

Mediation and conflict resolution in South and Southern Africa: A personal account of the past 30 years

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Abstract

This article is a personal account of my involvement with mediation and facilitation over the past 30 years.

It does not purport to be a comprehensive or systematic account of the growing impact of these processes both in preventing and resolving conflict in our country and beyond. It therefore does not focus on organisations outside my own spheres of involvement, like the African Centre for the Constructive Resolution of Disputes and the Centre for Conflict Resolution, whose important contributions I readily acknowledge.

The insights and experiences reflected in the piece nevertheless point to an ever widening application of the processes across a range of disciplines and tell something of the rich contribution they have made to making South Africa a better, and safer, place.

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Advancing mediation in South Africa

My involvement with mediation began in the 1980s, a decade of mass mobilisation against apartheid characterised by four key developments:

- an intensification of the armed struggle by the African National Congress (ANC),
- the emergence of powerful industrial, predominantly black, trade unions that mobilised the working class, and the emergence of union federations most notably the Congress of South African Trade Unions (COSATU) that harnessed worker militancy into an effective political force,
- the formation of the United Democratic Front (UDF) which mobilised grass roots support for campaigns against the apartheid regime, and
- the imposition of international trade sanctions against South Africa.

Each of these strategic thrusts sought to confront and weaken the apartheid state. Negotiation was not considered as an option on either side of the divide. And yet, at a time of heightened conflict in the mid 1980s, and the crackdown on opposition by the South African security forces, certain initiatives emerged which sought to open up a dialogue between the National Party and the ANC.

The initiatives of H.W. van der Merwe, Richard Rosenthal and Van Zyl Slabbert are three that spring to mind:

The first two were under the radar attempts to explore the prospect of a discreet dialogue between the ANC and the National Party. The third was a well publicised high profile and largely symbolic meeting on Goree Island off the coast of Senegal between a group of prominent liberal Afrikaners led by Van Zyl Slabbert and senior leaders of the ANC in exile led by Thabo Mbeki. Slabbert had together with Beyers Naudé been laying the foundation for this encounter in several meetings with the ANC in the late 1980s in Europe where a degree of trust had evolved. I attended one of these meetings in Bonn, Germany and was witness to an unfolding conversation on the prospect of talks between the ANC and the Nationalist government.

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The Slabbert initiative sought to show that Afrikaners and South Africans under the banner of the ANC could talk to one another about political issues and find an act of compromise with an adversary. The unions were more forthright. They rejected mediation as a tool which blunted the aggressive thrust of the working masses for political and economic emancipation.

When the Independent Mediation Service of South Africa (IMSSA) was formed in 1984, largely through the inspirational guidance of Douwes-Dekker, and began to offer mediation services to employers and unions, it was followed not long after by a formal resolution from COSATU that its affiliates would not use mediation. However, through the persistent low key networking of the IMSSA Board and its two senior staffers Dren Nupen and Bontle Mpakanyane, one by one COSATU affiliates began to break ranks and began using mediation. The metal workers union as I recall was the first to do so but was soon followed by others. Early successes in settling seemingly intractable disputes brought more and more employers and unions on board.

My own personal journey into mediation began when I was persuaded by Paul Pretorius, a colleague at the Legal Resources Centre (LRC) to accompany him to a mediation he was conducting in a wage dispute at an engineering works in the metal sector in Pietermaritzburg. We were good friends, and so taken by the process was he that he offered to pay for my airfare to accompany him. I was a reluctant companion having bought into most of the arguments that mediation would be ineffective if not counterproductive in the prevailing political climate.

Six hours of exposure to the process in the hands of an obviously skilled mediator changed all that. I saw two parties, employer and union, dug into positions that they sought initially only to justify and not to change. I could see no way out. But during the course of an unfolding mediated conversation between the parties, which took place in both joint meetings and in-confidence separate sessions with the mediator, I saw that the interests behind the rigid positions were being brought to the surface. I saw how they started to create options to address those interests; I saw a prioritisation of the issues and proposals coming onto the table; I saw movement and flexibility and linkages and trade-offs. And ultimately, I witnessed settlement. For me, it was a life changing experience

which was to chart the course of the rest of my professional career. I got some mediation training from the Irish American, and plunged in. Within two years I had left legal practice and was appointed to the position of executive director of IMSSA.

The Independent Mediation Service of South Africa (IMSSA)

IMSSA was a non-profit organisation offering mediation and then arbitration services to companies and unions. It relied heavily on overseas funding for its operational viability. Costs were split 50/50 between union and company, but as many of the unions could not afford the service, their access was funded by overseas donors. IMSSA established panels of mediators and arbitrators in the major centres and serviced a burgeoning need across South Africa.

The organisation was entirely delinked from any of the apartheid state structures and this contributed to its credibility with the parties. A number of IMSSA panellists have in the post-apartheid era gone on to become judges in the Constitutional Court, the Supreme Court of Appeal, the High Court and the Labour Court. Kate O'Regan has served a 14-year term on the Constitutional Court. Edwin Cameron is currently a member. Lex Mpati heads up the Supreme Court of Appeal. Azhar Cachalia and Nigel Willis are members. Ray Zondo and Dunstan Mlambo have headed up the Labour Court and are now High Court judges, as are Edwin Molahlehi, Lee Bozalek, John Murphy, Bash Waglay, Thabani Jali, Chris Nicholson, Kathy Satchwell, Roland Sutherland, Adolph Landman, Ivor Schwartzmann, Dennis Davis, Elna Revelas, Shenaz Meer, Jerome Ngwenya, John Hlophe, Ronnie Pillay, Cecil Somyalo, and Rob la Grange. Fikile Bam headed up the Land Claims Court and Fink Haysom went on to become special counsel to President Nelson Mandela.

This is not to suggest that it was because of their IMSSA affiliation that they graduated to higher office. The point is that each one of them carried the experience of mediation into their new roles and this has placed a number of advocates for the process at the heart of the South African judicial system. Another IMSSA panellist who used his mediation experience to good effect is

Brian Currin, a lawyer and a former director of Lawyers for Human Rights. He has spent over a decade doing sterling peace work in Northern Ireland and in the Spanish Basque country.

The 1980s posed real challenges for IMSSA mediators and we were often called in to mediate very difficult disputes. An intervention in which I was involved comes to mind. I was appointed to mediate a national wage dispute in 1987 in the retail sector. The company was OK Bazaars, for many years the largest department store chain in the country with branches in most cities and towns. The union was the Commercial Catering and Allied Workers Union of South Africa (CCAWUSA). Wage negotiations deadlocked and the union embarked upon a strike. An inability to make progress in direct settlement talks led to a heightening of tensions. A bomb exploded on the second floor of the Company's flagship store in Johannesburg. CCAWUSA shop stewards were detained under the state of emergency in place at the time, effectively removing key leadership. At the time mediation was proposed the situation was unravelling.

My co-mediator Gavin Brown and I reckoned that before we could engage the substantive issues we needed a commitment to a cessation of hostilities. The deal was that the union would counsel its members to act with restraint, stop harassing customers and maintain a disciplined picket line. The company would use its best endeavours to secure the release of the detained shop stewards. It arranged a meeting for the mediators with the Minister of Police, Adrian Vlok, in Cape Town. We made our representations to him. He listened and undertook to consider them. This of course is the same person who appeared so prominently in allegations before the Truth and Reconciliation Commission (TRC) as heading up a force some of whose members were guilty of atrocities against anti-apartheid activists. This is also the man who in our new democracy begged forgiveness from Rev. Frank Chikane, then head of the South African Council of Churches, whom his operatives had tried to poison, and who in a symbolic act of contrition, fell to his knees and bathed the good Reverend's feet. Unsurprisingly the detainees were only released after the strike was settled. But the efforts made had the affect of cooling tensions, enabling us to mediate a tough but rational engagement between the parties. After several days and a

final marathon 27 hour session the parties concluded an agreement on all issues and the strike ended.

IMSSA and the process of Relationship by Objectives (RBO)

Towards the end of the 1980s, IMSSA began to expand its portfolio of offerings. It established an elections and balloting service under Dren Nupen that conducted strike ballots and conducted shop steward and political party internal elections. It ran the elections at the first post-exile ANC National Congress in Durban in 1991 where Nelson Mandela was elected ANC President. I had the singular honour of making that announcement to the thousands of delegates present. In the run up to the first national democratic elections in 1994 it offered a comprehensive voter education programme.

There were other programmes of note. IMSSA offered relationship-building initiatives through a programme developed by the Federal Mediation and Conciliation Service (FMCS) in the US known as Relationship by Objectives (RBO). The programme was built around the development by the parties of consensus-based objectives and action plans directed towards addressing relationship deficits and improving the quality of their engagement. The process was independently facilitated by IMSSA mediators. An interesting example of this, described in the 10th anniversary edition of the IMSSA Review (1994:19–21), is an RBO intervention that took place between Mercedes-Benz and NUMSA in 1989:

The relationship between Mercedes Benz, a major motor vehicle manufacturer in the Eastern Cape and Border area, and the National Union of Metalworkers of South Africa (NUMSA) had been very strained and difficult for a number of years. A white workers union, Yster en Staal, was also involved. In 1989, IMSSA became involved with the parties when it mediated a dispute over the termination of the employment of certain union members who were found to have participated in acts of misconduct during a demonstration in the plant. The dispute was settled

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through mediation and in terms of the settlement agreement the parties committed themselves to a Relationship by Objectives (RBO) exercise to set their relationship on a new footing.

A team of five IMSSA mediators ran the process. At an initial site visit at a Mercedes Benz plant they found workers with wooden AK47s on their backs. At lunch time there were mock bayonet charges on effigies of management. White supervisors were carrying real weapons and the atmosphere on the shop floor was one of deep antagonism and hostility. This was the late eighties, and the political climate was still highly oppressive. A meeting the mediators had with the union took place in a room with a board on which was written 'Viva COSATU, Viva ANC, Viva SACP' [the ANC and the South African Communist Party at the time still banned organisations]. Mediator Charles Nupen broke the tension in the room by going up to the board and adding 'Viva IMSSA'!

The RBO took place at a neutral country hotel venue, over four days. The company was represented by its chairman, numerous board members and 40 other managers from various levels in the company. The union was represented by two senior full-time union officials and 30 shop stewards from various plants around the country.

The team of mediators constructed a mini-parliament and the parties engaged each other on a range of matters of concern to them including compliance with the Recognition Agreement, racial discrimination, political issues, the development of a sound basis for future negotiations between the parties, selection, training and development of employees, the quality and nature of supervision, social responsibility of the company, consultation and participation by employees in decision-making within the company, timekeeping, job security, carrying of weapons in plant, and the management of political demonstrations in plant.

The mediators guided the debate along constructive lines and the parties were given a full opportunity to voice their opinions and were encouraged to set objectives to overcome the problems in their relationship. Consensus was reached on a series of 30 objectives to do this, and action plans were

developed to give effect to the objectives. Responsibility was assigned to specific individuals and groups within each party to execute the action plans. Time limits were placed on this process. Panellist Reg Mason, who took part in some of the stages, says it was a series of ‘very constructive steps, painstakingly put together, step by step’.

Mediator Paul Pretorius says the parties chose the right time for IMSSA to intervene – everyone was losing and was aware that something needed to be done. In the course of the process, a change in attitude was perceptible on the part of individuals within each party towards one another and an atmosphere developed that was far more conducive to sound industrial relations. Workers and management spoke to each other in a way that was cathartic and moving, both sides speaking of the humiliation they had suffered at the hands of the other, and showing the hurt this had caused them.

Mtutuzeli Tom, one of the union representatives who was to become President of NUMSA, said:

It was the first time in our lives as a labour movement to sit and open our hearts to management and management to labour. IMSSA made it possible for the real issues to be looked at and we are still feeling the positive effects.

Ian Russell of Mercedes Benz agreed with this positive assessment:

The IMSSA third party intervention at Mercedes Benz in 1989 was a watershed in the Company's Industrial Relations history. Despite a history of emotionally explosive and uncontrollable industrial relations which had paralysed the manufacturing plant for years, the parties were able to craft their own ground breaking constitution ... the boundaries of the practices institutionalising the relationship have been severely tested since then on many occasions but it has been the commitment to the structures from both sides coupled with the spirit of the RBO process that has enabled Mercedes Benz to enter the ‘new South Africa’ with confidence and commitment to a long-term future in this magnificent country.

The RBO programme has become an abiding feature of our labour relations system with literally hundreds of interventions having taken place in the 24 years since the seminal experience at Mercedes-Benz.

IMSSA and peace processes

In due course IMSSA established a community mediation service headed up by Vincent Mntambo which rapidly became involved in setting up and facilitating community-based multi-stakeholder peace committees under the National Peace Accord, an initiative subscribed to by major political parties, liberation movements, churches, businesses and unions to stem the tide of political violence that began to engulf the country in the early 1990s and threatened the viability of the CODESA negotiations. Many non-governmental organisations (NGOs) played a role in implementing the Accord. By 1993 IMSSA was servicing 16 peace committees, attended by political parties, the clergy, police, trade unions, business and sundry other community groupings across the country – sometimes at considerable personal risk to the mediators involved. Its mediators were frequently called upon to mediate between warring parties and to act as peace marshals at demonstrations and marches. I can recall being deployed in the immediate aftermath of the murder of Chris Hani to his home in Dawn Park and along with other peace marshals standing between and separating armed police and a crowd of angry youths incensed at his killing.

I should acknowledge the incredible work of Peter Harris and his team from the Wits Vaal regional peace secretariat who worked tirelessly to defuse any number of conflict situations across the region. And also the work of Jerome Ngwenya, who roamed the rural areas of KwaZulu-Natal mediating peace pacts between the ANC and the Inkatha Freedom Party. I have little doubt that this crucial work was replicated across the length and breadth of the land by any number of ordinary unsung heroes.

By the end of 1993 and the run up to the first national democratic elections, mediation was embedded in South Africa as a recognised effective conflict resolution tool. I had been appointed as one of 10 commissioners of the

Independent Electoral Commission (IEC) charged to run the election, in all probability because of my mediation experience. Peter Harris was appointed head of the Election Monitoring Directorate, and he built a mediation capability within the Commission that mediated electoral related disputes across the length and the breadth of the country.

Moving on from IMSSA

The new democratic dispensation posed new challenges and new opportunities in the conflict resolution arena. One year in, by April 1995, I had decided to move on from IMSSA. The organisation had grown exponentially. It had trained and retained well over 150 panellists. The staff complement had grown from 3, when I joined, to over 50 and there were offices in all the major centres. I had become a manager of people and systems that enabled others to do the work I wanted to do. There was also the transformation imperative that spoke to the need for new leadership, black leadership, in the organisation. As an NGO we had not done badly in this respect, but there was a strong lobby for greater representation at the leadership level and that was completely understandable.

I resigned in April 1995 and was succeeded by Thandi Orleyn, a highly capable attorney and experienced mediator with whom I had worked at the LRC. Towards the end of my tenure at IMSSA I attended a major FMCS conference in Washington, D.C. IMSSA had drawn heavily on its institutional links in the United Kingdom (UK) and the United States of America (USA), particularly in capacity building, and we felt it important to foster these links. There I met a young man who had been studying in the USA. We spoke and it was clear that he had a passionate interest in conflict resolution. His name was Vasu Gounden. He of course has lived out his dream through the organisation he created, the African Centre for the Constructive Resolution of Disputes (ACCORD), and has undertaken groundbreaking work in Africa in the area of conflict management and peace building.

After I left IMSSA I opened a consultancy and within a matter of weeks a new opportunity presented itself. I was contacted by Halton Cheadle, the leader of the team that was drafting the New Labour Relations Act (LRA), and Les

Kettleidas, the Deputy Director-General of the Department of Labour, to enquire whether I would put myself forward to participate in building the Commission for Conciliation, Mediation and Arbitration (CCMA), the new national dispute resolution agency contemplated in the LRA. The deal was that I would be contracted by the International Labour Organisation (ILO) as a technical expert to advise on its construction and staffing, reporting to its head office in Geneva. The money would come from the Swiss government in terms of a technical cooperation agreement signed by the Swiss president and then Deputy President Thabo Mbeki. Thus what came into existence was a technical cooperation programme known as the ILO/Swiss project that I was destined to head up for a period of 12 years.

I was also to be accountable to the tripartite Governing Body of the CCMA which would be appointed to oversee its creation. This in itself was an interesting development as it was the first time that business, government and labour, acting in concert, had been tasked with executing a statutory mandate to oversee the construction and work of a major social institution. The LRA came into effect, in stages, from the end of 1995.

The Minister of Labour at the time was Tito Mboweni. He set tight time frames for the delivery of the CCMA as an operational entity and had targeted Mayday 1996 as the date when it would open its doors. With the best will in the world this was not going to happen but politicians, as I have come to learn, are hard taskmasters who can set impossible deadlines. 'If we delivered a first time national democratic election in four months', he opined, 'why could we not build a single institution in six?' It has to be said that the passion that he brought to bear to deliver his new labour relations dispensation encouraged focus and dedication on our part to the task at hand.

The first thing I did was to approach Peter Harris to make himself available to head up the CCMA establishment secretariat and he was readily confirmed in this position by the Governing Body. Peter, a civil rights lawyer, had demonstrated his adroitness as a project manager at both the Wits Vaal Regional Peace Committee and as head of the Monitoring Directorate of the IEC, and seemed to relish working under pressure. In a short space of time he

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put together a team of some 90 people and we set about sourcing and equipping infrastructure, recruiting staff and commissioners, training and accrediting them, and building the information technology (IT) and corporate support systems necessary to run a large organisation.

Although the LRA told us much about the roles and responsibilities of CCMA commissioners, and defined the conciliation, mediation and arbitration processes that they would be called upon to discharge, it told us nothing about the design of the institution, and the capacities required. What the law told us is that we had to have an office and capacity in each of the nine provinces, and a Head Office. We had to build a Commission that was representative both in terms of race and gender. The rest was up to us. I had already begun to work with Aurret van Heerden, my counterpart at the ILO based in Geneva, and the Australian labour attaché in Geneva, to develop a high-level conceptual design of the CCMA. Aurret was a former student leader in South Africa and underground anti-apartheid activist who was captured by the security police in the 1980s and brutally tortured. A man of considerable intellect and principle, he provided important advice and guidance in regard to the construct of the Commission and pointed us in the direction of the Australians who could offer key technical advice in these matters.

Towards the end of 1995, a group of us including John Myburgh, who was to become the first president of our Labour Court, Jayendra Naidoo, then director of our National Economic Development and Labour Council (NEDLAC), Ebrahim Patel, then general secretary of the South African Clothing and Textile Workers Union and currently the Minister of Economic Development, undertook a study tour to Australia to look at the workings of its Industrial Relations Commission which had been at the forefront of their labour relations system for 100 years. We drew much from that experience. For instance, the fact that the credibility of the CCMA would rest on three pillars: the capability and competence of its commissioners; easy access to its services; and an electronic case management system that could track the progress of cases from inception to conclusion.

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The establishment secretariat developed intensive training courses for newly recruited commissioners to hone their capabilities. The Commission's services would be free but that would not guarantee access to disputants based in rural areas so we decreed that our commissioners would not be office bound but would travel out into the countryside where there was a need, and conciliate and arbitrate in magistrates' courts, community halls and school premises to underscore the notion of public service to the most vulnerable in our society. Indeed, this was the *raison d'être* of the CCMA. We had to estimate from what statistical data were available at the time the number of disputes that would come at us in each province, and build our capacity and deployment strategy accordingly. In retrospect we were not too far off the mark.

We designed a case management system that not only tracked cases but generated all manner of reports and statistics on the work undertaken. At the time, and today, it is regarded as the leading system of its kind in the world. By the time we opened our doors to the public in all provinces in November 1996, we had in place over 100 full-time and 300 part-time commissioners and an overall staff complement of 500 employees deployed in 10 fully equipped offices throughout the country. In a period of 12 months the establishment secretariat guided by the Governing Body had built what was at the time, and arguably remains, the largest national social institution constructed in post-apartheid South Africa.

I was released from my ILO contract to take up the post as the first executive director of the CCMA. I always viewed this as a short-term appointment for the very same reasons that had led to my departure from IMSSA. My task was to 'bed down' the institution, address the inevitable personnel and systems challenges that would confront a new organisation and guide it through its formative period of operation. There was, however, to be no easing into a work cycle. In its first year the CCMA received and processed over 100 000 dispute referrals, with a considerable degree of success despite all manner of teething problems. I resigned as director at the end of 1997 and was succeeded by Thandi Orleyn who had followed me as director of IMSSA.

Today the CCMA is a well-oiled machine. Its budget has grown. The number of matters it handles has increased exponentially. Its efficiencies are impressive. It is truly representative both in terms of race and gender. Its settlement rate has improved progressively through the years. It is well led by Nerine Khan who as a young woman was among the first batch of commissioners recruited in 1996. It has proved its worth and become fundamental to the fabric of labour relations in our society.

From South to Southern Africa

So what was next? I resumed my role as chief technical adviser to the ILO/Swiss project and was given a brief to assist the social partners in Southern African countries to build their labour dispute resolution capability. Over the next eight years much of my time was spent delivering on this mandate in Lesotho, Swaziland, Botswana, Namibia, Zimbabwe, Mozambique and Angola. In addition I gave selective technical assistance to the social partners in Tanzania and Nigeria.

All but the Lusophone countries and Namibia had been colonised by Britain and their labour laws and dispute resolution systems reflected a strong colonial bias. Much emphasis was placed on the role of labour inspectors to enforce the law and deal with complaints. The inspectorate was headed up by a Labour Commissioner reporting directly to the Permanent Secretary in the Ministry of Labour. Only one or two countries had recently introduced specialist labour courts, and generally, to the extent that labour disputes wound up in the courts, it was the conventional civil courts that had jurisdiction. The right of workers to strike was at best ambiguously expressed in the law and at worst it did not exist. In the public sector unionism was discouraged. There was no reference to mediation or arbitration.

My experience in IMSSA and in building and directing the CCMA was to be of considerable assistance in undertaking the task ahead, but a one-size-fits-all approach would not be appropriate. Each country needed the opportunity to influence the design of the reforms it chose to introduce. So I employed a dialogue-driven methodology which enabled the social partners in each

country to forge consensus on the crucial policy choices they believed best suited their circumstances. In this endeavour I teamed up with Halton Cheadle, the South African labour law expert. The strategy had three components: firstly, develop the legislative framework to modernise the dispute resolution system; secondly, assist in putting in place the institutional arrangements, infrastructure and systems, through which dispute resolution services would be offered; and thirdly, train the people who would deliver the services.

Without exception the social partners in each country were positively disposed to the offer of assistance. Their dispute resolution systems, such as they were, were proving woefully inadequate in terms of dealing effectively with both collective and individual disputes. We worked at the outset in each country with a tripartite committee comprising senior representatives of the Ministries of Labour, employers and unions, each carrying mandates from their respective constituencies. The intervention took the form of strategic planning where we directed the conversation towards a shared vision and set of objectives, a shared analysis of the current challenges, and the development of a road map to get from where they were to where they wanted to be. I facilitated the engagements and Cheadle outlined key policy options.

A running record of decisions taken through the process would be recorded in PowerPoint as they were made. We found this to be a powerful tool as it visually demonstrated to the social partners the progress they were making and reinforced their faith in the value of social dialogue. Once the roadmap was finalised, Cheadle would set about preparing a draft set of amendments to each country's labour law giving legal expression to the policy choices the social partners had made. The text would be 'workshopped' with the social partners until sign-off was achieved.

This highly participative process engendered a strong ownership by the partners of its outcomes, and was a significant departure from traditional labour law reform processes. Traditionally, an expert would be appointed to conduct cursory consultations with the parties and eventually produce a legal text.

Employing this methodology over an eight-year period we achieved a modern statutory construct for dispute resolution in six of the seven countries to whom we were providing technical assistance. For reasons which never became apparent we were unable to secure the passing into law of the amendments agreed upon by the social partners in Angola. The Namibian social partners on the other hand opted for a completely new labour statute, a much more prodigious task but one which we eagerly embraced.

We then worked with social partners in each country to design the institutional arrangements that would need to be put in place. Lesotho, Mozambique and Swaziland opted for independent dispute resolution agencies with tripartite governing bodies while the other countries opted to house the new services within their Ministries of Labour. Common to all systems was the assertion of mediation as the primary dispute resolution process, with a residual recourse to arbitration for rights disputes.

The next major challenge was to assist with the recruitment of persons in each country to mediate and arbitrate and to build their capability in each discipline. At IMSSA and the CCMA we had offered one week training courses in each discipline for panellists and commissioners. We decided that in the Southern African countries we should raise the status and the level of training and offer an accredited course and a qualification. I entered into negotiations with the Universities of Cape Town, Zimbabwe, Namibia and the National University of Lesotho and secured their agreement to co-operate in offering a combined post-graduate diploma in dispute resolution. Evance Kalula, the head of the Labour Law Unit at the University of Cape Town, played a pivotal role in stitching the arrangement together with the result that each graduate would receive his or her qualification from each of the four universities. The diploma course was run over six weeks and the project brought together candidate mediators and arbitrators from Lesotho, Zimbabwe, Botswana, Swaziland, Namibia and Mozambique to Windhoek to the University of Namibia which hosted the event. The faculty was made up of some lecturers from the various universities, seasoned practitioners and experts from the ILO. Two diploma courses were run over the life of the project and some 200 candidates graduated with the post-graduate diploma.

The majority of these today form the complement of mediators and arbitrators who staff the dispute resolution centres in participating countries.

Social and economic initiatives

Toward the end of the 1990s I increasingly turned my attention to supporting initiatives that might impact national social and economic policy. At the time the business community and COSATU were putting forward economic policy proposals that were totally at odds with one another. The central issues at hand were how to grow the economy and create jobs. The objectives were of course shared rather than divergent, but on matters of how to get there, there were significant differences. A process of sustained social dialogue had produced political change earlier in the decade, but economic emancipation remained an elusive target for the majority of South Africans. I thought that if we could get the senior leaders of business talking to senior leaders of the unions on a relatively structured basis this would present the greatest possible opportunity to find common ground. I had been in Dublin in 1998 at a conference and had been exposed to the remarkable story of Ireland's economic renaissance through a series of 3-year social compacts, the result of structured social dialogue between government employers and unions and special interest groups like farmers. The idea of a study tour to Ireland came to mind. This would create an opportunity for leadership to spend quality time together and at the same time engage the architects of Ireland's economic miracle.

I shared these thoughts with Bokkie Botha, a senior employer representative who was on the CCMA Governing Body and who had progressive views about unions and the value of social partnership. He embraced the idea and so we partnered to introduce it to key trade union and employer leaders. We spoke initially to Ebrahim Patel, then the general secretary of the Southern African Clothing and Textile Workers Union (SACTWU) and arguably the leading intellectual in the trade union movement at the time, and to Leslie Boyd, the deputy chair of the Anglo American Corporation. Boyd was a tough businessman and a straight talker who had dealt with unions in the steel and engineering sectors all his working life. Both Boyd and Patel liked the idea and agreed to canvas it with colleagues, and, if the idea resonated, to suggest a

group of participants. Boyd brought the experience of the Netherlands into the equation as it too had experienced economic distress in the 1980s, but through a process of dialogue, had agreed upon measures to turn around the country's economic performance.

Eventually a bipartite delegation comprised of the following members was assembled: Boyd and Patel; Nicholas Oppenheimer, chairman of De Beers; Christoff Kopke, the Chief Executive Officer (CEO) of Daimler Chrysler SA; Marinus Daling, the CEO of Sanlam, and Bokkie Botha; Mbazima Shilowa, the general secretary of COSATU; Zwelinzima Vavi and his deputy, Gwede Mantashe, the general secretary of the National Union of Mineworkers; and Mbuyi Ngwenda, the general secretary of the National Union of Metalworkers. I was able to use my networks in both Ireland and the Netherlands to develop an itinerary and we planned a visit to both countries and to the ILO headquarters in Geneva over an eight-day period. As this was an ILO sponsored visit I accompanied the delegation.

During the course of its visit to Ireland, the delegation met the Irish Prime Minister, leaders of the Irish Confederation of Trade Unions and the Irish Business and Employer Confederation, members of the Central Review Committee (which monitors implementation of the Irish National Accords), the Chief Executive of the Irish Labour Relations Commission, and representatives of Enterprise Ireland, an institution which develops and promotes indigenous Irish business. In the Netherlands, the delegation met the Deputy Prime Minister and Minister of Economic Affairs, the Minister of Social Affairs and Employment, representatives from the Social and Economic Council and the Labour Federation, business and labour leaders, and representatives from government departments.

At the end of each country visit the delegation met to consider the lessons and insights gained. The delegation agreed that while South Africa's history and circumstances were different, there were nevertheless important lessons and insights to be derived from the Irish and Dutch experiences. These lessons and insights included:

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- A mutual recognition of crisis was the trigger which persuaded the parties to take action. (The level of unemployment and continuing job losses in South Africa was acknowledged by the delegation as a crisis.)
- Building and maintaining trust among the social partners was key to underpinning the levels of co-operation required to manage economic transformation. It was significant that both in the Irish and Dutch experiences agreements were based on trust.
- A shared analysis of the problem and a mutual recognition that parties needed to commit to find solutions. Both countries relied on statutory councils (like NEDLAC, The National Economic Development and Labour Council) in which they were represented, to undertake research and produce information upon which they could rely to develop plans and policy proposals.
- A vision of what the parties were aiming for, and a set of manageable objectives.
- Some extra-ordinary challenges. Leadership bore a particular responsibility and took risks. There were hard decisions to be taken and difficult trade-offs to be made.

Ultimately, there was a broad and expanding agenda. There were few major successes in the initial period, but importantly for the process there were some short-term gains to balance the sacrifices, and this was important to build confidence in the process. It was important to audit and report on progress and shortcomings.

The parties used existing social institutions and, where necessary, created new ones to give effect to their plans for national recovery. The accords in both countries enjoyed wide public support. South Africa's different circumstances, higher unemployment, sharper inequality, deeper ideological differences, and a larger population, far from being a deterrent, required of the parties a greater responsibility and a firmer resolve to meet the challenge of successful economic transformation.

Upon their return to South Africa the business and union leaders continued to meet and in due course decided to formalise their relationship by forming the Millennium Labour Council (MLC) which was launched by President Thabo Mbeki on 7 July, 2000. At the launch the parties signed the Millennium Labour Agreement which committed them to address South Africa's unemployment crisis:

MILLENNIUM LABOUR AGREEMENT

South African business and labour, following visits to Eire and Holland, and after numerous discussions, agree to establish a bilateral structure known as the Millennium Labour Council.

They agree:

1. The current unemployment, job losses and lack of job creation constitute a deepening crisis in South Africa that requires urgent action.
2. Current levels of poverty and inequality are unacceptable and new initiatives are needed to promote improved quality of life and decent work for all.
3. The Millennium Labour Council is to comprise twelve members each from the business and trade union constituencies.
4. The Millennium Labour Council will operate in association with NEDLAC as a bilateral council but with full policy autonomy.
5. The objective of the Council is to develop a shared analysis of the crisis and potential solutions to be pursued with government and NEDLAC, as appropriate.

Representing LABOUR
Zwelinzima Vavi

Representing BUSINESS
Leslie Boyd

The MLC was at its inception thrust into the debate about proposed amendments to the Labour Relations Act. These proposed amendments were controversial and had provoked a statement from the General Secretary of COSATU that there would be blood on the floor if they were passed into law. The MLC set about trying to find solutions to the impasse. I facilitated an engagement within the MLC and worked principally with Ebrahim Patel for the unions and Vic van Vuuren for the employers. After a period of several weeks of facilitated negotiation consensus was reached on all issues in the MLC. It was the intention to feed the outcome into NEDLAC, but the draft agreement was leaked to the press before this could happen. It generated a huge debate about whether the MLC was usurping the role of NEDLAC. Ultimately, however, the government 'bought into' the MLC agreement and a crisis in our labour relations system was averted. Shortly after, Les Boyd retired from Anglo American and withdrew from the MLC. He was replaced by Bobby Godsell – the CEO of AngloGold Ashanti – who together with Zwelinzima Vavi has co-chaired the MLC until today.

The MLC has not been able to impact its big picture objective of addressing the unemployment crisis, but nor for that matter has any initiative, including government initiatives over the past decade. The global financial crisis and South Africa's slow rate of economic growth are major contributing factors. Regrettably the schisms over what are the best policy prescriptions for economic growth remain, and the South African social partners have not been able to emulate their Irish and Dutch counterparts in developing a shared analysis of the causes of our economic malaise and what is necessary to deliver us from it. The MLC has nevertheless sustained itself over the years as a forum for dialogue between the captains of industry and trade union leaders. Its most abiding contribution is to have opened up lines of communication and to have built relationships at a leadership level. In a volatile labour market that contribution should not be underestimated.

Facilitating negotiations in the financial sector

In the early part of the new millennium, around 2003, I was approached along with Tefo Raditpole, an attorney and experienced mediator, to facilitate negotiations towards the development of the Financial Services Sector Charter,

the first initiative to drive a self-regulated process of transformation and black economic empowerment within an influential component of the South African economy. This was a major multi-stakeholder engagement that sought to agree on the terms of a scorecard by which the pace and progress of transformation within the sector could be measured. This would be measured by progress in achieving targets set for categories such as black equity ownership, skills development, employment equity, and preferential procurement. The process was strongly influenced by the emergence of Broad-Based Black Economic Empowerment (BBBEE) legislation and BEE codes, and the negotiation took place within the framework and targets which these measures prescribed.

All major financial institutions were represented and they were led by Jaco Maree, the CEO of Standard Bank. The transformation imperative was articulated and driven in the negotiations by a relatively recently formed organisation of black professionals known as the Association of Black Securities and Investment Professionals (ABSIP). Representing them at the table was a group of smart young streetwise black executives led by Kennedy Bungane who had a clear transformation agenda and a somewhat robust negotiation style. National Treasury had a 'watching brief' and watching from the wings were COSATU and the South African Communist Party. The role of Tefo Raditopole and me was to facilitate the negotiations and to keep them on track by mediating any obstacles or deadlocks that might arise.

An important aspect to remember about multi-stakeholder negotiations is that the negotiations within broad constituency coalitions to secure alignment on issues are often as challenging as the negotiations across the table, and this engagement was no exception. It tested the skills of Jaco Maree, but what became clear as the weeks drew on was that the parties had a grasp of the historical moment. Transformation was not about giving away, but about building and creating, about shedding the burdens of the past, about acting ethically, and unlocking the potential of all South Africans to create value and to share equitably in that value.

At a dinner organised by ABSIP earlier this year to honour Jaco Maree as a transformational leader, ten years after the successful conclusion of the Charter

negotiations, I was asked to make the keynote address. I had this simple message about transformation:

I am not privy to the statistics around ownership and procurement and skills development and the other criteria that are used to measure transformation in the financial services sector. But what I know is that when I walk into the local branch of my bank and I am the only white person there, and the quality of the service I receive is top rate, and I am made to feel special and that has nothing to do with the colour of my skin but only because I am a customer, then I know that I too am a beneficiary of transformation. That speaks profoundly to me.

By 2005, mediation had achieved such wide acceptance in South African society that it was offered as a basis for dispute resolution in no less than 31 South African statutes. In the South African Revenue Service (SARS), Fink Haysom and I designed an in-house mediation system to resolve tax disputes and trained SARS officials to mediate these disputes. Some would regard this as a heresy in that the mediation would not be conducted by an independent third party but the real issue for me was whether it was practical and whether it would work. By all accounts the system is working in SARS and has cut down significantly on the time taken to resolve tax disputes.

Mediation in the public sector

In 2007 I was asked to mediate a public sector strike with Meshack Ravuku, an ex-trade union organiser and a wonderful mediator. Virtually the whole public sector was on strike over wages and conditions of service. It was a very tense environment with daily mass demonstrations outside the negotiation venue. Essential service workers, particularly nurses, participated in the strike and there was a serious concern about the safety of patients, particularly in public hospitals. There were incidents of violence and intimidation. One evening demonstrators broke into the negotiation venue and emptied fire extinguisher canisters into the air conditioning system which contaminated the environment with a pervasive white powdery substance and had negotiators coughing, eyes streaming, heading for the exits. This was clearly no ordinary dispute.

Although there had been some movement in the mediation, when the parties deadlocked two weeks into the strike, Meshack and I took the unusual step of issuing a single-text recommendation to settle all issues. We were roundly condemned in certain quarters, but ultimately, when the parties settled a few days later, the agreement was pretty much in line with what we had recommended.

A very similar pattern emerged when I mediated the national wage negotiations in the auto industry in 2010, except the recommendation was made in accordance with the requirements of the applicable dispute resolution procedure before the strike commenced. Ultimately one week into the strike, a settlement was reached that was largely in line with what had been recommended. A lot of mediators are uncomfortable with the notion of single-texting. They argue that it removes the responsibility of 'working' the settlement from the parties and in a sense disempowers them. I, however, regard it as a useful tool, albeit to be used strategically and sparingly, and particularly when parties have exhausted their mandates and have deadlocked outside the zone of possible agreement.

Joining a consultancy

In 2008 I concluded my work with the ILO and went to work full-time in a boutique consultancy, Stratalign, that I established with Alan Brews, with whom I had had a previous association at the IEC and the CCMA, and Bontle Mpakanyane with whom I had worked at IMSSA. We targeted strategic interventions that were developmental in nature or which assisted distressed entities to recover and regenerate. Much of the work has involved facilitating and mediating in multi-stakeholder engagements.

In 2009 I was approached to lead a facilitation team to manage the negotiations between the City of Johannesburg and the taxi industry toward the introduction of the Rea Vaya bus rapid transit system in Johannesburg. The system was modelled on successful public transport initiatives in Latin America, particularly in Bogota, Columbia, where a good number of taxi owners traded their taxis and operating licenses for shares in the company running a bus rapid transit system with dedicated bus lanes on trunk routes. The business model was designed to offer commuters a speedier and safer form of travel, and reduce congestion on

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the roads and create a more environmentally friendly city by reducing exhaust emissions. What was envisaged was a partnership between the local authority and the industry where their respective operations would complement one another. Our role was to facilitate and where necessary mediate towards the conclusion of a bus operating contract.

Our first task was to design all elements of the negotiation process, and reflect it in a negotiation framework proposal for agreement by the City and the industry. This included how the parties would qualify for and be represented at the table, how work would be undertaken, where and how decisions would be made, the rules of engagement, and the role and authority of the facilitators which included mediation.

The negotiations commenced in a hostile environment as there were elements in the industry that viewed the Rea Vaya concept as a threat to their livelihoods and this created an insider-outsider rift within the industry. Regrettably some taxi leaders who supported the new initiative were assassinated and negotiations proceeded with a heavy security presence.

Within the first 12 months sufficient progress had been made to introduce an interim service in time for the soccer world cup, running from the city centre and Soweto to the national stadium. The service was a great success. Those prescient enough to use it found that it took nine minutes from a park and ride facility to get to the stadium. Others who opted for conventional buses or cars often found themselves in gridlock with travel to and from the stadium taking hours.

The first phase of the project was completed in 2011 and we are currently nearing completion of the second phase. When the project is finally complete there will be trunk routes running the length and breadth of greater Johannesburg giving all its residents ready access to the rapid transit system.

Mediation over ‘Kill the farmer, kill the boer’

One of the legacies of the struggle against apartheid was the so-called struggle songs in which issue was taken with various aspects of the white minority regime. One such struggle song was ‘Dubula Ibhunu’, paraphrased in English

as ‘Kill the farmer, kill the boer’. It was sung at various times by Julius Malema, then president of the ANC youth league. Afriforum, an activist Afrikaans NGO, and the Transvaal Agricultural Union (TAU), representing in the main white farmers, successfully applied to the Equality Court to have the song banned on the basis that it constituted hate speech. Both Malema in his personal capacity and the ANC were cited as respondents. Both appealed the decision to the Supreme Court of Appeal.

At the instance of the Judge President Lex Mpati, a former IMSSA panellist, the parties agreed to attempt to settle the matter through mediation. I was approached to conduct the mediation by the parties’ lawyers, which I agreed to do through Tokiso, a private dispute resolution agency.

Malema appeared in person, Gwede Mantashe, its Secretary General, appeared for the ANC, and Kallie Kriel for Afriforum. The TAU was also represented. The dispute was settled after two days of intensive mediation. The confidentiality rule applicable to mediations precludes me from revealing the details of the engagement. Save to say it was a fascinating encounter and reinforced my belief that even the most intractable disputes can be resolved through dialogue. It also graphically demonstrated how mediation can be used to craft a mutually beneficial outcome in circumstances in which, had the matter proceeded on appeal, there could only have been a winner and a loser.

The terms of the mediated settlement agreement were made public and they bear repeating here:

The parties have agreed to a full and final settlement of their dispute on the following terms:

- a. The parties agree that it is crucial to mutually recognise and respect the right of all communities to celebrate and protect their cultural heritage and freedom.
- b. The parties recognise that certain words in certain struggle songs may be experienced as hurtful by members of minority communities.
- c. Therefore, in the interests of promoting reconciliation and to avoid inter-community friction, and recognising that the lyrics of certain songs are

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often inspired by circumstances of a particular historical period of struggle which in certain instances may no longer be applicable, the ANC and Mr Malema commit to counselling and encouraging their respective leadership and supporters to act with restraint to avoid the experience of such hurt.

- d. The parties commit to deepening dialogue among leaders and supporters of their respective organisations and formations to promote understanding of their respective cultural heritages and for the purpose of contributing to the development of a future common South African heritage.
- e. The parties commit to continued formal dialogue amongst leaders of the ANC and leaders of AfriForum and TAU-SA and other role players to promote understanding of their respective cultural heritages and aspirations.
- f. The ANC and Mr Malema undertake upon the signing hereof to withdraw their Appeal to the SCA with no order as to costs.
- g. The parties agree that this Mediation Agreement will be made an Order of Court substituting the Equality Court Order. In this regard the parties agree to jointly approach the Honourable Judge Lamont for this purpose soon upon the signing of this Mediation Agreement. In the event the Honourable Judge Lamont were to decline the substitution of the Equality Court Order, Afriforum and TAU-SA irrevocably undertake to abandon the Equality Court Order and simultaneously the parties will apply to have this Mediation Agreement made an Order of Court.
- h. For the avoidance of doubt the parties agree that each party shall pay its own costs in respect of the Equality Court Proceedings.

The continuing and future role of mediation

During 2012 and 2013 South Africa experienced a resurgence of violence and volatility in its labour relations exemplified by the Marikana tragedy in which 34 mineworkers lost their lives. A CCMA mediation intervention was critical to

bringing a measure of stability to the environment when it brokered a settlement involving an adjustment to wages for certain categories of workers.

In April 2013 I was asked to lead a facilitation team to address significant incidents of unprocedural industrial action at two major Eskom power generation project construction sites. A combined total of 30 000 employees, 7 unions and some 30 principal contractors and over 200 sub-contractors were at the sites. The project had since the beginning of the year lost weeks of construction time, particularly at Medupi due to unprocedural industrial action, and it was clear that there would be significant overruns on project deadlines. The source of the problem appeared to be a deep unhappiness on the part of unions and their members with the applicable project labour agreement at each site, which they felt was skewed in favour of contractors and in effect denied them the right to strike.

We convened a facilitation process drawing in the leading contractors, union leadership and Eskom, well over 100 participants in all. Facilitators were deployed to work with the parties and I played an oversight role and took responsibility for drafting proposals for their consideration. The objective of the facilitation was to produce a game-changing outcome that would provide a more balanced rights regime and create the building blocks for a fundamentally different relationship. As we analysed the myriad pathologies that characterised the relationships on site, a recurring theme was the absence of any real substantive dialogue between the parties. So the team decided to present the possibility of a new collective agreement embodying the concept of dialogue-driven partnership.

Over several weeks and in the face of considerable skepticism and at times downright hostility, we developed this concept and produced a draft that ultimately found resonance with the different stakeholders. This partnership agreement was signed in early June and since then there has been an evolving stability at the sites. The situation remains fragile and there is still much bedding down to do if the policies and structures contemplated in the agreement are to take root. But it would be fair to conclude that South Africans have a remarkable ability to head off imminent disaster and find a path to peace. Time will tell whether the experiment at Medupi and Kusile contains the prescription for such an enduring outcome.

What Medupi and Kusile tell us is that the path to labour market stability is to cast as our number one labour market priority, the creation of high trust environments in our workplaces where employees feel valued, and have their voices heard. The concept of workplace partnerships, as heretical as it may seem to our deeply embedded Anglo Saxon system of adversarial industrial relations, may yet find its day in our troubled labour relations landscape.

Commercial mediation

Perhaps the most innovative development in the field of mediation in South Africa in the last five years has been building capability to mediate commercial disputes. Long since the preserve of commercial litigators, commercial disputes have sustained the large legal firms for decades. But there is a growing disquiet among corporations about the cost of commercial litigation and the time that it takes to secure a result. There is a widening interest in the opportunities that commercial mediation presents and large commercial law firms are having to revise their traditional hostility to the process. The complaint from the traditionalists that mediation is not about just settlement, but just about settlement, is fast losing ground.

But commercial mediators require more than a set of generic mediation skills. The circumstances pertaining to commercial disputes are *sui generis* and demand an understanding of mediating in a commercial environment. Commercial mediation agencies, such as the Centre for Effective Dispute Resolution in the UK (CEDR), have moved in very astutely to occupy that space and have partnered with the South African training agency Conflict Dynamics led by John Brand and Felicity Steadman, to satisfy what is an almost insatiable demand for commercial mediation training in South Africa. At the moment, commercial mediator supply far outstrips an evident growing demand for commercial mediation services, but that may well change when a government-supported court-annexed commercial mediation pilot programme comes on stream in the next few months. There is a very real sense that commercial mediation will in time become the most prevalent dispute resolution application in our society as parties seek quicker and more cost effective ways of generating more creative outcomes than the win-lose, costly and time consuming results that our civil

courts currently offer. Of course this can never be an either/or choice. The two modes of dispute resolution have to complement one another so that users can make informed choices about which option is most suitable.

Conclusion

In articulating my own mediation journey over the past 30 years, which has traversed only certain aspects of how mediation has become embedded in South Africa, there can be no doubt that mediation has become part of the fabric of how we deal with differences and conflicts in our society.

As we chart our way forward in our young democracy, there are more questions than answers as to the basis upon which we resolve all the conflicts that beset our communities on a daily basis. Nevertheless, we can be fairly confident about the process options open to us as we consider how best to address them, and there should be few who would question that mediation will be at the forefront of the choices available.

Source

Independent Mediation Service of South Africa 1994. *On the Frontline: Ten years of the Independent Mediation Service of South Africa, 1984–1994. IMSSA Review* Number 16, Special Tenth Anniversary Edition.