

ALTERNATIVE DISPUTE RESOLUTION (ADR) TRAINING FOR ZIMBABWE LAND COMMISSION HELD AT HARARE ON 6 & 7 FEBRUARY 2024

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What is Alternative Dispute Resolution (ADR)?

Alternative Dispute Resolution (ADR) refers to the different ways in which people engaged in any kind of relationships may resolve disputes among themselves, without the need to go to formal courts to find redress. It is sometimes referred to as Appropriate Dispute Resolution because of its advantages over traditional dispute resolution system like litigation. The procedure for ADR is simplified without confusing legal jargon so that real justice is delivered to the parties in dispute or disputants. ADR creates a conducive and cordial environment for a buy-in from the disputants creating and building trust and confidence.

In other words, this can also be viewed as an informal way of settling disputes, in which a third neutral party plays the role of intercession and assistance, as compared to the formal method of settling disputes through litigation in the courts of law. These processes are generally confidential, less formal, and less stressful than traditional court proceedings.

It is also worthy to note that the informal way of settling disputes can also be done while the litigation process also proceeding on the other hand. The Bible provides a very enlightening story that the use of ADR does not always result in win-win between the parties especially if there is a wrong party and an innocent party like the story in **1 Kings 13: 16-28** in which King Solomon had to make a difficult decision between two women who had a dispute about a baby, with both claiming to be mothers of that baby. The dispute was that two mothers lived in the same house, where each mother cared for an infant son. One of the babies died and each woman identified the remaining baby as her own. King Solomon tried to solve this dispute/conflict by suggesting they cut the baby into two, with each woman in the proposed arrangement getting half. The real or genuine mother of the child told King Solomon not to cut the baby into half but give the baby to the fake mother and from there King Solomon made a decision to give the baby to the innocent mother who did not want the baby cut into half. By way of analogy, not every land dispute may require a subdivision solution from the Zimbabwe Land Commission to try and accommodate both parties to the dispute because in some disputes, there may be an innocent party and a wrongdoer party such that a subdivision will not achieve justice and fairness. Justice must

not only be done but it must manifestly appear to be done. Principles of natural justice like the right to be heard to not mean that illegalities are entertained or accepted when ADR is used to solve a dispute e.g in the book of **Genesis 3 :22-24, God** afforded Adam and Eve the right to be heard before expelling and evicting them from the garden of Eden after a dispute arose regarding their violation of cardinal rules about their use and occupation of the garden land.

Application of Legal Principles

The use of ADR does not mean violation or disregard of the law or established legal principles. There is no one size fit all approach when dealing with disputes as each case will depend on its own facts and merits. Where a land dispute has prescribed, the legal principle is that any dispute that has been affected by prescription is extinguished and cannot be revived. **Section 9 (3)(a)** of the **Land Commission Act [Chapter 20:29]** excludes the jurisdiction of the commission from investigating a dispute or complaint unless the complaint is made within three years from the date on which the cause of the complaint or dispute first arose or came to the notice of the complainant or disputant. Prescription deals with time-frames within which a dispute may be entertained as provided for in terms of **section 15 the Prescription Act [Chapter 8:11]** which give **3 years** for any other debt not provided for in any enactment, 6 years for debts arising from bills of exchange and notarial contracts, 15 years for debts owed to the State arising out of loans or sales or leases of land by State and 30 years for debts secured by a mortgage bond, judgment debts or debts for tax and other charges payable to the State . A dispute that has prescribed is legally dead in the eyes of the law and such dispute must not be entertained under the guise of ADR to avoid congesting the Commission with floodgates of dead cases. The running of prescription can be interrupted so it is important to check the facts of the case to ascertain if prescription has been interrupted. Also illegal land occupiers or squatters without offer letters or requisite legal documents to prove tenure or ownership of land must not be given audience at all by the Zimbabwe Land Commission (hereinafter referred to as the "Commission") using ADR principles because they will be tainted with dirty hands. Appeals and reviews by any party aggrieved by some decisions of the Zimbabwe Land Commission may take place in terms of the law. The law frowns upon lawlessness via legal principles like spoliation that seek to discourage resort to self-help or taking the law into one's own hands in resolving disputes that include but not limited to property disputes like land disputes. Zimbabwe Land Commission is also guided by some written policies in terms of the discharge of its functions.

Section 36 of the **Land Commission Act [Chapter 20:29]** bestows sets out the appellate and dispute settlement functions of the Commission guided by the investigation and dispute settlement system principles set out in the **fifth schedule in terms of procedures and timeframes to be followed**. It is of paramount importance to comply with applicable existing laws mindful of the legal imperative that law as it is different from law as it ought to be. If the Zimbabwe Land Commission wishes its jurisdiction to cover investigating land complaints or disputes that are more than three years old, there is need to lobby the powers that be and Parliament of Zimbabwe to amend **section 9 (3) (a)** of the **Land Commission Act** to extend its jurisdiction to go beyond three years outside the legal confines of the existing legislation. An appeal deals with the substantive legal correctness of a decision or determination whereas a review deals with the correctness of a procedure adopted in arriving at a decision. **Section 69** of the **Land Commission Act** affords any party aggrieved by the decision of, or action or lack of action, on the part of the Commission in relation to any dispute or complaint, the right of appeal to the Minister within twenty-eight days after being notified of the decision or action of the Commission. Appeals and reviews against decisions or determinations of the Zimbabwe Land Commission may be minimised by utilising the legal advice from internal legal department. Suffice to mention that Zimbabwe Land Commission is part of the independent constitutional commissions established in terms of **section 236** of the **Constitution of Zimbabwe**. **Section 296** of the **Constitution of Zimbabwe** specifically provides for the establishment and composition of Zimbabwe Land Commission. It is worth noting that **section 297** of the **Constitution of Zimbabwe** provides for the functions of the Zimbabwe Land Commission. More specifically **section 297 (1) (d)** of the **Constitution of Zimbabwe** is mandated to investigate and determine complaints and disputes regarding supervision, administration and allocation of agricultural land guided by the principles of accountability, transparency and fairness. Intermediaries are encouraged to do thorough investigations about a land complaint or dispute as part of case management using some legal checklist or template which they can develop as lawyers and modify from time to time as a precedent.

Nature of land disputes dealt with by Zimbabwe Land Commission

The Zimbabwe Land Commission deals with or gets seized with a variety of land disputes ranging from boundary disputes, encroachments, illegal sales of State land, double or multiple allocation of land, ownership wrangles, illegal land invasion, inheritance land disputes, land disputes arising from divorce e.t.c. There is no magic formula or one size fit all formula for dealing with these land disputes but the facts of each case will guide the

Zimbabwe Land Commission on which type or types of alternative dispute resolution principles to apply to a given case in making a determination as a quasi-judicial body in terms of section 36 of the Land Commission Act. If land disputes are not properly resolved, they can lead to deadly violence and national instability and hence government of Zimbabwe created and mandated Zimbabwe Land Commission to deal with land disputes as some form of a special tribunal. Zimbabwe Land Commission uses a variety of Alternative Dispute Resolution methods (ADR) in the form of a combo or cocktail without specifically prescribing the exclusive use of one ADR method. The role of an intermediary in terms of **section 36** of the **Land Commission Act** as read with the **fifth schedule** is to carry out an investigation and compile a statement of agreed facts and disagreed facts between the disputants or parties to the dispute attending to detail, submit the case to the Commission to call for an oral hearing of the parties to the dispute and then Commission will make a determination. The Land Commission Act does not allow the Zimbabwe Land Commission to delegate or assign its appellate and dispute settlement functions jurisdiction relating to land disputes to any other person in terms of **section 36** of the **Land Commission Act**. The legal authority to make a determination regarding its appellate and dispute settlement functions lie with the Zimbabwe Land Commission and not assessors. In terms of **section 36** of the **Land Commission Act**, the role of assessors is one of assessing facts of a case as triers of fact and not making a legally binding decision or descending into the arena to sway a determination or decision of the Commission. The Commission is not legally bound to deliver its determination soon after conducting a hearing of the parties on the same day if it is not ready but it can take a break or adjournment to deliberate about a case before pronouncing or communicating its determination to the disputants or disputing parties either on the same day or another day.

Types of ADR Methods

There are various methods or informal ways that can be utilised by the parties in the resolution of disputes. For example, the commonly and widely used methods are as follows;

- a) Arbitration
- b) Mediation
- c) Conciliation
- d) Negotiation

ADR can be used to resolve many types of legal disputes over issues involving:

- Human relationships

- Land disputes
- Business relationships/transactions
- Any disputes which the law says can be resolved by ADR or which parties agree to resolve using ADR.
- Contracts in general
- Debts, loans, and leases
- Employment Contracts

Arbitration

This is where a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome. Arbitration is less formal than a trial and the rules of evidence are often relaxed.

In binding arbitration, parties agree to accept the arbitrator's decision as final, and there is generally no right to appeal. In non-binding arbitration, the parties may request a trial if they do not accept the arbitrator's decision. Arbitration is regulated by the **Arbitration Act [Chapter 7:15]** in terms of the procedures for arbitration. Parties may use or resort to arbitration by way of arbitration agreement. If parties sign an arbitration agreement, they will be bound by the outcome of the arbitration agreement and arbitration process. Article 34 of the Arbitration Act provides for limited grounds for recourse for the setting aside of an arbitral award before the High Court. A final arbitral award is registrable with the High Court of Zimbabwe for purposes of enforcement in terms of the Arbitration Act. The arbitration agreement will provide for the arbitration procedure, appointment of an arbitrator or panel of arbitrators, time-lines for the arbitration process and finality of the arbitral award. A template for arbitration agreement can be done for signing by the parties agreeing to submit to arbitration as a dispute resolution system.

Mediation

Mediation is a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps to try to arrive at an agreed resolution of their dispute. The term "mediation" has tended to be used interchangeably with "conciliation" in commercial ADR, though "mediation" has become the preferred term. Sometimes mediation is understood to involve a process in which the mediator is more proactive and evaluative than in conciliation, but sometimes the reverse usage is employed which describes

conciliation as a process in which the conciliator plays a proactive role to bring about a settlement and mediation as a more passive process than conciliation.

Conciliation

Conciliation is a dispute settlement system in terms of which a neutral and impartial third party known as a conciliator assists parties in finding a solution to their dispute. A conciliator may do side meetings with parties to try and break any deadlock. Conciliation is similar to mediation in that it results in the parties reaching an agreement themselves. It is also similar in that a solution is reached with the assistance of a trusted third party. A conciliator leaves the parties to come up with their own solution. Conciliation can fit well in the African tradition where third parties assist in dispute resolution e.g marriage disputes where aunties and uncles may assist in dispute resolution.

Negotiation

According to Mary Welsh, The Civil Practice Handbook p 5, negotiation is a means of getting what you want from others. It is a back-and-forth communication designed to reach an agreement when you and your negotiating partner have some interests that are shared and others that are opposed. There are three methods of negotiation, soft, hard and principled negotiation. Soft negotiation avoids personal conflict and requires parties to make concessions to reach an amicable resolution. It may result in a party feeling exploited and bitter. Hard negotiation or positional bargaining is the usual method of negotiation adopted by lawyers, is a conflict of wills. It is also known as positional bargaining. Both parties are unyielding and aim at winning at all costs. It usually results in the parties being inflexible, is protracted and costly and may ruin relationships between the parties. The dispute may not be fairly resolved as the more powerful party is more likely to prevail. Principled negotiation separates the people from the problem and attacks the problem not the people. Personal attacks are avoided. It is intended to help negotiators to determine issues on their merits rather than by haggling and confrontation. Generally, a principled negotiation aims at achieving a practical and workable solution between the parties to the dispute. There is no bullying or posturing in principled negotiation. Attributes of principle negotiation are follows:

1. Tackle the problem not the other party.
2. Focus on interests not on positions.
3. Generate a variety of possibilities.

Advantages of Alternative Dispute Resolution

Efficiency and time saving

ADR mechanisms are more efficient and time saving. The parties are at liberty to set their own time frameworks and procedure of their choice. There is no imposed procedure. Hence the parties are at liberty to determine the speed of the proceedings. give the parties more control over the process and the results. The process of ADR is also time saving in that the parties are not tied to the rigorous time frames prescribed by the court rules. Parties who resolve their disputes through ADR are generally more satisfied because they may directly participate in working out the terms of their settlement.

When appropriate settlement processes are made available, many disputes can be resolved more efficiently and with greater satisfaction to all parties. Lengthy and costly litigation can be avoided and productive results are more likely to be achieved.

The court system is overloaded. It cannot hold a trial for every lawsuit that gets filed. As a result, it can take several years for a legal case to go to trial. One of the benefits of ADR is that resolution is fast. A settlement or arbitration award can be issued within a few weeks or months of filing a lawsuit.

More flexibility

Closely related with the above benefit. The ADR process is less rigid. Unlike a trial date that can vary because of the backlog, ADR can be scheduled at any time. This not only provides greater flexibility but also helps speed up the resolution of the conflict.

Less bias

A neutral third party is selected to preside over all cases that go through ADR. The neutral third party should have no connections to anyone involved in the lawsuit and no interest in the outcome of the dispute. In a court trial, the judge is not selected to preside. The judge is assigned. This difference is critical, as clients can select a neutral third party with specific subject-matter expertise to help facilitate or arrive at a well-informed resolution.

Less friction

ADR mechanisms are more suited to resolving certain kinds of disputes than the process of adversarial, adjudication examples being disputes involving people in long –term relationships such as family members, neighbours, tenants and landlords and business. In most instances, litigating parties tend to hate each other after a hearing or after the

judgment has been handed down. This is due to the confrontational aspect brought by the adversarial nature of proceedings in courts of law. Lawyers also tend to use certain language and posturing that encourages resentment of one party against another. Business and other personal relationships are likely to be better sustained in ADR because the need for allegation and cross-allegation is avoided.

Once a court verdict is delivered, it invariably leaves one side disappointed, upset, angry, and even bitter. With ADR, the process uses every opportunity to preserve the rapport between the parties to the dispute. In fact, ADR can help preserve a variety of relationships, including those between business partners, employees-employers. Ultimately, with alternative dispute resolution, the difference in the outcome of your client's case will depend on strategic timing, uncovering dispositive facts and legal issues, choosing the right mediator or arbitrator, and preparing for all possible scenarios.

Relatively Cheaper/Affordable.

ADR reduces costs because of the use of fewer and less paid decision makers. ADR reduces costs because it does not require much support staff such as clerks, bailiffs, and court reporters. In addition, there are no permanent costs to support the processes under ADR. ADR institutions are ad hoc in nature. They are set when parties agree to set such. Hence their personnel costs run concurrently with their lifespan. In fact, the cost of arbitration may be fixed.

High Probability of Serving justice.

There is high probability of real justice as opposed to technical justice. In ADR the parties are not tied to the rigours of procedures which are found in court processes. The interest in ADR proceedings is for the substance of the matter to be dealt with. In other words, in ADR real issues that affect the parties are fairly analysed and ventilated until settlement is achieved. Unlike court processes, ADR proceedings do not give emphasis on technical issues which may hinder justice. Again, ADR proceedings are informal and user friendly and there is not much need for legal representation.

Accessibility

ADR mechanisms are more accessible to indigent/relatively poor parties and those with small claims. ADR proceedings are less threatening and further not intimidating to parties. Courts in Zimbabwe are largely accessible if the parties are represented by legal

practitioners. Without legal representation access to justice to self-actors in court is difficult, since the parties may not feel comfortable to approach the courts. There are no procedural hurdles in the majority of ADR proceedings.

Privacy/Confidentiality

ADR is also an entirely private process and so negative publicity is avoided. For the most part, this is apposite the court processes where all records are susceptible to leaking to the public. Court trials are public record and can be accessed by anyone. On the other hand, ADR is not only private, but also confidential. When an arbitration award is issued, or when both parties come to an amicable settlement through mediation, there is no public record of what transpired during the session. The amount of the award or settlement, the statements made, the list of participants, etc., all remain private. In summary, the public will have no idea when the ADR took place and the eventual outcome. This level of privacy can be very beneficial for high-profile clients, as both parties are able to maintain their reputations. ADR protects confidentiality.

Cheaper

ADR is cheaper compared to litigation via courts of law.

Faster

Also ADR is faster compared to cumbersome legal proceedings before a court of law.

Dealing with illegal land occupiers, settlers or squatters

Illegal land occupiers, settlers are like squatters and hence they do not have any legal standing (*locus standi*). This means that if a person does not possess a legally valid offer letter from the Ministry of Lands, such a person does not have any legal right to occupy land as no person is allowed to take the law into his/her own hands. In some cases, there are persons who masquerade with fake offer letters hence there is need for an intermediary to engage the Ministry of Lands to verify the security features of any offer letter to confirm whether it is genuine or not. If any offer letter raises a red flag, the intermediary must ensure that he/she verifies the authenticity of such an offer letter. The appropriate legal remedy for dealing with an illegal land occupier without an offer letter is due process in the form of eviction via a court of law. Frivolous and vexatious cases from bogus persons must not be treated with kid gloves but they disputants must be guided in terms of the law. There is need for intermediaries to do thorough investigations or probing to ascertain the person who has tenure to land whenever a dispute or complaint over land is lodged with the

Zimbabwe Land Commission in the interests of accountability, fairness and justice. **Access to justice** on the part of any person is a constitutional right embedded in terms of **section 69** of the **Constitution of Zimbabwe**. ADR does not work where the land occupier is an illegal occupant because an illegal occupant already has dirty hands for breaching the law and hence his/her case is a sham. The Land Acquisition Act and the Gazetted Land (Consequential Provisions) Act do not protect illegal occupiers of land. However, each case will depend on its own facts and merits. There are some special cases which the Zimbabwe Land Commission must investigate in terms of **section 36** of the **Land Commission Act** as read with the **fifth schedule** to ascertain if there is any legally valid reason why land occupants do not have land tenure by checking with guidelines from the Ministry of Lands, so that there can be a regularisation of such land occupants so that justice is done between parties. The fast track land reform programme is a special case which require investigation to ascertain how a person occupied land for purposes of regularisation. Since intermediaries are legally qualified persons, they must act as legal filters to also guide the disputants about the position of the law regarding land disputes that they get seized with as a way of avoiding unnecessary backlog of land disputes cases which waste time and resources.

Section 18 of the **Land Commission Act** does not recognise a joint venture agreement or share profit agreement over land allocated by the Ministry of Lands in terms on offer letter without an agreement approved by the Minister of Lands. A business partner who does not have a joint venture agreement or share profit agreement with a person who is a holder of a valid offer from Ministry of Lands letter does not have legal standing to bring a dispute or complaint before the Zimbabwe Land Commission but such a business partner may approach civil courts if a dispute arise with a person who is a holder of a valid offer letter. The law prohibits the sale or donation of State land by any person who is a holder of an offer letter from the Ministry of Lands as such transactions are illegal. However, a donation of land held under an offer letter from Ministry of Lands may be allowed in circumstances of inheritance from a deceased holder of an offer letter to his/her estate beneficiaries. **Section 36 (5)** of the **Land Commission Act** deals with devolution of land on marriage, dissolution of marriage, death, insolvency and mental and other incapacity.

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