

# Managerial judging and alternative dispute resolution in Australia: an example for South Africa to emulate? (part 2)\*

WOUTER LE R DE VOS\*\*

THEO BROODRYK\*\*\*

## 4 *The impact of judicial case management and alternative dispute resolution on the fundamental rights of the parties*

### 4.1 Nature of procedural rights

Traditionally, English common law shied away from recognising the fundamental principles of civil procedural law in the form of basic rights or guarantees accorded to the parties. As Jolowicz aptly remarked, “English law tends rather to take [these guarantees] for granted than to enshrine [them] in a legislative text”.<sup>164</sup> Since this statement was made close to fifty years ago there has been a dramatic change in the English approach. First and foremost, the incorporation into English domestic law of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>165</sup> by the Human Rights Act<sup>166</sup> resulted in the statutory recognition of fundamental human rights for everyone in England.<sup>167</sup> In the procedural field the adoption of article 6(1) of the convention, providing for a fair trial to litigants, brought about a sea change in civil procedural law. For the first time in history a fundamental procedural right was enshrined in statute which required courts to interpret all domestic law in conformity with this provision.<sup>168</sup> Secondly, whereas practical commentaries on civil litigation dominated the literature in the past, the mammoth work of Andrews on civil procedure, which has been described by Lord

\* See 2017 *TSAR* 683 for part 1.

\*\* Associate Professor of Law, Curtin University, Western Australia; Visiting Professor, University of Johannesburg.

\*\*\* Senior Lecturer, Procedural Law and Manager: Legal Aid Clinic, University of Stellenbosch.

<sup>164</sup> Cappelletti and Tallon (eds) *Fundamental Guarantees of the Parties in Civil Litigation* (1973) 664. Jolowicz added that the fundamental principles of English law, such as the *audi alteram partem* rule, could only be discovered “by a process of extrapolation or generalisation from a host of individual instances” – (n 2) 128 and 172.

<sup>165</sup> 1950.

<sup>166</sup> 1998.

<sup>167</sup> Wadham and Mountfield *Human Rights Act* 1998 (2000) ch 8.

<sup>168</sup> Wadham and Mountfield (n 167) 5, 84-85; Andrews (n 2) 149-151. The impact of this provision on English law falls outside the ambit of this paper – see Andrews (n 2) ch 7. See generally on the importance of fundamental rights or guarantees in civil proceedings, Cappelletti and Tallon (n 164); De Vos *Grondslae van die Siviele Prosesreg* (1988 thesis RAU). On the development of these principles, see Engelmann *et al A History of Continental Civil Procedure* (1972) 3-81. For a discussion on the position in different legal systems, see Habscheid (ed) *Effectiveness of Judicial Protection and Constitutional Order* (1983) 7 *et seq*; and De Vos “Die grondwetlike beskerming van siviele prosesregtelike waarborge in Suid-Afrika” 1991 *TSAR* 353 356-361; see also De Vos “Civil procedural law and the constitution of 1996: an appraisal of procedural guarantees in civil proceedings” 1997 *TSAR* 444. Well-known international instruments, other than the European Convention, recognising fundamental procedural rights, are the Universal Declaration of Human Rights (a 10); the International Covenant on Civil and Political Rights (a 14); and the American Convention on Human Rights (a 8) – see Sieghart *The Lawful Rights of Mankind* (1985) 169 *et seq*.

Woolf as “a serious book”,<sup>169</sup> took the subject to a new level by giving prominent attention to the principles underlying the rules as well as the guarantees accorded to the parties.<sup>170</sup>

Different legal systems adopted different ways of giving recognition to fundamental procedural rights. Apart from the modern English approach of incorporating an international human rights instrument in its domestic law, three other methods may be discerned:

- (i) as was the case in England before the adoption of the European convention, the rights are not explicitly stated in the law books; they can only be inferred from specific legislative provisions;
- (ii) as is the case in France, the rights are explicitly recognised in the procedural code but as such they form part of the ordinary law of the land and are not accorded a higher status; and
- (iii) following the American, German and South African example, procedural rights are entrenched in the constitutions concerned and the courts have the power to invalidate legislation or other forms of state action infringing such rights.<sup>171</sup>

This brief description provides a fitting background for a discussion of the recognition of civil procedural rights in Australia. Generally speaking, most jurisdictions in Australia do not accord any special status to the guarantees of civil litigants. For example, the right to be heard is usually not explicitly mentioned in legislation or court rules but it may be inferred from specific provisions or gleaned from court decisions. Western Australia is illustrative of this approach, which accords broadly with the traditional English approach.<sup>172</sup> However, a significant development occurred when Australia ratified the International Covenant on Civil and Political Rights in 1980.<sup>173</sup> Article 14 of the covenant encapsulates the guarantee of a fair hearing by stating:

“All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>174</sup>

This event was taken an important step further by the Australian Capital Territory and Victoria when they passed human rights acts incorporating a number of covenant rights, including the right to a fair trial, into their domestic laws.<sup>175</sup> Both jurisdictions adopted the English “dialogue model” in terms of which the court may declare a law to be incompatible with the human rights act but, instead of invalidating the law, the court then refers the matter to parliament for reconsideration of the law in question.<sup>176</sup>

These two jurisdictions clearly took the lead in Australia by explicitly giving recognition to the right to a fair trial in their domestic laws. In the authors’ opinion the provision endorsing the right to a fair trial may act as a yardstick against which

<sup>169</sup> Andrews (n 2) vii.

<sup>170</sup> (n 2) 49-57 and 59-232.

<sup>171</sup> See De Vos (n 168) 1991 *TSAR* 356-361 and De Vos (n 168) 1997 *TSAR* 451-461.

<sup>172</sup> See Kendall and Curthoys *Civil Procedure Western Australia* (loose-leaf) par 1.0.8B.

<sup>173</sup> Colbran *et al* (n 1) 27.

<sup>174</sup> Sieghart (n 168) 182-183.

<sup>175</sup> Human Rights Act 2004 (ACT) – s 21(1) and Charter of Human Rights and Responsibilities Act 2006 (Vic) – s 24(1); Colbran *et al* (n 1) 28.

<sup>176</sup> Colbran *et al* (n 1) 28; Hemming and Penovic (n 18) 32.

the wide case management powers of judges may be measured. Colbran *et al* are to the point in saying that “the right to a fair hearing may operate as a counterbalance to traditional or evolving civil procedures, particularly where judicial discretion is involved”.<sup>177</sup>

#### 4.2 Impact of case management powers on the fundamental rights of the parties

A core guarantee under the right to a fair trial is a party’s right to present his or her case to the court for a judicial determination; in other words, a party has the right to his or her “day in court”.<sup>178</sup> However, since the advent of judicial case management powers it has become crystal clear in the authors’ view that a party’s right to a day in court has lost much of its meaning. Broadly speaking this right may be curtailed in two ways.

##### 4.2.1 Curtailing a party’s right to present its case fully

A party may be prohibited from presenting its case to the court as planned if the court determines that the party failed to follow correct procedures in the context of pleading its case or if it failed to comply strictly with relevant case management directions. The *Aon Risk Services* case<sup>179</sup> made it clear that deciding a case on its merits and dispensing justice on that basis is not the paramount consideration. If the court determines on the basis of case management considerations that the party’s request for an amendment of its pleading is ill-founded the court may refuse the relief and thus prevent the party from presenting its case in accordance with its amended version of the facts.<sup>180</sup> Furthermore, the court may, if necessary, limit the number of witnesses a party wishes to call, thus limiting the party’s right to present its case fully.<sup>181</sup> A court may also prevent a party from calling a witness if the party did not strictly comply with the judge’s direction relating to the delivery of that witness’s statement prior to the trial. Two cases call for brief consideration to illustrate the last-mentioned judicial sanction.

##### (a) *Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No 3)*<sup>182</sup>

When the trial in this case had proceeded to the end of the third week Amcor sought to call a witness called Conn. However, Hodgson objected to this evidence *inter alia* on the ground that Conn’s witness statement was not delivered in compliance with the court’s case management direction. Amcor was directed to deliver its witness statements by 18 February 2011, which it duly did, with the exception of Conn’s statement. The latter statement was delivered only on 29 April 2011, which was 19 days before the commencement of the trial. Despite non-compliance with this direction counsel for Amcor indicated in the opening address at the start of the trial that they proposed to call Conn as a witness.<sup>183</sup>

Vickery J commenced by sounding a cautionary note regarding the role of case management directions:

<sup>177</sup> (n 1) 28.

<sup>178</sup> The phrase “day in court” was coined by Amos in “A day in court at home and abroad” 1926 *CLJ* 340; see Andrews (n 2) 212; De Vos (n 168) 1997 *TSAR* 457.

<sup>179</sup> (n 59).

<sup>180</sup> See par 2.3.1 above.

<sup>181</sup> See par 2.2 above.

<sup>182</sup> 2011 VSC 272.

<sup>183</sup> (n 182) – for these facts see par 26, 33 and 34.

“[C]ase management orders designed to serve the interests of justice in the course of a trial, particularly a long and complex matter such as the present case are not immutable. The procedures set in place for the management of the trial must be capable of reasonable adaptation to ensure that the trial is in fact conducted in accordance with the interests of justice as the case proceeds to judgment.”<sup>184</sup>

The judge proceeded by adding that “it is axiomatic that a just determination of a proceeding is the product of a trial, which must be conducted fairly and in accordance with the principles of natural justice and procedural fairness”.<sup>185</sup> Vickery J further argued that these principles are supported by the Civil Procedure Act,<sup>186</sup> which has the overarching purpose *inter alia* “to facilitate the just”<sup>187</sup> resolution of the issues.<sup>188</sup> The judge then emphasised that the act specifically states that nothing in it is intended to override the charter of human rights, which provides for a fair hearing.<sup>189</sup> Procedural fairness, according to Vickery J, “includes the right of a party to present relevant evidence in support of its case ...”<sup>190</sup> The judge then summarised the legal position by saying that the act calls “for a balance to be applied between the case management requirements of achieving an efficient, timely and cost effective resolution of the real issues in dispute, and the requirements for a fair hearing to achieve a just outcome ....”<sup>191</sup> Finally, looking at the facts, Vickery J emphasised that the statement was delivered 19 days before the trial and the opponent was also apprised at the outset of the trial that Amcor intended to call Conn as a witness. Thus, there would be no surprise and no prejudice caused to the opponent.<sup>192</sup> Therefore, the balance between case management considerations and the dictates of a fair trial clearly favoured a ruling allowing Conn to be called as a witness.<sup>193</sup>

In the authors’ view Vickery J must be commended for the balanced approach he adopted in this case. This judgment illustrates the important role that a statutory provision proclaiming the right to a fair trial can play in curbing excessive judicial case management.

(b) *Attorney-General of Botswana v Aussie Diamond Products Pty Ltd (No 2)*<sup>194</sup>

A similar scenario presented itself in this case, but the outcome was in stark contrast with *Hodgson v Amcor*.<sup>195</sup> A case management direction was given for the exchange of witness statements, which required AG Botswana to deliver its witness statements by 5 May 2009 and Aussie Diamond to do likewise by 3 July 2009. AG Botswana failed to comply with this direction and delivered the statement of a witness called Franken only on 29 August 2009, almost four months after the due date. However, this was still approximately six weeks before the trial, which was due to commence on 12 October 2009. AG Botswana provided a reason for this delay, saying that Franken was initially unwilling to testify but after several requests he eventually

<sup>184</sup> (n 182) par 27.

<sup>185</sup> (n 182) par 28.

<sup>186</sup> (n 32).

<sup>187</sup> emphasis in the original.

<sup>188</sup> (n 182) par 28.

<sup>189</sup> (n 175) where charter is cited.

<sup>190</sup> (n 182) par 31.

<sup>191</sup> (n 182) par 32.

<sup>192</sup> (n 182) par 33-34.

<sup>193</sup> (n 182) par 35.

<sup>194</sup> 2012 WASCA 73.

<sup>195</sup> (n 182).

agreed during August to cooperate and give evidence.<sup>196</sup> The trial judge rejected AG Botswana's application shortly before the trial to extend the time for service of Franken's statement, thus preventing it to present this evidence at the trial.<sup>197</sup> The objectives embodied in the rules of the supreme court<sup>198</sup> and the importance of case management principles acknowledged in the *Aon Risk Services* case<sup>199</sup> were cited as authority for concluding that the interests of justice did not favour granting the relief sought.<sup>200</sup> This decision was confirmed on appeal.<sup>201</sup>

It is notable that no reference was made in this case to a party's right to a fair trial, including the right to present the party's case by calling witnesses supporting its case. It is submitted that if Western Australia had a statutory fair trial provision like Victoria the outcome could have been different, especially taking into account that AG Botswana had delivered its statement some six weeks before the trial and had given a plausible excuse for its delay.

#### 4.2.2 Directing the parties to proceed to mediation

The proponents of compulsory mediation argue that the parties' right to present their cases for a judicial determination is not affected by this process because they are compelled only to attend the mediation and if that fails they may proceed to trial.<sup>202</sup> However, this argument loses sight of the costs involved in mediation and the resulting duplication of costs if the parties failed to resolve the dispute and have to return to court. Bamford and Rankin are to the point in saying that many litigants may only have sufficient funds to pursue one method of dispute resolution and not both that may be forced upon them.<sup>203</sup> They add: "In such a case, compelled mediation may serve to deny a party their right to trial. This is a serious injustice."<sup>204</sup>

Mandatory mediation and the pressure to settle that is brought to bear upon the parties may also result in the less powerful party or the one with fewer resources accepting an unfavourable settlement.<sup>205</sup> Where a party has a strong grievance compulsory mediation and a consequent settlement may also lead to complications, as noted by Gyles J in *Freeman v National Australia Bank Ltd*: "[T]here is little doubt that it would have been better for all concerned if the merits of the appellant's case had been fully explored in open court and dealt with by a reasoned judgment without the complication of the agreement arrived at as a result of the mediation."<sup>206</sup>

Ingleby argues that the shift from litigation to mediation has resulted in a rule favouring settlement and a notion that litigation is a deviant in the context of dispute resolution.<sup>207</sup> The author's argument also suggests that the parties' rights and legal entitlements are not regarded as important considerations in this new milieu.<sup>208</sup> He

<sup>196</sup> (n 194) par 129-134.

<sup>197</sup> (n 194) par 135.

<sup>198</sup> (n 45) o 1.4A and 1.4B.

<sup>199</sup> (n 59).

<sup>200</sup> (n 194) par 136-137.

<sup>201</sup> (n 194) par 162.

<sup>202</sup> Arthur (n 18) 247; Bamford and Rankin (n 1) 223.

<sup>203</sup> (n 1) 223.

<sup>204</sup> (n 1) 223.

<sup>205</sup> Willis (n 17) 412; Bamford and Rankin (n 1) 225.

<sup>206</sup> 2006 FCAFC 67 par 53.

<sup>207</sup> (n 18) 450.

<sup>208</sup> 450.

concludes on a powerful note: “If it really is the case that ‘there is no point in looking for justice, you should settle for what’s on offer,’ then why have courts at all?”<sup>209</sup>

As mentioned,<sup>210</sup> England has not adopted outright mandatory mediation. Instead courts have opted for a compromise in terms of which they regularly encourage the parties, even in strong terms if appropriate, to agree to mediation. It seems that the right of access to a fair trial under article 6 of the European convention<sup>211</sup> has influenced the English position, as *Halsey v Milton Keynes General NHS Trust; Steel v Joy and Halliday*<sup>212</sup> illustrates. In the *Halsey* case the defendant had refused the plaintiff’s invitations to mediate and it was argued on appeal that the defendant should not be entitled to costs as a result of its attitude. The court of appeal endorsed the judicial encouragement of the parties to mediate, even to do so in the strongest terms; but the court expressed the view that, having regard to article 6 of the European convention, “to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court”.<sup>213</sup> On this basis the court found no reason to make an adverse costs order against the defendant because of its failure to agree to mediate.<sup>214</sup>

In the authors’ opinion the recognition of article 6 of the European convention in English domestic laws created an important mechanism to curb the excessive use of mediation, especially in cases where it is not appropriate. This position is clearly in contrast with the approach of Australian courts.<sup>215</sup>

##### 5 *Assessment of case management and alternative dispute resolution in Australia*

In the authors’ view case management is an important tool to control the proceedings in order to prevent unreasonable delays and obstructionist conduct on the part of the parties or their lawyers. Case management can therefore play an important role in the quest for the expeditious adjudication of disputes. However, case management is not an end in itself to be pursued at all costs. If a court uses its wide case management powers to prevent a party from presenting an arguable case fully, simply because the party failed to comply strictly with case management directions, the question would arise whether the court is fulfilling its primary role of dispensing justice. There can be no doubt that a court is duty-bound to prevent an abuse of its process and it has statutory and inherent powers to deal with such conduct.<sup>216</sup> But apart from that, it is submitted that a court should not prevent a party from presenting an arguable case because of some procedural failures, unless there are really exceptional circumstances. Has the time not come for Australian courts to take stock of how far they have gone on the case management track? Case management is good but is too much case management still good?

As mentioned,<sup>217</sup> the authors support the notion of the voluntary use of mediation and other alternative dispute resolution processes by the parties. But have law reformers and the courts in Australia not gone too far in their relentless drive to promote these out of court dispute resolution processes above courtroom

<sup>209</sup> (n 18) 451.

<sup>210</sup> par 3.1.

<sup>211</sup> (n 168).

<sup>212</sup> 2004 4 All ER 920 par 4-11.

<sup>213</sup> (n 212) par 9.

<sup>214</sup> (n 212) par 50-54.

<sup>215</sup> par 54.

<sup>216</sup> See eg Bamford and Rankin (n 1) 139-141.

<sup>217</sup> par 3.2 above.

adjudication? Have the courts not diminished their important constitutional role as an institution of governance in the context of dispute resolution, which may negatively affect the evolution of the law? And have the courts not diluted the right of the parties to present their cases to a court for a judicial determination? In other words, has the right of the parties to their day in court not become a hollow guarantee? It is cold comfort to assure a party with limited financial resources that he or she could proceed to trial if mediation fails. One process may be all the party can afford, causing him or her to accept an unfavourable settlement. Is that justice?<sup>218</sup> In the authors' opinion these are fundamental issues calling for serious consideration by Australian courts and other stakeholders.

## 6 *Judicial case management and alternative dispute resolution in South Africa*

### 6.1 Introduction

South Africa has a hybrid legal system – “an English orientated judicial and procedural framework, which serves as the mechanism for the enforcement of continental flavoured substantive rules of law”.<sup>219</sup> The South African civil procedural system is, similar to the Australian system, of common-law origin and it is characterised by the adversarial system of litigation. The introduction of the Constitution of the Republic of South Africa, 1996 (hereafter constitution) did not affect the basic common law features of the South African civil justice system,<sup>220</sup> but it does give full recognition to the procedural guarantees of civil litigants.<sup>221</sup> Thus, civil procedural law obtained a constitutional dimension.

The most important constitutional guarantee is the right to a fair trial embodied in section 34 of the constitution.<sup>222</sup> It is likely the most significant procedural innovation brought about by the final constitution and its importance can hardly be over-emphasised. As stated before the right to a fair trial “constitutes the very core of procedural justice in civil litigation and provides the basis for other more specific guarantees”.<sup>223</sup> In the authors' view the right to be heard (*audi alteram partem*), including more specifically the parties' right to present their cases for a judicial determination, is undoubtedly one of the most important guarantees incorporated under the right to a fair trial.

<sup>218</sup> See Bamford and Rankin (n 1) 237.

<sup>219</sup> De Vos “South African civil procedural law in historical and social context” 2002 *Stell LR* 236 244.

<sup>220</sup> De Vos (n 219) 245.

<sup>221</sup> De Vos (n 219) 248.

<sup>222</sup> S 34 provides that “[e]veryone 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”.

<sup>223</sup> De Vos (n 168) 1997 *TSAR* 444 454.

Compared to Australia, South Africa has been relatively slow to transition to judicial case management<sup>224</sup> and to embrace alternative dispute resolution.<sup>225</sup> For the most part, adversarialism continues to dominate civil proceedings, with the parties exercising control over the pre-trial and trial phases of civil litigation.<sup>226</sup> The judge is assigned a passive role, whereas the parties, normally represented by their legal representatives, play an active role. It is up to the parties to institute legal proceedings and to prepare their cases for trial. The parties further determine what evidence is to be presented to the court and they question the witnesses.<sup>227</sup>

The following passage by Ngcobo CJ succinctly describes the current state of the South African civil justice system, particularly with reference to the “overly adversarial” nature of civil proceedings:

“Our civil justice system is still characterised by cumbersome, complex and time-consuming pre-trial procedures, overloaded court rolls, which necessitate postponements, delays in matters coming to trial and, at times, compels litigants to conclude settlements not acceptable to them. It is expensive, slow, complex, fragmented, and overly adversarial.”<sup>228</sup>

The following part of this article, after briefly mentioning the South African court structure and legislative framework, considers the position in South Africa specifically insofar as case management and alternative dispute resolution are concerned.

## 6.2 Court structure and legislative framework

The constitution is the supreme law of South Africa. In this regard, section 2 of the constitution provides that “[t]he Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled”. South Africa has a single national court system, as opposed to the

<sup>224</sup> also compared to, for example, the origins of judicial case management in the United States. In relation to case management in the United States, Marcus, Sherman and Erichson *Complex Litigation, Cases and Materials on Advanced Civil Procedure* (2010) 15 state as follows: “[w]hatever the overall tranquillity of federal civil litigation in 1938, by the late 1940s there was a widely-felt concern among federal judges about whether ‘protracted’ litigation, particularly antitrust litigation, should be handled differently. A 1951 study by the Judicial Conference of the United States suggested that the solution was greater involvement by judges”. By the 1970s, Chayes commented that “[t]he judge is the dominant figure in organizing and guiding the case ...” See Chayes “The role of the judge in public law litigation” 1976 *Harvard Law Review* 1281 1284.

<sup>225</sup> Anthimos, Baker, De Palo, Herbert, Judin and Tereshchenko “International commercial mediation” 2011 *International Lawyers* 111 119.

<sup>226</sup> Erasmus “Judicial case management and the adversarial mindset – the new Namibian rules of court” 2015 *TSAR* 259 261.

<sup>227</sup> De Vos (n 219) 245.

<sup>228</sup> <http://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf> (22-05-2017). Mogoeng CJ recently confirmed that the current South African judiciary does not function optimally and that they are not properly trained to conduct judicial case management: <http://www.iol.co.za/news/south-africa/court-lack-skills---mogoeng-1637001> (22-05-2017). According to the South African Law Commission, “[t]he most common general complaint about the current justice system in South Africa is that the cost of litigation is prohibitive. This prevents meaningful access to courts and even those with access are often victims of delay. For most litigants, delay means added expense and for many people justice delayed is justice denied. Delay combined with the cost of litigation has put justice beyond the reach of the ordinary citizen. The incomprehensibility and adversarial nature of the process with a resulting lack of control (parties can only participate in an indirect manner) furthermore leads to a sense of frustration and disempowerment”. In this regard, see The South African Law Commission “Alternative dispute resolution” Issue Paper 8, Project 94 (1997) 15.



Australian federal court structure. The South African court structure is as set out in section 166 of the constitution. The section provides for a constitutional court, a supreme court of appeal, various divisions of the high court of South Africa, magistrates courts and other specialist courts introduced through acts of parliament. Noteworthy legislative sources concerning civil litigation in the superior courts include the Superior Courts Act 2013 and the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (hereafter high court rules).<sup>229</sup> The Constitution Seventeenth Amendment Act 2012 provides *inter alia* that the chief justice of the constitutional court is appointed as the head of the judiciary and that the constitutional court is the highest court in all matters.<sup>230</sup> Practice directives, also commonly referred to as practice directions, issued in the various provincial divisions by the judges-president from time to time contain important information regarding practice and procedure in the division in which they were issued. These practice directives are especially important when considering the South African courts' approach to case management and alternative dispute resolution.

### 6.3 Case management

Rule 37 of the high court rules compels parties to attend a pre-trial conference with the aim of reaching a negotiated agreement regarding certain issues and to limit the duration of the litigation insofar as time-consuming administrative issues are concerned.<sup>231</sup> Rule 37 presents relatively few opportunities for the exercise of unencumbered judicial discretion<sup>232</sup> and, for the most part, judicial participation in the pre-trial process in terms of the rule is limited to circumstances where the parties have consented thereto.<sup>233</sup> The default position in respect of the conduct of pre-trial conferences in terms of rule 37 is that they take place between the parties, without the judge being present. While rule 37(8)(a) enables a judge in certain circumstances to, *mero motu* or at the request of a party, conduct a pre-trial conference in chambers, rule 37(8)(b) dampens enthusiasm by providing that “[n]o provision of this rule shall be interpreted as requiring a judge before whom a conference is held to be involved in settlement negotiations ...” All that the rule requires is that the pre-trial conference minutes must reflect “(c) that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto” and “(d) whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred”.<sup>234</sup> The scope for judicial control and initiative within the ambit of rule 37 appears limited.

<sup>229</sup> also commonly referred to as the Uniform Court Rules.

<sup>230</sup> s 1-3. See also s 8 of the Superior Courts Act 2013.

<sup>231</sup> See *Lekota v Editor 'Tribute' Magazine* 1995 2 SA 706 (W) regarding the stock-tacking nature of the pre-trial conference. See also *MT v CT* 2016 4 SA 193 (WCC) par 26. See also, for example, *Road Accident Fund v Krawa* 2012 2 SA 346 (ECG) par 17 where the court held that r 37 affords the parties “an opportunity ‘amongst other matters, to endeavour to find ways of curtailing the duration of the trial by redefining the issues to be tried’” and *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga* 2010 4 All SA 23 (SCA) par 6 where the court held that the rule also aims “to facilitate settlements between the parties, narrow the issues and to curb costs”.

<sup>232</sup> For example, r 37(10) provides that “[a] judge in chambers may, without hearing the parties, order deviation from the time limits in this rule”.

<sup>233</sup> r 37(8)(c); Flemming “Case management” 2011 *Advocate* 29.

<sup>234</sup> r 37(6).

In December 1997, a limited form of civil case management was introduced in the Cape high court in the form of rule 37A.<sup>235</sup> According to Erasmus, the introduction of the rule constituted “a major step towards bringing South African practice into line with developments in most common-law countries in which the judge has been accorded an increasingly important management role and responsibility in the pre-trial phase of a civil case”.<sup>236</sup> The rule has, however, since been repealed and its introduction has been labelled a failed experiment.<sup>237</sup> The reasons proffered for its failure essentially relate to an inability to properly monitor and evaluate the rule’s implementation and operation, *inter alia* because of the lack of proper infrastructure, such as adequate computer hardware and software, and personnel to administer the system.<sup>238</sup>

South African superior courts possess inherent jurisdiction. In *Chunguete v Minister of Home Affairs*,<sup>239</sup> Flemming J referred to Sir Jack Jacob’s lecture delivered in the 1970s<sup>240</sup> and quoted the following features of the court’s inherent jurisdiction:

- “(1) The inherent jurisdiction of the Court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the *process* of litigation.
- (2) The distinctive and basic feature of the inherent jurisdiction of the Court is that it is exercisable by summary process ....
- (3) Because it is part of the machinery of justice, the inherent jurisdiction of the Court may be invoked ... in relation ... to anyone, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties.
- (4) The inherent jurisdiction of the Court is a concept which must be distinguished from the exercise of judicial discretion ....
- (5) The inherent jurisdiction of the Court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case ....”<sup>241</sup>

According to Jacob, the exercise of these powers was derived simply from the very nature of the court as a superior court of law. It is for that reason that the jurisdiction is “inherent”.<sup>242</sup> “The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.”<sup>243</sup> Flemming J states the following regarding the meaning of “inherent jurisdiction”:

“What is appropriately called the ‘inherent jurisdiction’ is related to the Court’s functioning towards securing a just and respected process of coming to a decision and is not a factor which determines what order the Court may make after due process has been achieved. That is a function of the substantive law. The Court – always – is charged with holding the scales of justice. It is not within its task to add weights to the scales by detracting from a right given by the substantive law or granting a right not given by the substantive law.”<sup>244</sup>

<sup>235</sup> Erasmus “Case management moves ahead: new r 37A in force in Cape high court” 1998:1 *De Rebus* 27; Erasmus “Case management: the demise of Cape rule 37A” 2001:5 *De Rebus* 39.

<sup>236</sup> Erasmus (n 235 (1998)) 27.

<sup>237</sup> Erasmus (n 235 (2001)) 39.

<sup>238</sup> Erasmus (n 235 (2001)) 39.

<sup>239</sup> 1990 2 SA 836 (W).

<sup>240</sup> Jacob “The inherent jurisdiction of the court” 1970 *Current Legal Problems* 23 24.

<sup>241</sup> (n 239) 841 – emphasis in the original.

<sup>242</sup> (n 239) 841; (n 240) 27.

<sup>243</sup> (n 239) 841.

<sup>244</sup> (n 239) 848.

Taitz succinctly describes the courts' inherent jurisdiction as follows:

“[T]hose (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court.”<sup>245</sup>

The courts' inherent jurisdiction is utilised with a view, *inter alia*, to regulating the courts' procedures in the interests of the proper administration of justice,<sup>246</sup> especially where there is no rule dealing with a particular matter.<sup>247</sup> Where the rules provide for a particular matter, the scope for a court to exercise its inherent powers is more limited.<sup>248</sup> Courts may nevertheless act outside the powers provided for specifically in the rules.<sup>249</sup> Where the rules do not provide for a particular set of circumstances, the court has inherent jurisdiction to read the rules in a manner that facilitates the administration of justice and to handle the matter along practical lines.<sup>250</sup>

Furthermore, section 173 of the constitution provides that “[t]he Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice”.<sup>251</sup> It enshrines the inherent jurisdiction of our superior courts.<sup>252</sup> Section 173 constitutionally empowers courts to develop the common law, which comprises not only procedural law but also substantive law.<sup>253</sup> An example of the development of procedural common law is the development of a class action procedural framework by Wallis JA in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as Amicus Curiae)*.<sup>254</sup> The section has also been used to develop substantive common law. For example, Cameron JA in *Fourie v Minister of*

<sup>245</sup> Taitz *The Inherent Jurisdiction of the Supreme Court* (1985) 8-9.

<sup>246</sup> See, for example, *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 2 SA 734 (A); *Krygkor Pensioenfonds v Smith* 1993 3 SA 459 (A); *White v Moffett Building & Contracting (Pty) Ltd* 1952 3 SA 307 (O); *California Spice and Marinade (Pty) Ltd in re: Bankorp v California Spice and Marinade (Pty) Ltd; Fair O'Rama Property Investments CC; Tsaperas; and Tsaperas* 1997 4 All SA 317 (W); *Soller v Maintenance Magistrate, Wynberg* 2006 2 SA 66 (C); *Carmel Trading Co Ltd v Commissioner South African Revenue Service* 2008 2 SA 433 (SCA).

<sup>247</sup> See, for example, *S v Pennington* 1997 4 SA 1076 (CC). See also *Phillips v National Director of Public Prosecutions* 2006 1 SA 505 (CC) par 46 for the limits of this power. The *Krygkor* case (n 246); *Neal v Neal* 1959 1 SA 828 (N); *Matyeka v Kaaber* 1960 4 SA 900 (T); *Watson v Krieks* 1963 3 SA 546 (O); *A v R Kinder- en Kindersorgvereniging* 1996 1 SA 649 (T); *Beinash v Wixley* 1997 2 All SA 241 (A).

<sup>248</sup> *Western Bank Ltd v Packery* 1977 3 SA 137 (T); *Collective Investments (Pty) Ltd v Brink* 1978 2 SA 252 (N).

<sup>249</sup> *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 2 SA 457 (W).

<sup>250</sup> *Brown Bros Ltd v Doise* 1955 1 SA 75 (W), quoted with approval in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 1 SA 773 (A) 783.

<sup>251</sup> *SABC Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) par 35-36; *Legal Aid Board v S* 2011 1 All SA 378 (SCA); *Coetzee v National Commissioner of Police* 2011 2 SA 227 (GNP); *FirstRand Bank Ltd v Beyer* 2011 1 SA 196 (GNP).

<sup>252</sup> *SA Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) par 88; *S v Thebus* 2003 6 SA 505 (CC). See also *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 10 BCLR 1135 (CC) par 42.

<sup>253</sup> the *SABC* case (n 251) par 35 and 36; *Legal Aid Board v S* (n 251); the *Coetzee* case (n 251); the *Beyer* case (n 251).

<sup>254</sup> 2013 1 All SA 648 (SCA).

*Home Affairs*<sup>255</sup> developed the common-law concept of marriage to embrace same-sex partners.<sup>256</sup>

Judicial case management in South Africa is largely dependent upon the exercise of the South African superior courts' inherent jurisdiction. It is thus conceivable that there exists a stronger possibility that *ad hoc* approaches adopted by judges in the respective divisions of the high court of South Africa to judicial case management of civil proceedings may vary, perhaps even inordinately, from case to case. In order *inter alia* to address the lack of uniformity, Mogoeng CJ stated the following:

“The leadership of the Judiciary at all levels has resolved to begin a massive project of overhauling all the Rules of the High Court and Magistrates' Courts with the view of doing away with archaic Rules, progress- and efficiency-retarding Rules, to inject flexibility, facilitate the full scale implementation of electronic filing and electronic record-keeping, video conferencing, judicial case management harmonisation or streamlining of all Court Rules.”<sup>257</sup>

A judicial case flow management committee was established to implement the project Mogoeng CJ mentioned, called the Case-Flow Management Pilot Project (hereafter project). The project was launched in 2012 in five pilot court sites, namely in both Gauteng divisions, the Western Cape division and the KwaZulu-Natal divisions (Pietermaritzburg and Durban) of the high court of South Africa.<sup>258</sup> The project ended on 31 March 2015.<sup>259</sup> Preliminary indications are that the project delivered desirable results in the divisions where it was implemented. Since its commencement in the KwaZulu-Natal division, the waiting time for trial dates has decreased from twelve months to between six and eight months in Durban, and from two to three years to between eight and twelve months in Pietermaritzburg.<sup>260</sup> In the Western Cape, the waiting time for the allocation of a trial date has decreased from

<sup>255</sup> 2005 3 SA 429 (SCA).

<sup>256</sup> The minority decision of Farlam JA also developed the common law to allow same-sex marriage but read in wording to the Marriage Act 25 of 1961 that allowed such marriages to occur. However, consider the constitutional court's judgment in *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC). See also, for example, *Khoza v Body Corporate of Ella Court* 2014 2 SA 112 (GSJ) par 27 where the court held that “[e]ven if the aforesaid rule were to be held to be a substantive rule I would still have been obliged to consider whether the common-law substantive rule as it stands should not have been developed and extended to avoid irreparable prejudice to an applicant for a rescission of an order. Section 173 of the Constitution obliges me to do so”.

<sup>257</sup> Mogoeng (n 228).

<sup>258</sup> Hawkey “Attorneys to benefit from better case management - KZNLS AGM 2012” 2012:12 *De Rebus* 13. At a 2013 briefing of the office of the chief justice (OCJ), Mr Doringu, the head of court services of the OCJ, stated that the project is aimed at reducing the backlog of court cases and that practice directives would be drawn up to empower the courts' registrars to manage cases as they arrived, so that by the time they reached the judge, “various shortcuts had been taken and those cases that could have been disposed of at an earlier stage had been properly managed”. According to Mr Doringu, the judge would take control of the matters thereafter. In this regard, see <https://pmg.org.za/committee-meeting/16571/> (26-05-2017). A few other divisions appear to have attempted to adopt judicial case management approaches, such as the divisions situated in Bhisho and East London. In this regard, see for example: [http://www.dgru.uct.ac.za/sites/default/files/image\\_tool/images/103/Day%205%20Van%20Zyl.pdf](http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Day%205%20Van%20Zyl.pdf) (29-05-2017). However, it is unclear whether they have adopted the project's practice directive or whether they have adopted (any) other judicial case management practice directives. Further, there does not appear to be any empirical data to assess whether judicial case management in these divisions has been successful compared to implementation at the project's pilot court sites.

<sup>259</sup> [http://www.judiciary.org.za/doc/MEDIA-ADVISORY\\_CASE-FLOW-MANAGEMENT-WORKSHOP\\_08-April-2015.pdf](http://www.judiciary.org.za/doc/MEDIA-ADVISORY_CASE-FLOW-MANAGEMENT-WORKSHOP_08-April-2015.pdf) (29-05-2017); <http://www.vukuzenzele.gov.za/new-system-improve-access-justice> (23-05-2017).

<sup>260</sup> Manyathi-Jele “Progress on judicial case-flow management” 2014:5 *De Rebus* 10.

between two to three years to three months.<sup>261</sup> “In Gauteng, the waiting period for a trial date was reduced from one year to nine months at the start of the project. The Gauteng north high court had 224 921 outstanding cases on the civil roll, which were reduced to 144 027 by February 2015.”<sup>262</sup>

Prior to the implementation of the project, the office of the chief justice issued a draft practice directive entitled “Case management, allocation of cases and case management conferences”, which all pilot courts had to implement.<sup>263</sup> The directive distinguishes between two phases: from the institution of proceedings until the close of pleadings and from the close of pleadings until certification that a matter is trial-ready.<sup>264</sup> The directive provides that the registrar must manage the first phase<sup>265</sup> and a designated judge is responsible for managing the second phase of the litigation.<sup>266</sup> The judge must schedule an initial case management conference<sup>267</sup> and, before this conference takes place, the parties must confer about the nature and basis of their claims and defences, the possibilities for a prompt settlement or resolution of the case, and each of the issues to be addressed at the conference.<sup>268</sup> These issues include the control and scheduling of discovery,<sup>269</sup> the possibility of settlement or mediation of the dispute<sup>270</sup> and such other matters as may facilitate the just and speedy disposal of the case.<sup>271</sup> Immediately after the completion of the initial case management conference, the judge must issue a case management order that addresses these issues.<sup>272</sup> Before the trial takes place, the judge must hold a final pre-trial conference.<sup>273</sup> The directive also provides that it must, as far as possible, be implemented in consonance with rule 37 and that, where necessary, directions must be obtained from the judge to whom a matter is allocated in order to resolve difficulties in this respect.<sup>274</sup>

The Gauteng local division of the high court of South Africa issued a further case management directive effective from the first term of 2015.<sup>275</sup> This directive provides that only matters involving expert evidence shall be subject to judicial case-flow management and require certification before proceeding to trial on the set-down date.<sup>276</sup> In terms of the directive, a motion court dedicated to interlocutory matters is required to deal with all instances of non-compliance in trial matters with the rules, including rule 37, and the court’s practice manual.<sup>277</sup> Further, a judicial pre-trial

<sup>261</sup> (n 259) and (n 260) 65; <http://www.timeslive.co.za/thetimes/2015/04/13/justice-system-to-go-hi-tech> (23-05-2017).

<sup>262</sup> (n 259).

<sup>263</sup> Office of the chief justice draft practice directive “Case management, allocation of cases and case management conferences” (2012).

<sup>264</sup> <http://johannesburgbar.co.za/wp-content/uploads/SGHC-Precinct-Planning-Document-v2.pdf> (23-05-2017).

<sup>265</sup> (n 263) par 1.

<sup>266</sup> (n 263) par 5.

<sup>267</sup> (n 263) par 6(1).

<sup>268</sup> (n 263) par 6(2).

<sup>269</sup> (n 263) par 6(3)(e).

<sup>270</sup> (n 263) par 6(3)(k).

<sup>271</sup> (n 263) par 6(3)(l).

<sup>272</sup> (n 263) par 8.

<sup>273</sup> (n 263) par 10.

<sup>274</sup> (n 263) par 17; <http://www.phoenix.co.za/wp-content/uploads/2016/08/Important-Notice-on-Civil-Trial-Case-Management-at-the-GLD-07102014122009.pdf> (23-05-2017).

<sup>275</sup> <http://johannesburgbar.co.za/wp-content/uploads/uploads/AMENDED-CASE-MANAGEMENT-DIRECTIVE-FOR-2015-20150625lt.pdf> (23-05-2017).

<sup>276</sup> (n 275) par 1.

<sup>277</sup> (n 275) par 4.1-4.2.

conference to certify trial readiness is introduced.<sup>278</sup> Before such a “certification-conference” takes place, the judge must be informed of various issues, including: confirmation that discovery is complete or, if it is incomplete, why that is the case and when it will be complete; a succinct summary of common cause facts about which no further evidence will be allowed at trial; and a statement of the questions of law and of fact that the trial court must decide.<sup>279</sup>

The project clearly envisages a more participatory judge compared to the position that existed in the pilot courts prior to its implementation. It moves the judicial case management practice in these courts closer to the position in Australia. Rather than simply leaving it to the parties to control the pre-trial process, as rule 37 essentially does, the judges in the pilot courts are expected to manage proceedings by continuously engaging the parties on various issues, including the scope of discovery and possible settlement of the dispute. One gets the sense that, whereas rule 37 only requires the parties to report to the judge on what they have done during the pre-trial stage, under the practice directive such reporting merely confirms what the judge already knows because he or she is integrally involved in the pre-trial process.

The project is commendable. However, implementation of the initiative was limited to pilot courts, leaving several divisions of the high court of South Africa outside the project’s scope.<sup>280</sup> The approaches of South African courts to managing pre-trial proceedings may accordingly vary depending on which division has jurisdiction over the dispute. This does not take into account the variations in approaches of individual judges to managing complex cases. Importantly, just because a division has not adopted a practice directive that deals with judicial case management, this does not mean that the court would otherwise be precluded from actively managing complex cases that come before it. However, as it currently stands, in the authors’ view it would be misleading to say that it is generally the approach of the various divisions of the high court of South Africa to employ managerial judging in civil proceedings.

South African high court judges are compelled to rely on their inherent jurisdiction without the benefit of legislative guidance on the issue of judicial case management. Although such discretionary freedom may encourage creativity and innovation insofar as judicial case management is concerned, it does not necessarily assist in promoting judicial certainty and uniformity across the different divisions of the high court of South Africa. *Ad hoc* procedural activism is, after all, one of the main criticisms of managerial judging.<sup>281</sup> Further, the inherent limitations posed by the *ad hoc* nature of South African managerial judging has not been removed by developing comprehensive guidelines to assist judges to make managerial decisions.<sup>282</sup> No other

<sup>278</sup> (n 275) par 7.

<sup>279</sup> (n 275) par 8(1).

<sup>280</sup> Admittedly, it was somewhat challenging to obtain information from many of the divisions of the high court of South Africa, other than the pilot courts, regarding their particularised approaches to managing civil proceedings.

<sup>281</sup> Resnik “Managerial judges” 1982-1983 *Harv L Rev* 444. According to Elliot “Managerial judging and the evolution of procedure” 1986 *U Chi L Rev* 306 308-309, the techniques advocated by judges in managing proceedings tend to vary widely. In other words, it lacks consistency and uniformity. According to Molot “An old judicial role for a new litigation era” 2003 *Yale L J* 27 41-42, such discretionary management tactics that vary inordinately from judge to judge may threaten litigants’ due process rights.

<sup>282</sup> Meiring “Manual or automatic?” 2013 *Advocate* 34. For example, the following guides come to mind: *Managing Class Action Litigation: A Pocket Guide for Judges* (2005) and *Manual for Complex Litigation* (2017).

meaningful form of continuous judicial guidance, training or support is available to the South African judiciary to assist it to properly manage civil litigation.<sup>283</sup>

#### 6.4 Alternative dispute resolution

The shift in South Africa from the adversarial mode of resolving disputes to one embracing modes of alternative dispute resolution has also been relatively slow compared to the transition in Australia.<sup>284</sup> Arbitration is the most regulated South African alternative dispute resolution method. On the contrary, there is no single, general statute that regulates mediation in South Africa. Mediation in South Africa denotes a flexible concept and, consequently, one that is difficult to define. The concept connotes a different meaning to different users in different South African contexts. Its meaning varies when, for example, contrasting “private mediation” (where, generally, the mediation is triggered by contractual agreement) and various forms of “institutionalised mediation” (where mediation is connected to the courts or required by statute).<sup>285</sup> Parties to civil proceedings instituted in a South African superior court can generally agree to submit the dispute to private mediation. However, there is no form of institutionalised mediation that provides for voluntary or mandatory mediation of disputes in superior courts.

Mediation rules, in the form of amendments to the rules regulating the conduct of proceedings of South African magistrates’ courts, were recently published by the department of justice and correctional services. These rules provide the procedure for the voluntary submission of civil disputes to mediation in selected courts.<sup>286</sup> The mediation rules apply to the voluntary submission by parties to mediation of disputes prior to commencement of litigation and disputes in litigation which have already commenced and as contemplated in rules 78 and 79.<sup>287</sup> Rule 75 provides that the parties may refer a dispute to mediation prior to the commencement of litigation or after commencement of litigation but prior to judgment, provided that where the trial has commenced the parties must obtain the authorisation of the court. A judicial officer may at any time after the commencement of litigation, but before judgment, enquire into the possibility of mediation of a dispute and accord the parties an opportunity to refer the dispute to mediation.

Rule 37 of the high court rules was, for a long time, the only mechanism available to accommodate alternative dispute resolution in the high court.<sup>288</sup> The rule does not require that the parties engage in arbitration or mediation in an attempt to resolve the dispute; it merely requires that the parties consider referring the dispute for arbitration or mediation and record their decision in this regard in the pre-trial conference minute. Sub-rule 37(6) states that:

“The minutes of the pre-trial conference shall be prepared and signed by or on behalf of every party and the following shall appear therefrom ... (c) that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto; (d) whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred ...”

<sup>283</sup> Stander “South Africa’s first lady judge president: Monica Leeuw” 2010 *Advocate* 18.

<sup>284</sup> Anthimos *et al* (n 225) 111 119.

<sup>285</sup> Boule and Rycroft *Mediation: Principles, Process, Practice* (1997) 4-5.

<sup>286</sup> r 72.

<sup>287</sup> r 74.

<sup>288</sup> Paleker “Mediation in South Africa: here but not all there” in Alexander (ed) *Global Trends in Mediation* (2006) 333 340.

Apart from the reference to alternative dispute resolution in rule 37, it is now accepted that legal representatives are well advised to recommend mediation or they could be deprived of their costs, as could parties who unreasonably refuse to mediate.<sup>289</sup> In this regard, in *MB v NB*,<sup>290</sup> it was held that, in divorce proceedings, the parties' legal representatives should advise them of the benefits of mediation. Each party was ordered by the court to bear their own costs, taxed on a party and party basis. The attorneys were deprived of their full attorney and client fees. Brasseley AJ referred to the failure of the attorneys to act appropriately, *ie* to advise their clients of the benefits of mediation and held "[f]or this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients".<sup>291</sup>

It could be argued that, following the *Brownlee* decision, parties to certain disputes are obliged to consider the appropriateness of mediation<sup>292</sup> and that a dispute should be referred to mediation where there is a reasonable possibility that it could result in the resolution of the dispute. Also, attorneys must advise their clients of the benefits of mediation and assist them to submit a dispute to mediation. Failure to do so may result in the issuing of an adverse cost order.<sup>293</sup>

## 7 Conclusion

When comparing Australia and South Africa, it is apparent that there are marked differences in respect of these jurisdictions' judicial approaches to case management and alternative dispute resolution. In Australia, the courts' case management powers are regulated by legislation and court rules.<sup>294</sup> In South Africa, judicial case management remains largely unregulated and dependent upon the exercise of the South African superior courts' inherent jurisdiction. There is no statute or court rule that deals specifically with judicial case management in the superior courts. Further, Australian courts are generally afforded the power to minimise the adjudication of civil cases by diverting them to a process of alternative dispute resolution, especially mediation.<sup>295</sup> Conversely, South African superior courts do not possess the power to compel parties to engage in alternative dispute resolution, including mediation. In other words, there is no form of institutionalised mediation that provides for voluntary or mandatory mediation of disputes in South African superior courts.<sup>296</sup>

Nevertheless, the position in South Africa is evolving and increasingly resembles the position in Australia, specifically insofar as judicial approaches to case management and alternative dispute resolution are concerned. The recently implemented project demonstrates that there is an increased tendency in South Africa, firstly, to curtail party control in favour of judicial control over civil proceedings and, secondly, to regulate these powers by documenting them, specifically in the form of practice directives.<sup>297</sup> Further, South African courts are beginning to recognise that mediation could be an extremely valuable tool to assist

<sup>289</sup> (n 225) 123.

<sup>290</sup> 2010 3 SA 220 (GSJ).

<sup>291</sup> (n 290) par 59.

<sup>292</sup> in the context of r 37 of the high court rules.

<sup>293</sup> (n 284) 123.

<sup>294</sup> Willis (n 17).

<sup>295</sup> Bamford and Rankin (n 1) 9.

<sup>296</sup> Kuhner "Court-connected mediation compared: the cases of Argentina and the United States" 2005 *ILSA J Int'l & Comp L* 1 13.

<sup>297</sup> Hawkey (n 258).



our courts in managing civil litigation.<sup>298</sup> Voluntary court-annexed mediation is also now an entrenched part of lower court practice, following its incorporation into the lower court rules.

The question that arises is whether the continuous development of the South African civil procedural landscape in respect of the above issues is desirable. In other words, should South Africa emulate the position in Australia insofar as their courts' approach to these issues is concerned? Case management is undoubtedly an important tool to enable the court to control the proceedings and to assist in ensuring the expeditious adjudication of disputes.<sup>299</sup> Further, as mentioned, the idea of voluntary mediation as a dispute resolution method supplementary to courtroom adjudication resonates with the authors.<sup>300</sup> However, there are concerns. These concerns relate to the impact of the move away from courtroom adjudication, and instead embracing alternative dispute resolution methods, on the role of the court as a state institution of governance and on the fundamental right of the parties to present their cases to a court for a judicial determination.<sup>301</sup>

The authors are of the view that, because courts as state institutions of governance<sup>302</sup> have been entrusted with a specific function in resolving civil disputes, their role should not be diminished through absolute engagement in alternative dispute resolution processes. The courts are crucial to the continuous development of the common law and an unabated move away from courtroom adjudication may hamper the continuing evolution of the law by the courts. In the authors' view this would be counterproductive. Further, in both Australia and South Africa, the parties have certain fundamental rights, such as the right to a fair trial, which includes the right of a party to present his or her case to a court for a judicial decision. In South Africa, this is a constitutionally protected right. A system that over-prioritises case management and in the process limits a party's right to present his or her case appropriately or over-prioritises alternative dispute resolution and deprives a party from having his or her day in court, runs the risk of losing some of its quality.

It is primarily because of these concerns that the authors would caution against simply emulating the Australian approach in South Africa. A balanced and nuanced approach would be preferable. In terms of such an approach, courts would actively manage cases and encourage and enable the voluntary private and/or court-annexed mediation of disputes without disregarding their role as state institutions of governance and parties' fundamental rights, including the right to have one's day in court. South African reformers and legislators should refrain from pursuing case management at all cost as an end in itself and from going too far in promoting out of court dispute resolution processes above courtroom adjudication.

This does not mean that South Africa does not stand to benefit from having regard to the recent evolution of the Australian civil procedural landscape. South Africa still has some way to go insofar as its approach to the effective management of civil litigation is concerned, especially when compared to Australia. All the states and territories in Australia have adopted comprehensive legislative measures to regulate

<sup>298</sup> *MB v NB* (n 290).

<sup>299</sup> According to Molot (n 281) 42, if judges did not adopt an active judicial management role, it would "clog dockets, increase litigation costs, and free litigants to use litigation's expense and delay to gain unfair tactical advantages over their adversaries. For every potential problem that managerial judging's critics identify, its defenders identify other cases in which judicial case management has facilitated efficient resolutions and saved valuable court resources".

<sup>300</sup> par 3.2 above.

<sup>301</sup> See par 3.2 and 4.2 above.

<sup>302</sup> McIntyre (n 11).

case management. These measures encourage and mandate an active role by courts in managing civil litigation. However, South African superior courts continue to rely on their inherent jurisdiction, as echoed in section 173 of the constitution and supplemented by the practice directives of the respective divisions of the high court, to manage civil litigation. As South African courts are still far from institutionalising effective case management techniques, the South African civil procedural system remains exposed to the inherent limitations of unregulated *ad hoc* managerial judging in civil proceedings. It may therefore be worthwhile for South African reformers and legislators, through the adoption of legislation, expressly to empower judges to assume an active role in civil cases, thus enabling them to manage these proceedings proficiently. Similarly, it may be worthwhile to consider following the Australian example of institutionalising mediation as an effective civil litigation management and resolution tool in the South African superior courts. However, in the authors' view it should not be done on a mandatory basis. As mentioned, there are many reasons why voluntary court-annexed mediation may be beneficial from the perspective of managing and resolving civil disputes in South Africa.<sup>303</sup>

## SAMEVATTING

### GEREGTELIKE SAAKBESTUUR IN AUSTRALIË AS MOONTLIK NAVOLGINGSWAARDIGE VOORBEELD VIR SUID-AFRIKA

Die artikel oorweeg, as uitgangspunt, die Australiese geregtelike saakbestuur-sisteem. Oorweging word spesifiek gegee aan die posisie in Engeland ten einde die agtergrond vir die hervorming van die Australiese sisteem te kontekstualiseer. Die artikel fokus op Victoria en Wes-Australië as tipiese voorbeelde van Australiese state wat twee verskillende benaderinge tot geregtelike saakbestuur binne die konteks van die Australiese federale sisteem volg. Die artikel oorweeg verder die interaksie tussen geregtelike saakbestuur en die houe se benadering tot alternatiewe geskilbeslegting. In hierdie verband word die rol wat houe op die gebied van alternatiewe geskilbeslegting behoort te vervul, bespreek. Daarna, in die konteks van beide geregtelike saakbestuur en alternatiewe geskilbeslegting, word oorweging gegee aan die impak hiervan op die fundamentele regte of waarborge van partye tot siviele verrigtinge.

Die outeurs bespreek die hof se staatsregtelike rol binne die konteks van geskilbeslegting en argumenteer dat die hof dit nie sonder meer behoort te versaaak ten behoeve van alternatiewe geskilbeslegting, soos mediasie nie. Dit is volgens die outeurs kontra-produktief. Die outeurs maak melding van die partye se fundamentele regte, soos die reg op 'n billike verhoor, wat insluit die reg van 'n party om sy of haar saak aan 'n hof te stel vir 'n regterlike beslissing. 'n Stelsel wat 'n uitermate verheve prioriteit aan geregtelike saakbestuur verleen en in die proses 'n party se reg inperk om sy of haar saak na behore aan te bied of alternatiewe geskilbeslegting te hoog aanslaan en 'n party van sy of haar dag in die hof ontnem, loop volgens die outeurs die gevaar om kwaliteit in te boet.

Uiteindelik word die posisie in Suid-Afrika betreffende geregtelike saakbestuur en alternatiewe geskilbeslegting bespreek ten einde te bepaal of daar enige lesse vanuit die Australiese model geneem kan word ter bevoordeling van die Suid-Afrikaanse posisie. Daar word bevind dat Suid-Afrika nie blindelings die posisie in Australië moet nastreef nie en dat 'n gebalanseerde en genuanseerde benadering verkieslik is. Dit beteken egter nie dat Suid-Afrika nie by oorweging van die Australiese model kan baat nie.

<sup>303</sup> See Ray, Sherman and Peppet *Processes of Dispute Resolution: The Role of Lawyers* (2006) 305-308; Kuhner (n 296) 10-18; Kratz "Alternative dispute resolution in complex litigation" 1988-1989 *UMKC L Rev* 839 841.