Facilitative mediation

Seeing more than the tip of the iceberg

By Lieselotte Badenhorst

The practice of ‘legal’ mediation has - for many years now - been widely accepted in the United Kingdom (UK), on the European continent, the United States (US) and Australia. But court-annexed mediation is a new concept in South Africa. The Summary of Mediation Rules’ was released by the Department of Justice on 3 May 2013 (www.justice.gov.za/legislation/invitations/invite-mediation.html, accessed 7-2-2014) (www.lssa.org.za/index.php?q=con,244, Court-annexed mediation draft rules, accessed 7-2-2014). According to this summary, the following people can be mediators -

• accredited attorneys;
• advocates;
• traditional leaders;
• members of existing mediation forums; and
• any fit and proper person who has undergone appropriate prescribed training.

An attorney’s response to mediation may be: What can a mediator do to help this case that I, as an experienced negotiator, cannot do? In this instance, it can
be suggested that the outcome of negotiation or bargaining results in parties realising that some form of compromise has to be made. It often leaves people dissatisfied, because each party is left wondering whether they might have achieved more had they pursued their claim further. F Strasser and P Randolph Mediation. A Psychological Insight into Conflict Resolution (London: Continuum, 2004) surmise: 'Where negotiation has failed or left parties to the dispute dissatisfied, because of the perceived “sacrifices” they had to make, mediation can overcome this, since during mediation parties are truly “heard”.'

To prevent court-annexed mediation becoming just another ‘fad’ to free courts from litigation, I would suggest that, in South Africa, we should take the route of facilitative mediation rather than evaluative mediation.

Facilitative and evaluative mediation follow two different pathways. During evaluative mediation, the mediator assumes that participants want or need the mediator to provide direction as to the appropriate ground for settlement, based on law, industry practices or technology. The mediator should also be qualified to give direction by virtue of experience, training and objectivity (L Riskin ‘Mediator Orientations, Strategies and Techniques, Alternatives’ (1994) 7 Riskin’s Theory, Practice and Skills in Mediation Law Review at 23-4).

In contrast to evaluative mediation, facilitative mediation does not necessarily presuppose any knowledge of the technical aspects of the dispute or provide direction. It goes deeper than evaluative mediation. According to S Hawker, C Soanes and A Spooner Oxford Dictionary Thesaurus & Wordpower Guide (Oxford: Oxford University Press 2001) ‘facilitating’ means ‘to make easier’, but facilitation can also be used as a mechanism to uncover underlying issues. Furthermore, facilitative mediation enhances the likelihood for the mediator to remain ‘neutral’.

According to Strasser and Randolph (op cit), the facilitative form of mediation is based on the humanistic-existential model of the psychologist, Carl Rogers. The model originates in phenomenology and therefore suggests that all of us live in our own subjective world, which can only be known in any complete sense to ourselves. The self is the central aspect in this paradigm, and seeks protection at all times from ‘injury’, according to Rogers’ theory. Hence, we protect the self by way of how we behave. However, our behaviours are more often than not deeply rooted at the unconscious level. The mediator should therefore act as a catalyst to allow the unconscious to come to the surface. Two examples of behaviours that serve to protect the self are: During conflict, an individual who continually interprets his or her opponent’s behaviour as conspiratorial or politically inspired might have a tendency to project his or her own desire to cheat in some way, by unjustifiably accusing the opponent of cheating or undermining the process.

A person who harbours deep anti-social feelings towards people may develop pleasant mannerisms and good social skills in dealing with opponents during a dispute as a means of keeping his or her feelings in check. If an occasion arises when the mechanism fails to function properly, opponents will be shocked by the individual’s outburst of hostility. Furthermore, individuals strive to maximise rewards and try to minimise sanctions or penalties in their external environment, and hence develop favourable attitudes towards objects that satisfy their needs, and unfavourable attitudes towards objects that thwart their needs. These favourable or unfavourable attitudes may be aroused by internal and external threats, by frustrating experiences, or by a build-up of pressures, and are displayed in our behaviours, as mentioned in the above examples (E Mckenna Business Psychology and Organisational Behaviour: A Student’s Handbook 3 ed (Hove: Psychology Press 2000)).

Since our attitudes help us to adopt a stable view of the world that we live in, which contributes to the reduction of uncertainty and discomfort, formed attitudes are difficult to change (Strasser and Randolph (op cit)). Nonetheless, the psychologically trained mediator, who employs the facilitative method, has an advantage over the evaluative mediator in changing attitudes that may hamper the mediation process.

Facilitative mediation helps individuals to become cognisant of the root causes of their misdirected attitudes and behaviours. Because facilitative mediation focuses on the individuals as human beings rather than on the facts of the case, individuals feel empowered and a shift in attitude and behaviour is based on new insights gained through the process. This moves participants from conflict to a ‘working alliance’, and allows the mediator to stay neutral and without prejudice.

Facilitative mediation is non-interventionist. It only assists parties to reach a measure of accord, based on self discovery and insight. It does not presuppose knowledge of any specific law, industry practices or technology. Evaluative mediation, in contrast, is more directive and interventionist. The evaluative mediator provides the parties with an evaluation of the respective merits and demerits, and strengths and weaknesses of the parties’ cases, but does not uncover the underlying issues of the conflict. Strasser and Randolph (op cit) point out that evaluative mediation ‘discourages self-evaluation, prevents self-determination, promotes positioning, results in polarisation and encourages parties to focus on their rights and liabilities rather than interests and needs’.

Lieselotte Badenhorst BCom (Hons) (Unisa) MCom (Unisa) PhD (Industrial Psychology) (University of Koblenz Landau, Germany) is the director of the Centre for Alternative Mediation in Johannesburg.