REPORT ON THE INTRODUCTION OF COURT ANNEXED MEDIATION IN THE COURTS OF BOTSWANA-G.N.NTHOMIWA

BACKGROUND

Change is the most constant thing. A static Judiciary is one that is resistant to change and what is going on around it. The Judiciary has been going through changes since the setting of the tone for change at the judicial conference held at the Gaborone Sun Hotel in 1999. Programmes introduced so far have shown value for money in that they have improved the performance of the Courts.

In its endeavour to excel, the Judiciary is now exploring Court Annexed Mediation as the next programme to introduce. The concept is not new to us as mediation has been part of the general practice for dispute settlement in the Country although approached differently.

The process of Mediation has been defined and described as:

> ".. a process to assist parties to reach an agreement when they are in conflict. A person who is not directly involved in

> the conflict, called a mediator, is brought into a dispute. Unlike a judge in court, a mediator has no authority to impose any result on the parties. Instead, a mediator has skills in communication and negotiation as well as knowledge about conflict. The mediator assist the parties to communicate; helps them understand each other's needs, values, and emotions; lays the ground work to repair damaged relationships; and encourages creative options for resolution. Like a judge, however, the mediator should be impartial and have no allegiance to any of the individuals in the dispute."

Mediation is recognised in our Rules of Court in Order 42[1] as a form of dispute resolution. The manner of resolving disputes through this system supports the overriding objective of civil justice in Order 1 (2) of the Rules of the High Court which aims for:

> "…. the achievement of a just, efficient and speedy dispensation of justice."

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[1]In terms of Order 42 Rule (2) (4) (a) of the Rules of the High Court;

> "On the date set by the judge at roll-call or by conference call the parties and counsel shall meet to confer on the nature and basis of their claims and defences, the possibilities for a prompt settlement or resolution of the action and each of the issues listed in sub-rule (5)."

Sub-rule 5 states;

> "The following issues shall be addressed at the initial case management conference-
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> (n) the possibilities of settlement talks or possible mediation of the dispute;"

In its strategic plan the Judiciary undertook to develop, maintain and sustain a Judicial System that delivers justice efficiently and effectively. It is through this type of judiciary that the objectives of the rules can best be met. In an endeavour to achieve these objectives the Judiciary introduced a number of reforms which have gradually taken it to its objectives. Its efficiency in the delivery of its services is noticeable. Amongst others, the Judiciary introduced CRMS and JCM. The two reforms have ensured an efficient administration and management of cases.

It will be recalled that at the training of Judges and other stakeholders in 2009[2], Judges unanimously approved, inter alia, that:

"The Judge will encourage settlement including mediation. The High Court should seek to establish cost-free mediators that litigants can use in an effort to resolve their cases.[3]

Benchmarking on Court Annexed Mediation

Judicial Case Management has taken root both in the High Court and to a certain extend in the Magistrates' Courts. Other systems however, geared at improving productivity must now be explored. It is now time to explore the introduction of Court Annexed Mediation - a form of alternative Dispute Resolution (ADR) that is court sponsored/funded and operated programme. This system will allow courts to order mediation in deserving cases i.e. cases

[2] July 23rd – 28th 2009

[3] Report by Judge Daniel G Campbell, United States District Court, Arizona, 2009

where during conferences the court forms the view that there are prospects of settlement if parties are assisted to reach a settlement by mediators (See Order 42 (2) (4) (a)). The system will also work to the advantage of the parties in that it will reduce costs and even bridge relationships strained by litigation[4]. The intention is that mediation should eventually be introduced at all court levels. For a start it will be piloted in the High Court.

The piloting has been preceded by training of all judicial officers i.e. Judges, Magistrates and stakeholders which was done in March 2013. At the same time the Rules Advisory Committee has been instructed to work on the amendment of the Rules. Once the Rules have been published Court Annexed Mediation will start in the High Court. It will be followed by monitoring of the implementation of mediation.

As mediation and mediators will be attached to Courts, mediators will be under the control of the Judiciary and in the Government pay roll to prevent high costs that litigants may have to bear and for the sustainability of the system. Registrars will therefore be trained and properly empowered to deal with mediation through the rules of court. It is further important that mediation be protected so that what goes on in mediation remains in mediation and does not form part of the case record in the event the case goes back to court.

[4]In case flow management, page 120 Paragraph 1 it is stated that ADR programmes are usually introduced for one or more of the following reasons;
-to reduce backlogs or free up judicial resources, to expedite case dispositions, to reduce costs or to promote litigation satisfaction.

In the High Court there will be three key players, the Judge who must order mediation, the parties and the lawyers who must actively participate in mediation and the Registrar-Mediators who will carry out the mediation.[5]

The efficiency of this programme will hinge on the cooperation of the parties to litigation and their representatives.

You will recall that late last year (November 2012) the Chief Justice led a delegation of Judges and Registrars to the USA on a benchmarking mission. This had been prompted by an enquiry by Judge Wallace as to whether the Botswana Judiciary was not ready to participate in a program designed to promote alternative dispute resolution (ADR)[6] as there were retired judges who were interested in assisting in training the Judiciary in CAM for free. Because this program was new and has not been used in the

[5] *GoweniusKeanang Error Rantabe v. Gabriel Kanjabanga and two Others Civil Case No. 2914-02* the court noted;

> Order 42 rule 9 is not part of the Rules which took effect on 19 May 2008, by accident. Nor is it of minor significance. Fundamental to the successful implementation and operation of the 'JCM' system is the appreciation that, once registered, every case properly 'belongs' to the Court, and not to the parties or their attorneys. From that point on, the Court bears the responsibility of dealing with the matter expeditiously and fairly, inter alia, by setting out what the parties are required to do, and when they are to do it. That is not to say that, in controlling the pace of the litigation, the Judge will operate in a vacuum, or according to his own whims or personal schedule. 'JCM' pre-supposes the full participation of the parties, at all material stages of the process between registration and trial. That is why meetings are scheduled for the parties to prepare case management reports and proposed final pre-trial orders, and why their attendances are required at the Case Management, and Final Pre-Trial Order is issued, all interlocutory motions will have been disposed of; all factual and legal issues to be determined will have been identified; all evidence proposed to be tendered, in the form of witness summaries and exhibits, will have been recorded; and prospects of settlement will have been explored. The matter will then proceed purposely to trial, on a date, or dates, agreed by all concerned parties. (*emphases supplied*)

[6] Email to the Chief Justice of Thursday 1/19/2012 from Judge Dave Wallace.

Courts of Botswana before, the Chief Justice decided that training and installation should be preceded by a fact finding mission to the USA in the courts using the system. The Courts of Arizona in Phoenix and San Francisco were chosen for this exercise.

a. Pilot (CAM) in the High Court in the same way that Judicial Case Management (JCM) was started.

The visit which started in Phoenix was arranged such that it provided a balanced menu of mediation from different practitioners and the courts. The delegation met private practitioners handling mediations, mediators attached to the Courts Judges, Magistrates who conducted mediation, Judges who referred cases to mediation etc. This mix of practitioners gave the delegation a balanced view of mediation through the experiences of different players in the system. It also allowed the delegation to form a view on the type of mediation that might work well in its jurisdiction.

On noteworthy briefing to the delegation was by Justice Wallace who hailed Court Annexed Mediation as a system that had helped the courts deal with the huge workload that was facing them. Apart from expediting disposal rates of cases the system reduced costs and expenses associated with cases. To be effective he advised the following approach that;

a. Mediators must be trained. It is advisable for trainer of trainers to be trained to continue with the training.

b. Judges must be involved and must suggest settlement, hence judicial settlement.

c. Training on mediation should take around 32 hours.

d. Lawyers must also be trained to enable them to appreciate mediation and to effectively take part in it.

e. Judges must be trained on how to encourage mediation

f. It is ideal to use Registrars as mediators.

g. Mediation works in all the Courts i.e. Court of Appeal, high Court and Magistrates' Courts.

Summary on approach to the installation of ADR (CAM)

a. Sensitize all stakeholders on Court Annexed Mediation and it's benefit linking it to JCM to create buy-in-This was done in December 2012 by our Savingram dated 14th December 2012.

b. Develop educational material on mediation-aggressive information dissemination.

c. Train Judges, Registrars, Support staff and attorneys-Training was done from 11 March 2013 to April 2013 and had to stop on account of funds.

d. Establish Training Centre in Lobatse and equip it-Deferred due to resource constraints.

e. Review rules of courts to accommodate Court Annexed Mediation-The Chief Justice has instructed the Rules Advisory Committee to work on the relevant Rules.

f. Pilot CAM in the High Court in the same way that Judicial Case Management (JCM) was started.

g. Monitor the implementation of CAM.

4. CONCLUSION

Having observed and seen the benefits of ADR in the US Courts, it is clear that the reform is worth implementing as the next step in enhancing the performance of our Courts. With the tremendous results of mediation and settlement, cases could be completed without even going through the whole process of a trial process. Botswana could benefit from this process. All that is needed is a change of the mind set of Judges, Magistrates and the Court Administrators in the judiciary to embrace a more result oriented attitude towards case disposals.

ADR seems to be the answer to unclogging the system of small and easy cases which in the true sense should not go to trial. The die is cast for a new, challenging and exciting reform.

THANK YOU.