

An investigation into the mediation of disputes in the South African construction industry

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COMMENT

The paper by Ms Povey is to be welcomed as a valuable contribution to the pool of knowledge about our construction industry, especially in the field of alternative dispute resolution. Even from her bibliography the locally published information can be seen as rather meagre.

Judging by the international standards that she uses, her conclusions unfortunately cast a shadow over the local practice of mediation finding that 'it is not consistent with the accepted principles of the mediation process, as the mediator does not generally assist the parties in determining their own settlement' but 'centre[s] mainly on the collection of information on the dispute'.

My personal view is that her conclusion is possibly correct but unfortunately incomplete. First, the obvious question now to ask is: Why? Why do mediators not adhere to the 'core features of the process, namely that mediation is an extension of the *negotiation process* involving the services of a *third party* engaged by the disputants to *assist* them in *reaching agreement* on the issues in dispute'? Second, although 'most authors acknowledge that mediation is not easy to define' it would be interesting to know whether we developed a variant of mediation or perhaps another process similar to mediation to suit our local conditions and called it 'mediation'. After all, a rose by any name ...

When the question is asked why so much time is spent on gathering information and so relatively little time on bringing the parties together to enable them to reach agreement between themselves, a number of possible answers come to mind. Some of the disputes that I came across, for instance, reached that stage of negotiation between the two parties that they were no longer on speaking terms with each other but communicated through their respective lawyers and were compelled to enter into a process of mediation by virtue of the contract between them.

Other disputes were unresolved for such a length of time that the disputants probably decided to get somebody independent to find a solution, especially where an

appreciable sum of money is involved, hence mediation.

At times the disputants themselves tried to agree on a mediator but were unable to do so (possibly because a lack of sufficient trust between them on account of the protracted dispute) and then sought redress by means of mediation provided for in the contract.

One can readily understand that under these circumstances, what is desired from an independent person is what an equitable solution to a vexed problem would be. This would necessitate an in-depth understanding of the issues involved and hence substantial information gathering would be dictated in order to facilitate an informed decision making process. In spite of the shortcomings of our 'mediation' process, it is reassuring to learn that a large proportion of disputes were settled this way to exclude the cost, delay and other hassles accompanying litigation or arbitration.

If Ms Povey further researches these aspects her work will enrich our knowledge of alternative dispute resolution even further and I would like to encourage her to continue with this important work.

Pierre Stoffberg

RESPONSE

I thank Mr Pierre Stoffberg for his interest in my paper as well as his additional comments.

My research was aimed at testing whether the practice of mediation within the South African construction industry was consistent with the generally accepted principles of the mediation process. I found that this was not the case, however, this finding must not necessarily be seen as an indictment of the practice of mediation within our construction industry.

I did not investigate the *success* of mediation in resolving disputes within the industry. Nor was the research aimed at examining '*why*' our version of mediation has taken on the form that it has. I therefore agree with Mr Stoffberg that further research into these matters would enrich our knowledge and it is for this reason that I concluded my dissertation by recommending that the

following areas of research on mediation in the construction industry warrant further attention:

- A replication of Stipanowich and Henderson's (1992) research, carried out on a national basis in South Africa. Such research would be aimed at addressing the attitudes and experiences of all construction industry participants towards media-

tion and would build on the regional findings of Schindler (1989). The perceived differences between mediation, contractual adjudication and expert determination/appraisal should also be addressed.

- The statistical determination and verification of the settlement rate of the different styles of mediation being practised in the industry.

- The identification of the determinants for successful mediation.

In conclusion, I am pleased to report that further studies, based on some of my research, have taken place and continue to take place at the University of Cape Town's Department of Construction Economics and Management.

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