theorists) have been important. These themes are fully unpacked, analysed, and signposted later in this thesis. For now, though, it is interesting to examine some of the most salient rhetoric of mediation and how such positions itself within this work of mine. For instance, some concerns have been raised about the functionality of a mediated settlement agreement.[304] Ronán Feehily considers factors that hinder enforcement. He finds a mismatch between the courts' understanding of how such agreements operate and the need for certainty by parties. [305] He highlights the need for certainty when it comes to the enforcement of settlement agreements and points to areas where certainty is lacking. Feehily has written comprehensively about commercial mediation in an international context.[306] Adjacent to some of the research questions explored by this thesis, he has examined carefully mediation in South Africa.[307] At times Feehily has made specific reference to the enforceability and certainty of settlement agreements and asks when a court might refuse to enforce such a contract? Feehily considered how the factors of conduct, confidentiality and costs might impact meditated settlement agreement, if a review is conducted in terms of those factors.[308] Lifting the veil of contractual enforcement of settlement agreements, he draws on the jurisprudence of the US and Australia in search of answers. His interrogation of factors that might limit enforceability of a settlement agreement is interesting[309] and has been useful for this research. However, where this work differs from Feehily is that I have conducted research with specific reference to South African labour law.[310]

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[304] Janet Rifkin, 'Mediation from a Feminist Perspective: Promise and Problems' (1984) 2 Law and Inequality: A Journal of Theory and Practice 21, 22.

[305] Ronán Feehily, 'Commercial Mediation Agreements and Enforcement in South Africa' (2016) 49 Comparative and International Law Journal of Southern Africa 305; Ronán Feehily, 'Confidentiality in Commercial Mediation: A Fine Balance (Part 1)' 2015 Journal of South African Law 516; Feehily, 'Confidentiality in Commercial Mediation' (n 245); Ronán Feehily, 'The Role of the Commercial Mediator in the Mediation Process: A Critical Analysis of the Legal and Regulatory Issues' (2015) 132 South African Law Journal 372.

[306] Feehily, *International Commercial Mediation* (n 57).

[307] Ronán Feehily, 'Costs Sanctions; The Critical Instruments in the Development of Commercial Mediation in South Africa' (2009) 126 South African Law Journal 291.

[308] Feehily, 'The Legal Status and Enforceability of Mediated Settlement Agreements' (n 294).

[309] ibid 10–16.

[310] Feehily, *International Commercial Mediation* (n 57) 199–214.

Ring-fencing another thematic issue of mediation, Jacqueline Nolan-Healy goes further than Feehily and discusses, in greater depth, the role of consent in court-mandated mediation and how we might try to obtain such consent when participants seek mediation?[311] She highlights the problems that mediators may face when trying to persuade a party to accept a settlement, and where the legal limits lie in doing so. This is an interesting element to consider because depending on the behaviour and persuasion techniques (or coercion) of the mediator, there may be an allegation that consent was improperly obtained in order to reach a settlement.

Further, the theme of appropriateness is considered. One of the questions that this work asks is this: When a mediation should be held, and what is the court's role in reviewing a settlement agreement where the allegation has been made that the mediation process was inappropriate in the circumstances? The question of whether mediation is proper in some, or all situations, is a complex consideration. If we find that parties have been 'persuaded' to partake in a mediation, how do we know that the consent to participate in the process has been properly obtained?[312] The issue of consent is a factor that contributes to whether it is just to review a settlement derived from such a mediation. There is currently no easy answer to these questions, and the issues highlighted by these theorists provide a good starting point for this research, in which the jurisprudence will be expanded upon. These themes from the literature illustrate two main points of discussion: first, where the research may be developed to resolve some of the issues contextualised previously; and second, that there is flexibility of the parameters in the field of mediation and the continued scope for growth and understanding of the mediation jurisprudence. This thesis builds on the work of Nolan-Healy by using her work as a juncture to consider consent with relation to South Africa, and, how labour law can be of relevance to the area of mediation.

Considering when a court might review a settlement agreement is not a new question. The generalisability of much published research on mediation is problematic. For this work to have relevance, it is important to be conversant of the literature and work that has gone

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[311] Jacqueline M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1998) 74 Notre Dame Law Review 775.

[312] Jacqueline Nolan-Haley, 'Mediation Exceptionality Symposium – Against Settlement: Twenty-Five Years Later' (2009) 78 Fordham Law Review 1247.

before it and deliberate its specificity. Alan Rycroft (writing in 2016) has previously explored the entanglement of mediation and labour law with a specific reference to South Africa. A critical jumping off point for this work, his article that seeks to look specifically at judicial review of the mediation process at the CCMA, has been incredibly useful.[313] Rycroft accepts that the mediation process constitutes administrative action (and thus capable of being reviewed by a court), but suggests that greater clarity is needed in relation to the circumstances which justify judicial scrutiny.[314] My research goes further than that of Rycroft's and looks to seek clarity in the judicial review of commercial mediated settlement agreements by using South Africa.

One of the themes that I consider in this research is that of the mediator and what mediator privilege, if any, exists? This is not a new question and has been considered previously. Boulle and Nesic (this time writing in 2011, with an antipodean view)) building on the work of Boulle's collaboration with Rycroft, goes to the core of what might be expected from a mediator. They correctly sum of the status quo of several jurisdictions and question whether a privilege for mediators or mediation is viable.[315] Unfortunately, he does not go further by illustrating how a 'privilege test' might be conceived. Considering the time that has passed since publication of Boulle and Nesic's work, it is submitted that a fresh South African look at mediator privilege is necessary. This thesis will provide a novel view.

My research is not the first to consider whether mediation needs firm procedural fairness and process. The work of these theorists has been so helpful as a foundation for this research and specifically, to draw an understanding of mediation in South Africa. Tobie Wiese (writing for a South African audience in 2016) illustrates a good black letter guide to ensuring procedural fairness in a mediation[316] but unfortunately, Wiese does not delve substantively enough, and we are left wondering if there are further things to consider when formatting procedure process for mediation. Further, he does not ask or provide answers to some of the macro

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[313] Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13).

[314] ibid 92.

[315] Boulle and Nesic (n 7) 497.

[316] Tobias Gerhardus Wiese, *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (Juta 2016).

questions posed by this work, being: Does a lack of procedural fairness taint a settlement agreement?

In 2016 Brand *et al* looked briefly at aspects of confidentiality of mediation in South Africa. This is an important aspect for this research and how it might affect a request for a judicial review of a mediated settlement. Without reference to any rules or legislation, they state that there is a proviso to the rule of confidentiality – it can exist only if the mediator does not hear of potential criminal conduct or if there is no threat to life, health or safety. Unfortunately for us, the authors do not provide a standard or criterion of when confidentiality can be broken.[317] It is this lack of nuance that this thesis aims to provide.

Stella Vettori, again with specific reference to the South African and Mozambique, considers the dispute provisions of mediation under the Labour Relations Act.[318] She concludes that partaking in a CCMA mediation is not 'mandatory' but highly 'encouraged'. This conclusion has ramifications for how we use judicial review in terms of mediated settlement agreements and the extent of 'access to justice' in allowing people to attend at a court in front of a judge.[319] She argues that mandatory mediation is the antithesis of mediation and that, therefore, it denigrates the process and can ultimately divest it of most, if not all, its advantages. Vettori concludes that, although mediation can be a quick, efficient and cost-effective means of resolving some disputes, it is not suitable to every dispute.

The effect of mandatory mediation and the possible of encouragement of court-annexed mediation is thoughtfully considered by Chris Marnewick. Marnewick examines the Mediation Rules introduced in the South African magistrates' court as a pilot project and he concludes that the Mediation Rules do not adequately cover the mediation process.[320] Marnewick draws out then tensions of creating rules for a 'voluntary mediation' process, these tensions are analysed further in chapter 4. Marnewick, also, further highlights that those participants of a mediation process will require a proper understanding of the role and

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[317] Brand, Steadman and Todd (n 24) 25.

[318] Vettori (n 186).

[319] For an Irish perspective on access to justice see Ronan Feehily, 'Creeping Compulsion to Mediate, the Constitution and the Convention' (2018) 69 Northern Ireland Legal Quarterly 127.

[320] Marnewick (n 53) 92.

functions of the mediator for mediation to have its intended impact. This aspect of understanding the mediation process intersects with the work of Nolan-Healy. The work of these theorists has been so helpful as a foundation for this research and specifically, to draw an understanding of mediation in South Africa.

The intricacy and views of these theorists can be difficult to hold as a framework for the overall consideration: How does a court approaches a judicial review of a mediated settlement. This complex context gives rise to the need for a simple, succinct tool for predicting an outcome. One way of presenting the data and jurisprudence is a decision tree model by way of conducting a typology.

3.1.2 Why is a typology needed?

To identify patterns that present themselves in mediated settlement agreements, we need to devise a system to collate the information in a logical manner. A typology would serve well here to sort and measure various settlement agreements which require judicial review.[321] Typologies are often constructed to allow for the structured comparison of cases of different types.[322] They are used as analytical tools in the social sciences and are helpful in forming concepts, refining measurements, exploring dimensionality, and organising explanatory claims.

Typologies are not often employed in aspects of the law or legal practice, and the idea of a typology here might seem incongruent. However, a typology can be used here to sort and organise the way in which different factors or variables give rise to specific reasons that might trigger the judicial review of a settlement agreement. The solution goes deeper on a conceptual level. A well-formed taxonomy of settlement agreements would ultimately enable us to decide, in a *prima facie* sense, and without one strong situational set of facts present, [323] what solutions can be found by following a diagram and using simple computation to determine an outcome. Owing to the sufficient discrepancy between the cases that show that

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[321] David Collier, 'Typologies: Forming Concepts and Creating Categorical Variables' (Social Science Research Network 2008) SSRN Scholarly Paper ID 2811943 153 <https://papers.ssrn.com/abstract=2811943> accessed 19 January 2022.

[322] Laurie Nathan, 'The Mandate Effect: A Typology and Conceptualization of Mediation Mandates' (2018) 43 Peace & Change 318, 323.

[323] Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13) 91.

judicial assessment varies[324] – as it does in all jurisdictions – and the non-fuzzy logic of this kind of tool, the outcome will be procedural rather than substantive. In other words, this typology helps to identify agreements that can be amended or liable to review, but not to predict the *outcome* of such review. This typology would also enable practitioners to decipher where rights may lie, or where success is positioned, but would also help those without a legal education or background to determine whether their settlement agreement could be reviewed by a court, especially where interests are at stake.[325] The purpose of this typology is to introduce decision tree modelling, as a methodology, for the taxonomy of variables for a mediation process.[326]

3.1.3 Will a decision tree be useful?

Most simply described, decision tree analysis is a 'divide and conquer approach' to the classification of information, and it can be used to discover features and extract recurring themes from a database of knowledge.[327] One advantage that decision tree modelling has over other pattern recognition techniques is the interpretability and reliability of the constructed model.[328] The purpose of a decision tree is to convert the knowledge and lessons learnt from this research into a practical and easy-to-use tool.

There is an integral connection between the methodology of this research and the development of this decision tree tool. The methodology used here is one that is based fundamentally in finding patterns that emerge from the case law and literature. Such a curation of information can be presented in various ways, and one way to disseminate the outcomes of this research is by way of decision tree tooling. A decision tree tool can be used to predict the outcome of a question regarding judicial review. The aim of developing a decision tree in this manner is to find a set of decision rules that naturally partition legal principles and precedents to inform a robust, hierarchical classification model.[329] Once the information is entered into the decision tree tool, it can then be sorted. Using the decision tree

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[324] ibid.

[325] Jules L Coleman and Jody Kraus, 'Rethinking the Theory of Legal Rights' (1985) 95 Yale Law Journal 1335, 1335.

[326] Anthony J Myles et al, 'An Introduction to Decision Tree Modeling' (2004) 18 Journal of Chemometrics 275, 276.

[327] ibid.

[328] ibid.

[329] ibid.

model, it can then be presented as a schematic plan to frame the methodology of this research. It is suggested that is a novel use of the decision tree in the mediation field.

This research packages its findings by building a decision tree that can be used as a tool for the prediction and understanding of judicial review of settlement agreements. After much consideration I have elected to use a decision tree to present the most salient aspects of my research. This intention is to create a tool in the form of a decision tree that will do three things: (i) express the research findings in a succinct manner; (ii) enable persons to use the decision tree to determine when and how a judicial review of settlement agreement might take place; (iii) to create a legitimate, agile tool which will enhance the viability and certainty of mediation as whole by way of codification.

3.2 The creation of variables

This section is pioneering and proposes that factors that taint a settlement agreement can be distilled into discrete variables. This is a simple, yet powerful concept often used in statistical work.[330] A simple definition of a variable is something that is not consistent or does not have a fixed pattern and is liable to change.[331] Variables are any characteristic that can take on different values, such as scores or quantities, and this allows researchers to state the laws of science or mathematics, in practical ways. A solution in terms of variables means that new cases can be determined by mere substitution of values.[332] This interchangeability is one of this research, which envisions solutions that can be used dynamically and widely, with relatively few concerns about jurisdictional limits.

3.2.1 Variables and mediation

Variables in mediation can present themselves in different ways such as mediator conduct or the consent of the parties, to name just two. This section focuses on why, in the first instance, a variable in a mediated settlement agreement may justify the court's conducting a judicial review. To imagine mediation as having variables is problematic in the sense that we may regard the process as fickle and inconsistent with a society's need for law of general,

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[330] Andrew F Hayes and Kristopher J Preacher, 'Statistical Mediation Analysis with a Multicategorical Independent Variable' (2014) 67 British Journal of Mathematical and Statistical Psychology 451, 451.

[331] 'Variable' <https://dictionary.cambridge.org/dictionary/english/variable> accessed 16 June 2022.

[332] Alan H Schoenfeld and Abraham Arcavi, 'On the Meaning of Variable' (1988) 81 The Mathematics Teacher 420, 420.

coherent application. These concerns are not entirely without substance. Several variables might present themselves during mediation. Each kind of mediation process presents its own set of variables. Some of these variables may prompt a justifiable judicial review, while others may not. Being a dynamic factor, a variable can have a different effect on a process that remains otherwise relatively the same; such a variable is known as an independent variable.[333]

Despite the changing value of a variable, it allows for a controlled environment in which theories can be tested against solutions where the dependent variable is the outcome.[334] This research attempts to use a scientific principled system to streamline the process of court decisions. In essence the question is this: what variables might affect the legal review of the court and should any, or all, of these variables found in a mediation and a mediated settlement be enough to automatically trigger judicial review? Simply stated, there is a direct relationship between the variables of mediation and whether those variables can lead to judicial review.[335] To examine this relationship with efficacy and clarity, mediation variables must be categorised and catalogued. I have conducted this work which is outlined below. The notion that mediation can be composed of several variables can be refined further by way of dichotomous, nominal and ordinal variables. This is an original contribution by this thesis, and I term them as follows:

The consent variable

- A dichotomous variable has only two categories or values.[336] In the case of mediation, it would be either voluntary or mandatory. This is the first, primary variable we can ascertain. Once we know which primary variable is selected (either mandatory or voluntary) then we can further delineate the variables below.

The tainting variables

- This work categorises a series of events that may happen during a mediation which taint or negate a mediated settlement agreement into variables. A nominal variable has

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[333] HM Jr Blalock, 'Correlated Independent Variables: The Problem of Multicollinearity' (1963) 42 Social Forces 233, 233.

[334] ibid.

[335] Jacob (n 207) 568.

[336] Douglas G Altman and Patrick Royston, 'The Cost of Dichotomising Continuous Variables' (2006) 332 BMJ : British Medical Journal 1080, 332.

two or more categories, but there is no natural ordering of the categories.[337] Such a variable is difficult to order from highest to lowest, or from least important to most important. These variables may be in existence but not may be legally detrimental to the settlement agreement. It is this grey area that is the crux of this research. In the case of voluntary mediation these could be mediator conduct, good faith or fraud. In the case of mandatory mediation, the variables may include consent, procedural fairness and the role of the court.

The public policy variable

- An ordinal variable is similar to a nominal variable except that an ordinal variable allows for the clear ordering of different categories such as low, medium or high.[338] Public policy is a complex principle and entails many, often competing features. It is my submission that the role of public policy in mediation can be distilled into ordinal variables. Public policy has ordinal variables of constitutional rights, ubuntu and social norms. Within the context of public policy, a court must determine which part of public policy deserves the most protection, it being higher in ranking and requiring appropriate safeguarding.[339] The law of mediation does not have a specific legislative variable which is required by law. Counter acting this lack of legislation, we know that public policy has always been an accepted grounds of review of a mediated settlement agreement. This is discussed later in detail.

3.2.2 The consent variable

The primary question to ask is whether the mediation is voluntary or mandatory? The answer to this question, will in turn, provide us with the first variable. Mediation provides us with two dichotomous variables from which we can develop the decision tree. Two branches of the decision tree emerge as we differentiate the two types of mediation: mandatory and voluntary. Mandatory mediation is often required by a contract of employment concluded by private parties and then guided by labour law legislation. This workplace dispute mechanism provided for employees under the LRA has the effect that the parties must submit to a

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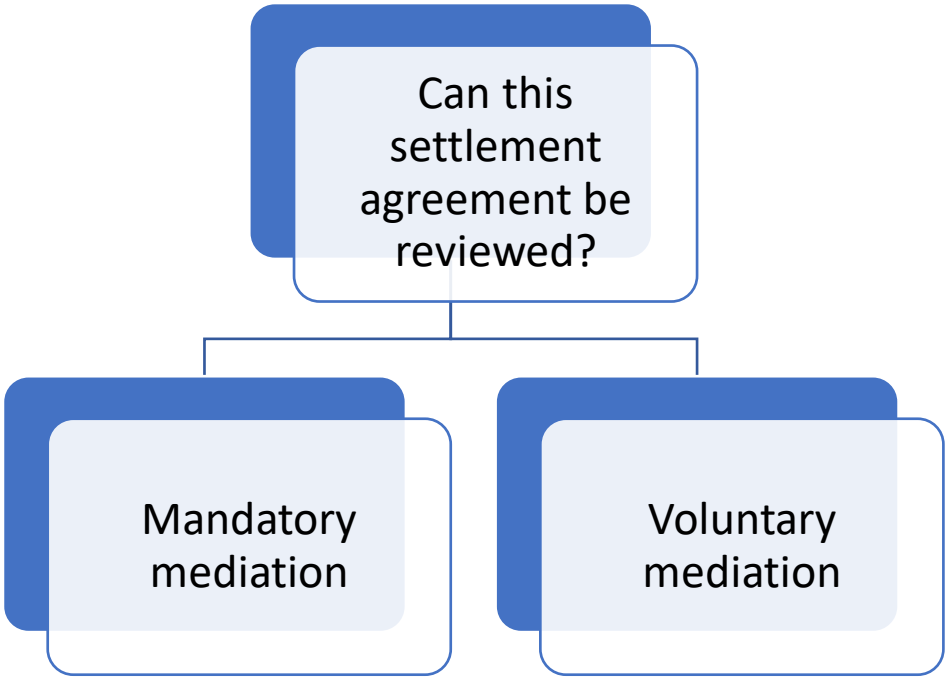
[337] Geraldine E Rosario and others, 'Mapping Nominal Values to Numbers for Effective Visualization' (2004) 3 Information Visualization 80, 80.

[338] Christopher Winship and Robert D Mare, 'Regression Models with Ordinal Variables' (1984) 49 American Sociological Review 512, 512.

[339] Kershwyn Bassuday, 'South Africa-'Beadica 231 CC v Trustees for the Time Being of the Oregon Trust' (CCT109/19) [2020] ZACC 13' [2021] PUBLIC LAW 442.

mediation process before approaching a court. Voluntary mediation is a process where the parties maintain the right to enter a mediation process. Such a process may also be encouraged by a court in the case of court-annexed mediation. Once the primary variable is determined – whether we are dealing with mandatory or voluntary mediation – secondary variables will emerge. This research will first contextualise the effect of dichotomous variables of mediation on a dispute and then illustrate the types of nominal and ordinal variables that can exist in a mediation.



3.2.2.1 The consent variable in voluntary mediation

Mediation can be divided into two dichotomous variables: mandatory and voluntary. Once a mediation is identified as voluntary, we can extrapolate some of the nominal and ordinal variables. Voluntary mediation occurs when parties enter and participate in a mediation process of their own free will and determination. Of course, even if the process if viewed as 'voluntary', there are degrees of free will to any process, because the definition of 'voluntary' evolves over time.[340] It could be that a party is more inclined to choose mediation due to pressure from the other side, or because they lack financial or time resources. This then limits the element of self-determination or free will. As we know, a characteristic of mediation is that it is predicated on the self-determination of the parties to be involved in the process;

[340] Hedeen (n 130) 275.

however, this can be academic in a sense, and self-determination may be a factor only in mediation that is in fact substantively voluntary.[341] Mediators, courts and the legislature try not to force disputants into mediation, but there is often an implicit pressure to try mediation and so there is an underlying compulsion to settle.[342] This can be problematic and can lead to circumstances ripe for a judicial review, as this thesis has set out in the preceding chapters. There are potential differences between mediations that occur in a private versus a public sphere. When mediation is directed by statute, such as labour law legislation, it may appear to be situated in the public law sphere. This is a grey area, since employment mediation concerns private entities that are regulated by public law-type legislation. In such mediation there is less freedom to contract, compared to voluntary mediation which takes places purely in the context of commercial or civil disputes. Without the confines of specific legislation, persons participating in voluntary mediation have greater autonomy to devise settlement agreements that speak to their freedom to contract. This distinction makes the nominal and ordinal variables of voluntary mediation worth interrogating, especially when it can be argued that the judicial review of the settlement agreement is required.

3.2.2.2 The consent variable in mandatory mediation

Mediation is either mandatory or voluntary. This research will contextualise the effect of mandatory mediation in different circumstances. When mediation is mandated, the process loses some of its core characteristics, one of which is the fact that it is a process of self-determination. When mediation is mandated by legislation or by a court, some complexities arise.[343] If a party is obligated to participate in a mediation, the element of self-determination is lost.[344] Mandatory mediation places the issue of self-determination front and centre. Can a party 'voluntarily' participate in a mediation process if the process was forced upon them by way of a court-aligned mediation process or legislation? The answer is not easy.[345] Mandatory mediation is often court-directed and has the beneficial effect of providing a type of dispute resolution to those who may not have otherwise been open to the process. Such a

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[341] ibid 279.

[342] Timothy Hedeen, 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some are More Voluntary than Others' (2005) 26 Justice System Journal 273, 279.

[343] Quek (n 125) 484.

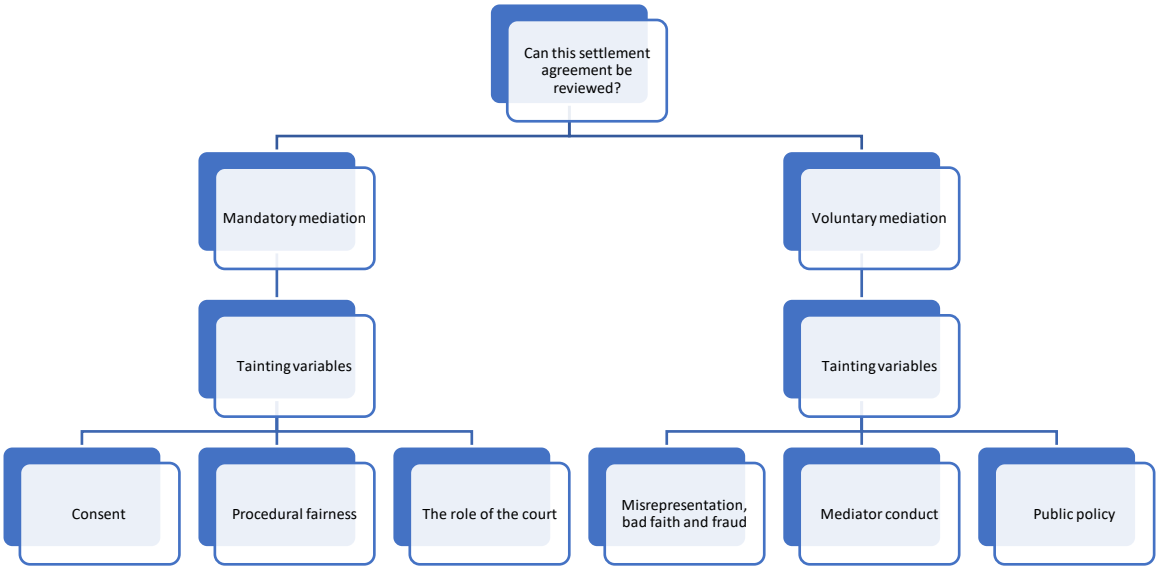
[344] ibid 485.

[345] Roselle L Wissler, 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts' (1997) 33 Willamette Law Review 565, 568.

process may also expedite the resolution of disputes and decrease the burden on court systems. In many ways, a court-directed mandatory mediation process removes much of the administrative burden from the participants as the process and protocol have been determined for them beforehand. This can be beneficial. But if a party complains that she did not freely participate in the process, this may also trigger the judicial review of the settlement. Having the mediation process configured for parties provides consistency, a framework and legitimacy; therefore, mandatory mediation is more 'process' based and relies more on civil procedure than does voluntary mediation. Mandatory mediation can be said to be more aligned to public law. It is used by institutions in organised environments and is enforced by legislation such as the Commission for Conciliation, Mediation and Arbitration (CCMA) in South Africa, which facilitated dispute resolution in the workplace.

3.2.3 The tainting variables

This research considers various aspects of a mediation process that may negate the mediated settlement agreement hoped for at the end of the mediation. To properly define this area, I have created a new genre of factors called: the tainting variables. These variables if present in the mediation process could taint the settlement agreement and lead to parties asking for a legal review. The work below is structured by examining mandatory and voluntary mediation and the variables that flow from each.



3.2.3.1 The tainting variables of mandatory mediation

This research shows that depending on the type of mediation used different variables will emerge and lead to different outcomes. The occurrence and effect of these variables as a singular or multiple presence may trigger the need for judicial review. By thoroughly examining the case law, legislation and scholarly debate, I have curated several nominal variables that are the most important to this research and most common to the selected case study of South Africa. I list them here and then expand on them below and in other parts of this thesis. The nominal variables of mandatory mediation are consent, procedural fairness, and the role of the court.

Consent

The issue of consent in a mediation is bifurcated.[346] A well-known characteristic of mediation is its self- determinate, voluntary and thus consensual nature, which has led to it acquiring a hallowed status.[347] The parameters of consent and consensuality have been considered by several writers[348] and are discussed in the previous chapter of this thesis.[349] On a macro level we are left to consider the following question: when is consent to participate in the mediation necessary, and; what kind of consent is required? Further, is the absence of informed consent to vitiate the process of coming to a mediated settlement agreement? The idea of a completely consensual dispute resolution process may be hampered by the existence of court-aligned mediation programmes or legislation that mandates mediation. A second more nuanced aspect of consent is obligation. Is a mediator under a duty to inform or educate the parties who are participating in mediation?[350] It is true that not all parties involved in a mediation may understand their rights or the legal situation. They may not fully understand the legal ramifications of reaching a settlement agreement, and the effect that it may have on their rights. If there is a lack of understanding on the part of less-informed participants, then there is a non-consensual element at play, especially in the case of a decision that has far-reaching consequences.

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[346] Kathryn Toner and Robert Schwartz, 'Why a Teenager over Age 14 Should Be Able to Consent, Rather than Merely Assent, to Participation as a Human Subject of Research' (2003) 3 The American Journal of Bioethics 38, 38.

[347] McEwen and Maiman (n 166) 3–4.

[348] Welsh (n 147) 5; Boulle and Rycroft (n 28) 24; Owen M Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 1073, 1076.

[349] The issue of consent has been discussed previously in chapter 2.

[350] Nolan-Haley, 'Informed Consent in Mediation' (n 311) 803.

It can be argued that these two types of consent are different: one is a substantive consent to the bargaining process and the other is an informed, educative consent. In the first instance, my view of substantive consent in the terms of mediation, is when a party participates in a mediation process, they do so freely and voluntarily.[351] Informed consent suggests that there is an educative function needed by the persons making the decision.[352] In terms of a mediation, the question to be considered is this: is there a duty to inform a party of the ramifications that their consent might carry? I suggest that both types, despite being different, lead to the same consequence. The consequence is that if a party agrees to something they do not understand, this kind of decision-making is flawed and lacks consensus in terms of the decision-making process. I suggest that this is not very different from a mandatory mediation process where the self-determination to participate is lacking. In cases such as these, does the mediator have some sort of legislative, common-law or ethical duty to assist the parties by explaining the legal or practical aspects of the process to them?

There is a certain irony here. Mediation is often recommended for those who are not comfortable about attending at a court, and are perhaps unaccustomed to legal principles, yet some mediated settlement agreements will ultimately affect rights and obligations, and a clear understanding of this impact is key. In a courtroom, a judge might pause proceedings to warn or advise a party to take care or to offer advice where rights may be negatively affected. On reflection, we can present the following factors relevant to assessing the nature and quality of consent:

i. To what extent should a lack of legal insight (about either the decision to participate or a decision during mediation) of a party in a mediation be cause for judicial review?
ii. When should a mediator step in to perform the duty of fostering informed consent by educating the parties?
iii. If this duty does not exist, what is the effect on the durability of the settlement agreement?

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[351] For an interesting discussion of consent in clinical trials see: Sara Manti and Amelia Licari, 'How to Obtain Informed Consent for Research' (2018) 14 Breathe 145.

[352] Tomasz Pietrzykowski and Katarzyna Smilowska, 'The Reality of Informed Consent: Empirical Studies on Patient Comprehension—Systematic Review' (2021) 22 Trials 57.

iv. Should a lack of legal acumen on the part of a disputant in mediation be cause for judicial review?

This research attempts to decipher and refine these questions and allow for a categorisation of variables so that a clear, analytical precedent can be formed.

Procedural fairness

This research asked two interlinked questions relating to how fairness is represented. Firstly, we can ask this: how do we establish the fairness of a mediation process? Secondly, if there is a procedural shortcoming that affects the integrity of the process, what recourse is available in terms of a judicial review.[353] Justice theories distinguish between fair procedures and fair or favourable outcomes.[354] There is always some subjectivity as to how justice, in relation to a particular issue, is perceived by those who experience or observe a legal process.[355] A distinction can be drawn between substantive justice, in relation to the fairness of the outcome, and procedural justice, which relates to how the decision was reached.[356] By attempting to offer access to justice to more persons, mediation offers justice with flexibility, informality and participation, but without the procedural safeguards of a formal justice systems. It has generally been accepted that the benefits offered by mediation outweigh the shortcomings of the process. However, despite the benefits derived, the uncertainty in the mediation process is undesirable in a sophisticated legal system.

For mandatory mediation, the parties who have been directed towards the process must have consistency and continuity. To provide this degree of consistency, mandatory mediation must be placed within the framework of procedure. The procedure is provided for by legislation and court rules, in the hope that this will suit a wide range of disputes and different parties. For instance, labour legislation may deem it suitable and necessary, that all labour disputes first go through a mediation process at an employment tribunal: the process and stages of mediation are defined by tribunal rules that dictate the structure of the mediation and how the tribunal officers should behave. By and large, the type of mediation that takes place in an

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[353] Tom R Tyler, 'The Relationship of the Outcome and Procedural Fairness: How Does Knowing the Outcome Influence Judgments about the Procedure?' (1996) 9 Social Justice Research 311, 311.

[354] ibid.

[355] Boulle (n 8) 191.

[356] ibid.

employment law setting is heavily constrained by process and procedure. In fact, it can be argued that the process is so institutionalised that it is public law in nature. This approach has been strategically engineered to assist vulnerable employees, who often lack power, to feel that they can trust the service and will get a 'tried and tested' product in terms of the process. This pre-formulated procedure also assures legal practitioners or employees that it is a considered process, and this ensures accountability. In cases where procedure has not been followed this could, and may, trigger a judicial review by parties who feel aggrieved. Such a review may also fall under the inherent power of a labour court, as discussed further below.

The role of the court

A succinct question relating to the role of the court in judicial review is as follows: are there applicable legislative or procedural rules that require or allow the court to intervene? The most basic definition of the role of a court is a body which has the judicial authority to hear and resolve disputes in civil, criminal, ecclesiastical or military matters.[357] In a commercial sense, the core role of the court is one of facilitation on an economic basis.[358] The powers held by a court are paramount for the functioning of a sound economic system where commercial contracts and relationships are in play.[359] When a contractual breach is alleged, the court's role is to supervise where necessary and use its powers to clarify the responsibilities of the parties and try to settle the dispute. In essence, the court has the power to resolve disputes using judicial review, by studying the law and the legislation, and then applying its institutional knowledge to the facts of the matter.[360] A further aspect of judicial review is that must be tempered with judicial restraint.[361]

The legitimacy of judicial review depends on the capacity of a court to decide cases acceptable to the legal community of which it is a part.[362] South Africa has a chequered

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[357] 'Court | Definition, Functions, Structure, & Facts | Britannica' <https://www.britannica.com/topic/court-law> accessed 23 June 2022.

[358] Glen Biglaiser and Joseph L Staats, 'Finding the "Democratic Advantage" in Sovereign Bond Ratings: The Importance of Strong Courts, Property Rights Protection, and the Rule of Law' (2012) 66 International Organization 515, 515.

[359] Simon Johnson, John McMillan and Christopher Woodruff, 'Courts and Relational Contracts' (2002) 18 Journal of Law, Economics, and Organization 221, 221.

[360] Harold Leventhal, 'Environmental Decisionmaking and the Role of the Courts' (1973) 122 University of Pennsylvania Law Review 509, 511.

[361] This is discussed in detail in chapter 5.

[362] T Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2008) 7 International Journal of Constitutional Law 106, 108.

history and presents a very interesting case study in terms of socio-legal norms and political considerations; finding the balance between black letter law and practicality can be challenging. Roux argues that at a theoretical level, some combination of principle and pragmatism is likely to provide the best way for a Constitutional Court in a new democracy – such as South Africa – to establish its own legal legitimacy while safeguarding its institutional security.[363] While Roux speaks specifically about the South African Constitutional Court, I suggest that this approach can be extrapolated to any court, in any jurisdiction and any mediation process. In other words, when a court exercises it power in terms of judicial review, it must do so with a combination of pragmatism and principle. Such an approach is specifically important in South Africa, where the dynamics of social and political currents are nuanced, and the court is often seen as a tool for transformation and a driver of equality.[364]

In South Africa, access to free and fair justice is a cornerstone of constitutional democracy. Mediation is seen as a tool for achieving this in many respects. One reason why legislation can mandate mediation as a tool for labour dispute resolution, is the knowledge that participants always know that they will always have access to judicial review. Labour legislation provides that the court has the power to review the performance of any function or action authorised by such legislation.[365] To engage the court's power, some variable must trigger a court to intervene and conduct a judicial review. It could be one of the variables that I have highlighted above, or it could be any variable that might affect the process or outcome of the mediation, in a substantive or procedural manner with implicates fairness. Below I examine, in detail, how a court makes decisions and delivers judgments when it has to determine whether a settlement agreement should be varied in any way. From these judgments I have highlighted interesting and important patterns for the durability of settlement agreements. A set of rules emerges from this perspective, which I recommend as a benchmark.

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[363] ibid.

[364] Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 South African Journal on Human Rights 253, 254.

[365] Section 158 of the Labour Relations Act 65 of 1995.

3.2.3.2 The tainting variables of voluntary mediation

In voluntary mediation the variables tend to be of a more substantive nature. They relate to aspects such as: how the mediator conducted herself, the nature of the public policy norm, and, perhaps, whether there was an element of fraud. If a party deems these issues irreconcilable with the outcome of the mediation, they may request a court to review the settlement agreement in part or in its entirety. As stated above, a nominal variable is one that cannot be ordered or placed in a hierarchy. The following nominal variables are important in the context of voluntary mediation but cannot be ordered in relation to importance. The exception is 'public policy'; I argue that this variable can be ordered and deal with this separately below.

Mediator conduct

A major drawcard of mediation is that it allows parties to design a dispute resolution system against a structural framework that suits them, their dispute, and their position in life. On the face of it, this bespoke setting is welcomed, but it is not without its dangers. Much of the framework or procedural fairness in mediation must be facilitated by the mediator, who is hopefully skilled enough to recognise difficult scenarios and knows where further attention is required to correct the situation. What, then, is the remedy for party who claims that the mediator acted in bad faith or was negligent in his duties? Should a court follow evidentiary and procedural principles by requesting that a mediator submit to questioning and give testimony? If this is the case, then the confidentiality of the mediation process and the general principle that a mediator will remain silent on what has occurred during mediation are impacted. In any event, the law is unclear. Further, if a court, during a judicial review, finds the behaviour or actions of the mediator less than satisfactory or even negligent, should the mediator be held to account and be liable for civil damages? The effect of interrogating the actions of the mediator would also influence the confidentiality of the mediation. This erosion of confidentiality comes with a host of considerations, and these will also be examined in detail in this thesis. A further aspect to consider are social motives, which may also play a role in the way a mediator conducts herself:

> They use persuasive arguments, positional commitments, threats, bluffs, and coercive power to get their way. Prosocial negotiators, in contrast, develop trust, positive attitudes, and perceptions, engage in constructive exchange of information, listen to each other, and seek to understand one another's perspective. As a result, pro-socially

> motivated negotiators are more likely to uncover possibilities for trade-offs and to realize integrative potential— the possibility to achieve higher joint outcomes than a mere 'split-the-difference approach', …[366]

The idea of social motives does not, on the face of it, seem to cause concern or raise issues of untoward behaviour. However, this can be subjective, and the problem becomes clear when a court needs to determine when overly persuasive arguments made by a mediator start to place the integrity of a settlement agreement in jeopardy. Overly persuasive or coercive behaviour on the mediator's part is one example of where mediator behaviour might need moderation by a court. Should a court find that a mediator has conducted herself in a manner that is unbecoming of the mediation process, it might decree that judicial review of the settlement agreement is just and equitable.

Good faith

It is settled in contract law that a court may review or set aside a contract that it regards as tainted. Factors that taint general contracts are mistake, misrepresentation, fraud, illegality, duress, undue influence and contracts against public policy. I take the view that these factors can be curated to sit under the general heading of 'bad faith'. Grouping *mala fide* intentions or actions together, gives better structure for this research and helps in the drive for clarity. Rycroft asks the following important question: is there a difference between the provisions that govern commercial contracts and those that relate to mediating parties who seek to reach a settlement agreement where good faith is lacking, fraud has been caused, or a party has misrepresented a state of affairs?[367] In terms of mediation requiring judicial review, variables to the mediation present themselves, and the court must determine when a settlement agreement would justify review. How is a court able to distinguish between a party that negotiates 'aggressively' and a party that has acted in bad faith? Within the scope of this research, a court must rely on principles firmly established by contract law. In my view, it would be best practice for a court to have a clear legal test or thresholds upon which to base any decision with specific relation to the mediation process, rather than merely relying on older, perhaps archaic, contractual principles. Mediation is a modern method of dispute resolution, and it is argued that the jurisprudence must keep pace. This thesis intends to

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[366] Bianca Beersma and Carsten De Dreu, 'Social Motives in Integrative Negotiation' [2003] Journal of Psychophysiology 219.

[367] Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13) 84.

provide such a legal test, which does not currently exist in a well-articulated form. In this instance, for clarification, we can further delineate the evidence of a tainted mediation into further nominal variables of good faith:

i. Have the parties entered and participated in the mediation in good faith?
ii. Has a party made an incorrect statement (a misrepresentation) which persuades the other party to agree to the settlement agreement?
iii. Has a party act deceptively (fraudulently) and intentionally to influence another party to enter into a settlement agreement?

3.2.4 The public policy variable – the ordinal variable of voluntary mediation

Public policy is complex, nuanced and dynamic. To ensure fairness in contractual relationships in society, public policy is an underlying principle of contract law that must be adhered to. It can be difficult to define how the intersectionality between contract law, public policy and mediation exists, as not much has been theorised or written on this aspect. However, if a mediated settlement agreement is offensive to public policy, this would be a very strong incentive for a court to review the agreement. The courts have held that agreements that are contrary to public policy should be set aside, or those specific terms or clauses rectified. In South Africa, public policy is often linked to the African theory of 'ubuntu'. Ubuntu is a philosophy of life that enshrines the concept that we operate as a collective and must abide by a framework of humanity, morality, and solidarity. South African courts have adopted ubuntu as an underlying requirement for contractual relations and public policy is further informed by values enshrined by the South African Constitution.[368] Some of these expectations of good public policy include the right to dignity and non-discriminatory practices in contracting.[369] There may be times when a settlement agreement differentiates between two groups of persons. On the face of it, a differentiation does not automatically equate to unfair discrimination, especially if there is a rational and reasonable justification for the differentiation. However, should a court find that a settlement

[368] Dale Hutchison, 'From Bona Fides to Ubuntu : The Quest for Fairness in the South African Law of Contract: Contract Law' (2019) 2019 Acta Juridica 99.

[369] Andrew Hutchison, 'Good Faith In Contract: A Uniquely South African Perspective' (2019) 1 The Journal of Commonwealth Law <https://www.journalofcommonwealthlaw.org/article/7441-good-faith-in-contract-a-uniquely-south-african-perspective> accessed 23 November 2022.

agreement unfairly differentiates to the extent that it presents as discrimination, a court may find it necessary to review the settlement agreement. During this process of review, a court may use a legal test to determine whether discrimination has taken place. This is an instance of when mediated settlement agreements need to be ratified by the law. Contracts, and therefore settlement agreements, must speak to these values of public policy. Should a settlement agreement be found to lack the underlying values propagated by public policy, a court would be justified in instituting judicial review. After considering the issues at hand I draw out the ordinal variables ranked below (number 'i' being the most important and number 'iii' the least important):

i. Has a constitutional principle been infringed?
ii. Does the settlement agreement offend public policy? (This can be further organised by variables such as social norms and the limitation of rights.)
iii. Does the settlement agreement align with the principles of ubuntu?

This discussion of public policy ordinal variables introduces the distinction and intersectionality between public and private law. It is at this juncture that we can start to consider the impact that public law (by way of public policy and the constitution) will have on privately held, voluntary mediations. The sub question here is this: when is it appropriate to augment private law with public law principles? There is some jurisprudence related to mediation in SA that is a useful guide, but that ultimately show the chasm of potential differences between the application of these principles in public and private law.

3.3 When can a mediated settlement agreement be reviewed?

From the proceeding sections we might now recognise that a judicial review of the settlement agreement may occur. The real question is when? Whether a mediated settlement agreement can be reviewed is a complex issue. Generally, at its most macro level, mediation can be classified into two broad groups: mandatory and voluntary mediation. Mandatory mediation occurs when parties are directed by legislation or a court to use mediation as a dispute resolution process. Mediation has often been used in the workplace where employment disputes need less formal and more flexible procedures than those used in a courtroom. Often labour law legislation requires that an employment dispute must first go through the process

of mediation before a court can be approached.[370] Voluntary mediation occurs when parties, of their own volition, decide to resolve their dispute by using mediation.[371] Currently, voluntary mediation is empowered by private treaty – perhaps a mutual agreement by parties to submit to the process after a dispute has arisen – or as a pre-emptive dispute resolution clause in a written contract. Some courts 'encourage' voluntary mediation by running court-annexed mediations that they partly or wholly fund with the intention of reducing their court roll. Both types of mediation will be discussed in detail at various stages of this thesis.

In most cases, when participating in mediation, parties do not forfeit any of their legal rights and remedies.[372] If the parties find that the mediation has been unsuccessful and there is no settlement at the end of the process – and there are legally recognised rights involved in the dispute – each party can go on to enforce his or her rights through the appropriate judicial process.[373] Where there is a settlement at mediation, rights and obligations may be, but not always, affected to some degree.[374] However, where mediation has produced a *binding* settlement agreement, the rights and obligations of the parties will be superseded in some way, unless, of course, there are grounds or variables on which a court might invalidate the settlement agreement.[375] It is these grounds that hold the centre of this thesis.

3.4 The decision tree as a tool

Below is a decision tree. It functions by taking all the variables that I have distilled and curated by way of cause and effect. The tree below is a tool for the consideration of buyer's remorse in the context of mediated settlement agreement. It is intentioned that the tool will allow users to predict with some ease whether their application for judicial review will be successful. At the bottom of the decision trees, I have included as a final block, the appropriate newly created legal test, to ensure consistency.

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[370] For example, see South African labour legislation.

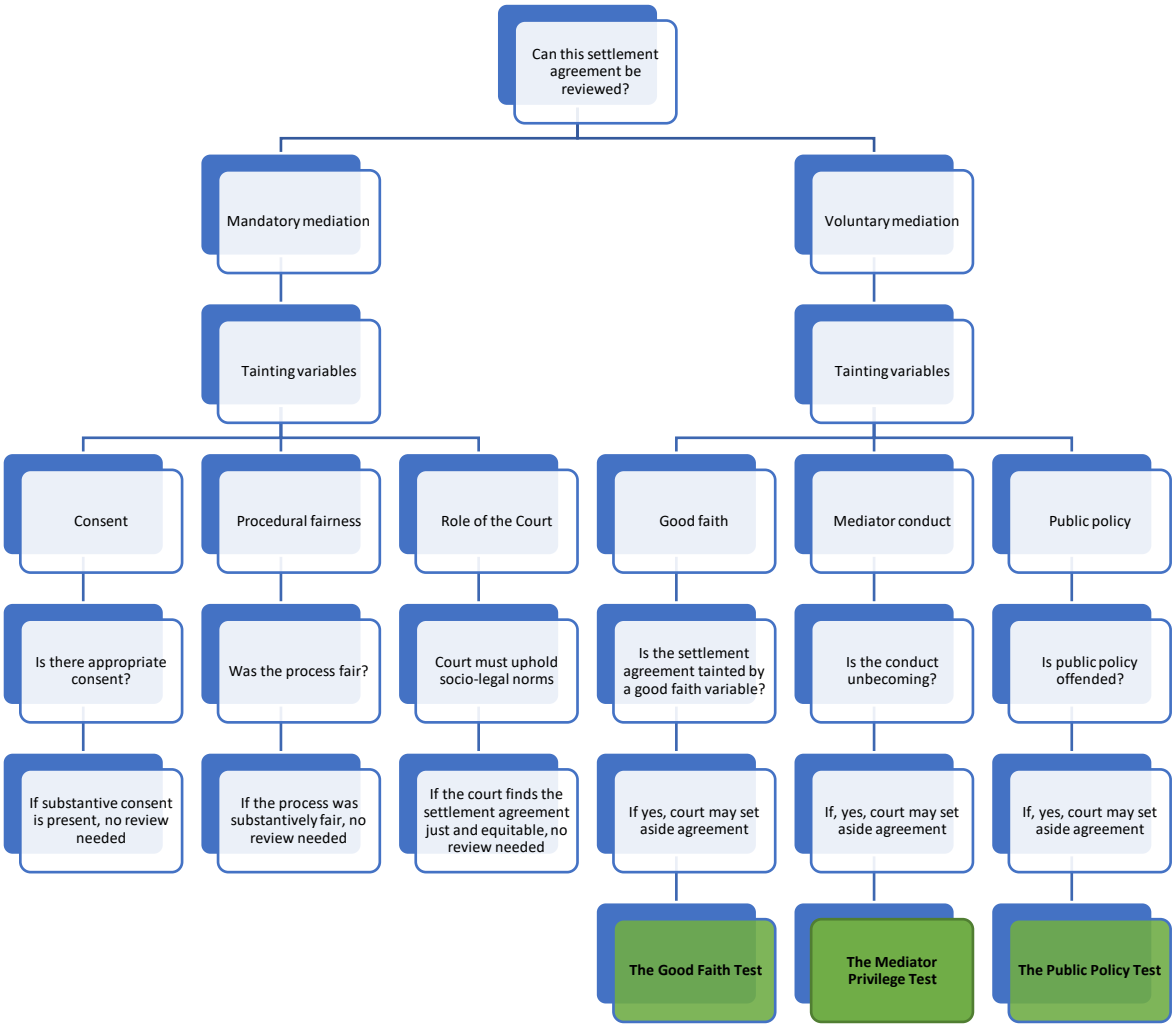
[371] Common also in other jurisdictions; e.g. role of ACAS in the UK to resolve employment disputes. See Rory Ridley-Duff and Anthony Bennett, 'Towards Mediation: Developing a Theoretical Framework to Understand Alternative Dispute Resolution' (2011) 42 Industrial Relations Journal 106.

[372] Boulle and Rycroft (n 51) 225.

[373] ibid.

[374] ibid.

[375] ibid.



The conceptualisation which allows factors of mediation to be considered as variables, is a useful contribution to the current jurisprudence. Such a tool will enable issues pertaining to mediation to be analysed in a coherent, logical fashion.

3.5 Concluding thoughts and way forward

This conceptualisation and typology show us several things. First, it places in context the current status quo of mediation and the need for certainty and consistency in mediation for determining when a court may review a settlement agreement. Second, it shows us that a coherent design and process is lacking from the area of judicial review and court intervention. Third, the typology then presents us with scenarios of when a settlement agreement may be reviewed. This is done by taking an analytical view of settlements and what may prevent a settlement agreement from being enforceable. Fourth, this analysis contributes to the

knowledge of mediation by delineating these reasons into variables, further categorising these variables into dichotomous, nominal and ordinal. This categorisation allows us to distinguish between the dichotomous variables of mediation by identifying whether they are mandatory or voluntary. From here we can categorise mediation more discretely into nominal and ordinal variables. This empirical sorting is novel for the field of mediation and has an organisational impact on how we view judicial review. Fifth, this typology builds a decision tree that has been formulated with the variables. This tool combines the methodology and the research in a unique and logical manner. The decision tree will allow us to determine whether a settlement agreement should be reviewed by a court.

I have argued in this thesis, that there is not sufficient jurisprudence for courts to effectively deal with the issue of judicial review regarding mediated settlement agreements. This is true in a general commercial or civil sense. Labour law on the other hand is more nuanced. Labour law in South Africa is layered and complex; South Africa has a great wealth of unique jurisprudence, shaped and moulded by feisty and powerful trade unions; apartheid era institutional memory; and; a very new constitution. This, in my view, affords it primacy as an influential legislative force. However, despite this prominence, as Rycroft writes, there is a call for greater clarity in terms of the judicial review of mediated settlement agreements.

In 1995, the Labour Relations Act (LRA) marked a major change in the direction of South Africa's development when the country transitioned from an apartheid state to a political democracy.[376] The aim of the LRA was to reconstruct and democratise the economy and society as applied in an employment law sphere.[377] The main aim of the LRA was to introduce new institutions which could give employers and workers an opportunity to break with the adversarialism that had typified much of the labour sector pre-Constitution, by promoting, amongst other things, collective bargaining and providing expeditious dispute resolution system by way of the CCMA.[378] The LRA provides a through and detailed framework for the judicial review of settlement agreements in the context of workplace disputes and Commission for Conciliation, Mediation and Arbitration (CCMA) processes.

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[376] D du Toit, *Labour Relations Law: A Comprehensive Guide* (LexisNexis SA 2015) 5.

[377] ibid.

[378] ibid.

The CCMA, according to its website, is a national public entity in terms of Schedule 3A of the Public Finance Management Act (PFMA), is an independent body that neither belongs nor is affiliated with any political party, trade union or business, but is funded by the state and, as Du Toit highlights,[379] its role is to 'actively seek to resolve disputes by conciliation[380] and, in certain respects, arbitration' with minimum formality.[381] The CCMA is pervasive when it comes to alternative dispute resolution and plays a role in relation to both collective and individual disputes. In almost all cases, a dispute must first go to the CCMA before it can go to the Labour Court.[382] The LRA also supports an optional private dispute resolution in a workplace and once parties have exhausted their internal dispute resolution processes they may have access to the Labour Court or take industrial action.[383] The Labour Court has the same status as the High Court and maintains exclusive jurisdiction to deal with matters in terms of the LRA or any other law referred to it under s 151 and 157.[384] The LRA, then, heralds settlement as a preferred means of dispute resolution. In fact, to promote settlement, the Labour Court can refuse to hear a matter if is not satisfied that an attempt has been made to resolve the dispute by conciliation. This context and power give labour law jurisprudence and the Labour Court the gravitas to be considered a benchmark in terms of legal tests to determine whether a settlement agreement in a labour dispute should be reviewed.

This thesis conducts a comprehensive analysis of judicial review of CCMA conciliation and mediation agreements. From the labour law jurisprudence and other areas of law, this thesis creates three new legal reforms that can be used as a legal test by a court to determine whether a settlement agreement should be judicially reviewed. This work uses the existing scaffolding of labour law to give judicial review of mediated agreements in South Africa

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[379] ibid 32.

[380] This thesis uses 'conciliation' and 'mediation' interchangeably; the difference between the two is negligible and does not have any technical or substantive effect.

[381] Explanatory Memorandum to the Draft Bill 148.

[382] Du Toit (n 376) 32.

[383] ibid 33.

[384] Section 151(2) of the LRA provides that the Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the High Court has in relation to the matters under its jurisdiction. Section 157(2)(a) of the LRA provides that the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from employment and labour relations.

greater clarity. This has not been done before in South African law and is a new contribution to the area of mediation in South Africa.

Chapter 4 Mediation in South Africa – a case study

4.1 Introduction

In the previous chapter I went about the task of conceptualising some of the core features of mediation. I looked at how these core features could lead to substantive or procedural irregularities within the settlement agreement, which could necessitate judicial review. These variables, as I term them, must now be placed in context. To achieve this contextualisation, I have decided to use South Africa as a case study. There is good reason. South Africa is not new to mediation and a chequered history means that many of the variables highlighted previously make appearances from time to time. This chapter shows how the two nominal variables of mandatory, and voluntary appear in South Africa. This work will also then explain and show how these variables can be refined and categorised further to uncover more delineate ordinal variables. In essence, this chapter looks for themes and patterns from the jurisprudence and then sorts them into variables of relevance. This chapter curates carefully, the law around some of the variables of mediation in South Africa, to create clear jurisprudence.

4.2 Why South Africa?

In South Africa mediation has been in use for a long time albeit without much formal codification. The use of alternative methods of dispute resolution by the traditional societies of South Africa is well established in the customs and traditions of various tribes.[385] Mediation in South Africa by British officials was first referred to in 1837,[386] as being used by traditional communities, when people who were in conflict or had breached a community law were not punished according to western notions of justice and retribution, but rather by corrective measures found by way of conflict resolution and approved by their community values.[387]

There has been a linear path from these community-based procedures to the alternative dispute resolution processes now established in South Africa. Mediation in South Africa can

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[385] RGB Choudree, 'Traditions of Conflict Resolution in South Africa' (1999) 1 African Journal on Conflict Resolution 10.

[386] Berger (n 23).

[387] See Masina (n 22).

work in two variables; either: voluntary or mandatory. This chapter will look at both variables, individually, and analytically and examine how they are provided for by South African law. This chapter will then further refine these variables further into those discussed previously[388] by framing it with case law.

4.3 Voluntary mediation and how it is reflected in the law

At a macro level we are faced with the following question: how does South African law provide for voluntary mediations, and does the jurisprudence recognise that some variables can taint the outcome of a settlement agreement? A voluntary mediation can take place in any setting where private individuals or entities wish to mediate to resolve a dispute. Private mediations are (can be) well-resourced (often by large companies), don't often have time restrictions, and can be conducted by well-trained and experienced mediators, who may even specialise in certain types of disputes, such as construction disputes.[389]

Resources like these mean that mediation outcomes are disclosed rarely and any information and data relating to private voluntary and well-run mediations are not available. So how then do we build a framework where the data from discreet mediation? The answer is by examining the voluntary mediations in South Africa that have ended up in further legal process. We find that these processes are normally court-annexed to some extent, and the recording and archiving of the jurisprudence is better. This section places variables that have an impact on a mediation outcome, within the context of voluntary mediation processes in general. The research below is compartmentalised by different aspects of voluntary mediation and how they relate to the overall contextualisation of the variables.

4.3.1 Voluntary mediation and procedural fairness

Settling a claim on the steps of a court room is not a new scenario. Courts have always encouraged disputants to first try and resolve the dispute themselves before resorting to the mechanisms of a court. There have attempts at the codification of meditation legislation, by the South African legislature. Notably in 2014, the legislature, having identified a need for a robust and fast dispute resolution in lower magistrates' courts, initiated a pilot project

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[388] See Chapter 3.

[389] Boulle and Rycroft (n 51) 3.

mediation programme. However, Prior to 2014 the South African legislature made two attempts to introduce mediation and alternative dispute resolution mechanisms into the court system by way of the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991[390] and High Court Rule 37. The Short Process Courts and Mediation in Certain Civil Cases Act is outdated and was promulgated in time pre-democracy, and as such this legislation lacks relevance and not important for this work and has been repealed effectively by disuse. The High Court Rule 37 merely directs parties to attend a pre-trial conference that must be held between the parties no less than six weeks before the date of the trial. Such a direction bears with it the hope being that in front a judicial officer, the parties might be able to come to a settlement and avoid further legal proceedings. The High Court Rules, and specifically Rule 37, is more modern aim of these pieces of legislation was to provide a legal framework for mediation to happen within the context of legal proceedings. The High Court rules don't specifically mention mediation, but the aim, is to encourage mediation in the courts.[391] However, academics have criticised these as weak attempts to imbue the court system with a mediation theme.[392]

Most recently, on 9 March 2020, the new Uniform Rule 41A of the High Court[393] came into operation, which introduces mediation in the High Court. In South Africa, the High Court and the Labour Court share *locus standi* for employment matters, and therefore this rule may be used for employment matters too. The rule providing for mediation is a straightforward one: in every new action or application, the applicant must serve on the other party a notice asking whether they agree to mediation, and that party must reply by notice, indicating whether they agree to this. A judge may at any stage before judgment also direct the parties to consider referring a dispute to mediation. Participation in mediation is voluntary and thus, as in the Magistrates' Courts Rules, there is no mandatory element. There are no explicit consequences for refusing to participate, such as an adverse costs order.

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[390] John Faris, 'Deciphering the Language of Mediatory Intervention in South Africa' (2006) 39 The Comparative and International Law Journal of Southern Africa 427, 428.

[391] 'Justice/Legislation/Rules and Practice Directions' <https://www.justice.gov.za/legislation/rules/rules.htm> accessed 15 November 2022.

[392] Paleker (n 25) 336.

[393] (GG N 43000 of 7 February 2020).

Unfortunately, the rules are silent about how the parties decide who should be the mediator and do not provide a deadlock-breaking mechanism on this choice. The rules are still lacking in certainty and completeness. Despite these lacklustre attempts at institutionalising mediation, it is true that mediation has been approved by courts.[394] In 2014 mediation was 'formally' introduced in South Africa as a pilot project as part of the Magistrates' Courts Rules. The Mediation Rules were introduced to foster mediation practice in the magistrates' courts and were incorporated into the Magistrates' Courts Rules under the authority of the Rules for Courts of Law Act 107 of 1985.[395] The aim of these rules is to encourage parties who applied for their dispute to be adjudicated by the court to first try to settle their matter by way of mediation. Mediation, thus, became available as a method for parties to resolve disputes in the magistrates' courts. Parties who wished to use mediation to settle a dispute could enlist the assistance of a mediator from a prescribed list of mediators approved by that magistrate's court.

The aim of the Mediation Rules was not to mandate mediation but rather to endorse an alternative method of dispute resolution should the parties wish to take that route, and to make mediation more accessible to persons where it is appropriate to do so, furthering access to justice. In other words, mediation was encouraged by the magistrates' courts for parties who could not afford or did not wish to spend exorbitant amounts on legal fees and whose monetary claim was of a relatively low quantum value.

4.3.1.1 Voluntary mediation and the Mediation Rules

As well-intentioned as the Mediation Rules may be, they do not provide sufficient clarity for those new to the mediation process in the magistrates' courts.[396] There is an aspect to these rules that lead to confusion. The provisions of the Mediation Rules aim to provide direction for those wanting to partake in a mediation voluntarily. However, the way the mediation rules are drafted and the intention of them (made for use in the Magistrates' Court) can sometimes give the impression (incorrectly) to those not accustomed to mediation that it is a 'mandatory process' and they *must* consent to the process. Whether a mediation is voluntary or mandatory will have an impact on how we deal with a review of the mediated settlement

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[394] See *MB v NB* 2010 (3) SA 220 (GSJ) para 50 for the court's approval of mediation.

[395] Marnewick (n 53) 81.

[396] ibid 87.

agreement. This impression, to an extent, leaves us with the feeling that true and actual consent to partake in the process might be impeded, as persons may think it is obligatory. The way the Mediation Rules have been drafted leads to a confusion on what kind of consent should be required. Further, despite being a process touted as voluntary the Mediation Rules might take the shape of something more directive. This is a problem if we are to use variables to determine when a settlement agreement should be reviewed. Here we have the situation of a voluntary process presenting as a mandatory process, which blurs the how the variables sketched out previously apply. It is my view, there is not much to be done about, but to keep it in mind as a peculiarity. Unfortunately, though, the Mediation Rules disappoint further still.

The Mediation Rules mainly concern the duties and functions of the mediation clerk and the role and functions of the mediator. Not much is said about the role of the parties and how consent can be ascertained or what they must do before, during or after the mediation. The Mediation Rules assume much ability on the part of the court clerks, and indeed, on the part of the parties, who may be wary of such dispute resolution mechanisms. The Mediation Rules do not guide, or inform sufficiently, the parties on how to prepare for mediation, or what to expect from such a process, possibly new for them.

It is here that this thesis offers a critique. There is a misaligned focus to the Mediation Rules. Mediation is a disputant-centric dispute resolution approach, where the disputants themselves are involved in developing feasible and workable solutions with the mediator who assists as a neutral impartial party. The Mediation Rules do not seem to recognise the role that the disputants, and their self-determination in giving consent to participate in the process. The Mediation Rules don't acknowledge the how disputants themselves play a part in settling their own dispute, which is a foundational element of mediation. Marnewick states (and I share this view) that the Mediation Rules give the impression that they were drafted only for court clerks and meditators and not for the possibly mediation-cautious public.[397] If mediation is meant to be a disputant-centred decision-making process with self-determination at its core, then appropriate rules of engagement should be attuned to the needs of the public,

[397] ibid 88.

especially those unaccustomed to legal systems or mediation generally. Marnewick offers a further assessment:

> It appears, on a strict reading of the … forms attached to the Mediation Rules constitute the extent of the *guidance* contemplated. Since the Mediation Rules and forms are patently deficient with regard to guidance for the disputing parties in the matters listed above, guidance will have to be sought elsewhere.[398]

While, at first blush, the Mediation Rules seem to mandate mediation, this is not the case. The aim of the 2014 rules was not to establish a mandatory mediation regime for disputants but rather to establish mediation as part of a regulated and controlled (which in itself is problematic) method of resolving disputes in the magistrates' courts.[399] Initially, the Mediation Rules were implemented in some of the regional and district magistrates' courts as a pilot project[400] and it is unclear when the roll-out of mediation services will be completed at a national level. Despite some inadequacies, this is the first proper step towards providing cost effective court-approved mediation rather than mandated mediation in the strict sense,[401] as the Mediation Rules only apply to voluntary submission by parties to mediation. It is submitted that while the Mediation Rules do not attempt to mandate mediation, mediation will probably be *encouraged* by clerks and magistrates with a view to lessening their ever-increasing court rolls.

One must, at this juncture, wonder if the encouragement by the court staff to partake in the mediation diminishes an aspect of self-determination and thus consent integral for mediation as a process. This is not unlike how the CCMA works and that, I submit that, it is a good benchmark. Perhaps though, the legislature is aware of these deviations from the core features of 'pure mediation', but it is a dilution they are willing to accept, especially if they hope they can replicate the successes of the CCMA.

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[398] ibid 88–89.

[399] ibid 7. Some academics may argue that any regulation of mediation attempts to mandate it; see below.

[400] ibid 4.

[401] Court-approved or court-annexed mediation is mediation that occurs with the approval of the court as a process that parties may use to resolve disputes. Mandatory mediation means that mediation as a dispute resolution process is obligatory and prescribed by legislation.

4.3.2 Voluntary mediation: fraud, misrepresentation and confidentiality as 'good faith'

In chapter two I outlined some of the core general features of mediation. At times some of these features (such as consent) are contested by various forces. Fraud, misrepresentation, and confidentiality often affect a mediation outcome in a similar way – that being – that the extent of consensus is ultimately question. In this section, I find that these variables can be placed together under the global heading of 'good faith' in relation to voluntary mediation. fraud, good faith and misrepresentation,' It is my view, and supported in places by case law that these variables of fraud, good faith and misrepresentation all have a similarity about them. The common denominator between fraud, good faith and misrepresentation is that they all lack something; they lack honesty and transparency. To consider them together is prudent and logical. If fraud or bad faith or misrepresentation is present – we can say that there is a patent lack of transparency and a party in the mediation process has ulterior or deceiving intentions which could affect whether the mediation agreement deserves scrutiny. Thus, there is a lack of good faith.

Confidentiality as an element of good faith

Confidentiality as a core feature of mediation is not without its problems and complexities.[402] It requires more attention from this thesis then that of fraud and misrepresentation (as these are often widely covered by straight forward contract law). In my view, to properly examine the effect that confidentiality has on the mediation process, we must locate the substantive issue of confidentiality under the broader heading of 'good faith'. If we consider confidentiality as an aspect of good faith, we are better able to categorise and refine this aspect of the research. Thus, we can say that confidentiality (in whatever form it may take) is integral to conducting in a 'pure mediation' in good faith. If, after a mediation, a party claims that there was disclosure of protected information (agreed by the parties), then may be able to request a review of his settlement agreement by a court, arguing that good faith was absent, The Mediation Rules provide for confidentiality in mediation, but how far does this promise stretch? This section shows how the law in South Africa approaches the contested nature of confidentiality in mediation.

[402] Michael Laubscher, 'Contract As A Basis For Mediation Confidentiality.' (2021) 33 SA Mercantile Law Journal 112.

As stated above, the South African legislature codifies and regulates some aspects of court-annexed mediation by introducing a chapter on mediation in the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa in 2014.[403] The Rules mention 'confidentiality' nine times but do not provide a thorough explanation or examination of the concept's limits or thresholds. Section 77(vii) of the Mediation Rules provides that at a mediation conference the clerk of the court or registrar must assist the parties in concluding a written settlement agreement, which provides, amongst other general settlement agreement clauses, that confidentiality and privilege attach to disclosures made at the mediation. The Mediation Rules do not elaborate further. In defining the role and functions of the mediator, the Mediation Rules merely provide as follows:

> [A]ll discussions and disclosures, whether oral or written, made during mediation are confidential and inadmissible as evidence in any court, tribunal or other forum, unless the discussions and disclosures are recorded in a settlement agreement signed by the parties, or are otherwise discoverable in terms of the rules of court, or in terms of any other law.[404]

Once again, disappointingly, the Mediation Rules do not provide a framework for the application and extent of this confidentiality. The Mediation Rules do embellish the scope further in the prescribed forms that are attached to them. The forms provide that the clerk, mediator or participants may use a standard-form settlement agreement known as Form MED-14. A clause in this settlement agreement deals briefly with confidentiality and provides as follows:

> 5 CONFIDENTIALITY
>
> 5.1 It is understood between the parties and the mediator that the mediation will be strictly confidential and without prejudice.
> 5.2 Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court

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[403] GN R183 (18-03-2014) with effect from 1 August 2014.

[404] Section 80(1)*(e)*.

> proceeding, unless such information is discoverable in terms of the normal rules of court. Only a mediated agreement, signed by the parties may be so admissible.
> 5.3 The parties further agree to not call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the parties.
> 5.4 The parties understand the mediator has an ethical responsibility to break confidentiality if s/he suspects another person may be in danger of harm.

The Mediation Rules do go further than expected in clause 5.4, which makes an exception for the mediator to break confidentiality if there is suspected harm to another person. This break in confidentiality allows for the possible effects of an absolute confidentiality clause on public policy in terms of protecting life and preventing harm. A *prima facie* reading of the rules and forms contained in the annexure would allow participants in mediation to believe that their disclosures are made in strict confidence, only to be broken should there be concern about harm to a person. This break in confidence is acceptable in terms of our socio-legal norms, especially if a personal harm is envisioned.

Brand[405] *et al* go further, without reference to the Mediation Rules, and state that there is a proviso to the rule of confidentiality – it can exist only if the mediator does not hear of potential criminal conduct or if there is no threat to life, health or safety. The authors do not provide a standard or criterion of when confidentiality can be broken. This is an example of South African jurisprudence falling short on providing proper guidelines for mediation practitioners. Such autonomy may be acceptable for judges or admitted attorneys (and other persons belonging to a professional body) but perhaps not for mediators, who are not subject to a code of conduct enforced by an official society. Furthermore, the Meditation Rules are also silent about the issue of mediator immunity or liability, which may prevent mediators from participating in such a process, especially where court-annexed mediation is concerned.

It is submitted that the Mediation Rules are inadequate and unclear. The Mediation Rules seem to encourage mediation to such an extent that perhaps the desired effect would be that like the work of the CCMA. An examination that delves deeper in to how the CCMA gains

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[405] Brand, Steadman and Todd (n 24) 25.

jurisdiction of so many mediations, might help to determine aspects of legal review, such an examination follows below.

4.4 Mandatory mediation and how it is reflected in the law

Earlier it was mentioned that the CCMA is a sophisticated dispute resolution mechanism, the CCMA is more than that. The CCMA is generally responsible for the most widespread use of mediation in South Africa. 'Mediation' and 'the CCMA' are synonymous. The Commission for Conciliation, Mediation and Arbitration (CCMA) is the engine room for alternative dispute resolution in South Africa. In many ways (either through the legislature or judicial precedent) an employee is pressed to use CCMA processes before approaching a labour court.

4.4.1 The Commission for Conciliation, Mediation and Arbitration

Its success can be attributed to the pioneering work of Independent Mediation Service of South Africa (IMSSA) which was formed in 1984 and now defunct.[406] To address the challenges of South Africa's labour market, characterised by high levels of unemployment and systemic inequality, the LRA – one of the first pieces of legislation to be passed in a newly democratic South Africa – established the CCMA to promote the quick, accessible and effective resolution of disputes.[407] The preamble of the LRA provides us with some insight into the intention of the drafters:

> [T]o provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose ….[408]

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[406] ibid 4.

[407] Paul Benjamin, 'Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)' (International Labour Organization 2013) 2.

[408] Preamble of the LRA.

To fulfil the intention of legislature the CCMA, a (so-called) independent body, administers conciliation and arbitration proceedings that the LRA prescribes as chosen mechanisms to arrive at a settlement, or a final and binding decision.[409]

4.4.1.1 Is the CCMA mandatory?

The Labour Relations Act (LRA) *requires*[410] parties to refer *all* employment disputes to the CCMA for mediation and conciliation as a *prerequisite* before embarking on industrial action; approaching the Labour Court; or requesting an arbitration award by the CCMA.[411] Section 135 of the LRA provides as follows:

> (1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.

Definitions of important terms are sometimes not provided by the LRA, which is curious when one considers the impact of such mandatory language. The LRA does not provide a definition of conciliation and does not distinguish conciliation from mediation.[412] Turning to the literature for clarification, it suggests that conciliation is wider than mediation, and mediation could fall under the heading of conciliation. It has also been suggested that the LRA uses the term 'conciliation' to give commissioners maximum flexibility.[413] Conciliation can be seen as a more flexible approach to dispute resolution, as conciliators may change tactics and use different approaches with the aim of securing a settlement agreement that is mutually acceptable to both parties.[414] As there is not much distinction between the outcome of mediation and conciliation, the concepts can be interchangeable, especially where the end result is a settlement agreement.[415]

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[409] Section 145 of the LRA in conjunction with s 158(1)(g) of the LRA.

[410] The emphasis is my own, but I do so to show how the LRA mandates the mediation of workplace disputes. Its effect is persuasive.

[411] Brand, Steadman and Todd (n 24) 4.

[412] Section 135(3) of the LRA provides: 'The commissioner must determine a process to attempt to resolve the dispute which may include– mediating the dispute; conducting a fact-finding exercise; and making a recommendation to the parties, which may be in the form of an advisory arbitration award.'

[413] Paleker (n 25) 356.

[414] S Hayter, 'So What is Conciliation Anyway?' 4 South African Law Bulletin 63, 64.

[415] Brand, Steadman and Todd (n 55) 21, where the authors also use the term 'mediation' to refer to both mediation and conciliation. See also Fuller (n 99) 308.

The LRA uses commanding language but then fails to define 'conciliation'; if the argument is that the LRA does not define 'conciliation' to give it flexibility, why does the LRA mandate mediation in the first place? A possible answer is that the LRA is trying to be pragmatic rather than perfect, considering South Africa's past. Another possible answer is that a principle of interpretation of statutes is that if the statute does not define a term, it must be given its ordinary meaning. Arbitration, like mediation, is a process that can be mandated by the LRA, or the parties can elect to appoint an arbitrator for private dispute resolution by agreement. An arbitrator will consider the merits of each party's submission and make a finding. An agreement to arbitrate privately may set out the disputed issues and the powers of the arbitrator to reach a binding decision that will resolve the dispute.[416] Arbitration, while a legitimate tool for dispute resolution, does not allow for the same self-determination and consensus as the mediation process and is not as helpful in analysing settlement agreements.

4.4.1.2 Self-determination and consent at the CCMA

One of the core features of mediation is consent. Parties must have the self-determination that allows them the consent required to participate in a mediation. What happens if a party is not willing to participate in LRA-mandated mediation? Considering the above, it seems that parties who wish to avoid the CCMA entirely are not denied justice and may still approach the Labour Court. The following questions arise: When can parties approach the Labour Court without first approaching the CCMA? Is 'mandatory mediation' merely a suggestion rather than obligatory, if one uses the rules in such a manner?[417] Put differently, when may a party refuse to attend a CCMA hearing and request a court to review the matter?[418] To answer these questions, the case law has been thoroughly analysed and its content interrogated so as to locate the variables identified above. This is important because we will then be able to gauge when the court will agree to review a matter and when it will refer the matter back to the CCMA. It is this insight that this thesis envisions where the decision-tree will be useful.

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[416] D du Toit, *Labour Relations Law: A Comprehensive Guide* (LexisNexis 2015) 178–179.

[417] Rule 13(2) does provide factors for the commissioner to consider in the exercise of the discretion in subrule (1), such as the reason for absence, previous absences, prejudice and other relevant factors.

[418] Kershwyn Bassuday and Alan Rycroft, 'Incapacity or Disability? The Implications for Jurisdiction *Ernstzen v Reliance Group Trading (Pty) Ltd* (C717/13) [2015] ZALCCT 42' 2015 Industrial Law Journal 2516, 2520.

What the following case shows us is the essential role that the CCMA plays in dispute resolution and the role of the court in relation to the jurisdiction and power of the CCMA. In other words, which institution should be more venerated, what is the role of the court in relation to the jurisdiction and power of the CCMA, and how 'mandatory' is mediation under the LRA? This speaks directly to the very concept of mandatory mediation, which is paradoxical under a logic of pure mediation.

In *Mohlomi v Ventersdorp / Tlokwe Municipality*[419] the court had to consider several of the above issues. The employee,[420] citing unfair dismissal, approached the Labour Court directly, instead of the CCMA, under the guise of s 158(1)*(h)*, which allows for the court to review a decision by the State who acts as an employer.[421] The employee complained that his employment contract at the municipality was terminated without due process or procedure and he sought to have the decision reviewed and his termination set aside on an urgent basis. The court held that it was accepted in law that the Labour Court has the jurisdiction and power to hear such matters under s 158(1)*(h)*. The court then posed the following enquiry: should it allow for a review where specifically prescribed alternative means of dispute resolution are available?[422]

This question, posed by the court, engages the larger theme of access to justice and the role that mediation has, being one form of such access, has been highlighted by case law. In its deliberations, the court referred to a landmark case in South African administrative law, *Chirwa v Transnet and Others*,[423] where the Constitutional Court held that the LRA was the primary source for matters concerning allegations by employees of unfair dismissal and unfair labour practices, irrespective of who the employer is, including the State and its organs. In *Chirwa*, the Constitutional Court went on to state that the employee had access to procedures, institutions and remedies to deal with allegations of unfair dismissal, and it was

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[419] *Mohlomi v Ventersdorp / Tlokwe Municipality and Another* (2018) 39 ILJ 1096 (LC).

[420] Since we are dealing with employment matters, the term 'employee' will generally be used for a claimant, disputant or suitable party approaching the court.

[421] See also *Merafong City Local Municipality v SA Municipal Workers Union and Another* (2016) 37 ILJ 1857 (LAC) para 38 where the court held that the Labour Court is not precluded by the LRA from reviewing the decisions and acts contemplated in s 158(1)*(h)*. It has the power and jurisdiction to review them on any grounds permissible in law.

[422] *Mohlomi v Ventersdorp / Tlokwe Municipality and Another* (n 419) para 34.

[423] *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) para 64.

not at liberty to ignore these fine-tuned dispute resolution mechanisms created by the LRA. If this were the case, held the Constitutional Court, then three systems of law would be in existence: one system for the dismissal of employees by State employers, another system applicable in civil courts, and another system in the forums and mechanisms established by the LRA.[424] This also becomes a question of access to justice and the way mediation (underscored by labour law imperatives) could, depending on the context, either promote or diminish this right. The court in *Mohlomi* elaborated the need for fairness:

> What all the above means is that the LRA has a very unique scheme where it comes to resolving disputes that arise in the scope of the employment relationship. This includes such disputes involving the state as employer. The LRA creates a right to a fair dismissal and the right to a fair labour practice, and then provides for a prescribed dispute resolution process to give effect to such rights. At the heart of this dispute resolution process lies the notion of fairness as between both employer and employee. This notion of fairness is not compatible with concepts such as unlawfulness or illegality or invalidity. At a level of policy, this Court should always strive to *give primacy to this prescribed dispute resolution processes of the LRA* and the notions underlying it.[425]

The court was aware that employees may sometimes forum-shop and explained that it had a duty to consider the real context of an employment dispute beyond the label given to it by the employee. An employee may cunningly allege 'unlawfulness' to gain access to the court, rather than the approach used for 'unfairness', which falls within the jurisdiction of the CCMA. The court cautioned that 'unfairness' and 'unlawfulness' are not the same concepts. The duty to scrutinise the underlying nature of a dispute allows the court to determine whether approaching the Labour Court is the correct remedy. The court held that it should exercise its powers under s 158(1)*(h)* of the LRA only in exceptional circumstances:

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[424] This reasoning was applied by the Constitutional Court again in *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) para 56. See also *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) and *Magoda v Director-General of Rural Development and Land Reform and Another* (2017) 38 ILJ 2795 (LC).

[425] *Mohlomi v Ventersdorp / Tlokwe Municipality and Another* (n 388) para 39 [own emphasis]. See also *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 ILJ 564 (CC).

> A slew of case law shows that the courts are wary of intervening in employment matters where the LRA has a finely calibrated dispute resolution system in place, and allows for mechanisms such as mediation. This dictum shows the importance the courts place in mediation to resolve disputes by absolving itself as adjudicator and it shows that for the Labour Court to entertain this issue would be contrary to the dispute resolution process clearly prescribed by such statute and should only be done with great circumspection and reluctance.[426]

By way of such reasoning, as evidenced in *Mohlomi* above, and to answer our question at the start of this chapter – how mandatory is the CCMA? And what, if any, is the affect on self-determination and consent? It is submitted that a court would not consider favourably a matter where the parties have not given mediation due attention, especially by failing to attend the mediation. The court will carefully scrutinise the real reason for an employee abandoning the LRA mechanisms of dispute resolution in favour of a direct approach to the courts. It might be further extrapolated that should an employee not attend a mediation at the CCMA, the court would interrogate the factors ordinarily considered by commissioners under Rule 13(2) to reach a conclusion. This means, in practice, that although Vettori argues that mediation by the LRA is mandatory only in theory, it seems that the courts would enforce mediation as proposed by the LRA and thus mediation *is de facto* mandatory. A position where a preference to mandatory mediation is given raises certain questions about access to justice and the availability of review are raised as a result. Further, it raises questions central to the spine of this research relating to variables, one being: if self-determination and, thus consent, is limited to some extent in the CCMA, does complaint of this limitation trigger a review of the legal settlement? And, if so, how does the labour court deal with such an inquiry. In considering this position we will then be able to establish some principles of review that might guide this discussion in terms of commercial mediated settlements.

Mandatory mediation is not without its difficulties, and it has been the subject of constitutional challenges in South Africa.[427] In *Intervalve (Pty) Ltd v NUMSA*,[428] the

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[426] See *Madzonga v Mobile Telephone Networks (Pty) Ltd* (J 1867/2013) [2013] ZALCJHB 232.

[427] In *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd and Another* [1999] ZALC 157, the court held at para 73 that the wording of s 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can be either arbitrated or referred to the Labour Court for adjudication.

[428] *National Union of Metal Workers of South Africa v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC).

Constitutional Court emphasised the importance of labour disputes being first referred to the CCMA for mediation, before arbitration or adjudication can take place. In a matter that involved various employers and one large trade union, the Labour Appeal Court (before the matter reached the Constitutional Court) adopted a technical approach to citing all the employers in the matter. The Labour Appeal Court held that since some employer parties were not cited at all when the matter was first referred to the CCMA, the matter had not been properly referred to the CCMA for mediation and could thus not be adjudicated upon by the court, as s 191 of the LRA had not been complied with. In the Constitutional Court, the case raised questions of substance over form: at the heart of the issue was whether the employees could allege unfair dismissal in a Labour Court if there was no referral to the CCMA for mediation first. The trade union argued that not every employer needed to be cited when referring a matter to the CCMA for mediation, and employers could be joined in proceedings before a court at a later stage. The trade union also contended that such a technical omission should not divest the employees of their claim. The Constitutional Court made it clear that referral for conciliation is indispensable and is a precondition for the Labour Court's jurisdiction over unfair dismissal disputes.[429]

From the above judgments, South African labour law jurisprudence places much faith in the mediation process and considers mandatory mediation, a pre-requisite before any person can validly approach a court for adjudication. Such a prerequisite comes with additional aspects to consider: What do we do when a party to a settlement agreement (which was supposed to be confidential) now feels 'buyer's remorse'?

4.4.1.3 Procedural fairness and the CCMA

The decisions reached at the CCMA through mediation are subject to judicial review, which is exercised by the Labour Court. Numerous settlements emanating from the CCMA have been judicially reviewed.[430] Due to the sheer number of mediations and conciliations that the CCMA handles, labour law jurisprudence can provide many interesting principles and precedents. I, therefore, rely heavily on South African labour law, in so far, as it concerns

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[429] ibid 40.

[430] 'CCMA Cases Keep Climbing | Fin24' <https://www.fin24.com/Economy/Labour/ccma-cases-keep-climbing-20171022-2> accessed 23 April 2020.

mediation. The CCMA's Annual Report[431] for 2021/2022 reported that 156,777 cases were referred to the CCMA during the 2022 financial year end. By offering largely free services for the resolution of workplace disputes throughout South Africa, the CCMA takes a central role in resolving South African labour disputes. According to the institution's own statistics, the CCMA dispute resolution system is highly effective, settling about 75% of disputes at conciliation.[432] However, the quality of settlements reached is criticised for two reasons: the varying skills and experience of commissioners, and a system that pressurises commissioners to cut corners to handle the caseload and fosters their 'self-interest' to settle at all costs.[433] The CCMA has taken measures to tackle 'commissioner blind-spots'.[434]

Whatever critique is levelled against it, support for the use of mandatory mediation at the CCMA is further fortified by the Rules for the Conduct of Proceedings before the CCMA.[435] The CCMA rules provide that the parties must attend the mediation proceedings in person.[436] A founding principle of mediation is that it is voluntary in nature. What happens when a party to the matter, referred to the CCMA, does not wish to take part in mediation? Rule 13 provides for three possible consequences if a party, usually the employee, fails to attend. The commissioner may (1) continue with the proceedings; (2) adjourn the proceedings to a later time within the 30-day period; or (3) conclude the proceedings by issuing a certificate that the dispute remains unresolved. On the face of it, the certificate issued by the commissioner provides an exit strategy for those not wanting to participate in mediation at the CCMA. In this regard, Vettori states:

> It follows, therefore, that if parties are unwilling to participate in a mediation or conciliation procedure, they may avoid it by simply not attending the process. Since the commissioner may not dismiss the matter, and must issue a certificate of non-resolution, the parties will have abided by the procedures provided for in terms of section 191 of the LRA. Consequently, the parties may then proceed to either

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[431] 'Annual Reports – CCMA' <https://www.ccma.org.za/categories/annual-reports/> accessed 17 November 2022.

[432] 'About Us | CCMA' <https://www.ccma.org.za/About-Us> accessed 21 April 2020.

[433] Anton Steenkamp and Craig Bosch, 'Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential' 2012 Acta Juridica 120.

[434] Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13) 80.

[435] As published under GNR1448 in *GG* 25515 dated 10 October 2003.

[436] Rule 13.

> adjudication by the Labour Court or arbitration procedure. In this sense, conciliation or mediation is *only theoretically mandated* in terms of the LRA. In practice, the parties can avoid conciliation or mediation with impunity by simply not attending the procedure, and they will not be denied access to further dispute resolution procedures as a consequence of such non-attendance. All that needs to be done is that the matter be referred for conciliation by the applicant.[437]

All of this leaves us asking a blunt question: what do we do with aggrieved parties who refuse to use the CCMA?

4.4.1.4 How does the labour court deal with confidentiality?

A court, when asked to review a settlement agreement, will normally expect evidence to be led by the party asking for the judicial review. Evidence, and the role of the mediator in giving such evidence in a labour court, comprise a confusing triad. There is an intersectionality between evidence required by the court; its review of a settlement agreement; and the implicit characteristics of confidentiality. Such a mix of factors does not allow for a concise set of legal principles on the topic. This complex intersectionality has, as we have reconciled above, been neglected by the drafters of the Mediation Rules. In an act of clarification, this section will examine how the labour courts have dealt with these issues by analysing relevant cases from which we can draw guidelines for the judicial review of settlement agreements.

Rule 16 of the CCMA Rules explicitly provides for the confidentiality of the mediation proceedings: the common-law confidentiality principle of 'without prejudice' that protects statements made in *bona fide* (good faith) negotiations leading to settlement; and the non-compellability of the parties, including the mediator, as witnesses in any further proceedings.[438] However, in *Kasipersad v Commission for Conciliation, Mediation and Arbitration and Others*[439] the court made it clear that what happens in mediation is not beyond the law's reach. During a review (in terms of s 158(1)*(g)* of the LRA) the court noted that the prohibition on producing and referring to statements made during mediation in any

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[437] Vettori (n 39) 370 [own emphasis].

[438] AA Landman, 'Mediating in the Shadow of the Law' (2015) 36(2) ILJ 1766, 1766–1769.

[439] (2003) 24 ILJ 178 (LC). See also *Cindi Hadio v CCMA (Careers Staff Solution)* [2015] 12 BLLR 1207 (LC).

subsequent legal proceedings, or the prohibition on the commissioner testifying about what occurred during mediation would conflict with the applicant's right to just administrative review and the inherent power of a court to review the performance of the CCMA. The court concluded that the LRA and the Constitution were superior to the CCMA Rules.

In the *Kasipersad* case the court did not have to subpoena the commissioner to give evidence about what occurred during the mediation as she voluntarily and consensually furnished the court with an affidavit in which she gave an account of her actions during the mediation. The actions of the mediator precluded the development of the jurisprudence in this area. This meant that the court did not have to engage in an enquiry about whether a subpoena was ethical or just.[440] Unfortunately, the court did not make any comments about the power of Rule 16 and whether this should override the commissioner's intention to participate in the court process and the value of the legal principle of just administrative action. It is clear, though, that without the commissioner's affidavit, there would have been little for the court to review.

In *Premier Foods*,[441] misconduct on the part of the CCMA commissioner was alleged and the court demanded a transcript of the CCMA proceedings.[442] The employee had applied to the Labour Court to review and set aside the proceedings of the CCMA. During the proceedings, the commissioner had expressed a strong adverse view about the merits to one of the parties. This had formed the basis of a recusal application when the proceedings commenced before the commissioner. The commissioner refused to hear the recusal application and proceeded with the dispute. On review, the Labour Court correctly considered the evidence of what had happened at mediation and held that the conduct of the commissioner constituted a material irregularity in the conduct of the proceedings.[443]

Confidentiality, and specifically the issue of giving evidence of what happened during a CCMA mediation, and whether it was privileged, was finally considered by the

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[440] Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13) 83.

[441] *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation & Arbitration and Others* (2017) 38 ILJ 658 (LC).

[442] The proceedings in question were arbitration proceedings but for our purposes the legal principles remain valuable.

[443] ibid paras 37–38.

Constitutional Court in 2018 in *September and Others v CMI Business Enterprise CC*.[444] This case required the Constitutional Court to interpret Rule 16, which governs the admissibility of evidence led at conciliation proceedings. Rule 16 was amended after the proceedings had commenced, but it still applied to several cases filed before the amendment. The amended CCMA Rule 16 now provides that a court of law may order that evidence of what transpired during conciliation proceedings be produced:

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

In a judgment that would have far-reaching consequences for the confidentiality of CCMA proceedings and, in turn, the conduct of the commissioner, the court held that Rule 16 did not intend to extend a common-law privilege as found in 'without prejudice' negotiations. The Constitutional Court held that the court before it, the Labour Appeal Court, had adopted an overly formalistic approach and failed to consider the purpose and context of the LRA, and the dispute resolution mechanisms for which it provides. Underling the need for frank and early dispute settlement, the Constitutional Court held as follows:

> There is no reason to surmise that the Governing Body of the CCMA intended, by enacting rule 16, to extend the common law privilege attached to without prejudice settlement negotiations. Such an interpretation is not supported by the context and purpose of the rule. The purpose of rule 16, to promote frank discussion and early settlement of disputes, is properly served by the application of the common law rule of settlement privilege. The

[444] *September and Others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC).

> interpretation of rule 16, as contended for by the respondent, to impose a blanket ban on the entirety of the content of conciliation proceedings, does not further promote this purpose, or serve any legitimate purpose.[445]

The Constitutional Court was unable to see how excluding all evidence from conciliation proceedings would further the aims and purport of the LRA. The court held that any privilege to confidentiality may be waived by the consent of both parties or, as provided for in the amendment, by order of a court of law. Any documents disclosed during the conciliation proceedings that are otherwise privileged retain their privilege in subsequent proceedings, unless otherwise agreed to between the parties or if ordered by a court of law. The Constitutional Court then issued a cautionary note to those involved in CCMA proceedings, which was that information may be disclosed at subsequent proceedings if it is just to do so:

> Since the rule has been amended, parties involved in conciliation would know that whatever is said during conciliation proceedings may be disclosed in subsequent proceedings with their consent or if ordered by a court. It is assumed that such an order would be issued sparingly and where the interests of justice warrant disclosure.[446]

The *September* judgment is welcomed for the clarity that it provides for those participating in CCMA proceedings. The judgment makes it clear that what is said and disclosed in a 'safe harbour' may not be confidential at all. While this judgment is a step forward for certainty and clarity about confidentiality, it also clarifies that there is no 'safe harbour' in which to discuss matters frankly without possible consequences in subsequent proceedings. It must be noted, too, that in employment matters it is often the employee who has fewer financial and legal resources when in dispute with an employer, who may have a team of legal advisors on staff or retainer. Although this judgment assisted the employees in question, it may not always have that effect. It once again encourages employees to choose a formal courtroom system rather than trying to resolve disputes with the autonomy that mediation is supposed to offer.

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[445] ibid para 70.

[446] ibid.

4.4.1.5 Mediator conduct at the CCMA

In some circumstances, after a settlement agreement has been reached at the CCMA, one of the parties complains that the settlement agreement lacks veracity due to the conduct of the mediator and should be set aside. Two questions emerge here: firstly, when does mediator conduct trigger a judicial review; secondly, can a mediator be held liable? Generally, there is no governing body for mediators to belong to and be regulated by. These lack of oversight, makes clarity of these issue difficult. To determine some of the obligations expected of mediators, one can turn to theoretical definitions for reference. Moore describes mediators as individuals or groups who are independent or in some cases autonomous.[447] Moore states further:

> They generally do not have specific substantive needs they want met by an agreement between or among disputants. They also commonly do not have predetermined, biased, or fixed opinions or views regarding how a dispute should be resolved, and are able to look at all parties' issues, needs, interests, problems, and relationships in a more objective, impartial, or 'multipartial' manner than can the participants themselves.[448]

In his definition of mediator, Moore states that the role encompasses attributes where the mediator will be objective and impartial and will assist with identifying needs and interests. This definition could be more aligned with the conceptualist definition offered by Folberg and Taylor, or perhaps this definition of mediator itself is aspirational in its definition and a high-water mark for the behaviour of mediators. A good mediator should also be well informed about the parties and the features of their dispute. He should be informed about the balance of power; the primary sources of pressure exerted on the parties; the pressures motivating them to agree as well as the pressures blocking agreement; the economics of the industry or particular company involved; political and personal conflicts within and between the parties; and the extent of the settlement authority of each of the parties.[449]

These definitions, which attempt to benchmark of mediator conduct, are helpful in theory, but how do they work in practice? Such a question provokes further questions such as: how do

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[447] Moore (n 6) 9.

[448] ibid.

[449] Cooley (n 113) 266.

we consider the alleged misconduct of a errant mediator and what, effect, if any, would this have on the appropriateness of a judicial review being triggered? Turning to the case law, this research selects cases that can answer these questions, to some extent.

Pressure

At times the techniques of a mediator may be called into question. Rycroft[450] states that a mediator might use various techniques to encourage a settlement and cites some guidelines from *Workers Equally Support Union of South Africa ('WESUSA') obo Modise and Others v Slabbert Burger Transport (Pty) Ltd*,[451] where Van Niekerk J stated:

> Mediation is often a robust process in which the mediator will seek to persuade and cajole parties, using techniques that rely on gentle and less gentle pressure to reach agreement. Obviously, a mediator cannot overstep the mark and act dishonestly, or misrepresent a position to the parties, or engage in conduct that amounts to intimidation.[452]

We know that pressure can be applied to reach agreement, but when is the pressure applied by the mediator on the parties so great that it can be seen as inappropriate? In *WESUSA* the court had two joined applications regarding the same settlement agreement. The employer wished to make the settlement agreement an order of court, while the employee wanted the settlement agreement to be set aside. The matter was set down for arbitration and the CCMA arbitrator tried to mediate one last time. The evidence portrayed the CCMA arbitrator as a person who exerted too much force and reminded the parties several times that the matter 'would be finalised on that day', in an attempt to speed up the negotiations and reach a settlement. When the commissioner found out that the employer was willing to offer only seven months' salary as compensation, he indicated to the employer that there was a good chance that the employee would be successful in claiming 12 months' salary and that he (the arbitrator) had the power to make such an award. The employer claimed that he was placed

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[450] Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13) 84.

[451] *Workers Equally Support Union of South Africa ('WESUSA') obo Modise and Others v Slabbert Burger Transport (Pty) Ltd, Slabbert Burger Transport (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (J 745/06, J 1840/05) [2009] ZALC 214 (3 February 2009).

[452] ibid para 8.

under an unacceptable level of pressure, coercion and duress when he signed the settlement agreement put forward by the employee's union. The court used this opportunity to set some guidelines for mediator conduct and held that a mediator cannot overstep the mark and act dishonestly, or misrepresent a position to the parties, or engage in conduct that amounts to intimidation.[453] The court then referred to *National Union of Metalworkers of SA and Others v Cementation Africa Contracts (Pty) Ltd*[454] where the court stated:

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

The court in *WESUSA* agreed with the court in *Cementation Africa Contracts* that a mediator should avoid expressing her own views to the parties on the merits of their positions and should show impartiality by not voicing her own opinions. In conclusion, the court held that the arbitrator in question did not act unethically. The court held that the arbitrator merely pointed out the range of possibilities, should the matter proceed to arbitration. Here the court is protecting the power of the mediator (or in this case, the arbitrator) given in terms of the LRA to settle disputes. The courts have been consistent in their approach to reprimanding a mediator for inappropriate conduct or overstepping the mark. In *Machabe v Ekurhuleni Metropolitan Municipality*[455] the court had to determine whether the arbitrator acted reasonably in terms of a private arbitration while making the settlement agreement an award. The arbitrator included a term that the employee was entitled to a car allowance, which term was not agreed to in the settlement agreement. The court held that the arbitrator had exceeded his powers and had extended and broadened the terms of the settlement agreement.[456]

Advice in terms of consensual outcome

Previously in this thesis I looked generally at how advice can be given in a mediation setting and whether, in fact, it is appropriate for mediators to give advice at all. Two of the research question raised earlier were: (i) what kind of consent is necessary, and; (ii) is there a duty on

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[453] ibid.

[454] (1998) 19 ILJ 1208 (LC).

[455] (2018) 39 ILJ 638 (LC).

[456] See also *Saohatse v Vista University* (1999) 20 ILJ 2451 (LC) para 17.

a mediator to educated parties to ensure informed consent? Now I will turn to the context of South Africa. In *Anglo Platinum Ltd v CCMA*[457] the court had to determine whether it was proper for a commissioner to give advice when sitting as a mediator at a CCMA hearing. Like the academics writing on this issue,[458] the court found this to be a complex enquiry that depended on the form and manner in which the advice was given.[459] The court found that there was no doubt that in the process of testing the positions of the parties through reality testing, advice may inadvertently be conveyed, or that the parties may, in internalising the questions posed by the commissioner, perceive them to be advice.[460] The court stated that there was nothing untoward about this approach and advice given in this manner was appropriate. However, the court stated, a conciliating commissioner acts improperly if he gives direct advice on the merits of the case to the parties. The court found that when the commissioner gave direct legal advice based on a judgment of the Labour Court, he was not aware that the decision had been overruled by the Labour Appeal Court. The facts of this case showed us the dangers of commissioners giving advice when facilitating conciliation: they are generally experts in managing dispute resolution processes, but because of their workload they cannot keep up with the latest developments in the law.[461] An ancillary question relates to liability. Can a mediator be found liable if the legal advice given is not proper, or correct? The court held that the consensus seems to be that a conciliating commissioner acts improperly when he gives direct advice to the parties on the merits of the case.[462] Unfortunately, the court remained silent on whether a mediator could be held liable.

Notwithstanding this silence, in some cases, an aggrieved party regrets the outcome of a settlement and may wish to pursue some sort of recourse against their mediator.[463] In fact, one writer in 1996 stated that nearly 20% of civil settlement agreements in the US converted into malpractice suits.[464] Data like this is not available in South Africa and an action for

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[457] *Anglo Platinum Ltd v CCMA* (2009) 30 ILJ 2396 (LC).

[458] Nolan-Haley, 'Informed Consent in Mediation' (n 119).

[459] *Anglo Platinum Ltd v CCMA* (2009) 30 ILJ 2396 (LC) para 30.

[460] ibid para 31.

[461] Boulle and Rycroft (n 51) 212.

[462] *Anglo Platinum Ltd v CCMA* (n 457) para 34.

[463] Chris Guthrie, 'Better Settle than Sorry: The Regret Aversion Theory of Litigation Behavior' 1999 University of Illinois Law Review 43, 69.

[464] Lynn A Epstein, 'Post-Settlement Malpractice: Undoing the Done Deal' (1996) 46 Catholic University Law Review 453, 453.

damages against a mediator has yet to be tested in the South African courts. It is submitted that in these situations, a mediator might argue for some sort of mediator indemnity or immunity.

Mediator immunity and liability

Mediators do not belong to a professional body or society that regulates their conduct. This is unfortunate. The conduct of the mediator is a variable that influence whether a judicial review of the settlement agreement. There may be times where a mediator has conducted themselves badly and seeks immunity for his negligence or misconduct. The concept of mediator immunity is an interesting one. To gain a better understanding of mediator immunity it may be convenient at this point to examine mediator immunity in the US and see what parallels, if any, can be drawn. Mediator immunity works in two ways. First, mediators would want immunity from being summoned to testify before a court, and second, mediators would want to avoid legal liability for damages or other penalties. In the US, it has been argued that if mediators can avoid litigation because of their conduct, a greater number would be willing to act as mediators and an adequate supply of mediators would be guaranteed.[465] Furthermore, it has been stated that without giving mediators such protection from vexatious litigation, mediators will be reluctant to participate in court-annexed programmes, thus denying the courts the necessary resources to settle claims in a cost-effective manner. This might also affect those mediators who volunteer their services or who are paid substantially less than market rates.[466] Despite the progressive approach of US mediation, it is not a panacea for all. Rules on mediator liability in the US vary from state to state, and can be very complex and situational, thus lacking the general applicability needed for a robust precedent.

In *Wagshal v Foster*, the Court of Appeals in the District of Columbia further institutionalised mediation by extending quasi-judicial immunity to mediators. Although *Wagshal* is another important step in solidifying the standing, respect and influence of alternative dispute resolution procedures, the court held that more formalised improvements were needed by creating minimum standards for mediation training programmes and

[465] Scott H Hughes, 'Mediator Immunity: The Misguided and Inequitable Shifting of Risk' (2004) 83 Oregon Law Review 107, 110.

[466] ibid.

promulgating clear confidentiality guidelines.[467] In considering the case for judicial immunity, the court referred to the three-part test in *Butz v Economou*,[468] which was used to ascertain whether a case evaluator qualified for such immunity. The three-part *Butz* test makes the following enquiry:

1. whether the functions of the official in question are comparable to those of a judge;
2. whether the nature of the controversy is intense enough that future harassment or intimidation of the officials by litigants is a realistic prospect; and
3. whether the system contains adequate safeguards to justify dispensing with private damage suits to control unconstitutional conduct.

The court in *Wagshal* found that all three parts of the *Butz* test had been met and granted the immunity requested. Interestingly, on the last part of the test, the court found that the parties could have used another process apart from suing the mediation official, and that there were alternative ways of preventing unconstitutional infringements. This test may be a useful template for South African courts to consider, should they ever wish to develop a test for immunity. Such an approach may be favoured in a judicial system like South Africa's, where resources are already constrained, and where diverting some cases on the court roll may assist overburdened courts.

Despite the progress made by some jurisdictions in the US, some academics argue that it has been too hasty. Hughes argues that the limited case law and legislative action on mediator immunity has been misguided and that the rules are unsound and inequitable.[469] He states that the important cases on mediator immunity – which also consider the connected issues of liability – have misapplied policy, principles and reasoning. He further states that:

> [W]hile the parties and the courts both gain from court-annexed mediation, mediator immunity removes the risk of harm by a poor or misbehaving mediator from the courts' shoulders and places it firmly on a few unlucky and unprepared disputants. Mediator immunity represents the inequitable shifting of risk of mediator misconduct

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[467] Brian Dorini, 'Institutionalizing ADR: Wagshal v. Foster and Mediator Immunity Case Comments' (1996) 1 Harvard Negotiation Law Review 185, 185.

[468] *Butz v Economou* 438 U.S. 478 (1978) 512.

[469] Hughes (n 465) 111.

> from the mediators and the courts to those mediation participants least able to protect themselves from or shoulder the burden of such negative behavior.[470]

If we consider the opinion of Hughes and the fact that no cases[471] in South Africa specifically consider the issue of mediator liability – connected to a claim for damages and then an argument of immunity – the chances are that it will take years and many cases to apply or construct proper legal principles for immunity. In the past there has been support for certain 'judicial officers' benefiting from immunity in South Africa. Levy and Mowatt state:

> The general rule is that a judicial officer is not liable for acts negligently done or defamatory words spoken in the exercise of his functions, unless he exceeds his qualified privilege. Such delictual immunity is extended to persons 'performing functions analogous to those of a judicial officer, or those who act in a quasi-judicial capacity'.[472]

The term 'quasi-judicial' might be extended to include the functions of arbitrators as they make decisions by applying the law to facts:

> The arbitrator, then, like the judicial officer is granted delictual immunity and is not liable for his lack of skill or negligence when he adjudicates and thereby performs a quasi-judicial function.[473]

But can such a view be adopted in regard to the role of mediator?[474] The role of the mediator is not to arrive at a binding decision; she merely attempts to merge the interests of the parties

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[470] ibid.

[471] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) considered the power of commissioners. The court was faced with a power given to commissioners presiding in insolvency enquiries, to commit to prison, witnesses who refused to answer a question satisfactorily. The court held that it would be inappropriate for such a power to be exercised by a person who was not a member of the judiciary. This rationale could be extrapolated to mediator immunity.

[472] MH Levy and JG Mowatt, 'Mediation in the Legal Environment' (1991) 24 De Jure 63, 66. In support of the extension of a delictual immunity for judicial officers, the authors cite three cases: *Matthews v Young* 1922 AD 492 at 509; *Penrice v Dickinson* 1945 AD 6 at 14–15; and *Moeketsi v Minister Van Justisie* 1988 (4) SA 707 (T).

[473] ibid 67.

[474] ibid 66.

for a settlement rather than reach a decision about which party is right.[475] After comparing mediators and arbitrators, Levy and Mowatt conclude that '[t]he result of the comparison is that the principal reason for granting immunity to judicial or quasi-judicial officers has no application to mediators'.[476] If that is the case and there is no immunity for mediators in South Africa, then the legal process for claiming damages from a mediator would be an action based in the law of delict. The law of delict prescribes that all five essential requirements for delictual liability must be proved for the plaintiff to succeed in procuring damages.

This is a heavy legal burden for a party to mediation to bear. The plaintiff must show that harm was caused by the mediator; that there was a causal connection between the conduct and the harm that the plaintiff suffered; and that there was fault or blameworthiness on the part of the mediator.[477] The plaintiff must be able to prove (amongst other things) that the conduct of the mediator was wrongful, either intentionally or negligently. The negligence test developed in *Kruger v Coetzee*[478] would apply, and the plaintiff must be able to prove that the mediator could foresee the reasonable possibility of his conduct injuring another (the plaintiff or the plaintiff's property) and causing her patrimonial loss; that the mediator should have taken reasonable steps to guard against such occurrence; and/or that the mediator failed to take such steps. It is argued that the degree of skill and diligence required of the mediator should be equal to that of a professional in a similar branch to which the mediator belongs.[479] The test for negligence would therefore be that of a 'reasonable expert' not that of a 'reasonable man'.

Another route for holding a mediator liable and claiming damages would be through a claim for breach of the contract of mandate, where there was perhaps not a specific agreement to mediate the contract.[480] The contract of mandate is described as a consensual contract

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[475] ibid 67.

[476] ibid.

[477] JR Midgley, *The Law of South Africa*, vol 15 (3rd edn, LexisNexis SA 2015) <https://www.lexisnexis.co.za/lawsa> accessed 3 September 2020.

[478] *Kruger v Coetzee* 1966 (2) SA 428 (A).

[479] Levy and Mowatt (n 472) 68.

[480] JG Mowatt and C Schembri, 'Aspects of the Contractual and Delictual Liability of a Mediator' (1996) 113 South African Law Journal 672, 675.

between one party, the mandator, and another, the mandatary, in terms of which the mandatary undertakes to perform a mandate or commission for the mandator.[481] Payment of a reward or remuneration is not an essential element of the contract but can be included as a commission or fee.[482] Mowatt and Schembri state that under the terms of a mandatory contract a mediator must act as the facilitator of the resolution of the dispute between the parties. In their performance of this mandate, the mediator must fulfil several duties, which include exercising care and diligence, imparting information, advising, and acting in good faith.[483] Should a mediator not perform any of these obligations, this amounts to a breach of contract, and exposes the mediator to the usual remedies that flow from such a breach.[484]
A savvy mediator, in an attempt to bypass liability, may consider inserting a limited liability clause into the mandate contract. What then is the effect of mediators inserting a limited liability clause into agreements to mediate? In terms of general contract law, parties may not contract out of liability for fraud or gross negligence,[485] but the law does allow for parties to insert exemption clauses into their contracts that limit liability in the event of a defective performance in relation to an obligation.[486] Thus it seems that a mediator may contract out of liability or out of the negligent non-performance of her duties, or her lack of skill.[487] Mowatt and Schembri state as follows:

> The extent of the mediator's liability will therefore be defined by nature of the contract between him and his clients, and his liability on breach of that contract will depend on the nature and wording of any exemption clauses in the contract. It is possible for the mediator to escape altogether from contractual liability for pure economic loss caused to his clients by the negligent performance of his duties, provided that the exemption clauses are appropriately worded.[488]

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[481] DH van Zyl, 'Mandate', in *The Law of South Africa*, vol 28(1) (3rd edn, LexisNexis SA 2020).

[482] ibid.

[483] Mowatt and Schembri (n 480) 676.

[484] ibid 677.

[485] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 21.

[486] Mowatt and Schembri (n 480) 678.

[487] ibid. The authors also cite *Central South African Railways v Adlington & Co* 1906 TS 964 and *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) at 419C–E.

[488] ibid.

Such a view may have been correct when the authors penned their article in 1996, but since then, as noted above, contract law has developed in line with the South African Constitution, which espouses certain values and principles. It is submitted that any contract containing an exemption clause which attempts to limit the liability of a mediator would have to be considered against the values enshrined in the Constitution and the subsequent case law. Any exemption clause, however well-worded, would need to be tested against the standards of public policy and it would need to be determined whether such an exemption would detract from achieving fairness, justice and equity. The issue of a mediation exception clause has not yet been considered by a court, and it would be imprudent for me to suggest how a court might deal with a mediator's liability, as several variables need to be considered in each mediation matter.

In terms of liability, there might be greater protection for parties who deal with mediators who are also admitted as attorneys or advocates. Attorneys and advocates in South Africa are registered with the Legal Practice Council in terms of the Legal Practice Act 28 of 2014. The Law Society of South Africa ensures that attorneys and advocates provide excellent legal services to the community in an ethical, professional, considerate and competent manner.[489]

Looking abroad, in 1991, a Pennsylvanian court held that lawyers who broker settlements are exempt from malpractice suits following the settlement of a lawsuit, absent an allegation of fraud to foster the negotiation and settlement process.[490] However, this protection for attorneys has eroded over time, especially in situations where the settlement was concluded without the client's participation or where a rule of law was misstated to the client.[491] The chief problem is that there is no control over mediators (who are not also attorneys), such as a governing body, which effectively means that they may enter into any contractual arrangement that they wish with their clients. It is tempting to conclude that statutory intervention is desirable to protect the public and to control mediators, but this may go against the core definition of mediation, if the process is heavily legislated.[492]

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[489] 'LSSA – Representing the Attorneys Profession in South Africa' <https://www.lssa.org.za/> accessed 7 September 2020.

[490] *Muhammad v Strassburger, McKenna, Messer, Shilobod & Gutnick* 587 A2d 1346 (1991).

[491] *McGuire v Russo* (2017) LEXIS 1307 (Pa).

[492] Mowatt and Schembri (n 480) 683.

Essentially, South African case law allows a dissatisfied party to approach a court for the judicial review of a settlement agreement, if they allege that the mediator behaved inappropriately or negligently. This review of the case law shows us how one of the variables that we identify early can be finesses into several further categories. This jurisprudence shows that the court will intervene if there is an allegation of impropriety on the part of the mediator. At present, South African law does not grant mediators any immunity and does not impose strict liability for the conduct of mediators. Any attempt to impose liability on a delinquent mediator must be channelled through the courts as a delict, which requires a burdensome onus of proof. It is submitted that the only viable option for a dissatisfied party is to approach the court for judicial review. A dissatisfied party should also not expect any monetary compensation.

4.5 The importance of clear legislation

After reviewing the magistrates' court Mediation Rules which encourages voluntary mediation, I concluded that the Mediation Rules were inadequate and unclear. What is clear from the section above on the CCMA is that the CCMA, is underpinned by clear and comprehensive legislation that receives support from the courts. This support provides that most labour disputes are mandatorily referred to the CCMA, before a further step in the dispute resolution process can be taken. The LRA, unlike its lesser cousin, the Mediation Rules of the Magistrates' Courts, is a well-structured source of mediation protocol.[493] The LRA is looked on favourably by many academics,[494] and having mediation structured by the LRA provides legitimacy, which although welcome, may stifle the flexibility or creativity of the mediation processes. Prescribing a mediation process might have unwelcome consequences of constraint. Mediation, when pursued under the authority of a body such as the CCMA, must adhere to certain rules, procedures and conduct. In effect, mandated mediation attempts to structure mediation in a way that rule-makers regard as expedient or practical. As noted above, the appeal of mediation is the customisation and autonomy that are available to the disputants in the process. What effective does legislation have on mediation?

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[493] John Brand, 'CCMA: Achievements and Challenges - Lessons from the First Three Years' (2000) 21 Industrial Law Journal 77, 79.

[494] Bob Hepple, 'Can Collective Labour Law Transplants Work - The South African Example' (1999) 20 Industrial Law Journal 1, 1.

Such 'legislating' of the mediation process removes the individualisation of the process and perhaps represents a move away from how mediation should work.[495] For instance, the rules and procedures of a CCMA mediation process may work well for a middle-management banker disputing an unfair labour practice at her workplace. The middle-management banker will easily understand the rules of meetings and the tone of the discussions.[496] The same may not be true of a less sophisticated employee who works as a general cleaner, may not be as well-educated as others at the mediation table, and may not understand all the CCMA rules and procedures.[497] This hypothetical employee faces a double burden: understanding and acclimatising to formal mediation rules that he had no role in creating and applying his mind to achieving a fair resolution. In such a situation, the allegedly straightforward and accessible nature of mediation is absent.

Furthermore, mediation that is closely linked to the justice system takes on the institutionalised and adversarial legal culture of the courtroom.[498] Mediation that takes place in a formal setting may in fact turn into a 'lesser' courtroom experience, with both parties not willing to share options, move from positions or find commonality. This is not ideal as the main goal of mediation is to approach dispute resolution in a collaborative manner; with institutionalised mediation, disputants will often enter CCMA mediation with the goal of 'winning'.[499] Disputants are *instructed* to attend at the CCMA, where they sit in a common reception area waiting for the commissioner to call their 'case' with manila case file in hand; the atmosphere is not unlike that of the corridor of a court.[500] From there the parties are called and the process mirrors that of a clerk of the court calling parties' names from the court roll at a magistrate's court; this gives the unmistakable feeling of sparring. It has been argued that mandatory mediation is the antithesis of mediation and that it denigrates the process, and can ultimately divest the mediation process of most, if not all, of its advantages.[501] Coercing

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[495] Alan Rycroft, 'What Should the Consquences Be of an Unreasonable Refusal to Participate in ADR Note' (2014) 131 South African Law Journal 778, 785.

[496] Hanneli Bendeman, 'An Analysis of the Problems of the Labour Dispute Resolution System in South Africa' (2006) 6 African Journal on Conflict Resolution 81, 82.

[497] Brand (n 493) 81.

[498] Paleker (n 25) 333.

[499] My own observations made during 2016 while auditing CCMA hearings at the Cape Town offices for academic research.

[500] Rycroft, 'What Should the Consquences Be of an Unreasonable Refusal to Participate in ADR Note' (n 495) 780.

[501] Vettori (n 11) 358.

participants into entering the mediation process may lead to parties being unwilling to participate in good faith and to co-operate in reaching a settlement.[502] Vettori states:

> The result hereof is precisely the opposite of what proponents of mediation attribute to the process of mediation, namely, that mediation is an effective tool in the attainment of access to justice. The result is an extra, obligatory and futile step in the long journey of access to justice, imposing on the parties extra time delays and extra costs. In such a situation, mandatory mediation may be described as an obstacle to access to justice.[503]

Mandatory mediation, by its simple definition, loses sight of the underlying fundamentals of mediation: a process entered into voluntarily.[504] Quek states that any attempt to impose a formal and involuntary process on a party may undermine the reason for mediation, and therefore mandatory mediation should be used only for compelling reasons.[505] If we accept that self-determination, and thus consent, are paramount to the mediations process (and a variable), this leaves mandatory mediation in a grey area, at risk of review. This underlying risk will influence how the labour court deals with a request for review of a legal settlement agreement derived at the CCMA. This core research question is considered analytical by a comparison and contrast of various judgements and using the principles of *stare decisis*, to sort and refine the most salient case law.

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[502] ibid. See also Roselle L Wissler, 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts Alternative Dispute Resolution Symposium Issue' (1997) 33 Willamette Law Review 565, 581, where the author shows that mandatory mediation resulted in lower rates of settlement than where mediation was voluntarily undertaken by the parties.

[503] Vettori relies on *Halsey v Milton Keynes General NHS Trust* (2004) EWCA (Civ) 579 para 9, where the court held: 'It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is quite another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on the right of access to the courts.'

[504] Quek (n 125) 481.

[505] ibid.

Chapter 5 The review of labour law settlement agreements

5.1 Introduction

The focus of mediation has always been settlement,[506] and successful mediation should result in an agreement or the abandonment of a complaint or grievance. The process of mediation allows for parties to settle their dispute or compromise. In some cases, however, a mediation process ending in settlement can be the subject of litigation.[507] The research question of this thesis can be phrased in another way: what happens when the parties have resolved their dispute, but something about the mediation causes doubt, and the signed settlement agreement now leads to a form of 'buyer's remorse'?[508] Genn writes, as referenced above, that settlement is not just about coming to a resolution, it is about coming to a fair settlement that is just.[509] This leaves us with the following question: how do we come to just and fair settlement? This question is not new, and courts have contemplated this issue in various forms through the case law.

I have identified, selected and collated cases which I believe are the most significant. I have analysed them in detail. This analysis of the case law will allow for the determination of the most important factors relating to the judicial review of a settlement. Through this analysis the variables of mediation created earlier will be placed in context of the case law. Such a contextual approach will give us insight into *how* decisions about review are made and *when* review is appropriate. Previously, academic literature sought to determine the extent of judicial review of CCMA matters,[510] but this chapter will go further by building on that work and examining the courts' judicial review of CCMA matters and other general settlement agreements in an innovative manner. In addition, this chapter will provide the basis upon which I will formulate and provide a new judicial review test and framework in the final chapter of this thesis.

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[506] S Vettori, 'Mandatory Mediation: An Obstacle to Access to Justice' (2015) 15 African Human Rights Law Journal 355–377.

[507] A Landman, 'Mediating in the Shadow of the Law' (2015) 36 ILJ 1766.

[508] A Rycroft, 'Judicial review of Mandatory Mediation Process in South Africa' (2016) 1(1) Mediation Theory and Practice 79, 80.

[509] Genn and Genn (n 69) 69.

[510] {Citation}

The purpose of this chapter is to analyse how the courts have dealt with their power of judicial review of settlement agreements. This chapter deals with the effect that legal processes can have on a settlement agreement. Additionally, the chapter will explore the legal rights of parties in a mediation and to what extent a settlement agreement affects such legal rights. This chapter goes to the core of the research question: when is it appropriate for a court to review a settlement agreement? The chapter, informed by the conceptualisation conducted in chapter 3, will argue that a clear and coherent framework must be formulated for the South African courts to use when considering the review of settlement agreements. Courts must employ a legal test to determine when to defer to a settlement agreement despite a request from a party to the settlement agreement for judicial review. It is submitted that such an assessment of case law has not been undertaken in this manner previously. In conclusion, this chapter will provide the basis upon which I will define the variables of mandatory mediation and formulate and provide a new judicial review test and framework in the final chapter of this thesis.

5.2 Categorising settlement agreements under the LRA

Determining when a judicial review should happen means asking questions which are adjacent to this central question to find a fuller explanation. At various points this work (in general and specifically this section) will ask ancillary questions to delve deeper than previous research has done. An interesting area for analysis is the granting of court orders in terms of settlement agreements and the process used by a court. This section of the thesis surveys case law, and then searches for, and categorises the case law by way variables that could trigger court intervention. In chapter 3 we looked at variables that might affect the outcome of a mediated settlement agreement. One aspect of interest is the intersectionality of private law, public law and the Constitution. What are the constitutional, statutory or policy rules in place that require or permit review?

5.2.1 Court orders, judicial review and their variables

For a mediated settlement agreement to be made into a court order, a court will typically conduct a review of the settlement agreement. The purpose of making a settlement agreement an order of court is to enforce compliance with the agreement. Like other agreements, the settlement agreement must therefore be unambiguous, unequivocal and not likely to lead to

any dispute.[511] The labour court will ordinarily also exercise a judicial review function during the application of s 158 of the LRA. This 'review function' conducted by the court is illuminating for our research question. This section looks specifically at settlement agreements dealing with employment matters under the LRA. Section 158(1)*(g)* of the LRA, read together with s 145, explicitly provides the Labour Court with the power to review the CCMA's performance, thus enabling the court to supervise the way in which the institution fulfils its statutory dispute resolution mandate. Based on this power, the Labour Court may, among other functions, set aside mediated agreements, by way of judicial review. The right of judicial review granted by the LRA is an expression of the common-law principle of administrative justice which is encompassed in the constitutional right to a fair trial, enshrined in s 33 of the Constitution. The judicial review of settlement agreements under the LRA is possible 'on any grounds that are permissible by law'. Neither s 158(1)*(g)* nor s 145 of the LRA indicate how the test for review should be carried out.[512] Paying heed to the principles of reasonableness, lawfulness and procedural fairness that generally govern administrative action,[513] the Labour Court retains extensive review powers. Below are the nominal variables that I have created from case law to enable us to index the jurisprudence:

5.2.1.1 Self-determination and consent

The Labour Court has exclusive jurisdiction to rectify or cancel a settlement agreement concluded at the CCMA. This power is given to the Labour Court by s 158(1)*(c)* of the LRA. Court intervention may be necessary where one of the initial reasons for a settlement agreement falls away, but other reasons remain. In *Public Servants Association of SA on behalf of Members v Gwanya NO and Another*[514] the employees and the employer had entered into a settlement agreement which provided for the employees to be paid an allowance during periods of increased workload. The settlement agreement was made an order of court. After a few years, the employer gave notice to the employees of its intention to stop the allowance scheme. The employees approached the court for an order stating that

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[511] *SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-Time Employees* (2014) 35 ILJ 455 (LAC) para 21.

[512] In *Sidumo v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) the court reviewed an arbitration award under s 145 of the LRA and established a test for reasonableness, fairness and equity of arbitrators.

[513] Administrative action is normally associated with public law.

[514] (2015) 36 ILJ 1275 (LAC).

the employer was in breach of the settlement agreement (which had been made an order of court). The court held the following:

> Where the court is approached to make a contract between the parties an order of court, it must not readily do so even if the parties desire that the agreement be made an order of court because the court should not be ... a recorder of contractual terms or a registry of duties and obligations agreed to by the parties involved in litigation. The present matter illustrates the dangers of simply making an agreement an order of court. The agreement deals with how the parties would address a dispute that exists between them. It is a contract between the parties. Making that an order of court does not give the contract the status of a court order. All it does is set out or should have set out the basis upon which legal proceedings were terminated.[515]

What we can ascertain form this judgment is the hope of the court that parties make their own contract imbued with self-determination and by giving the required consent. The court held that the original consent to the settlement agreement had fallen away as one of the contractual provisions of the settlement agreement had become void. Addressing the court's role in contract making, the court emphasised that the basic principles of contract law must be adhered to, together with the constitutional values of fair labour practices. In this case consent and agreement had been withdrawn as the provisions of the settlement changed unilaterally by one of the parties.

5.2.1.2 Procedural fairness

A basket of variables, procedural fairness, is underpinned by comprehensive legislature, rules, public policy and the Constitution. The labour court frames much of the CCMA mediation process with procedural fairness. Relying on fair process, it is hoped that a streamlined dispute resolution will be achieved, that is easy to understand and clear, avoid future disputes. These cases show us how the various ways a court can activate procedural fairness variables, which can trigger the need for judicial review. The way the court goes about determining whether such a variable exists is interesting for this research. Further, such

[515] At paras 28 and 29.

an examination of procedural fairness in settlement agreements, would allow us to determine the ways in which a court judicially reviews a settlement agreement.

Vagueness

The Labour Court, it seems, does not hesitate to intervene where a settlement agreement is vague or lacks essential details or where the settlement agreement has no useful purpose. In *Public Servants Association of SA on behalf of Members v National Health Laboratory Service*[516] the employees approached the court to make a settlement agreement, which stipulated payment for overtime worked, an order of court. The court refused to grant an order in terms of s 158(1)*(c)* because no amounts were specified for payment, the sum was not qualified, and there was no clear method to verify the amounts. The court went on to state that it was not inclined to grant court orders where settlement agreements did not prevent unnecessary ligation or could not be enforced. This case shows us that in terms of a mediated settlement agreement, a court will expect a certain level of structure and detail (such a level of detail may have an impact on confidentiality) before it gives its endorsement.

Non-compliance with a settlement agreement

A party may ask for his settlement agreement to be made a court order, where non-compliance with the settlement agreement has become an issue. This party must show the court that the settlement agreement obligations have not been complied with. This is especially important where one party may face imprisonment due to contempt of court. In *Mathosi and Others v Kintetsu World Express (Pty) Ltd and Another*[517] the court held that by applying the relevant test for a dispute of fact[518] the court could not exercise its discretion to make the settlement agreement an order of court as no proper evidence had been led to show a failure to comply with a settlement agreement. The court held that an order that was unclear and ambiguous meant that a future dispute could arise, and this defeated the very purpose for making it a court order. Accordingly, the court held that such an order is not enforceable or executable.

Private deals and formalities

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[516] (2007) 28 ILJ 930 (LC).

[517] (2008) 29 ILJ 2785 (LC).

[518] See generally *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

The LRA governs by way of statue and institutions such as the CCMA determine how and when dispute resolution should take place. But what is the situation for parties who wish to bypass the LRA and conduct a more flexible, less codified ADR process? In other words, what do we do about private settlement agreements that deal with an employment relationship? And can any settlement agreement be made a court order to ensure that the parties carry out their obligations? In *Harrisawak v La Farge (SA)*[519] Pillay J had to decide whether an oral settlement agreement entered into between the parties, after an unsuccessful CCMA conciliation (without the assistance of the CCMA) but before arbitration, could be made an order of court. The court held as follows:

> [Section] 158(1)(c) is restrictive and not justified by the use of the word 'any' before the word 'settlement' in the section. Furthermore, the settlement agreement relates to the employment relationship. The stated purpose of the LRA is to provide effective dispute resolution in labour disputes. That includes the provision of services by personnel competent and qualified to resolve labour disputes. Moreover, the dispute at the time the settlement agreement was entered into was pending as an arbitration before the CCMA.[520]

The court in this instance interpreted s 158(1)*(c)* restrictively and held that not *any* (not only oral) settlement agreement could be made an order of the Labour Court, and that the CCMA needs to intervene, as provided for by the LRA. The judgment seems to close the door on those wishing to enter into a settlement agreement to end their employment dispute and then approaching a court for ratification by court order. *Harrisawak, Bramley v Wilde t/a Ellis Alan Engineering and Another*[521] considered whether the amendment[522] to s 158 (1)*(c)* made any difference to the interpretation of what kind of agreement can fall under s 158 and whether the mechanisms of the LRA must be invoked. The court held that the legislature could never have intended that every 'settlement agreement', irrespective of its character, could be made an order of court. The court held as follows:

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[519] (2001) 22 ILJ 1395 (LC).

[520] At para 5.

[521] (2003) 24 ILJ 157 (LC).

[522] Section 158(1A) of the LRA. For the purposes of sub-s (1)*(c)*, a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of ss 22(4), 74(4) or 75(7).

> The legislature has, by way of the amendments in question, sought both to define and limit the type of settlement which might properly be made an order of court. Certain disputes are expressly excluded. For the rest, 'settlement agreements' which are so subject must have as their genesis disputes of a particular kind, namely disputes which a party 'has the right to refer to arbitration or the court' under the provisions of the Act.[523]

An emerging theme is that the court, while ostensibly promoting mediation, ADR and settlement agreements, seem to be less inclined to give a settlement agreement the same kind of gravitas that a court order has, as so not to encroach on the role of the court. A motif that becomes prevalent here, and in other areas of case law and jurisprudence, is the court's constant dimming of the power of mediation to settle a dispute, and the court, in various ways, does not provide adequate support to give mediated settlement agreements sufficient certainty. In *Molaba and Others v Emfuleni Local Municipality*[524] the court held that after the 2002 amendments to the LRA (considered by the court above), a settlement agreement concluded in the circumstances of *Harrisawak* could be made an arbitration award in terms of s 142A, because the dispute had been referred to the CCMA for conciliation, and it would not be necessary to ask the court to intervene by securing the enforceability of the agreement (by making it an order of court). The effect was to limit the application of that section to those instances where a party had validly referred a dispute to the Labour Court for adjudication and where the dispute had been settled at any time after such referral.[525] However, the court noted, this left open the question of whether the broad interpretation afforded to s 158(1)*(c)* by *Harrisawak* should survive the 2002 amendments. Van Niekerk J held the following in substantiating his narrow view in *Molaba*:

> The interpretation adopted in *Harrisawak* might suggest that this court ought to entertain an application in terms of s 158(1)(c) only because the agreement in question settles an employment related dispute. It implies that any party to the settlement of an employment related grievance, whatever its nature, is entitled to approach the court to

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[523] At para 161.

[524] (2009) 30 ILJ 2760 (LC).

[525] At para 16.

> have that settlement made an order. It would also entitle any party to a collective agreement to have that agreement made an order, thus blurring the line between a constitutive and a judicial act.[526]

In *Molaba* the court seems to have overlooked *Bramely* (where the matter could be arbitrated or referred to a court) and held that settlement agreements provided for by the LRA were to be limited to those agreements that were concluded *after* the dispute had been referred to the Labour Court for adjudication. The court held that a narrower interpretation of s 158(1)*(c)* was to limit its application to such instances where a party has validly referred a dispute to the dispute mechanism provided for by the LRA for adjudication and where the dispute, at any time after the referral, has been settled. An interpretation to this effect would preserve the integrity of s 142A. It would also, held the court, avoid all the difficulties, conceptual and practical, that the broad interpretation presented.[527]

The Labour Appeal Court has recently clarified the ambit of settlement agreements which may be made orders of court by addressing the question of settlement agreements in respect of disputes which had not been referred to the statutory conciliation mechanisms. In *Greeff v Consol Glass (Pty) Ltd*[528] the court stated that s 158(1)*(c)* must be read with s 158(1A) and cannot be intended to mean that it applies to *any* settlement agreement. The Labour Appeal Court provided some guidelines for when the Labour Court makes a settlement agreement an order of court in terms of s 158(1)*(c)*. The settlement agreement must:[529]

(i) be in writing;
(ii) be in settlement of a dispute (ie it must have as its genesis a dispute);
(iii) the dispute must be one that the party has a right to refer to arbitration, or to the Labour Court for adjudication, in terms of the LRA; and
(iv) the dispute must not be of the kind that a party is only entitled to refer to arbitration.

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[526] At para 9.

[527] See also *Dell v HPD Construction* (2010) 31 ILJ 1871 (LC) and *Tsotetsi v Stallion Security (Pty) Ltd* (2009) 30 ILJ 2802 (LC).

[528] (2013) 34 ILJ 2385 (LAC). See also *Fleet Africa (Pty) Ltd v Nijs* (2017) 38 ILJ 1059 (LAC).

[529] At para 19.

5.2.1.3 The role of the court

The LRA provides a wide ambit for the role of the court in reviewing settlement agreements. The court's role is to clarify and elucidate matters. In some cases, both parties cannot agree about the meaning of the contents of a settlement agreement and approach the court for intervention. This happened in *SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-time Employees*. The parties could not agree on the interpretation of the terms in the settlement agreement and asked the court for clarification. The court held that where such discord exists it was not permissible for the court to make such a settlement agreement an order of court. The court also confirmed that it was not competent for quasi-judicial bodies (such as the CCMA) to interpret a settlement agreement that has been made an order of court. The court in SA Post Office also issued a warning about making a settlement agreement an order of court with a mechanical 'copy and paste' approach, because an agreement may contain conditions that must be fulfilled for an event to take place, or an agreement may be ambiguous or uncertain, requiring extraneous evidence to ascertain the agreed terms and give effect to the terms of the agreement. *In Public Servants Association of SA on behalf of Members v Gwanya NO and Anothe*r, the court took a different view to that taken by Wagley J in *SA Post Office* and stated that the employees should have approached the CCMA to clarify a settlement agreement that was made a court order:

The appellant (employees) should first have referred the dispute either to a council or the commission for conciliation and, if it remained unresolved, to the council or the commission for arbitration. The appellant (employees) did not follow s 24(8) of the LRA but approached the Labour Court for a contempt of court order, alternatively for an order that the court order had been breached, as well as declaratory relief.

The rhetoric of the court leads to a confusing situation for those seeking clarification of a settlement agreement made an order of court as the Labour Appeal Court has not applied s 24(8) of the LRA in a uniform manner. It is submitted that a further, nuanced judgment is needed on this section to ensure clarity and would add much to the certainty of the process. This case also shows us the process that parties must embark on for an acceptable settlement agreement. The thinking of the court suggests way forward for parties wishing to enter into a settlement agreement would be to first approach the CCMA to meet the requirements of this judgment. Such an approach would be quicker and more cost-effective than entering into a settlement agreement after Labour Court litigation. Furthermore, as the rules of legal

precedent provide, the latest judgments of the two courts in the same jurisdiction must be followed. In this case, the CCMA must be approached in the first instance.

A duty of the court is to review an agreement where the circumstances are out of the ordinary or unique. In *Ngwenya v Premier of KwaZulu-Natal*[530] an employee was suspended for six months and disputed the fairness of his suspension at the CCMA. A settlement agreement was entered into at the CCMA and the employee resumed his duties. The next day the employee was suspended again. The employee approached the Labour Court urgently, asking for the settlement agreement to be made an order of court. The court held that ordinarily it would only intervene if there were just reasons to do so without the employee exhausting all other remedies. The court stated that the employer was not acting in good faith in entering into this settlement agreement and held as follows:

> The purpose was to push the applicant around. Such action is bordering on fraud. I have come to this conclusion on the basis that the respondent well knew there was no intention of honouring the agreement and yet led the applicant to believe the matter was settled.[531]

The court avoided asserting that the actions by one of the parties bordered on fraud. But the above case above is interesting because this is the first time (in this work) that we see the court referring to 'good faith'. The intersectionality between 'good faith', 'public policy' and 'ubuntu' will be explored further in this research and will become a recurring theme. Despite the guidelines provided by *Greeff,* it can be noted from the above evaluation of Labour Court proceedings that judicial review can be obscure and intricately complex, which may lead to ambiguity in its application. One is left with the impression that a judicial review test of labour settlement agreements needs to be standardised. It is submitted that the guidelines from *Greeff* can be augmented, by considering all the principles distilled from preceding Labour Court cases. Some of the principles are from the Labour Court, which is of lesser standing than the Labour Appeal Court, but this does not detract from their applicability. I have distilled ten guidelines from the Labour Courts to assist with the review of settlement agreements by the courts:

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[530] (2001) 22 ILJ 1667 (LC).

[531] At para 30.

1. The Labour Court has exclusive jurisdiction to cancel or rectify settlement agreements.
2. The contractual principles used by the settlement agreement must align with the constitutionally protected mandates for fair labour practices.
3. For a settlement agreement to be made an order of court, it cannot be vague or make unqualified claims.
4. The agreement must be in writing.
5. There must be a proper, holistic interpretation of the settlement agreement and a piecemeal approach will not be acceptable.
6. There must be a genuine, good faith intention to honour the settlement agreement.
7. Non-compliance with a court order must be sufficiently proved by an applicant where contempt of court is prayed for.
8. The CCMA is competent, as a first port of call, to interpret a settlement agreement that has been made an order of court.
9. The CCMA must be used to facilitate settlement agreements before the court will consider making a settlement agreement an order of court.
10. Only a settlement agreement, in writing, where the dispute has been referred to court first and subsequently settled out of court, can be made an order of court.

By analysing the case law and then curating these guidelines, we see that the Labour Court has used a set of principles that is like those used in cases dealing with public policy, for example *Barkhuizen.*[532] Put differently, the Labour Court has used the ideology and framework of contractual fairness and public policy while not stating that it is implicitly doing so. Such a confidence is acceptable. The Labour Court can do so because there is a strong imperative for fair labour practices and, in turn, settlement agreements, mandated by the Constitution.

The main research question of this thesis is this: When it is appropriate for a court to review a settlement agreement? In answering this question, I have examined some ancillary judgments to gauge how they determine fairness and reasonableness in terms of a settlement agreement

[532] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

that is alleged to be flawed. In the section above, I examined how courts make a settlement agreement an order of court and took note of the rubric that the court uses to judge whether a settlement agreement is fair. I can now delve deeper by looking at settlement agreements that are affected by variables such as bargaining power, undue influence, duress and misrepresentation. Such an interrogation will allow me to move closer to answering the core research question; and perhaps answer another question, along the way: When is the conduct of parties during a mediation of such a nature that a settlement agreement should be reviewed? This section considers this question. Hard bargaining is not the same as being unethical, nor is it the equivalent of duress. The law distinguishes between hard bargaining and unethical behaviour on the part of the legal practitioner. Hard bargaining could be caused by an imbalance in bargaining power,[533] and an imbalance of bargaining power can be the result of one party being unrepresented, lacking quality representation at the bargaining table, or simply having a legally weak case.[534]

Duress and undue influence

The question that emerges is whether a lack of representation for just one of the parties places an inappropriate amount of pressure on the party. Furthermore, does this pressure, if undue, trigger a need for review? In *Sejane v CCMA and Others*[535] the court considered a settlement agreement between an illiterate employee and a large corporation, represented by a human resources manager and an attorney. The employee sought to set aside the agreement as null and void and claimed that the CCMA commissioner who presided over the conciliation proceedings forced him to sign the agreement. The employee alleged further that there was no consensus and that he had been prejudiced as he was not legally represented. The court agreed with his assertions. In its judgment, the court was scathing in its description of the actions of the commissioner and held that the commissioner was derelict in her duties for not properly considering the interests of the employee. As a result, the court, after conducting a judicial review of the settlement agreement, set the agreement aside. The court did not go into much detail about the legal principles for setting aside the agreement due to an imbalance of

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[533] *Workers Life Direct (Pty) Ltd v Goodford and Another* (unreported, Gauteng Division, Case no: 51810/2014) para 15. See also *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA).

[534] Kershwyn Bassuday, 'Dispute Resolution Mechanisms in Employment Contracts – When Should the Labour Court Intervene? *SA Football Players Union & Others v Free State Stars Football Club (Pty) Ltd* (2017) 38 ILJ 1111 (LAC)' 2018 ILJ 97, 103.

[535] *Sejane v CCMA and Others* (J2789/99) [2001] ZALC (2 October 2001).

bargaining power; this is indeed unfortunate as it does not allow us to build a framework. But it is clear from this case that the court will not hesitate to set aside a settlement agreement if it regards one party as being in a weaker bargaining position or without legal representation. It is submitted that such an approach may be reasonable where a party is in a weaker bargaining position; however, a mere lack of legal representation cannot be used as a reason to set aside a settlement agreement.

According to Christie,[536] duress involves threatening a person with the aim of making that person enter into a contract without being able to show his own volition or exercise his own choice. To prove that a contract was entered into without consent, and under duress, the innocent party must prove the following:

1. a threat of considerable evil or harm to him or his family;
2. actual violence or reasonable fear;
3. an imminent threat of evil;
4. the threat was *contra bonos mores* and unlawful;
5. the threat must have induced the innocent party to contract.[537]

Duress is commonly defined as forcing a person to do something against their will, possibly with threats of violence.[538] Case law shows us how the courts address such circumstances. In *Kanku and Others v Grindrod Fuelogic*[539] the employees argued that they were forced to sign a settlement agreement and were locked in a boardroom until they acquiesced. The court held that duress was not necessarily a consequence of 'physical threat, such as locking the employees into a room and physically forcing them to sign an agreement' and could be more subtle and nuanced. In *Golin t/a Golin Engineering v Cloete*[540] the court stated the following with reference to settlement agreements and duress:

> When a party claims that there has been full and final settlement, the Court should recognise the settlement as a termination of the issues on the merits, once the Court

[536] RH Christie and G Bradfield, *Christie's Law of Contract in South Africa* (2016) 349.

[537] *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304–305.

[538] https://dictionary.cambridge.org/dictionary/english/duress.

[539] (C602/2014) [2017] ZALCCT at para 38. See also *Hendricks v Barnett* 1975 (1) SA 765 (N).

[540] (1996) 17 ILJ 930 (LCN).

> has, upon investigation of the settlement issue, been satisfied that there indeed was a settlement and that the settlement was voluntary, i.e. without duress or coercion, unequivocal and with full knowledge of its terms and implications as a full and final settlement of all the issues. The onus is on the party who relies on the settlement to prove that the alleged settlement complies with these requirements ....

Does the sophistication of a party have an impact on the settlement agreement? A high-ranking employee in *Ulster v Standard Bank of SA Ltd and Another*[541] alleged coercion during a settlement negotiation. The employee had worked for the bank for three decades, was dismissed for unsatisfactory performance, and referred the matter to the CCMA as an unfair dismissal. The parties entered into a settlement agreement in which the bank agreed to amend the employee's employment record to reflect resignation instead of dismissal, and the employee accepted an offer of one month's remuneration. The employee later approached the court to set aside the settlement agreement, citing duress. The employee submitted that she had been coerced into signing the settlement agreement by her own legal representative and in-house legal counsel for her union. The court confirmed its power to set aside unacceptable settlement agreements, but stated that the employee entered into the agreement with open eyes, fully aware of its consequences, and that she was bound by that agreement. We can surmise from this case that if a party claims to have entered a contract involuntarily because of undue influence, he bears the onus to prove, on a balance of probabilities, that the settlement agreement was not entered into voluntarily.

The crisp question before the court was whether the employee was coerced into signing the settlement agreement. The court considered various factors such as the employee's position as a bank manager and the length of her employment. The court found that at any time the employee could have rejected the bank's offer and it was inconceivable that the employee was not fully aware of what she was agreeing to. There was no duress but merely a party wishing to escape from a settlement agreement after suffering 'buyer's remorse'.[542] The court accordingly dismissed the application. *Ulster* shows us that the court is willing to review a settlement agreement because of duress if:

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[541] (2013) 34 ILJ 2343 (LC). See also *H & A Manufacturing (Pty) Ltd v Pender-Smith and Others* (2013) 34 ILJ 2581 (LC) and *Lawrie v Nursing Response CC and Others* [2016] ZAECGHC 30.

[542] Rycroft (n 236) 80.

1. The settlement agreement contains matters which could have been referred to the CCMA or the Labour Court;
2. The settlement agreement has been made an order under the LRA;
3. A legal principle exists which allows for the settlement agreement to be set aside, such as duress; and
4. On a balance of probabilities, a factor exists that tainted the settlement agreement.

The hybrid approach of the court is clear here. The court will use the LRA to found jurisdiction (that the settlement agreement falls under the scope of employment matters) and to determine the assertion of a claim, but will use general contractual principles to determine if the settlement agreement should be set aside.

Misrepresentation

Misrepresentation has long been a factor that could taint a general commercial contract. What is the effect of alleged misrepresentation in a labour settlement agreement? In *Baise v Mianzo Asset Management (Pty) Ltd*[543] the court had to determine whether a settlement agreement was tainted by misrepresentation and thus void. Generally, we know that a contract tainted by misrepresentation lacks consensus and can be cancelled, with performance returned.[544] In this matter, an employee entered into a settlement agreement that terminated his employment and in terms of which he was paid a certain amount of money. The employee appealed to the court to have the agreement declared void due to misrepresentation on the part of the employer's representatives. The employee alleged that the managing director misrepresented that his position was to become redundant, thus inducing him to sign the settlement agreement, which ended his employment. The employee brought the application to the court in terms of s 158(1)*(a)*(iv) of the LRA, which provides that the Labour Court is empowered to make a declaratory order within its equitable jurisdiction in terms of the LRA. The Labour Appeal Court was unable to find what right in terms of the LRA can be invoked to sustain the claim that the agreement must be set aside and that it had jurisdiction. The court stated:

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[543] *Baise v Mianzo Asset Management (Pty) Ltd* (2019) 40 ILJ 1987 (LAC). See also *Baudach v United Tobacco Company* 2000 (4) SA 436 (A), where an employee was told that her position had been made redundant although this was not the case.

[544] DP Visser, 'Rethinking Unjustified Enrichment: A Perspective of the Competition between Contractual and Enrichment Remedies' 1992 Acta Juridica 203, 211.

> The Labour Court, without expressly saying so, treated the case as a contractual dispute. By so doing, in my view, it was generous, for otherwise the application should have been dismissed out of hand for incoherence. The incoherence is patent. Several questions arise. In the absence of expressly alleging that the Labour Court was to exercise civil jurisdiction pursuant to section 77(3) could the Labour Court properly do so? Is it appropriate for the Labour Court to peel away the husk of the allegations and deal with the real dispute, as is required of commissioners of the CCMA? Can such an approach be competent where unlike in the CCMA the parties before the Labour Court are required to plead?[545]

This quotation raises some interesting issues. Can the Labour Court be expected to deal with a civil matter if the employee has couched its appeal in terms of s 158? The court in *Baise* noted that the Labour Appeal Court was not precluded from entertaining claims of a civil matter if they were connected with the LRA in some way, and that the issues could be dealt with by the Labour Court, as it does share concurrent jurisdiction with the High Court.[546] In any event, the court concluded that the settlement agreement dealt with redundancy – to bring it squarely within the ambit of the court's jurisdiction of labour matters. The court examined all the affidavits which were submitted as pleadings and found that the wording of the settlement agreement was deliberately vague and that no mention was made of 'redundancy', 'retrenchment' or 'dismissal' – all terms most likely to trigger an inquiry under the LRA.[547] Rather, the parties chose the words 'termination' and 'settlement' to actively bypass the mechanisms of an unfair labour practice. The court held that '[t]he document, manifestly, is the product of negotiation not consultation'.[548] Nevertheless, the Labour Appeal Court adopted the court *a quo*'s stance and treated the matter as a civil claim.[549] Despite not expressly stating so, the court seemed to rely on s 77(3) of the Basic Conditions of Employment Act, which provides for civil claims.[550] By treating the matter as a civil one the

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[545] *Baise v Mianzo Asset Management (Pty) Ltd* (n 543) para 9.

[546] ibid.

[547] ibid para 15.

[548] ibid.

[549] ibid para 16.

[550] Section 77(3) of the Basic Conditions of Employment Act 75 of 1997 provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

court was free to determine whether the employer induced the appellant to conclude an agreement which, but for the misrepresentation, the appellant would not have concluded.[551]

In assessing the probability of a misrepresentation, the court looked at the correspondence between the employee and the employer and found that the communications between them proved that the idea of retrenchment or resignation was in the minds of both parties, and that the employee could not allege that he was misled about his job becoming redundant. The court found that there was no misrepresentation and that there was consensus. This judgment illustrates that a court will be willing to review a settlement agreement if it does not stray too far from its labour jurisdiction and starts edging into general contract law. Once the court has accepted this undertaking, it does seem to merely use the general contractual remedies for factors that may taint a contract, in this instance, misrepresentation. It goes further by infusing it with labour law jurisprudence. This case also shows us that there is a multilateral symbiotic relationship between general contractual principles and labour law and settlement agreements. This dynamic gives us the sense that using labour law principles to reform the rules around the review of settlement agreements is workable. However, what is missing from this judgment is any consideration of confidentiality or the freedom of parties to contract, and the sanctity of contract in terms of a settlement agreement and mediation characteristics. This case is a good example of a court being willing to review a contract stemming from a negotiation without considering confidentiality or privacy provisions.

Public policy

Another instance of alleged duress which highlights a public policy as a catalyst for judicial review occurred in *National Union of Metalworkers of South Africa and Another v Clear Creek Trading 167 (Pty) Ltd t/a Wireforce.*[552] One group of employees met with the company's labour officer, who also had security guards present in the room, and another group of employees met with an external labour facilitator in a different location. In both instances, the groups of employees were presented with settlement agreements and told that the company did not require their services any longer. The employees testified that they were coerced into signing the settlement agreements by the presence of the security guards who were unfamiliar to them (their uniform was different to that of the security guards who

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[551] *Baise v Mianzo Asset Management (Pty) Ltd* (n 309) para 11.

[552] (JS656/16) [2018] ZALCJHB 340 (12 October 2018).

manned the entrance to the company's premises). It was further alleged that the company's labour officer pointed at these security guards when the employees resisted signing the settlement agreements. Under these circumstances, the employees signed the settlement agreement. The employees approached the court to set aside these settlement agreements based on duress.

In determining whether the employees were bound by the settlement agreements, the court referred to the Constitutional Court's judgment in *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another*:[553]

> As against this, we must consider the importance of giving effect to agreements, solemnly concluded, by parties operating from the necessary position of approximate equality of bargaining power. Here, the power of the Labour Appeal Court's approach is obvious. What is at issue here is a powerful consideration of public policy – the need for parties to settle their disputes on terms agreeable to them. That need arises in their own interests, and the interests of the public. Here, the applicant had engaged in outright material deceit and misrepresentation. He himself, confronted with the misrepresentation in his curriculum vitae, confessed he had no defence. It was then that he entered into a final agreement to put a present dispute to bed. He did so full knowingly, with his eyes open to his own future interests. It may have been different if he had agreed to abjure recourse to the courts in future disputes. But here the dispute was hot and fresh, and present. *He agreed to part ways with Reckitt on terms that were final, and that protected him from further action by his employer – including the possibility of a disciplinary process that could wound his career irremediably. That finality included an agreement that the courts would not be involved. The parties would go their ways without more. The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound*.[554]

This quotation provides clear discourse from the Constitutional Court which evaluates the need for public policy to foster and protect settlement agreements. How a court exercises its

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[553] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another* (2016) 37 ILJ 2723 (CC).

[554] ibid para 22 [my emphasis].

function of judicial review and the level of intervention needed were also discussed in the case. The Constitutional Court stated *obiter*:

> When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.[555]

In its judgment, the Constitutional Court promotes the notions of certainty and finality. A court would be less inclined to offer judicial assistance where the party wishing to escape from the settlement agreement had initially entered into the settlement agreement in the hopes of escaping some further or present liability or repercussions. This is an important principle as it emanates from the Constitutional Court and must be accepted as good law.

The converse was true in *Wireforce* as the parties in the matter did not have equal bargaining power, as in *Gbenga-Oluwatoye*, and because the agreement was for the benefit of the party seeking to escape the consequences of his own conduct. In *Corns v Adelkloof Drankwinkel CC t/a Cellars Drankwinkel*[556] the court held as follows:

> I am unconvinced that there was any attempt to comply with the obligations placed upon an employer by section 189 of the Act. The applicant was told that her services had to be terminated on 15 December 2000. She heard about this for the first time on that day. Yet the document setting out her package is dated 11 December 2000, four days previously, and is titled 'Kennisgewing van aflegging' [notice of retrenchment]. She received no such notice, and she was taken to Mr Viljoen unprepared and unrepresented.[557]

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[555] ibid para 24.

[556] *Corns v Adelkloof Drankwinkel cc t/a Cellars Drankwinkel* (2002) 23 ILJ 2047 (LC).

[557] ibid para 13.

Public policy seems to suggest a requirement of reflection when a settlement agreement concerns retrenchment or termination of employment, and the court recognised this in *Bekker v Nationwide Airlines (Pty) Ltd*,[558] where it held that '[where] an agreement of this nature is reached as a form of settling a retrenchment, the agreement must be preceded by consultation'. The case law seems to suggest that employees should be given time to consider the settlement agreement and that the employer should facilitate some sort of consultation as envisioned by s 189 of the LRA. If this is absent, it seems that the court would be more inclined to offer the employee an escape from the settlement agreement.

In *Wireforce* the court found that the employees were unexpectedly called in and presented with the settlement agreement ready for signature. The court noted that this was an attempt by the employer to evade the provisions of the LRA and, specifically, the consultation requirements of s 189. The court found that the employees were coerced into signing the settlement agreements and set them aside.

How much reflection is needed to show there has not been undue influence? The courts will insist on substantial proof of undue influence before they will set aside a settlement agreement. In *Lutchman v Pep Stores and Another*[559] the employee had been employed for 11 years (and as a manager for some of those years) and had been charged with gross negligence for not banking cash timeously; the cash was ultimately lost due to an armed robbery at the store. The employee was dismissed, and she signed a settlement agreement at a CCMA conciliation. Later she sought to have the settlement agreement set aside on the grounds of undue influence. On the allegation of the undue influence, the court remarked:

> One has to be extremely gullible to believe this, particularly when her subsequent conduct is taken into account. For one, it is unbelievable that a person who had been with Pep Stores for 11 years, rising to the level of manager, could have been so pressured to sign a 'piece of paper' that she only discovers what it actually is at her home.[560]

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[558] 1998 (2) BLLR 139 (LC). See also *May v Demag* (2001) 22 ILJ 2019 (LC) paras 7–13.

[559] *Lutchman v Pep Stores and Others* (D 967/02) [2004] ZALC 6 (10 February 2004).

[560] ibid para 17.

The court dismissed the application as it found that the employee had pleaded guilty to gross negligence during the disciplinary hearing, and subsequently had not been able to persuade the court that she was denied the time to reflect upon the situation or that she had been under pressure or undue influence to accept the terms of the settlement agreement.

This section shows us that a competent court will interrogate and assess the claims of undue influence, duress, or misrepresentation through the lens of public policy and by utilising common-law contractual principles. This section shows us that there is scope for a multifaceted, reciprocal approach to be used in the judicial review of settlement agreements, and that we can draw from labour law jurisprudence as the latter has drawn previously from contract law.

Chapter 6 The judicial review of civil and commercial settlement agreements

6.1 Introduction

In the previous two chapters I carefully considered the status quo of mediation and settlement agreements as a stand-alone discourse. I have also considered the concept of the 'tainting variable'. I also carefully reviewed the position of mediation in South Africa. I found that South African labour and labour-related legislation affords mediated settlement agreements primacy. The lessons learnt from the CCMA and the labour courts will be used as a lens through which to view civil and commercial settlement agreements. This foundational knowledge, and the above classification of variables, will allow me to draw comparisons, make distinctions, and finally, offer recommendations on how the judicial review of mediated settlement agreements can be augmented for better practice. South African law does not suggest that a settlement agreement is anything other than a contract.[561] It is my understanding that the freedom of contract is an external principle from the legal system of mediation. Further, a valid settlement agreement, being a form of contract, must adhere to all the public policy and general contractual requirements such as consensus, certainty, legality and possibility of performance.[562] Does this then mean that settlement agreements are impacted in the same way as general contracts? The following sections seek to clarify this area of the law and shifts gears to consider the impact that public policy has on a judicial review process. It is submitted that such a clarification in needed in terms of external variables, such as legal principles (the freedom to contract), public policy and constitutional principles.

6.2 The effect of public policy on settlement agreements

In the course of this thesis, I have set about identifying, defining and explaining variables as they relate to settlement agreements. The hypothesis is that once variables have been identified in terms of a particular settlement agreement, one can then predict, to a certain extent, whether judicial review is appropriate in the circumstances. Public policy is a variable

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[561] Dale Hutchison and CJ Pretorius (eds), *The Law of Contract in South Africa* (3rd edn, Oxford University Press Southern Africa 2017) 28.

[562] CJ Nagel, *Business Law* (6th edn, LexisNexis SA 2019) 20.

that I have identified in terms of a mediated settlement agreements, generally, but specifically relating to voluntary mediated agreements.

By conducting a survey of the case law available, I will determine when a court considers public policy to be a variable upon which to initiate a judicial review.

6.2.1 A constitutional right

Public policy is a principle that underpins the legal framework in South Africa. Public policy is deeply rooted in South African jurisprudence by way of the Constitution and its underlying values.[563] For example, a court might review a contract on the grounds of public policy when the contract prevents parties from accessing justice. In terms of the Constitution, the courts must be accessible so that parties can refer a dispute for adjunction. Persons in South Africa have the right to access a court and to have their dispute resolved by using the law. It is not generally possible to contract out of this right, and any settlement agreement that provides that mediation is the sole alternative to litigation, and that further litigation is unavailable, would be unenforceable and against public policy.[564] The right of access to a court was discussed in *Chief Lesapo v North West Agricultural Bank and Another*[565] where the court held as follows:

> The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance.[566]

The above principles are provided for by s 34 of the Constitution, which guarantees the right to seek the assistance of the courts and provides that everyone has the right to have any

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[563] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 30.

[564] Ronán Feehily, 'Commercial Mediation Agreements and Enforcement in South Africa' (2016) 49 Comparative and International Law Journal of Southern Africa 305, 335.

[565] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

[566] ibid para 22.

dispute that can be resolved by the application of law decided in a fair public hearing before a court.[567] Section 34 provides for resolution by an independent and impartial tribunal or forum.[568] South African common law has always recognised the right of an aggrieved person to seek the assistance of a court of law, and the courts have long held that a term in a contract that deprives a party of the right to seek judicial redress is contrary to public policy. Such a right was outlined in the pre-constitutional era case of *Schierhout v Minister of Justice*[569] where the court held:

> If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good grounds for holding that such an undertaking is against the public law of the land.[570]

South African jurisprudence has provided clear guidance on the few instances where parties may be deprived of the right to seek judicial review. After the advent of democracy, the Constitutional Court had to consider the issue of enforcing contractual clauses and the intersecting s 34 rights in the 2007 case of *Barkhuizen v Napier*.[571] The matter concerned the constitutionality of a time-bar clause in an insurance contract, which prevented the insured party from instituting legal proceedings for a repudiated insurance claim. The applicant in the matter alleged that the time-bar clause was contrary to the provisions of s 34 of the Constitution. The court stated that s 34 not only reflected the foundational values that underlie constitutional order, but also constituted public policy.[572] In *Barkhuizen* the court held that public policy was deeply rooted in South African jurisprudence by way of the Constitution and its underlying values.[573] In its majority judgment, the court noted that public

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[567] Section 34 of the Constitution Act 108 of 1996 provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[568] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) paras 195–218.

[569] *Schierhout v Minister of Justice* 1926 AD 417.

[570] ibid 424.

[571] *Barkhuizen v Napier* (n 532).

[572] ibid para 33.

[573] ibid para 30.

policy imports the notions of fairness, justice and reasonableness from the Constitution.[574] Furthermore, the court expressed the need for simple justice between individuals as informed by the principles of *ubuntu*.[575] The origins of *ubuntu*, both natural and historical, are difficult to establish conclusively; however, there is enough consensus in the literature to show that *ubuntu* as a philosophy and a way of life is associated with many African societies.[576] The concept of *ubuntu* is not easy to define from a Western perspective, and some writers do not attempt strict definitions of the concept at all.[577] One literal translation of *ubuntu* states that a person can only be a person through others.[578] Mokgoro, writing about *ubuntu* and the law, states:

> It has also been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources ….[579]

Considering the effect of the time-bar clause, which limited judicial redress, the court held that public policy would sometimes tolerate such clauses, subject to considerations of reasonableness and fairness. The court stated further:

> What is also relevant in this regard is that the Constitution recognises that the right to seek judicial redress may be limited in certain circumstances where this is sanctioned by a law of general application in the first place, and where the limitation is reasonable and justifiable in the second. The Constitution thus recognises that there may be circumstances when it would be reasonable to limit the right to seek judicial redress. This too reflects public policy.[580]

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[574] ibid para 51.

[575] ibid.

[576] Gessler Muxe Nkondo, 'Ubuntu as Public Policy in South Africa: A Conceptual Framework' (2007) 2 International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity 88, 89.

[577] JY Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 1 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 2 <https://www.ajol.info/index.php/pelj/article/view/43567> accessed 11 August 2020.

[578] L Mbigi and J Maree, *Ubuntu: The Spirit of African Transformation Management* (Sigma Press 1995) 1–7.

[579] Mokgoro (n 577) 2.

[580] *Barkhuizen v Napier* (n 532) para 48.

It follows then that any settlement agreement must pass constitutional muster and not infringe the principle of access to justice or other principles of public policy. Further, it appears that any settlement agreement that attempts to limit judicial redress would be invalid, unless a court finds that enforcing such a clause is not contrary to public policy.[581] In approaching such a question, a court will need to balance the principle of freedom to contract and the need to ensure that contracting parties have access to the courts.[582] Such a consideration requires a methodology, and the Constitutional Court in *Barkhuizen* ultimately developed a two-stage test to determine whether a contractual clause is fair and aligned with public policy. The first stage is to consider whether the clause itself is unreasonable. If the clause is reasonable, the second stage is to consider whether it should be enforced in the light of the circumstances.[583] Despite the convenience of the two-stage *Barkhuizen* test, the courts have not always applied the law uniformly.

6.2.2 Divergent routes

The divergence between the contractual approach of the SCA and that of the Constitutional Court has been addressed by the latter court.[584] There has been a gradual move to circumvent this freedom of contract given to us by the SCA in *Brisley*, by way of public policy, to ensure fairness and reasonableness. In the relatively recent landmark case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[585] there was a shift away from the absolute enforcement of the *Shifren* principle, which in turn erodes some freedom to contract. In *Everfresh* the Constitutional Court interpreted s 39(2) of the Constitution to allow for the remedying of the law of contract where the objective normative values of dignity, freedom and equality are not met.[586] The court was not able to develop the common law so as to impose an obligation to negotiate in good faith,[587] due to a procedural issue, but stated in

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[581] Dale Hutchison, 'From Bona Fides to *Ubuntu*: The Quest for Fairness in the South African Law of Contract' 2019 Acta Juridica 99.

[582] *Barkhuizen v Napier* (n 532) para 55.

[583] ibid para 56.

[584] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (2020) (5) SA 247 (CC) [79].

[585] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

[586] ibid para 48.

[587] For a comparative jurisprudential review of the role of good faith, see *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (n 584) para 61.

passing that such a development would have been possible if argued in the correct manner.[588] In later cases, the courts stated that good faith is a principle of South African contract law; one such case is *Botha v Rich*,[589] where the Constitutional Court considered the disproportionate sanctions that might occur if unfair, unreasonable and unconstitutional contractual clauses are enforced. The court held that it was matter of public importance to determine whether the enforcement of a contractual cancellation clause is fair and constitutionally compliant.[590] The court in *Botha* did not revisit or revise the *Barkhuizen* test, and thus it remains the leading authority in our law on the role of equity in contract, as part of public policy considerations.

The above approach was recently confirmed by the Constitutional Court in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[591] and *AB and Another v Pridwin Preparatory School and Others.*[592] *Beadica* concerned the interpretation of lease and franchisee agreements between parties in a black economic empowerment deal. In *Beadica*, the Constitutional Court confirmed the proper constitutional approach to the judicial enforcement of contractual terms and, in particular, the public policy grounds upon which a court may refuse to enforce these terms. The Constitutional Court noted that the SCA, in previous judgments, had outlined what it considered the 'most important principles' governing the judicial control of contracts through the instrument of public policy, but the Constitutional Court wished to elucidate two principles further. The first is the principle that public policy demands that contracts freely and consciously entered into must be honoured.[593] The court, referring to past judgments, emphasised that the principle of *pacta sunt servanda* gives effect to the central constitutional values of freedom and dignity.[594] The court further recognised that, in general, public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda*, held the court, is thus not a relic of South Africa's pre-constitutional common law. It continues to play a crucial

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[588] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (n 585) para 26.

[589] *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC).

[590] ibid para 24.

[591] *Botha and Another v Rich NO and Others* (n 221).

[592] *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC).

[593] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (n 584) para 82.

[594] Bassuday (n 339).

role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.[595] On the issue of public policy lending itself to certain and enforceable contracts, the court held as follows:

> Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.[596]

The court held that the requirements of public policy were informed by a wide range of constitutional values and there simply was no basis for privileging *pacta sunt servanda* over other constitutional rights and values.[597] This led the court to the second principle: that the courts should use 'perceptive restraint'.[598] 'Perceptive restraint' has been a favoured approach by the SCA, and the Constitutional Court had previously clarified how this principle should be used. According to this principle, a court must exercise 'perceptive restraint' when approaching the task of invalidating, or refusing to enforce, contractual terms. The SCA has held that the power to invalidate a contract or not to enforce it must be used sparingly, and only in the clearest of cases.

It was 'inescapable', stated the Constitutional Court, that the only inference that can be drawn is that there were no circumstances that prevented the applicants from complying with the terms of the renewal clauses in the leases. In fact, the clauses were favourable to the applicants. The applicants simply neglected to comply with the clauses in circumstances where they could have complied with them. The requirements of public policy are informed by a wide range of constitutional values, and when several constitutional rights and values are

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[595] ibid para 83.

[596] ibid para 84.

[597] ibid para 87.

[598] ibid para 88.

concerned, a careful balancing exercise is required to determine whether the enforcement of contractual terms would be contrary to public policy in the circumstances.[599]

6.2.3 A balancing act

Such a balancing exercise was conducted in *Pridwin*, a judgment handed down on the same day as *Beadica*, where the Constitutional Court had to determine whether a termination clause in a contract with a private school was unconstitutional, against public policy and unenforceable to the extent that it did not allow for fair procedure and the appropriate consideration of the welfare of the children concerned. The court in *Pridwin* held that it was in the interests of justice to examine the termination clause, even though the children in question had moved to a different school by the time the matter reached the court. Brushing away mootness, the court held that the impact of a judgment dealing with these clauses would have a far-reaching effect, especially for those school-going children[600] who are female and black.[601] The court, in deciding to review such a contractual clause, took a forward-thinking and practical view of the well-being of other individuals who might find themselves in similar situation at a future date. Such anticipation of future disputants will have the effect of minimising disputes yet to occur and will also protect the marginalised in society, presumably those with lesser bargaining power. The Constitutional Court held:

> What public policy is, and whether a term in a contract is contrary to public policy, must now be determined by reference to these values. This leaves space for enforcing agreed bargains (pacta sunt servanda), but at the same time allows courts to decline to enforce particular contractual terms that are in conflict with public policy, as informed by constitutional values, even though the parties may have consented to them.[602]

The court held that there was nothing unfair or intrinsically wrong with the termination clause and there was no suggestion that it was not brought to the attention of the parties, nor that one term's notice is an unreasonably short period of time. The contract was freely and

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[599] ibid para 87.

[600] *AB and Another v Pridwin Preparatory School and Others* (n 592) para 56.

[601] Interestingly, in *Beadica*, although the agreements were connected to a black economic empowerment deal, this did not sway the court to find in favour of the applicants.

[602] *AB and Another v Pridwin Preparatory School and Others* (n 592) para 61.

voluntarily entered into between persons of equal bargaining power and it could not be said to fall short of the *Barkhuizen* standard.[603] The court stated that the problem was not with the terms of the contract, but the effect that enforcement would have on the best interests of the child, as entrenched in s 28(2) of the Constitution, and the right to basic education, as protected by s 29(1)*(a)* of the Constitution.[604] The crucial issue was whether independent schools, as private entities, assume constitutional duties and obligations that limit the free exercise of contractual rights by providing education to children. The Constitutional Court reviewed the reasoning of the SCA, which held that since the school was a private entity, it had the freedom to enter and terminate any contract according to its terms and interests; in addition, there was no duty to be heard in terms of administrative law.[605] Furthermore, any countenance that there was a duty to hold a hearing before the cancellation of the contract was incorrect, and such a duty would lead to absurd results.[606]

6.2.4 Contracts of a peculiar nature

The Constitutional Court pointed out that the SCA's finding failed to consider contracts of a peculiar nature, which seek to regulate the fundamental educational rights of children under the Constitution. The court noted that such contracts cannot be equated with standard commercial contracts such as a lease or a mediated settlement agreement.[607] At times, this thesis has noted the similarities between a settlement agreement and a general contract. However, we know that the application and status of the settlement agreement is more nuanced, and we can identify with the court when it speaks of 'contracts of a peculiar nature'.

The direct effect of a contract, or indeed a settlement agreement, that has an adverse impact on a child's right to basic education under the Constitution will not be enforced or upheld.[608] In *Pridwin* the court held that peculiar contracts that regulate the fundamental educational rights of children must be properly executed. In practice, any such contract that might

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[603] ibid para 65.

[604] ibid para 68.

[605] ibid para 62.

[606] *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA) para 34.

[607] *AB and Another v Pridwin Preparatory School and Others* (n 592) para 63.

[608] ibid para 91.

infringe upon a child's right to basic education must offer the parties an opportunity to express their view on the matter and provide appropriate reasons.[609]

Is there a difference between provisions that govern commercial contracts and those that relate to mediating parties who seek to reach a settlement agreement? If so, what then is the impact of *Pridwin* on settlement agreements? In this research, I take the view that mediated settlement agreements are contracts of a peculiar nature and the standard benchmark rules that we have used in the past do not fit settlement agreements as well as might be hoped. Contracts of a peculiar nature that have adverse effects on the fundamental educational rights of children could be extended to include settlement agreements with confidentiality clauses derived from mediation. It is submitted that a settlement agreement emanating from a mediation agreement is peculiar in our law and cannot be said to have the same status as a lease or purchase agreement, since the settlement agreement is often derived from a place of conflict, distrust and animosity.

6.3 Robust settlement agreements

Could the principle of public policy be used to sponsor the enforcement of settlement agreements? Can the mitigation of future disputes be a reasonable public policy argument used to allow robust clauses in mediated settlement agreements? The need for certainty, as upheld by the court in *Brisley*, may justify the use of iron-clad settlement agreements. Having a robust settlement agreement in place finalises a dispute and prevents participants from asking for a 'second bite at the apple'.

But what of tainted settlement agreements? Would the South African courts permit serious allegations of fraud or duress to be concealed by a settlement agreement clause? Landman states, with reference to *Brisley*, that despite the contractual freedom that the common law provides, constitutional values and public policy would prevail, and a court would not uphold a settlement agreement containing a clause that conflicts with this.

It is further submitted then that certain contracts, which the court describes as those of a peculiar nature, are held in less esteem contractually. Surely, such contracts can never be seen

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[609] ibid para 93.

to display the clarity of regular commercial contracts, and thus it would be hard to imagine a court regarding a settlement agreement with such reverence and declining a judicial review, especially where, as in the instance of *Pridwin*, the best interests of a child are concerned. Perhaps an alternative approach is that the mediation itself was the fair procedural process and provided the opportunity for the parties to be heard and make representations? This remains unclear and unsettled in South African law. What is certain, when the above judgments are analysed, is that the freedom to contract is limited and restrained by the principles of public policy, even in the case of confidentiality clauses in settlement agreements. Thus, a court may set aside a clause in a settlement agreement that offends public policy, especially where the clause or settlement agreement intends to prevent court access, to limit equity, or to operate in bad faith.

6.4 Freedom to contract and settlement agreements

Generally, it has been suggested that the courts[610] have used common contractual law principles when dealing with commercial settlement agreements;[611] more recently, the Constitutional Court has reconsidered when the freedom to contract may be inhibited. I examine the ramifications of these decisions in this later in this chapter. A contract is a legal agreement whereby the parties involved agree to intentionally create legally binding obligations.[612] At its core a settlement agreement is a contract. The practice of making settlement agreements is well-established and has existed for a long time in South Africa.[613] In South Africa, the common-law and statutory law of contract provide for contracts that are the outcome of the mediation process,[614] and contract law assumes that a valid contract requires honesty, openness, clear communication and choice.[615] Van Huyssteen notes:

> An agreement must also comply with the opposite norms of society before it will create

[610] Steven Weller, 'Court Enforcement of Mediation Agreements: Should Contract Law Be Applied' (1992) 31 Judges' Journal 13.

[611] Alan Rycroft, 'Settlement and the Law' (2013) 130 South African Law Journal 187, 190.

[612] LF van Huyssteen, *Contract Law in South Africa* (6th edn, Wolters Kluwer 2019) 28.

[613] *Eke v Parsons* 2015 (3) SA 37 (CC) para 8.

[614] Rycroft, 'Settlement and the Law' (n 611) 188.

[615] ibid.

> obligations – hence the requirement of legality (public policy). This requirement obviously also entails that the agreement must be in accordance with the Constitution.[616]

The creation of obligations has been commonplace in a free enterprise system, and persons in a capitalist society have been allowed create, enter and be bound by any contractual arrangement they desire.[617] The freedom to contract is a fundamental principle of the law of contract and parties should be able to determine and decide on how various contractual agreements impact their personal and commercial lives.[618] This freedom to contract, within the bounds of legality, must be served by the maxim *pacta sunt servanda*: contractual obligations must be enforced to give certainty to the contract. The principle of freedom to contract and the notion that contractual clauses must be enforceable are fundamental to the South African common law of contract.[619] At times there has been a tension between the freedom to contract and the need to abide by the requirement of legality. This tension has played out in the courts. It is important for us to consider these tensions as this will allow us to articulate how and when the court balances a request for the judicial review of a settlement agreement and contractual freedom.

South African courts have long entrenched the freedom to contract, which is viewed as a matter of public policy.[620] In *SA Sentrale Ko-op Graanmaatskapy Bpk v Shifren en Andere*[621] the court (in 1964) formulated what is now known as the *Shifren* principle, which allows for such contracting freedom. It is accepted that parties can validly agree in writing to an enumeration of their contractual rights, powers and duties in relation to a specific contract, which they may only alter again by reducing any changes to writing. This contractual freedom, found by way of contractual formalities, was confirmed by the Supreme Court of

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[616] Van Huyssteen (n 612) 28.

[617] Friedrich Kessler, 'Contracts of Adhesion – Some Thoughts about Freedom of Contract' (1943) 43 Columbia Law Review 629, 629.

[618] Dikgang Moseneke, 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 Stellenbosch Law Review 3, 9.

[619] *Steyn and Another v Karee Kloof Melkery (Pty) Ltd and Another* (2009/45448) [2011] ZAGPJHC 228 para 21.

[620] Malcolm Wallis, 'Commercial Certainty and Constitutionalism: Are They Compatible?' (2016) 133 South African Law Journal 545, 549.

[621] 1964 (4) SA 760 (A).

Appeal (SCA) in *Brisley v Drostsky*[622] decades later in 2002, and is good law, especially when considered through the lens of the Constitution and the courts' general duty to develop the common law in light of the values it enshrines.[623] In *Brisley*, the SCA outlined the proper approach to good faith, fairness and reasonableness in the law of contract. The SCA held that good faith does not form an independent or free-floating basis upon which a court can refuse to enforce a contractual provision, and the acceptance of a distinct good faith principle in contract law would lead to unacceptable uncertainty.[624] The SCA added that contractual rules and doctrines were already underlined by good faith and there need not be an added emphasis on this. The main principle that is applied in South African law (and by *Shifren*) with respect to the content, execution and enforcement of contracts is that the agreement must not offend public policy or the public interest.[625] There is a paradoxical aspect to the *Shifren* principle that limits and yet entrenches the freedom to contract.[626] The historical development of the judicial enforcement of contract is mired in struggle:

> Historically, there has been controversy regarding the role of the concepts of good faith, fairness and reasonableness in the law of contract. In particular, the question of when, and to what extent, these concepts may be invoked at the expense of the 'competing goals' of certainty and fairness in contract law has been vexed. Over time, our courts have developed a consensus on certain key principles governing the judicial control over the enforcement of contracts.[627]

Displaying a mix between paternalism and public policy, the court in *Shifren* intended its *ratio* to minimise disputes and provide certainty to contracting parties. Human dignity, enshrined by the South African Constitution, complements the value of freedom for individuals to contract, and coupled with this freedom, the court's role is to reject any obscene excesses of contractual clauses, by way of public policy principles. Discussing the dispute mitigation effect of non-variation clauses, the court in *Brisley* stated that:

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[622] *Brisley v Drostsky* 2002 (4) SA 1 (SCA).

[623] Lauren Kohn, 'Escaping the "Shifren Shackle" through the Application of Public Policy: An Analysis of Three Recent Cases Shows Shifren is not so Immutable after All' (2014) 1 Speculum Juris 74, 82.

[624] *Brisley* (n 622) para 22.

[625] Van Huyssteen (n 612) 47.

[626] Kohn (n 623).

[627] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) para 20.

> they limit contractual freedom but do so by the prior design and agreement of the parties themselves, in the exercise of their contractual freedom, and in order to enhance certainty in their future dealings and to minimise disputes between them.[628]

This limitation of contractual freedom has not found favour in every quarter and some writers state that, in practice, the *Shifren* principle frequently leads to harsh and unjust results, as it allows a party to go back on their word, notwithstanding the other party's good faith reliance on it.[629] However, the clear role of the court becomes apparent here, and whatever action a court may take in this regard to avoid such bad faith, the court's duty is to exercise its power carefully when deciding to strike down or refuse to enforce a contract on the basis of public policy.[630] However, since *Brisley*, several cases have developed good faith as an accepted principle in line with public policy.[631] Public policy is the vehicle which is used to protect the concept of the freedom to contract. When a court finds that a contract goes against the principles of public policy, it will not hesitate to review, intervene or set aside offending contracts or clauses.

6.5 Settlement agreements that become court orders

In a previous section I considered the circumstances in which the labour court can justify making a settlement agreement a court order. There is a useful nexus between the granting of a court order in terms of a settlement agreement and the matrix of conducting a judicial review of a settlement agreement. In determining whether it should grant a court order, the court invariably conducts legal tests to determine, first, whether it is appropriate to intervene in the matter, and if so, whether terms should be set aside. By looking at these cases we can condense a set of rules and guiding principles. When a settlement agreement is concluded in

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[628] *Brisley* (n 622) para 89.

[629] Kohn (n 623) 75.

[630] *Brisley* (n 622) para 92.

[631] See *Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others* 2013 (5) SA 205 (WCC); *Combined Developers v Arun Holdings and Others* 2015 (3) SA 215 (WCC); *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC); *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC); *W v H* 2017 (1) SA 196 (WCC); *Bondev Midrand (Pty) Ltd v Madzhie and Others* 2017 (4) SA 166 (GP); *Four Wheel Drive Accessory Distribution CC v Rattan NO* 2018 (3) SA 204 (KZD). But in *Roazar CC v The Falls Supermarket* CC 2018 (3) SA 76 (SCA) the court declined to import a duty to negotiate in good faith in the circumstances, and in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) the court declined in the circumstances not to enforce a term on the basis of public policy.

the context of a civil action, the aim is to relieve the court of its duty to decide the issues in dispute. Where it has the effect of disposing of the issues between the parties as raised by the action itself, it would in most instances constitute a settlement agreement, which is subject to the common-law principles of contract.[632] In *Ex parte Le Grange and Another: Le Grange v Le Grange*[633] the court outlined the effect of using settlement agreements:

> The implication thereof is that the agreement may be enforced by any party thereto or resiled from by any party on the same grounds as those applicable to contracts in general. Where the parties agree to resolve their dispute in this manner one of two things may happen:– They may agree to withdraw the action, in which event any dispute regarding compliance with the settlement agreement must be dealt with as constituting a breach of contract. The enforcement of any remedy available to the aggrieved party, such as specific performance, can only be achieved by the commencement of a new action. Because the original action had been terminated, the court cannot, and does not play any active role in the supervision of the enforcement of the settlement agreement.[634]

In this excerpt the court highlights the two effects that a settlement agreement may have on the parties' available actions, which are now limited, because the dispute is removed from the remit of the court process and the parties must rely on breach of contract principles. To counteract this reduction of legal remedies, parties will usually ask a court to endorse their settlement agreement; a party may apply to court to have the settlement agreement declared an order of court.[635] When is it appropriate for a court to make a settlement agreement an order of court and what, if any, judicial oversight is required? A review of the current case law follows.

Can litigating parties use a settlement agreement to set aside a judgment *in rem*[636] and then have that settlement agreement made an order of court? In *Airports Company South Africa v*

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[632] *Ex parte Le Grange and Another; Le Grange v Le Grange* 2013 (6) SA 28 (ECG) (1 August 2013) para 9.

[633] *Ex parte Le Grange and Another; Le Grange v Le Grange* (n 632).

[634] ibid para 9.

[635] *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) at 95.

[636] A judgment *in rem* determines the objective status of a person or thing.

Big Five Duty Free (Pty) Limited and Others[637] the court made it clear that a judgment *in rem* may not be set aside by only a settlement agreement between the litigating parties. For a settlement agreement to have the effect of setting aside a judgment *in rem*, the appeal court must sanction the settlement agreement and make that agreement an order of court on the basis that the setting aside is justified by the fullness and merits of the appeal.[638] Furthermore, the court sanctioning the settlement agreement should give reasons for doing so. It can be noted from this case that the court wants to be involved in the settlement agreement and is not willing to leave it to the parties in question to contract freely. The court wants to give the settlement agreement its stamp of approval. We see here how the court is, some might say, infringing on contractual freedom. Perhaps the court took such a stance since it had given a judgment on this matter and did not want to be 'overruled' in a way. The protection of the status and rank of the court is a theme that crops up intermittently and in these instances we notice that the court is unwilling to degrade its status in terms of certain settlement agreements.

6.5.1 The effect of preceding litigation

Is the situation different where the court has been involved in the dispute to a lesser degree? What about a request for a court order where the court has yet to give judgment on a matter? The Constitutional Court considered this issue in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited.*[639] The case concerned a dispute between the municipality and a construction company regarding state-funded housing projects. The construction company claimed for the non-payment of rendered building services and, in response, the municipality claimed that payment was not required as the tender contract was invalid due to an irregular awarding process. The parties sought judgment from the courts. In an unusual move,[640] after the court had heard the matter, but before it had delivered its decision, the municipality applied to withdraw its case from the remit of the Constitutional Court, stating that a settlement agreement had been entered into after the hearing.[641] The municipality also

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[637] *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (5) SA 1 (CC).

[638] ibid para 1.

[639] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC).

[640] ibid para 19.

[641] Rule 27 of the Rules of the Constitutional Court provides: 'Whenever all parties, at any stage of the proceedings, lodge with the Registrar an agreement in writing that a case be withdrawn, specifying the terms relating to the payment of costs and payment to the

asked the court to make the settlement agreement an order of court.[642] It was clear from the terms of the settlement agreement, as well as the relief sought in the withdrawal application, that the application and the settlement agreement were integrally linked and the court had to consider carefully what effect such a court order might have:[643]

> The request for withdrawal of the application for leave to appeal is contingent upon the settlement agreement being made an order of this Court. I must first consider the terms of the settlement agreement. The effect of a settlement order is to vest the terms of the settlement agreement with the status of an order of court.

In a move that signals that the court prefers to be involved, the court was not inclined to make an order without being privy to the terms of the settlement agreement. To emphasise its role, the court then considered an earlier judgment which related to court orders and referred to *Eke v Parsons*[644] where it was held:

> This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place relate directly or indirectly to an issue or *lis* between the parties. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court.[645]

The court agreed with the principles espoused in *Eke* and went on to hold that a settlement agreement between litigating parties can only be made an order of court if it conforms to the Constitution and the law. Furthermore, the court was not able to make the agreement an order of court if the matter was not in the context of litigation. In *Buffalo City* the court stated that a court order from the Constitutional Court was not appealable to any other court. Therefore,

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Registrar of any fees that may be due, the Registrar shall, if the Chief Justice so directs, enter such withdrawal, whereupon the Court shall no longer be seized of the matter.'

642 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (n 639) para 18.

643 ibid para 20.

644 *Eke v Parsons* (n 613).

645 ibid para 31.

the pronouncement on the issue truly becomes final, and the court was keen to see the settlement agreement in question:

> The settlement agreement traverses litigation unrelated to the proceedings in this Court. In the settlement agreement, the parties are contracting on matters outside the context of the litigation in this Court. They seek to have their agreement, which in part relates to matters to which this Court has no knowledge, made an order of court. This the Court cannot do.[646]

Not only does the view of the court show its interest in being well-appraised of the situation, but it also has a knock-on effect for the confidentiality of a secret settlement agreement and whether a slightly suspect, secret settlement agreement actually has any enforcement value at all. The basis for the municipality's application was the legality of the tender contract: the municipality contended that the deal was concluded without a competitive bidding process and thus fell foul of s 217 of the Constitution. There was no explanation in the withdrawal application as to how the settlement agreement cured the alleged defects in the tender contract, and the court held that inconsistency with the Constitution cannot be cured by a settlement agreement.[647] The court held further that the municipality could not enter into a settlement agreement which seeks to validate a contract that is inconsistent with the Constitution and that such behaviour was inexplicable and contrary to its public accountability duty.[648] Furthermore, the court held that the settlement agreement did not meet the *Eke* requirements for making it an order of court and that the scope of the settlement agreement went beyond the subject matter of the case presented to the court:

> In addition, the scope of the agreement goes beyond the subject matter of this case and asks this Court to settle litigation and sanction the lawfulness of agreements of which it has little to no knowledge. The Court is being asked to sanction an agreement without being in a position to pronounce on its legality.[649]

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[646] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (n 639) para 27.

[647] ibid para 32.

[648] ibid para 33.

[649] ibid para 31.

If *Eke v Parsons* is good law, as it seems to be, this means that settlement agreements concluded outside of what the court considers litigation have less than ideal force. The avenues for non-compliance are limited to remedies for contractual breach. In other words, there must have been a dispute, the parties must prove the start of litigation, and litigation pleadings must have been filed with the court for the court's perusal. Despite *Eke v Parsons*, several cases have been heard by the lower courts dealing with the issue of the court's involvement in a dispute and the subsequent settlement agreement. Recently, the issue of preceding litigation arose again, but this time in the High Court in *Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited and Another*.[650] The case concerned an unopposed application where one party asked the court to make the settlement agreement an order of court. The parties entered into a settlement agreement to acknowledge outstanding debts, payment dates and a suretyship granted in respect thereof. There was no suggestion that litigation had preceded the settlement agreement. The High Court raised the following question: 'May a settlement agreement be made an order of court when the agreement was reached without litigation having commenced between the parties?'[651] To answer this question, the High Court correctly recalled the Constitutional Court's decision in *Eke v Parsons* where it was held that a court was not competent to make a settlement agreement a court order without prior litigation. But the High Court in *Avnet* also noted that there were divergent High Court judgments dealing with the question of whether a court may make a settlement agreement an order of court, despite there being no preceding litigation.[652] This can be confusing for those who have not conducted an exhaustive survey of judicial precedent and may have an impact on whether parties understand how their settlement agreements are affected.

Buffalo City is a Constitutional Court judgment and therefore has supreme precedential value; the judgment is also a recent one, having been delivered on 16 April 2019. The different views on the issue can be found in the unreported cases of *Growthpoint Properties Ltd v Makhonyana Technologies (Pty) Ltd and Others*;[653] *Lodestone Investments (Pty) Ltd v*

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[650] *Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited and Another* 2019 (4) SA 541 (GJ).

[651] ibid para 2.

[652] ibid para 10.

[653] NGHC Case No. 67029/2011 (12 February 2013).

Muhammad Ebrahim t/a Ndimoyo Transport[654] and *National Youth Development Agency v Dual Point Consulting (Pty) Ltd and Another*.[655]

Growthpoint concerned an application to have a settlement agreement made an order of court in circumstances where there was no preceding litigation between the parties. It was argued that the court lacked the jurisdiction to make such an order because there was no prior litigation between the parties and because the High Court rules did not provided for such an order to be granted in the circumstances. The court noted that at the time the dispute existed between the parties, formal legal proceedings were a possible avenue, but the parties decided to avoid such proceedings and enter into a settlement agreement. The court held as follows:

> If the court has no jurisdiction to grant an order of this nature simply because of the absence of pending proceedings, it would mean that legal proceedings would first have to be instituted, should it then be resolved and a settlement agreement is concluded, only then would the court be empowered to make such an order. This will lead to an unnecessary duplication of legal proceedings. The term 'inherent jurisdiction' refers to the court's function of securing a just and respected process of arriving at a decision and it is not a factor which determines what order the court may make after due process has been achieved.[656]

The court was adamant that the jurisdiction of the court was not derived from the court rules and believed that a court was empowered to make an order that was just, in an effort to foster efficiency and avoid duplicate legal proceedings. Three years later, a different view was taken in *Lodestone*, where Van der Linde J had to decide whether to make a settlement agreement an order of court, notwithstanding that there had been no prior litigation between the parties. The settlement agreement essentially acknowledged the indebtedness of one party and made arrangements for payment. The court was not convinced that it had the power to make the settlement agreement an order of court where there was no prior litigation, and declined to do so. The court held that it was unnecessary to decide the issue of whether it had the power to make such an order, as it was discretionary in nature and the court would not

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[654] GLD Case No. 5716/2016 (29 April 2016).

[655] (06982/2016) [2016] ZAGPJHC 114 (19 May 2016).

[656] *Growthpoint Properties Ltd v Makhonyana Technologies (Pty) Ltd and Others* (n 263) para 41.

exercise such a discretion in this instance. The court's reluctance to consider the issue in *Lodestone* is frustrating and unfortunate.

Nevertheless, a month after *Lodestone*, a similar matter was brought before Van der Linde J in *National Youth Development Agency*. Again, the court held that it did not have the power under Rule 41 of the Uniform Rules of Court to make the settlement agreement an order of court where there was no preceding litigation. The court stated that *Growthpoint* would be binding on it if there was something clearly wrong with the court's reasoning. The court held that even if the court had the power to make this kind of settlement agreement an order of court, it was unclear if it could exercise such a discretion. The court stated that the details provided about the dispute were sparse and that the court was merely being asked to execute a decision:

> [T]he impression is rather left that the real issue was not whether or not the monies were repayable, but the manner or terms of repayment. I revert to this issue below. The second aspect is that there was a dispute resolution process available, that of mediation, to the parties; and that process appeared to have served them well. In other words, the dispute determination facilities and resources of this court were not tapped into; rather, what is being sought to be tapped into now is the execution mechanisms that this court avails.[657]

The court was not pleased that it had not been privy to how and why the dispute was settled and called into question the efficiencies and capabilities of the mediator who conducted the process. Furthermore, the court drew a distinction between the settlement agreement considered in *Avnet*, which concerned a private commercial acknowledgement of debt and the type of settlement agreement stemming from a process provided for by legislation. The court referred to s 31 of the Arbitration Act[658] as a provision which was specifically designed to avail the enforcement mechanisms of the court to extra-judicial processes. The Arbitration Act sets out the prerequisites that must be complied with before an award made under it will be made an order of court. The court made the following point about the role of the legislature and the judiciary:

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[657] *National Youth Development Agency v Dual Point Consulting (Pty) Ltd and Another* (n 265) para 11.

[658] 42 of 1965.

> [T]he legislature has expressly acknowledged the value of extra-judicial dispute resolution; and has respected to a significant degree party autonomy in the parties' running of that process. And it has, under those prescribed conditions, aided by the machinery of the Law in other respects, for instance the subpoenaing of witnesses, lent also the enforcement arm of the Law to the process. If the legislature were prepared to lend the enforcement arm of the Law no matter what the underlying process; no matter how the settlement came about; no matter whether there was a fair underlying process; one would have expected explicit litigation to that effect. There is no such.[659]

It must be noted that while the court is dealing here with a settlement agreement flowing from an arbitration, the principles offered have value. The court emphasised that in the case of arbitrations the legislature had set out in considerable detail the prerequisites that have to be complied with before an arbitration award will be made an order of court; for instance, there must be an arbitrator who must conduct herself in accordance with minimum standards.[660] No such legislation is in place for private commercial settlement agreements. This lack of codification muddies the water and brings uncertainty. For the effective use of mediated resolutions, the proper judicial oversight of settlement agreements that become court orders is imperative. The only way for a court to have such judicial oversight would be for the matter or dispute to have commenced in the court, and for pleadings and papers to have been filed with the court registrar as part of the litigation process. The court in *National Youth Development Agency* was correct in stating that the role of the court cannot merely be to act as an executioner or debt collector, and the court must apply its power with discretion and thought. What we see from the case law is that for the full force of the court to be behind a settlement agreement parties must be frank with a court and ensure their dispute preceding has been proceeded by appropriate litigation In *National Youth Development Agency* the court underlined the role of the courts in settling disputes and noted that their primary function is to determine disputes between parties, whether vertically between the state and an individual, or horizontally between person and person.[661] In *Avnet* the court accepted that the

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[659] *National Youth Development Agency v Dual Point Consulting (Pty) Ltd and Another* (n 657) paras 14–15.

[660] ibid para 13.

[661] ibid para 16.

reasoning of *Eke v Parsons* was *obiter* because litigation had previously taken place in that matter, and therefore *Eke v Parsons* was of persuasive force.[662]

In *Avnet* the court held that it could not make the settlement agreement an order of court as it dealt with an acknowledgement of debt about which the court had not been approached in the first instance. Making such an order would be unfair or possibly unjust to the debtor in question. The court in *Avnet* disagreed with the approach in *Growthpoint* and held the following:

> [T]he settlement agreement between the parties before me is (absent some challenge to it) already a legally binding agreement. If the respondents adhere to their obligations under the agreement, there will be no need for legal proceedings or a court order at all. If they do not adhere to their obligations, the applicant will then be entitled to institute proceedings based on the settlement agreement and seek a court order requiring compliance with the terms of the agreement.[663]

Avnet makes it clear that the court is not empowered to make a settlement agreement an order of court if there is no preceding litigation before a court or a dispute resolution procedure provided for by legislation. The court directs those claiming non-compliance with a settlement agreement to use the remedies for breach as provided for by the common-law principles of contract. This is not an ideal outcome for those wishing to use mediation and settlement agreements as a tool to bypass the court system, or to ensure the confidentiality or durability of their settlement agreement. It leaves one with the lingering feeling that there are essential elements missing from the practice of mediation specifically when legal certainty is called for. The case law indicates that the courts wish to entrench and secure their status as the final umpire.

6.5.2 Enforcement of a settlement agreement that has been made a court order

This research has shown us that enforcement remains a problematic area for settlement agreements. This is unfortunate as the scope and effectiveness of a settlement agreement as a

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[662] *Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited and Another* (n 650) paras 25–26.

[663] ibid para 35.6.

legal remedy are determined by the method of enforcement.[664] We are left with a situation where settlement agreements can only be enforced using common-law contractual principles and this may prevent satisfactory enforcement.[665] For those parties intent on certainty, a court order may be a possible solution to ensure compliance. It is settled law that one of the duties of the court is to scrutinise a settlement agreement before making it an order of court.[666] Once a settlement agreement is made an order of court, it is interpreted in the same way as any judgment or order and affects parties' rights in the same way.

One advantage of a court order is that the court retains jurisdiction over the matter in the sense that it has the inherent power or authority to ensure compliance with its own orders.[667] This enables the parties, in the event of a failure by any one of them to comply with the terms of the order, to return directly to the court that made the order, and to seek the enforcement thereof without needing to commence a new legal action.[668] In *Avnet*, the court held as follows:

> When the parties resolve the dispute that is before the court, the court may then (after satisfying itself that the settlement agreement is a permissible one) make the settlement agreement an order of court. Such an order of court becomes an order of court '*like any other*' – there is no difference between such an order, and one granted by the court after dealing with the merits of the dispute. This is a coherent and consistent approach to the manner in which courts adjudicate and give orders in the disputes before them.[669]

The approach of providing a 'buyer' with a type of 'warranty' to mitigate 'buyer's remorse' may be welcomed by those who are nervous about participating in the mediation process. Where the settlement agreement has been made an order of court and a party breaches this court order, they may find themselves in contempt of court. The crime of contempt of court is

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[664] Catherine O'Regan, 'Contempt of Court and the Enforcement of Labour Injunctions' (1991) 54 Modern Law Review 385.

[665] Fiss (n 126) 1084.

[666] *Eke v Parsons* (n 613) paras 29–30.

[667] *Ex parte Le Grange and Another: Le Grange v Le Grange* (n 242) para 10.

[668] ibid.

[669] *Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited and Another* (n 650) para 31.

the unlawful and intentional violation of the dignity, repute or authority of a judicial body.[670] The existence of the crime of contempt of court is based on the principle that the courts cannot and will not permit interference with the due administration of justice.[671] The case law that follows examines the legal position regarding the failure to comply with a settlement agreement that has been made a court order. Contempt of court moves from a contractual breach or penalty played out in a civil jurisdiction to an issue with criminal consequences. In *Bayerische Motoren Werke Aktiengesellschaft v Grandmark International (Pty) Ltd and Another*[672] a party contended that, using a balance of probabilities test, it was likely that the court order of the settlement agreement had not been intentionally disobeyed. The court held that this submission was incorrect: the court must be satisfied beyond reasonable doubt – the test in criminal proceedings – that the offence has been committed.[673]

A party contending that there has been contempt of court must establish that the court order has been brought to the attention of the non-compliant party and that the party failed to comply with it. Wilfulness and *mala fides* on the part of the errant party will normally be inferred and the onus will be on this party to rebut this inference on a balance of probabilities.[674] The test for contempt of court has three requirements and can be found in *Fakie NO v CCII Systems (Pty) Ltd*,[675] where the court stated:

> Finally this development of the common-law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was willful [sic] and *mala fide*, the requisites of contempt of court will have been established. The sole change is that the respondent no longer bears a legal burden to disprove willfulness

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[670] J Burchell, *Principles of Criminal Law* (5th edn, Juta and Company 2016) 864.

[671] ibid.

[672] *Bayerische Motoren Werke Aktiengesellschaft v Grandmark International (Pty) Ltd and Another* 2012 BIP 287 (GNP).

[673] ibid 295.

[674] See *Consolidated Fish Distributors (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C) at 522E–H; *Putco Ltd v TV & C Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 836D–E.

[675] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

> [sic] and *mala fides* on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt.[676]

Using the standard of reasonable doubt and imposing criminal penalties is a very punitive approach to what is essentially a breach of contract between private parties. It makes a private contractual breach one of civil disobedience, which comes with criminal consequences. The two cases below show that the court can adapt a penalty depending on how the settlement agreement has been breached. For instance, what is the situation when a party complies with some, but not all, of the provisions of a settlement agreement that is made a court order? Does this mitigate or lessen the criminal implications? In *Marcel's Gourmet Frozen Yoghurt (Pty) Ltd*[677] the court held that despite some of the provisions of the court order being complied with, the court had to express its disapproval of the members of the public who disobeyed its orders, and found the party guilty of contempt of court.[678] What is the sanction if a non-compliant party has a proper reason for not complying with a court order? It seems that the court relies on general contractual law principles for non-performance. In *William Sana Mahlangu and Two Others v Laudium Taxi Association and Rashid Ismail*[679] the court held that compliance with the settlement order was impossible, and the non-compliant parties could not be held in contempt as there was no *mala fide* intention on their part not to perform.

If punishment is imposed for the crime of contempt of court for non-compliance, it is usually, or often, a suspended sentence and a fine set by the court. This is not a hard and fast rule. In *Gilbeys Distillers & Vintners (Pty) Limited v Dyeshana*[680] the court held that the imposition of a fine would not be a suitable sanction and would have very little deterrent effect in a case of this nature, which concerned counterfeit products. The court gave several reasons why suspension of the prison sentence was not appropriate:

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[676] ibid para 41.

[677] *Marcel's Gourmet Frozen Yoghurt (Pty) Ltd* BIP 81 (C).

[678] ibid para 40.

[679] J1660/16.

[680] *Gilbeys Distillers & Vintners (Pty) Limited v Dyeshana* BIP 139 (C).

> There are, however, a number of aggravating features which cannot be ignored. Firstly, there is the large scale on which the transgressions took place. Secondly, although difficult to calculate, respondent probably earned a very substantial profit from this particular form of enterprise. Thirdly, respondent persisted with the deceit by putting up a false defence in this case. Fourthly, it is obviously not easy for an applicant to prove transgressions of this nature. Customers of respondent are unlikely to be willing to give evidence against him and, as has been shown in this case, his own bookkeeping and records are virtually non-existent. Finally, and perhaps most importantly, this is not the first case of this nature brought by applicant.[681]

Case law has clarified most issues with specific regard to the enforcement of settlement agreements that have been made court orders. What is clear are the serious penal consequences for parties who do not comply with a civil settlement agreement that is made an order of court. These non-compliant parties can face criminal sanctions. In some cases, prison time may be appropriate, if deemed just by a court. This is one area of law where a civil matter can have criminal consequences. There is a tension here. The jurisprudence shows the legitimacy that a settlement agreement can have if properly converted into a court order. However, for such gravitas to be given to a settlement agreement, the notions of confidentiality and a self-determined mediation process must be set aside. In conclusion, it seems that a court must make the settlement agreement an order of court to ensure the enforcement of the settlement agreement. In real terms, the chance of final and certain justice and peace between parties in a mediation settlement agreement is not possible without settlement agreement being reviewed by a court.

6.6 Public Law vs Private Law

After consideration of the jurisprudence a clearer question emerges: To what extent should public law intervene and be applied to private law disputes? How best do we articulate this? This chapter makes it clear that the courts regard public policy, informed by constitutional rights, as sacrosanct and there is no basis for privileging the freedom to contract over public policy. This chapter does not settle, but considers, whether a settlement agreement has enough public policy content to allow for iron-clad settlement agreements, as called for by

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[681] ibid para 60.

Brisley. The court has indicated that the freedom to contract is not unlimited, in terms of settlement agreements. This chapter also examined the tension that might arise when a court makes a settlement agreement a court order. The clearest case law shows that a court that is not privy in the first instance to the terms of the dispute or the settlement agreement should not make a settlement agreement a court order. This means that a party may be unable to avoid litigation or a court process, where 'preceding litigation' is required. In fact, this chapter shows us a settlement agreement must first go through a process of judicial review before it can be enforced and before a penalty (for non-compliance) can be imposed. In other words, a court review is necessary for a settlement agreement to have any long-lasting effect; this cements the courts' standing as final arbitrator.

Chapter 7 Three reform approaches and concluding remarks

7.1 Introduction

This thesis has, over several chapters, reviewed the status quo of mediation, examined the extent that labour law could influence private settlement while gathering salient lessons. The way this thesis analyses, compares, contrasts and recognises patterns in the sphere of mediation is novel. By conducting an in-depth review of case law and jurisprudence this thesis has conceptualised the problems associated with mediation. This framework of questions of means that solutions can now be found. Searching for these solutions, this research presented South Africa as a case study, from which it was able to identify themes, make observations and articulate parallels in terms of mediation intersectionality between private and public law, by examining the CCMA (how they mediated and come to agreements) and the labour courts (how they engage their judicial review function). This work interrogated how settlement agreements are currently reviewed by a court, cognisant always of the perspectives of public policy and constitutional norms. At various stages this thesis has drawn upon other jurisdictions for assistance and comparison. Ultimately, the significance of this study is, that it contributes three reform approaches to mediation jurisprudence, using South Africa as a benchmarking case study. This research develops and deploys a set of reforms as a best practice guide for courts to use in their review of settlement agreements. Such a set of guidelines will also assist legal practitioners, mediators and the general public, where clarity and certainty are needed in cases of judicial review.

7.2 Lessons from the Labour Court

While refining principles and parameters, and considering possible reforms, I conducted research to determine how and when a labour court can intervene in terms of granting a court order. I considered several jurisprudential approaches and have composed and collated, after an in-depth analysis, five discrete factors to be used by a labour court when granting a court order. Having all the court-approved law in one place makes it easier to establish how a court determines whether it is correct and just to make a settlement agreement that deals with an employment dispute a court order. By collating and organising these factors, a better understanding of how a court determines the circumstances of a court order can be gained. This knowledge can be used to improve and reform the jurisprudence around court orders for civil or commercial settlement agreements. This is a transitionary piece of research (by

collating these directives) that enables me to reform general mediation jurisprudence and lay down a legal test. A labour court may grant an order in terms of a settlement agreement under s 158(1)*(c)* of the LRA if one or more of the following factors are applicable:

i. The dispute is justiciable in terms of the LRA (*Harrisawak v La Farge (SA).*
ii. The terms of the settlement agreement give effect to proper, competent obligations and duties (*SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-time Employees*; *Eke v Parsons*).
iii. The dispute is one where the party has a right to refer in terms of LRA to a labour court (*Greef v Consol*).
iv. The dispute is not related to a collective agreement.
v. It is just and equitable to do so.

It is trite, but worth repeating here, that employment matters are distinct from civil matters. Fair labour practices, unlike general contractual relationships which set up duties and obligations, are enshrined in the Constitution.[682] Several pieces of legislation provide for the fulfilment of fair labour practices. Placing this in context, it is unsurprising, for various socio-legal reasons, that the courts are willing to accept settlement agreements made in an employment context more readily than general commercial contracts. The South African Labour Court, emboldened by sturdy legislation, takes an often interventionist approach when asked to judicially review settlement agreements in relation to employment disputes. This intervention, a mix between public and private law, the freedom to contract, and the balancing of employment rights poses more nuanced questions such as: (i) Should the civil courts be as interventionist at the labour court? And: (ii) Do variables present in commercial cases carry the same weight as those variables found in the review of employment settlement agreements. The courts have considered the issues of the individual employee and the lack of bargaining power or resources which could limit the ability of an employee to use all the mechanisms of the LRA dispute resolution system before reaching a settlement. The intention of the LRA is to speedily resolve employment disputes. How can we achieve the same result in matters of a civil or commercial nature?

7.2.1 Three approaches

This thesis innovatively develops three separate and distinct tests that can be used in determine when a judicial review voluntary mediation is appropriate.

I. The *Good Faith Test* is one that factors public policy as variable into the norms of judicial review. This test was developed with direct reference to the complexities that good faith can have on contractual relations, and, indeed, mediated settlement agreement. This test, if used correctly, will be able to give an indication of whether 'good faith' as a contractual principle is a variable that was present in the settlement agreements. A lack of good faith may trigger judicial review.

II. The *Mediator Privilege Test* has been developed with the understanding that the current law relating to the idea of a mediator's conduct being a variable which might, if presented, trigger a cause for judicial view. This test considers all the jurisprudence before it to determine whether a mediator's conduct in terms of confidentiality passes muster. As such this test has an intersectionality quality, positioned between the variables of 'mediator conduct' there obligations in terms of confidentiality fitting under the banner of 'good faith' as a variable.

III. The *Public Policy Test* is a test created by looking at judgements that deal with court orders in terms of a settlement agreement. We can use this legal test to determine whether a court would be inclined to 'convert' a settlement agreement into a court order. This kind of test would be useful to alert mediators to kind of variables that might taint a settlement agreement, particularly, if there is a hope for certainty in enforcement. It is also submitted here that the test offers a more use as it deals with several nuanced issues which relate to public policy and constitutional intention.

7.3 Approach I: The Good Faith Test

This research has surveyed all labour law jurisprudence relevant to settlement agreements. From this comprehensive survey I can distil three guiding principles which can be used in general commercial or civil settlement agreements. I have curated these principles found in the labour law cases into a legal test, which I call the Good Faith Test. This test will allow a court to determine if and when a settlement agreement should be reviewed by it, and if it

should perform some sort of judicial surgery (by way of amendment or recission) to make the settlement agreement good, proper and lawful. The purpose of this test is to supplement the jurisprudence of commercial and civil settlement agreement by using labour law principles. We know that, notwithstanding the provisions of the Constitution and fair labour practices, a court may rectify, amend, or cancel a settlement agreement entered into by two parties if one of the following grounds is presented to the satisfaction of the court:

The Good Faith Test

i. There is no valid reason for the settlement agreement, or the settlement agreement is vague, ambiguous or does not comply with basic principles of contract law (*Public Servants Association of SA on behalf of Members v Gwanya NO and Another and Public Servants Association of SA on behalf of Members v National Health Laboratory Service*).
ii. The settlement agreement does not reflect the intention of the parties (*SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-time Employees*).
iii. It is just and equitable for the court to intervene (*Barkhuizen v Napier*)

If one of the legs of this test is answered in the affirmative, then the court may intervene and rectify or set aside the settlement agreement. However, as we know, a court may always intervene if it finds it is just and equitable to do so.

7.4 Approach II: The Mediator Privilege Test

One of the shortcomings identified by this research is that the role of mediator is an awkward one. We know that a core feature of mediation is confidentiality and connected to this is. I considered various instances where the role of the mediator can have an impact on when and how a legal settlement agreement may be reviewed. There may be instances when a court demands that a mediator gives evidence about what was said during meditation. This has the effect of undermining the mediation process and any claims of confidentiality. One possible remedy is to provide the mediator with a distinct privilege. Currently, the court is not willing to imbue the role of mediator with any sort of privilege. The position of the South African courts and legislature is that they have not yet considered a cogent test to determine, in instances where the matter is in dispute, if a mediator should be allowed to claim a legal

privilege to avoid testifying. I suggest that there may well be times that a mediator should be allowed some sort of protection in the form of a privilege. In situations such as these, and to prevent uncertainty, a clear test is needed. Mediator privilege, or anything remotely similar to the privilege of judges, has not been easily given to mediators. It is suggested that, on a case-by-case basis, and where the circumstances deem it just and equitable, a mediator should be given some sort of privilege. The best way is to present a test that the court can use to determine if a privilege can be granted. The following test is articulated to ensure consistency in the matter of mediator privilege. It borrows from the four-part Wigmore test which was generally used by US courts to determine whether communications are privileged or not.[683] For our purposes, I have adapted the test to be mediation-focused, and to be used on a case-by-case basis by a court of law. The test below aims to answer some of the short fall determined by the conceptualisation of this thesis in chapter 3. These tests then will fit into the decision tree tool created in chapter 3.

Mediator Privilege Test

i. The mediation must have been initiated in confidence.
ii. Confidentiality is essential to the mediation process.
iii. It is good public policy to protect the relationship of the parties in the mediation.
iv. The harm caused by testifying is not justified and is outweighed by the need for a judicial review.

The use of such a test must be strictly controlled to ensure success and buy-in from the courts. As we know from a close review of the case law, the courts are not willing to give any kind of privilege to persons who are not judges or legal counsel. For this test to be considered acceptable, a robust standard must be maintained, with all the aspects of the test being answered in the affirmative. However, by using this test we can improve the accountability and recognition of mediation. Further, such a test will save resources, as the court's role is to utilise the common law and to possibly devise a test every time a matter like this appears before the court, unless, of course, a court finds and uses an appropriate legal precedent. This

[683] The Wigmore criteria: the communications must originate in a confidence that they will not be disclosed; this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; the relation must be one which in the opinion of the community ought to be sedulously fostered; the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

test has been formulated to give a court and legal practitioners some guidance as to when and how a mediator may be subpoenaed for evidence and brings clarity to this area of the law.

7.5 Approach III: The Public Policy Test

From the outset, this research intended to determine how and why mediated settlement agreements would be reviewed by a court. This determination has an impact on when and how mediation is used and the place it is given in our law in terms of certainty and stability. To place this research in context, the jurisprudence of labour law in South Africa was used as a case study to develop strategies for reform. I have created legal tests which can be used by a court or legal practitioner to dispel some of the uncertainty about whether a court will find it appropriate to review a settlement agreement. After a thorough examination of the case law and jurisprudence, I have developed a test especially for circumstances where a court must consider whether is it appropriate to convert a mediated settlement agreement into a court order. This type of ratification by a court is not without its complexities. I suggest that any test which considers whether a court should convert a mediated settlement agreement into a court order must be strictly formulated and have robust thresholds. One reason is that a court must be certain that the settlement agreement is of a standard that satisfies legal norms and constitutional principles and can benefit from the legal enforcement tools of a judiciary such as a finding of contempt of court or the imposition of a fine. A second more practical reason is that a settlement agreement in the area of labour law has generally been finessed into an acceptable legal and procedural form before it reaches a court, because it derives its structure from labour legislation. In a sense, some of the oversight work of the court – ensuring that the court order will be lawful – has been done before the matter reaches the court. Commercial and civil settlement agreements do not have the luxury and benefit of this overarching and comprehensive legislation to give them a good legal form. The court may make a civil or commercial settlement agreement an order of court if the following are considered:

The Public Policy Test

i. Has there been preceding litigation in the matter, with papers filed with the registrar of the court (*Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited and Another*)?
ii. Does the court have knowledge of and judicial oversight over the dispute that is being resolved in the settlement agreement (*National Youth*

Development Agency v Dual Point Consulting (Pty) Ltd and Another; *Lodestone Investments (Pty) Ltd v Muhammad Ebrahim t/a Ndimoyo Transport*)?

iii. Is it just and equitable for the court to grant the order (*Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others*, *Beadica*)?

If the answers to the above questions are in the affirmative, then the court may make the settlement agreement an order of court if the settlement agreement is valid, certain, clear and there are no foreseeable impediments to the execution of the settlement agreement.

The above approach is necessary if we consider the outcome of *Lodestone* and *National Youth Development Agency* indicating the need for preceding litigation. It is submitted that the approach in this judgment is correct, as a court must consider the penalty of contempt of court that attaches to a court order which is breached. A breach of a civil or commercial settlement agreement that has been made a court order would effectively have criminal consequences. This test would give a structure to the court's judicial oversight role, where the boundaries of 'beyond reasonable doubt' and 'balance of probabilities' overlap.

7.6 The limits of reform

In the preceding section, legal factors were curated, and legal tests were developed. The articulation of these legal reforms requires some consideration. The development of these reforms required a thorough consideration and analysis of the law; where the existing South African law did not provide for certain aspects, foreign law was investigated. I argue in chapter 3 that if the legislature codified such tests in a unform statute it would bring much-needed certainty to the area of alternative dispute resolution in South Africa. It is well known that a fair and sophisticated legal system benefits from the separation of powers. The court's role is not to make new law, but to interpret it. However, if the legislature is slow in coming to grips with the need to reform the area of mediation, and to provide certainty and structure that is currently lacking, I would welcome the courts using the above legal tests when they consider the judicial review of a mediated settlement. Any amendment or reform of the law has consequences that may affect different situations and relationships in various ways.

7.7 The limitations of reform

It is important to consider the consequences of any reform. Such a consideration will enable the reform to be accepted as a well-thought-out solution to an underlying problem. This knowledge will enable the reform, if accepted, to be implemented fairly and equitably. Any new test for mediation should come with limits and have consequences. I have evaluated the proposed reforms and have determined what consequences may flow from any codification of these tests. The consequences of the reform of mediation practice include the 'publicisation' of mediation, the effect on confidentiality and the limitation of contractual freedom.

7.7.1 The 'publicisation' of mediation

Throughout this work, a constant theme has been the tension and juxtaposition between types of law. Law and its processes can be divided into separate groups for ease of navigation. For instance, public law may be separated from private law. Public law governs interactions between the government and state actors and their relationship with legal persons.[684] Private law most often relates to private persons and how they deal with each other, mostly in terms of contractual relationships.[685] However, this is not to say that the intersectionality of private and public law does not exist.[686] In South Africa, labour law is publicised, meaning that it has many elements of public law in its composition, even if a strict interpretation might mean that it is characterised as 'private law' by some. Labour law legislation in South Africa embodies many constitutional values, such as the upholding of dignity and equality. In some cases, contract law has caught up with constitutional norms, separate from labour law to the extent that contract law, too, primarily 'private' in the past, is now becoming more public.[687] It seems then that mediation is increasingly becoming a public law issue. Consequently, this thesis argues that sometimes a commercial mediation agreement may be augmented by distilling principles from labour law jurisprudence. The consequence of such argumentation is that alternative dispute resolution, historically seen as an independent free-form dispute resolution platform, is now veering incredibly close to becoming a product of public and

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[684] Martin Loughlin, *Foundations of Public Law* (OUP 2010) 2.

[685] ibid 3–4.

[686] Kohn (n 623) 75.

[687] Malcolm Wallis, 'Commercial Certainty and Constitutionalism: Are They Compatible?' (2016) 133 South African Law Journal 545, 546.

institutionalised norms and principles. The question is whether legal practitioners and the court will adapt to such a change.

7.7.2 The erosion of confidentiality

The review of a settlement agreement has a direct effect on confidentiality. A bedrock principle of mediation has always been the promise of confidentiality.[688] Parties often enter a mediation process with the promise (and hope) that what is said during mediation will remain confidential and between the parties. A problem arises when one of the parties wishes to have a mediated settlement agreement reviewed by a court.[689] To serve the purposes of review, elements of confidentiality must be breached to allow for a court to make a finding. If the review of settlement agreements becomes streamlined, easy and effective, such review may occur more frequently as it becomes easier to conduct and more 'mainstream'. Further, if the law allows the regular review of settlement agreements, parties wishing to settle disputes discreetly might not wish to particate in ADR and may become wary of settlement agreements and the 'safe harbour' they once provided. But like all new law or legal precedent, these developments must be tested against the norms of public policy.

7.7.3 The freedom to contract

In a sophisticated legal system, we take the principle of freedom to contract as a given. It can be seen as a mark of democracy and autonomy for parties to be able to construct contractual agreements to suit their complex personal or commercial relationships and needs. However, as legal norms develop, this freedom becomes more nuanced. Legal rhetoric provides that the freedom to contract should and must be curtailed if it offends certain ethics or disregards the general well-being of a society or legal system. Such imperatives are directly related to those agreements created via mediation. During judicial review, a court may decide that it must forego the principle of freedom to contract and replace it with other norms. Settlement agreements have not escaped this normative process. This research places in context mediated settlements, the freedom to contract, and when a court might intervene for the purpose of conducting a judicial review. Any reform or practice which emboldens (by framing and providing legal tests) a court to review a settlement agreement has the effect of

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[688] Feehily, 'Confidentiality in Commercial Mediation' (n 305) 517.

[689] Rycroft, 'Legal Review of the Mandatory Mediation Process in South Africa' (n 13) 80.

limiting the freedom to contract. A person wishing to conclude contracts that are inviolable will now find that his settlement agreement must be designed and drafted in such a manner that the court will find the use of tests to intervene in the settlement agreement frustrating and might abandon these attempts. To have such an agenda when drafting a settlement agreement will have a negative impact on the substance and faith of the settlement agreement. The only safeguard, once again, is the court's duty to uphold the spirit and purport of good constitutional norms.

7.8 Concluding remarks

The purpose of this research was to determine when it was most appropriate for a court to conduct a judicial review of a mediated settlement agreement. The literature is varied, and complexity is added by jurisdictional differences found in mediation law. This means that this thesis has had to bob and weave amid jurisprudence, case law, international principles, constitutional norms, public policy, and the freedom to contract. These factors have a bearing on how mediation outcomes are considered and regarded, and worthy of research.

The parameters of mediation have not been adequately framed for the certainty and complexity of the disputes that mediation hopes to resolve. This research has shown that by creating a typology of different types of settlement agreements, we are able to develop and categorise how mediation settlements fail. This research has shown us that variables occur in mediation, which depending on the variable present there may be a tainting of a settlement agreement, which could leave parties with a lacklustre outcome.

This study has raised important questions about the nature of certain mediation short falls with specific refence to South Africa. We recognise that South Africa is a unique case study for the exploration of mediation. South African jurisprudence is a credible fount to determine how different settlement agreements might be appropriate for legal review.

This work contributes to existing knowledge of mediation by providing a set of three legal tests. These tests are put forward as benchmark and best practise guide. The aim is to empower parties to determine and predict, would some reliability, the outcome of their request to have the mediation settlement agreement judicially reviewed. Further, this work has considered the accessible of this research and limits barriers for use by developing and

creating a decision tree model tool. The aim of this tool was to disseminate the findings of this research to an audience who perhaps may be less sophisticated in terms of legal acumen, and less accustomed to the area of mediation.

Looking forward, and building on this research, a possible future research undertaking would imagine a data collection tool at the CCMA, where mediations are recorded by software that *learns* 'how a mediation is conducted'. This software would sift through the verbal and physical communications, recognising and curating patterns, which we could analyse. In my view, this type of research would only be possible with advanced artificial intelligence. One of the purposes of this work that hasn't been explicitly mentioned – but can be made explicit here – is the prominence of South African law. I take the view that South Africa has significance and sophistication in many legal areas. In a way this research merely highlights the robust and intelligent nature of South African jurisprudence.

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